

NEW MERGER CONTROL RULES WHICH WILL APPLY IN INDONESIA

Although it is included in Indonesia's annual national legislation program (*Program Legislasi Nasional/Prolegnas*) so far, the draft new Indonesian Competition Law which will replace Law No. 5 of 1999 on The Prohibition against Monopolistic Practices and Unfair Business Competition (the "**Competition Law**"), has not been passed. The Indonesian Business Competition Supervisory Board (Komisi Pengawas Persaingan Usaha/"KPPU") has been pushing for the proposed changes to the Competition Law, including among others, those regarding merger control, to be issued as soon as possible. In theory, the new merger control provisions should come into force upon the issuance of the relevant implementing regulation.

The prevailing Indonesian merger control rules only require a post-merger notification under Government Regulation No. 57 of 2010 and KPPU Regulation No. 2 of 2013. The new KPPU commissioners, appointed April last year, with Kurnia Toha as the Head of the KPPU leading 9 (nine) commissioners, stress the urgency of changing the post-merger notification requirement to a pre-merger notification requirement. They believe that the post-merger notification regime creates uncertainty for business actors given the possibility of the KPPU annulling a transaction after the transaction has been completed. However, the KPPU confirms that to date, the KPPU has never annulled any transaction reported to it although it is not impossible that in the future, the KPPU will assess mergers more strictly and might annul transactions deemed to have the potential to result in monopolistic practices and/or unfair business competition, if regulators and legislators decide in the end not to impose a pre-merger notification requirement. It seems that the spirit of the KPPU's assessing mergers more strictly is reflected in the KPPU's proposed actions this year:

- the Prevention Deputy (*Deputi Pencegahan*) will no longer handle merger control matters, the Law Enforcement Deputy (*Deputi Penegakan Hukum*) will;
- assessments of mergers involving state-owned enterprises (*Badan Usaha Milik Negara/BUMN*) will be stricter, not waived automatically;
- partnerships (*kemitraan*) will be supervised more strictly .

It is expected that the pre-merger notification procedure will give business actors greater certainty because they will only conclude their transactions upon them being approved by the KPPU, instead of facing the possibility of their transaction being annulled after being concluded. However, some competition observers and scholars have raised the issues outlined below.

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Under the current merger control rules, the KPPU should issue its opinion on whether a merger transaction has any potential to result in monopolistic practices and/or unfair business competition within 90 (ninety) days of the KPPU's receipt of the complete report. However, there is no deadline for the KPPU to determine whether the report is complete and in practice, it has sometimes taken the KPPU 1 (one) to 2 (two) years to declare a report complete, which should mark the start of the 90 (ninety) day time limit for it to issue its decision. If this does not change with the pre-merger notification procedure, when reportable transactions can be closed will be uncertain and could be much later than anticipated.

However, the new time limit proposed is 25 (twenty-five) days as of receipt of the notification. In theory, this should mean that the assessment of whether the report is complete or not should be made within 25 days and no procedure will not have a time limit. However, as the KPPU is often short of staff, whether it will be able to do so within the proposed 25 (twenty-five day) time limit and issue its opinion in a timely manner remains questionable. If it cannot, corporate actions and transactions will be delayed.

Meanwhile, (i) the proposed sanction for late notification (ie from IDR 1 billion to IDR 25 billion) will become 25% of the transaction value; and (ii) asset acquisitions and greenfield Joint Venture establishments will also be required to be reported to the KPPU, which might trigger an increase in the number of merger notifications the KPPU will have to handle.

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