



NEW KPPU REGULATION ON MERGER FILINGS – SIMPLIFICATION YET SOME CLARITY IS NEEDED

The Indonesian Business Competition Supervision Commission (*Komisi Pengawas Persaingan Usaha* – “KPPU”) recently introduced a new regulation on merger filings, KPPU Regulation No. 3 of 2019 on Assessments of Mergers or Consolidations of Business Entities or Acquisitions of Shares in Companies which might Result in Monopolistic Practices and/or Unfair Business Competition (“**New Regulation**”). This regulation replaces the KPPU’s previous regulations on merger filings (“**Previous Regulations**”) including amongst others KPPU Regulation No. 2 of 2013.

Some key or notable changes in the New Regulation are the following:

Reportable Transactions: the inclusion of Acquisitions of Assets

The Previous Regulations required mergers, consolidations and **share** acquisitions meeting certain requirements to be reported to the KPPU. The New Regulation requires acquisitions of **assets** to be reported also.

This is inconsistent with the relevant higher regulation, Government Regulation No. 57 of 2010 on Mergers or Consolidations of Business Entities or Acquisitions of Shares in Companies which might Result in Monopolistic Practices and/or Unfair Business Competition (“**GR 57/2010**”), under which the ‘Acquisitions’ which must be reported to KPPU **exclude** acquisitions of assets. It has yet to be seen whether a provision which arguably deviates from its upper level regulation can be fully enforced.

Not only does the provision cause the New Regulation to be inconsistent with the upper level regulation of which it serves as an implementing regulation, it will also cause confusion because the title of the New Regulation indicates that asset acquisitions are of no concern.

The Impact on the Reportability Analysis, and reportability of foreign mergers

The requirements for determining whether or not a transaction is reportable to KPPU remain mostly if not entirely the same as those listed in our advisory entitled “*Overview of Merger Reportability Analysis*”.

We note some changes to the wording used to describe the requirements, which might lead to different interpretations and could arguably be used to exempt certain transactions from being reported or to see them as reportable.

For instance, Article 4 (2) seems to indicate that the **assets** the value of which is calculated to determine reportability should not be limited to those in Indonesia, but to all assets listed in a financial statement. If interpreted as it is, the value of the assets of global groups of companies will most certainly reach

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the asset threshold of IDR 2.5 billion, even if the value of their assets in Indonesia is less than that. Meanwhile, in the Previous Regulations, it was clearly stated that the assets the value of which was to be calculated were only those in Indonesia.

Another example is the provision on local effect test under which applies to **foreign mergers**. Under the New Regulation if **at least 1 (one) of the parties** to a transaction has business in or sales to Indonesia, the local effect test is met. This is different from such a provision under the Previous Regulations which stated that a local effect test is met if **both parties** have business in Indonesia, **or** if only one party has business in, then the other one must at least has sales to Indonesia. Under the New Regulation, an acquisition of a target company active in Indonesia (indirectly, via controlled subsidiary) by a foreign party which does no business in or sales to Indonesia may be a reportable transaction.

Receipt of Submissions: KPPU can Reject Non-Complete Submissions

Before 2019, KPPU tended to accept merger notifications or reports even if the documents submitted were limited, eg only the notification form. Starting from early 2019, KPPU has been stricter and applying an unwritten policy of only accepting notifications with all the minimum documents required.

Now, this policy is formally imposed under Article 10 of the New Regulation under which KPPU will only accept notifications with the complete (minimum) documents during the KPPU's working hours and will record the date of receipt and issuance of the receipt document.

KPPU will issue a receipt of the documents, if notification documents consist of at least the notification form and the following supporting documents:

- the audited financial reports of the undertakings concerned for the last 3 audited financial years;
- the ownership charts of the undertakings concerned;
- the constitutional documents of the undertakings concerned (before and after the transaction);
- the company profiles of those involved in the undertakings concerned;
- a summary of the transactions;
- the business plan;
- an analysis of the impacts of the transaction.

Note:

KPPU now allows and recommends that notification documents be submitted in a soft copy.

The Notification Form: Less Information at the Early Stage and a Change of Format

The stricter completeness assessment is compensated for by the fact that the initial information required by the notification form is less than before, at least at the early stage. Information about the party's competitors, consumers and suppliers, only needs to be submitted if KPPU requests it. Although there is no clear explanation of in what kind of situation KPPU may request such information, at least the absence of this information at the early stage will not cause the documents submitted to be incomplete and rejected by KPPU. Otherwise, it would be challenging to ensure that complete information was submitted while racing to meet the 30 (thirty) working day deadline. The New Regulation does also provide the date of the conversion rate to be used to determine Rupiah equivalent for amounts in foreign currencies.

The Previous Regulations provided different forms for each kind of transaction and differentiated between the forms for post-merger notifications (compulsory) and pre-merger consultations (non-compulsory). This is not the case with the New

Regulation which provides a new general notification form to be used for all kinds of reportable transactions, ie mergers, consolidations and acquisitions of shares or assets. The same form will be used as a guideline for pre-merger consultations with KPPU.

While the new form differs slightly from the previous form, certain sections may not be applicable to all kinds of transactions. For example, questions might arise regarding what information needs to be inserted regarding the number of shares when reporting an asset acquisition transaction.

Deadline for Declaring the Completeness of the Notification Documents

KPPU should assess a transaction within 90 (ninety) working days of receipt of the complete notification documents. The term complete here means not only all the minimum required documents, but all the documents deemed necessary for KPPU to start assessing the reported transaction, about which KPPU can ask for clarification and additional documents from the reporting party following the submission day.

However, as explained in our advisory entitled "*New Merger Control Rules Which Will Apply in Indonesia*", the Previous Regulations were silent on a deadline for KPPU to declare the completeness of notification documents. It has sometimes taken 1 (one) to 2 (two) years for KPPU to declare a report complete, which should mark the commencement of the 90 (ninety) day period.

Now, under the New Regulation, KPPU should assess the completeness of the notification documents within 60 (sixty) working days.

Assessments of Transactions

Some notable changes have been made to the procedure for the assessment of reportable transactions under the New Regulation.

Firstly, KPPU divides the **assessment process** into (i) the initial assessment and (ii) the whole assessment. Previously, KPPU directly conducted whole assessment. However, the timeline for the entire process remains the same, 90 (ninety) working days.

Secondly, KPPU can take into account the following **additional considerations**:

- (i) policies on the escalation of competition and strengthening of national industries;
- (ii) the development of technology and innovation;
- (iii) the protection of small and medium enterprises;
- (iv) the impact on employees; and
- (v) the implementation of the prevailing laws and regulations.

Those considerations are in addition to the main analysis considerations of market concentration, entry barriers, anti-competitive conduct, efficiency and bankruptcy. While these main analysis considerations were described in detail in the Previous Regulations, the New Regulation does not provide such detail any longer.

Thirdly, the **result of the KPPU assessments** was previously either of the following **opinions** (*pendapat*):

- there is no potential for monopolistic practices or unfair business competition;
- there is a potential for monopolistic practices or unfair business competition; or
- there is no potential for monopolistic practices or unfair business competition, but KPPU would apply remedies.

Under the New Regulation, the result will be either of the following *decisions* (*penetapan*):

- Decision on Notification (*Penetapan Notifikasi*):
 - (i) there is no potential for monopolistic practices or unfair business competition;
 - (ii) there is a potential for monopolistic practices or unfair business competition.

In the Decision on Notification, if KPPU decides that the reported transaction might have adverse effect on competition, KPPU can apply remedies when granting clearance for the transaction.

- Decision of a Declaration of Non-Reportability (*Penetapan Tidak Wajib Notifikasi*).

Calculation of Days of Delay in a Notification's Submission

Failure to notify KPPU of a reportable transaction by the deadline will result in a fine of IDR 1 billion per day of delay, up to a total fine of IDR 25 billion. The Previous Regulations did not state what should be deemed the last day of delay. Under Article 22 of the New Regulation, the days of the delay should be calculated up to the date of the investigation by KPPU into the alleged late submission of the notification to KPPU.

Missing Details: Assessment Analysis, Procedure for Consultation etc.

There are some details which were previously provided under the Previous Regulations, missing from the New Regulation. These cover (i) the detailed aspects to be considered in the assessment analysis (for example, the New Regulation does not provide any detail on how KPPU will analyse the entry barrier), (ii) the procedure as well as timeline for pre-transaction consultation. Other missing details include some other minor, but potentially essential details, such as whether the only assets to be calculated are those located in Indonesia.

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