Merger Control

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Overview of merger control activity during the last 12 months

Indonesian Merger Control rule is set under Law No. 5 of 1999 ("Law No. 5"), and is implemented by Government Regulation No. 57 of 2010 ("GR No. 57") and KPPU Regulation No. 2 of 2013 ("KPPU Regulation No. 2" – together with Law No. 5 and GR No. 57, the "IAL"). The government authority in charge of the business competition in Indonesian is called the Indonesian Business Competition Supervision Commission's (the "KPPU").

KPPU's official website at www.kppu.go.id reported 74 merger, consolidation and acquisition notifications received by KPPU in 2018.

Out of 74 merger, consolidation and acquisition notifications received in 2018, three of them were not reviewed due to exemptions under Law No. 5. KPPU is currently reviewing five reports and is expected to issue its opinions between May–July 2019, leaving more than 60 reports pending review by KPPU. According to KPPU, one primary reason for delay is due to KPPU's ongoing review process of the 2017 reports.

KPPU seems very strict in enforcing the reporting obligation. In early 2019, KPPU announced that KPPU is now investigating 60 delayed reports by business actors and has imposed penalty sanctions upon more than five business actors for the delay.

New developments in jurisdictional assessment or procedure

There have been no amendments since the latest amendment of KPPU regulations in 2013.

Assessment

Indonesian Merger Control requires a post notification, being 30 Business Days after the effectiveness of the transaction ("Mandatory Notification") for merger, consolidation or acquisition meeting the following conditions:

(i) combined asset value exceeds IDR 2.5 trillion or approximately US$ 175 million, or sales value exceeds IDR 5 trillion or approximately US$ 350 million (for banks, the threshold is IDR 20 trillion) ("Threshold"); and

(ii) non-affiliated transaction.

The term "Acquisition" is defined as "a legal action to acquire shares of a business entity, causing a change of control" (i.e., (i) ownership of shares or voting rights above 50% in a company, or (ii) factual control, i.e., ability to influence or direct the company's policy and/or management).

KPPU Regulation No. 2 stretch out the coverage of Mandatory Notification to also include offshore mergers, consolidation and acquisition meeting the following requirements:

(i) *Conducted outside the jurisdiction of Indonesia*: Specifically, for acquisition, it must result in a change of control: either by ownership of shares or voting rights above 50%; or factual control (ability to influence or direct the company's policy and/or management). In this case, the determination on whether the transaction results in a change of control should be determined on the basis of the law applicable in the jurisdiction in which the target is established or domiciled.

(ii) *The acquisition meets the threshold*: The threshold applies to assets located and sales (excluding exports) which take place only in Indonesia. From the text of the KPPU Regulation No. 2, the assets and/or sales include those of (i) the target, (ii) the acquirer, (iii) the ultimate shareholders of the target/the acquirer, and (iv) all controlled direct and indirect subsidiaries of the ultimate shareholders, the acquirer and the target only in Indonesia.

(iii) *Has a direct impact to Indonesian market due to either*:

a. all parties in the transaction conduct business in Indonesia, whether directly or indirectly (the KPPU Regulation No. 2 give an example of "conducting business" through having controlled subsidiaries in Indonesia);
b. one of the parties in the transaction is conducting business in Indonesia while the other party is conducting sales in Indonesia; or
c. one of the parties in the transaction conducts business in Indonesia while the other party has a sister company conducting business in Indonesia.

(iv) *Conducted between non-affiliated companies*: If the transaction is conducted between affiliates, the transaction is exempted.

Procedure and estimated timing

While the Mandatory Notification adopts a post-merger notification concept, the IAL allows a pre-merger consultation, but the opinion rendered by the KPPU in the framework of such a consultation procedure is not binding. Therefore, irrespective of whether the parties have carried out a pre-merger consultation, the Mandatory Notification remains applicable.

Upon the submission of a complete filing, the KPPU should complete its assessment of the transaction within 90 business days. Although the KPPU should abide by this term, in practice it may take several weeks or even months after submission of a post-merger control filing before the KPPU confirm that the submission is complete.

Unlike in other jurisdictions, a merger control filing in Indonesia does not result in the KPPU approving, conditionally approving or rejecting the acquisition. Instead, the KPPU will render an opinion, which can be:

- no allegation of monopolistic practice or unfair business competition;
- an allegation of monopolistic practice or unfair business competition; or
- a conditional no allegation of monopolistic or unfair business competition.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

Sector of Industry

According to KPPU, in 2018 KPPU was still reviewing Mandatory Notifications of 2017. In 2017, most of the industries reviewed are: mining; oil; food; plantations; and real estate. According to one of KPPU's commissioners, the main priorities of KPPU are food, energy, banking and financial services, logistics and infrastructure, education, and health.

Market Definition

KPPU through its Guideline No. 3 of 2009 concerning Relevant Market divides "market" on both a geographical and product basis.

Geographical market identifies whether a price increase in an area will substantially influence another area; if so, then those areas are in the relevant market. KPPU determines the geographical market on several indicators, among others, transportation costs, travel time, tariff and regulations which may restrict the trade between cities/areas.

Product basis relates to similarity in character and function and/or substitution level. A relevant market occurs in the events of (i) "demand-side substitution": if the substitute prevents the price increase of the relevant product above the competitive level price, or (ii) "supply-side substitution": whether consumers will switch to another product when there is an increase of price. The element of "substitution" plays an important role in determining whether or not a product is considered in the same relevant market, hence competing with each other.

Entry Barrier

Pursuant to KPPU Regulation No. 2, an entry barrier consists of (i) absolute barriers (e.g., government regulation, licence, etc.), (ii) a structural barrier (e.g., goods supply and technology under the existing business actors' control, sunk cost applied in the case the consumer switch to another product), and (iii) a strategic barrier (e.g., incumbent business actor that aggressively approaches the new business actor, tying and bundling, exclusive distributorship agreement).

Market entry barriers analysis does not only focus on the convenience of the new player in entering the market, but the strength of the new player must also be sufficient in giving competitive pressure, and the time needed to enter into the market that is not too long in order to provide competitive pressure.

Nature of International Competition

Any International competition ruling or assessment may be submitted to KPPU as supporting documents but given its independency, there is no guarantee that KPPU's decision will follow the international competition ruling/assessment.

Key economic appraisal techniques applied e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

Pursuant to KPPU Regulation No. 2, in determining whether a merger, consolidation or acquisition could result in the occurrence of monopolistic practices and/or unhealthy business competition, the KPPU would assess the transaction based on the following analysis:

1. Market Concentration

A merger, consolidation or acquisition transaction resulting in a high market concentration may potentially cause a monopolistic practice and/or unhealthy business competition. In general, KPPU applies two optional methods to determine market concentration: Herfindahl Hirschman Index (HHI); or Concentration Ratio (CRn).

2. Entry Barrier

Please refer to our answers under the section "Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc." above.

3. Anti-competitive Behaviour Potential

a. Unilateral effect

A merger, consolidation or acquisition resulting in a dominant player in the market which can abuse its position to gain highest profit and cause loss to the consumers.

b. Coordinated effect

Collusive action between competitors which can be assessed through three conditions: price; sanctions applied to the collusive members; and low competitive pressure.

c. Market foreclosure or vertical merger

Vertical merger which took place in a chain of production process, such as between a material supplier and manufacturer/wholesaler and retailer.

4. Efficiency

A comparison between the achieved efficiency and the anti-competitive impact caused by a merger, consolidation or acquisition. If the anti-competitive impact is bigger than the expected efficiency achieved through the merger, consolidation or acquisition transaction, healthy competition will be prioritised compared to encouraging efficiency, since a healthy competition would directly or indirectly result in a more efficient market.

5. Bankruptcy

Should the purpose of a merger, consolidation or acquisition avoid a company from going bankrupt, which may further give loss to the consumers, then the action is acceptable. KPPU will assess several factors, among others: (i) the financial condition of the company; (ii) whether reorganisation is possible; or (iii) there are no other alternatives other than a merger.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

There is no second stage of investigation under the IAL. As discussed above, there are three possible results of the Mandatory Notification:

1. there is no allegation of monopolistic practice or unfair business competition;
2. there is an allegation of monopolistic practice or unfair business competition; or
3. a conditional no allegation of monopolistic or unfair business competition.

If KPPU opines that the merger, consolidation or acquisition has allegedly resulted in a monopolistic practice or unfair business competition, KPPU may take necessary measures, including to initiate an investigation as well as to impose administrative sanctions. The form of administrative sanctions varies from fines to unwinding the transaction.

In the last five years, all opinions issued by KPPU on merger, consolidation and acquisition notifications are positive – meaning that there were no allegations of monopolistic practice or unfair business competition resulting from the transaction. To date, KPPU has only rendered one sanction to unwind an acquisition transaction. However, the case was not examined based on a Mandatory Notification and the relevant decision rendered by KPPU was then annulled by the district court.

Key policy developments

There has been an ongoing discussion of the renewal of the Law No. 5 for the past four years and the draft bill has been circulated for several rounds. However, there has been no significant update on when the new bill will be issued. Detailed discussion on the material changes of the new bill can be found in section 7 below.

One of the key policy developments under the new antitrust bill is on the use of indirect evidence – which has attracted various opinions from the public. Given the difficulty of evidentiary process in antitrust cases, some scholars and practitioners view that it is necessary to have the indirect evidence under a new antitrust bill. Nonetheless, others believe that the existence of

the indirect evidence is not in line with the laws on evidence under the Indonesian legal system.

In the past, KPPU used indirect evidence in the evidentiary hearing of three cartel cases related to fuel surcharge, cooking oil, and motorcycles to which the business actors were found guilty. However, the district court then annulled KPPU's decisions in the fuel surcharge and cooking oil cartel cases at the appeal level.

Reform proposals

The Indonesian Parliament is currently deliberating a new antitrust bill, replacing Law No. 5. The bill that is currently being deliberated introduces a pre-merger regime. There has been no clear indication as to when the new bill will be enacted. Some key amendment issues are set out below:

Issues	Law No. 5	New Antitrust Bill
Notification Regime	Post-merger	Pre-merger approval
Notification Coverage	• Merger • Consolidation • Acquisition	• Merger • Consolidation • Acquisition • Assets Transfer Plan • JV Establishment Plan
Extraterritorial Effect	No	Permits the exercise of the jurisdiction over the extra-territorial activities of foreigners which produce economic effects within the territory of Indonesia, in the context of the competition policy
Administrative Fines	IDR 1 billion – IDR 25 billion	5%–30% of the sales value
Leniency	None	KPPU can provide mercy and/or reduction of punishment for business actors acknowledging and/or reporting the devotion that are also violated by the terms

Further changes on the Law No. 5 amendment are still possible until the amendment is passed.

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Ms. Miriam Andreta is an Indonesian qualified lawyer and expert and has extensive knowledge in Mergers & Acquisition, Banking & Finance, Oil & Gas and Antitrust matters.

She has 14 years of experience acting for both foreign and domestic lenders in high-profile syndication financing to Indonesian companies. On Antitrust matters, Ms. Miriam Andreta has been advising both local and foreign companies on various antitrust complex issues, including extensive numbers of merger notifications.

Miriam Andreta recently was listed as a Rising Star Indonesia 2019 by *Asian Legal Business*, she was recognised by *Asia Business Law Journal* 2019 as one of the A-List: Indonesia's Top 100 Lawyers. She was also listed as one of the "40 Under 40" by *Asian Legal Business* 2018, One of the Top 5 Finalists of Young Lawyer of the Year in the 5th Annual Asian Legal Business Indonesia Law Awards 2018 and Shortlisted as Woman Lawyer of the Year in the 5th Annual Asian Legal Business Indonesia Law Awards 2018.

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Mr. Rainer Faustine Jonathan is a young talented lawyer having more than five years' experience assisting both domestic and multinational companies in general corporate and dispute resolutions matters. He read law at Universitas Indonesia and is admitted to the Indonesian bar.

Prior to joining Walalangi & Partners, Mr. Rainer Faustine Jonathan worked as an associate in other prominent law firms in Jakarta. He was involved in the working group that handled several high-valued anti-trust, litigation and arbitration cases. In addition, he also assisted clients in corporate matters, among others in bond issuance, acquisition of shares and land acquisition.

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Ms. Putri Bening Larasati is a licensed Indonesian lawyer, with more than five years of experience, assisting clients on various M&A Transactions, Real Estate Transactions, General Corporate Matters and Antitrust Matters.

Ms. Putri Bening Larasati graduated in 2013 from the Faculty of Law, University of Indonesia, majoring in Economic Law. Within the law school she participated in a wide range of organisational activities, among others, the Asian Law Students Association (ALSA). Prior to joining Walalangi & Partners, she joined one of the biggest law firms in Indonesia as an associate.

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