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Indonesia's M&A Notification Regime

Summary

Over a decade has now passed since the passage of Indonesia's Anti-Monopoly Law ("**AML**") in 1999. After a slow start, the Indonesian Business Competition Supervisory Commission ("**KPPU**") has now become a significant feature of the Indonesian business landscape, taking a more active role particularly since 2009, in which year it issued a spate of interpretive guides to the AML. In July 2010, the Indonesian Government issued the long-awaited Government Regulation No. 57 of 2010 ("**GR 57**"), which enlivened the merger control provisions in Article 29 of the AML, which until then had been dormant. GR 57 was followed by a detailed guide to the implementation of the merger control provisions in the form of KPPU Regulation No. 13 of 2010, which was recently replaced by KPPU Regulation No. 10 of 2011, introducing minor changes and clarifications ("**Implementing Guide**"). This article updates our memo of November 2010 and revisits the merger control provisions, as updated, and gives a brief oversight of their implementation to date. Finally, it is worth re-emphasizing that the 'notification' regime constitutes more than simple notification – it is really an approval regime conducted after the event. The difficulties arising out of a post-hoc approval regime are clearly not lost on the KPPU. The early drafts of GR 57 required pre-notification but were not received positively, as they were perceived as exceeding the KPPU's AML mandate. As a result, the KPPU has instituted a hybrid system, which allows for a voluntary pre-merger clearance in the form of "consultations" as well as instituting a mandatory post-merger clearance regime in the form of "notifications". To date, few firms have conducted formal consultations. It is likely a mandatory pre-merger clearance regime would be at the top of the KPPU's wish list if the law were to be revised.

This update to our November 2010 note reviews the changes incorporated in KPPU Regulation No. 10 of 2011, which amends KPPU Regulation No. 13 of 2010, the KPPU's guide to the implementation of the merger control articles in the Indonesian Anti-Monopoly Law (Law No. 5 of 1999) and Government Regulation No. 57 of 2010.

Regulatory Background

Merger Control Regulation	Status	Notes
1. Articles 28 and 29 of Law 5/1999	Valid	
2. Government Regulation 57/2010	Valid	
3. KPPU Regulation 1/2009	Revoked by (5)	Pre-notification
4. KPPU Regulation 10/2010	Valid	Administrative forms
5. KPPU Regulation 11/2010	Valid	Consultations. Has not been revoked but subject matter covered by (8)
6. KPPU Regulation 13/2010	Amended by (8)	Re guide to merger control. Covers voluntary pre-merger consultation process, mandatory post-merger notification, administrative fines. Effectively revoked – operative attachment replaced by (8)
7. KPPU Regulation 2/2011	Revoked by (8)	Re fines for late reporting. Subject matter incorporated in (8)
8. KPPU Regulation 10/2011	Valid	Re guide to merger control. Covers voluntary pre-merger consultation process, mandatory post-merger notification, administrative fines

Introduction

This advisory discusses the merger control regulations GR 57 and the Implementing Guide.

As is common with Indonesian legislation, Law Number 5 of 1999 regarding the Prohibition of Monopolistic Practices and Unfair Business Competition (the "**AML**") sets out a number of general principles, the details of which are deferred to subsequent implementing regulations. GR 57 is one such implementing regulation. GR 57 elaborates on and implements the obligations contained

in Article 29 of the AML. Article 29 requires a prospective qualifying participant in certain mergers, consolidations or share acquisitions to notify the KPPU within 30 business days of it occurring. The substantive prohibitions on certain mergers, consolidations and share acquisitions are found in AML article 29.

In September 2011, the KPPU issued an updated guide to the implementation of GR 57 in the form of KPPU Regulation No. 10 of 2011 ("Implementing Guide"), replacing KPPU Regulation No. 13 of 2010. While the updated Implementing Guide is substantially similar to the previous guide, it elaborates and clarifies certain aspects, including:

- clarification regarding notification timing and responsible party;
- KPPU market monitoring;
- elaboration of matters relating to administrative fines for notification delays;
- more detailed diagrams regarding notification and consultation assessment processes;
- revised terminology.

Advisory

GR 57 abandoned the KPPU's previous attempt to install a mandatory pre-transaction reporting regime which appeared in earlier drafts and was widely perceived as exceeding the KPPU's mandate under AML article 29. Under GR 57, the obligation to notify only arises once the transaction in question has become legally effective. The transaction must then be reported at the latest within 30 business days of it becoming legally effective.

The notification thresholds remain unchanged – i.e. the notification obligation applies to transactions in which the total asset value of the resulting entity and certain affiliates reaches or exceeds 2.5 trillion Rupiah (US$277 million), or sales of 5 trillion Rupiah (US$555 million) annually. For banking industry entities, assets must reach 20 trillion Rupiah or more (US$2.22 billion). These values are calculated on the Indonesian territory and do not include sales designated for export. Transactions between affiliates, as defined, are exempt from the reporting requirements.

The Implementing Guide clarifies how the notification period will be calculated in certain scenarios:

a. If one of the parties conducting the merger, consolidation or acquisition is a limited liability company and the other party is a non-limited liability company (e.g. offshore company) the notification must be done within 30 business days as of the date of the signing of the agreement on merger, consolidation or acquisition by the parties. The Implementing Guide does not distinguish between conditional and non-conditional agreements but in accordance with article 5(1) of GR 57, a conditional agreement should not be notifiable until and unless it actually effects the relevant transaction[1].

b. If a share acquisition occurs on the Indonesian stock exchange, the notification must be conducted within 30 business days as of:

    (i) the date of the response letter from Bapepam-LK in relation to the share acquisition disclosure letter, if the transaction is for less than 50% of the target company's equity;

    (ii) the date of the company's letter to Bapepam-LK on the approval of the GMS for the acquisition if the transaction is for more than 50% of the target company's equity.

GR 57 does not cover simple asset acquisitions, rather it is limited to acquisitions of the shares of a limited liability company, in addition to mergers and consolidations. However, in its closing paragraph, the Implementing Guide appears to leave the door open on this question, likely intended to cover circumstances which have not specifically been anticipated.

The Implementing Guide now specifies which party is to conduct the notification: i.e.
(a) the party surviving the merger;
(b) the acquirer, in a share acquisition transaction;
(c) the party resulting from the consolidation.

The fine for non-compliance within the stipulated 30 business days is an administrative fine of IDR 1,000,000,000 (one billion Rupiah) per day of delay (approximately US$110,000 at the current approximate exchange rate of US$1 = Rp. 9,000), up to a maximum total of IDR 25,000,000,000 (twenty five billion Rupiah) (US$2.77 million). This is in addition to a range of heavy penalties available under the AML for substantive breaches of the law, including cancellation of the transaction.

1 This may depend on the law of the jurisdiction. In Indonesia for example, certain transactions may only be effected by notarial deed.

The Implementing Guide notes the KPPU will regularly monitor various sources to identify transactions which should be reported, including reports from the public, news from mass media, official letters from relevant institutions and so on. It elaborates on which "foreign" mergers will be considered exempt from reporting requirements – one of the primary considerations appears to be that one of the entities should have some physical presence in Indonesia, either directly or indirectly (via an affiliate), although this may not be a conclusive factor. In general, the KPPU does not consider vertical consolidations to be as damaging to competition as horizontal consolidations. In deciding whether a horizontal consolidation is damaging to competition the KPPU will use the Herfindahl Hirschman Index ("**HHI**") measurement, whereas for a vertical consolidation, it will look at whether the relevant parties have market power or a dominant position in the upstream and downstream markets. If they do not have a dominant position in either of these markets, the KPPU will not continue the investigation.

GR 57 also accommodates pre-transaction consultations (either oral or written). Conducting such a consultation does not reduce the authority of the KPPU to investigate a transaction. However, the Implementing Guide does commit the KPPU to only evaluate a transaction once only, as long as there is no material change in the data provided or in market conditions (such as a reduction in the number of actors in a concentrated market, with a resultant HHI change of 500 or more; a change in the post-transaction business plan[2], or a change in HHI spectrum[3]). A post-transaction notification is still required even if a consultation has been conducted. While the Implementing Guide contains details on the consultation process, KPPU No. 11 of 2010 on consultations has not been revoked and contains the administrative forms required to undertake a consultation. It is worth noting that the KPPU will publish the details of consultations on its website and the outcome, which may be one reason why formal consultations have not been popular.

Merger Control Activity

During 2011, thirty eight separate merger notifications were filed (after consolidation), with the following results:[4]

(1) No re-examination: 3 (this occurs where a voluntary formal consultation has previously been conducted and there has been no material change in the data or market conditions since then);
(2) No objection: 22;
(3) Not reportable (did not reach threshold, affiliated or no change of control): 5;
(4) Pending/no further information: 8.

According to the published information, four voluntary pre-merger consultations were conducted in 2011. No merger pre-notifications were conducted in 2011 (in fact the supporting regulation No.1/2009 was revoked by No.11/2010).

Calculating the thresholds

In order to ascertain whether a particular transaction meets the mandatory reporting thresholds, the KPPU will calculate the sum of the assets and/or turnover of:

a. for a merger or consolidation, the enterprise surviving or resulting from the merger or consolidation; or

b. for an acquisition, the enterprise conducting the acquisition and the acquired company;

plus, in either case,

c. the enterprises which directly or indirectly control or are controlled by the enterprise surviving or resulting from the merger or consolidation, or by the enterprise which makes the acquisition and the acquired enterprise.

Therefore, there must be some relationship of upstream or downstream control for the assets/turnover to be counted. Control is defined as the possession of more than 50% of the shares or the control of more than 50% of the voting rights, or an ability to influence and determine management or management policies. Affiliated transactions, which are exempted from the notification requirements, are defined as transactions involving companies in which one company either directly or indirectly controls the other or where they are under common control, or where the relationship fulfils the 'primary shareholder' relationship.

An UNCTAD peer review of Indonesia's competition law in 2009 noted that less then 1.4% of fines applied by the KPPU

2 The reporting forms for both consultations and notifications require, amongst other things, a brief description of the transaction background and the related business plan, covering the purpose of the transaction, plans for production capacity expansion and brand, product and marketing development.
3 The KPPU divides markets into low (<1,800) and high (>1,800) concentration spectrums.
4 As reported by the KPPU, 27 April 2012.

had ever been paid (UNCTAD Voluntary Peer Review of Competition Law and Policy: Indonesia, 2009). Under the AML, the KPPU must apply to the district court for an execution order if a decision is not complied with. However, perhaps in response to a past general lack of compliance, the Implementing Guide states that the KPPU will work together with relevant agencies to identify qualifying mergers which are not reported and to enforce fines for late notification.

Articles 28 and 29 of the AML state, in part:

28 (1) Business actors are prohibited to conduct commercial entity mergers or consolidations which may cause the occurrence of monopolistic practices and or unfair [tidak sehat, or "unhealthy"] business competition.

A commercial entity is a company or form of business, whether in the form of a legal entity (for example a limited liability company) or not, which conducts a type of business which is permanent and continuous in nature and has the purpose of generating a profit.

(2) Business actors are prohibited to conduct share acquisitions of other companies if the action may cause the occurrence of monopolistic practices and or unfair business competition.

Sufficiently clear.

29 (1) Commercial entity mergers or consolidations, or share acquisitions as meant by Article 28 which cause the value of the assets and or of sales to exceed a certain amount, must be notified to the Commission, at the latest 30 (thirty) days after the date of the merger, consolidation or acquisition in question.

Sufficiently clear.

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