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MERGER CONTROL IN INDONESIA – A BEGINNER'S GUIDE

By WongPartnership and Makes & Partners, member firms of WPG, a regional law network.

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Merger Control in Indonesia – A Beginner's Guide

Introduction

The merger control regime in Indonesia is primarily regulated by Law No. 5 of 1999 on the Prohibition of Monopolistic and Unfair Business Competition Practices ("**Law 5/1999**") and its implementing regulations. In Indonesia, this involves a mandatory post-completion notification regime for mergers, consolidations and acquisitions of shares (which result in a change of control), that exceed prescribed thresholds to determine whether the relevant transaction may result in monopolistic practices and/or unfair business competition. In October 2019, the Supervisory Business Competition Committee (*Komisi Pengawasan Persaingan Usaha* or *KPPU*) which oversees the implementation and enforcement of Law 5/1999, issued KPPU Regulation No. 3 of 2019 ("**KPPU Regulation 3/2019**")[1], which is the main implementing regulation of Law 5/1999. In connection with the mandatory post-completion notification, KPPU Regulation 3/2019 has amended certain merger control requirements in Indonesia, including stipulating that the acquisition of assets will also be subject to the mandatory post-completion notification.

Given the increase in KPPU's exercise of its enforcement powers under Law 5/1999 in recent times and the introduction of KPPU Regulation 3/2019, we have, in this update, summarised the key parameters of the merger control regime in Indonesia that investors should be aware of when structuring their investments.

When should an investor be concerned with the merger control regime in Indonesia?

KPPU Regulation 3/2019 states that any transaction which involves a merger or consolidation, or acquisition of shares (which result in a change of control) or assets that meet the Thresholds (as defined below) must be notified to the KPPU in writing no later than 30 business days after the completion of the transaction.

What amounts to a "change of control"?

Under KPPU Regulation 3/2019 and Government Regulation No. 57 of 2010 on the Merger or Consolidation of Business Entities and Acquisition of Shares of Companies which may Cause Monopolistic Practices and Unfair Business Competition ("**GR 57/2010**"), a change of control occurs when the transaction results in a change of controlling shareholder of the company in question. Further, pursuant to KPPU Regulation 3/2019 and GR 57/2010, a "controlling shareholder" refers to any shareholder who (a) owns shares or holds voting rights of more than 50% in the Relevant Entities (as defined below), or (b) owns less than 50%, but possesses the ability to influence and determine the management of the Relevant Entities.

For the purposes of the merger control regime in Indonesia, the term "Relevant Entities" refers to (i) the acquiring entity, (ii) the acquired entity, as well as (iii) the entities which directly or indirectly control or are controlled by the entities in (i) and (ii).

[1] KPPU Regulation No. 3 of 2019 on the Assessment of Merger or Consolidation of Business Entities and Company's Acquisition that could result in Monopolistic Practices and Unfair Business Competition.

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What are the value thresholds that would trigger the notification requirement to the KPPU?

If, as a result of the transaction, the Relevant Entities exceed the following thresholds:

(a) the total asset value of the Relevant Entities exceed IDR2,500,000,000,000 (approximately S$238.1 million); or

(b) the total sales value of the Relevant Entities exceed IDR5,000,000,000,000 (approximately S$476.1 million),

(collectively, the "**Thresholds**"),

the KPPU must be notified of the transaction in writing no later than 30 business days after the completion of the transaction.

Pursuant to KPPU Regulation 3/2019, the type of transactions that would trigger the mandatory post-completion notification, are mergers or consolidations, or acquisitions of shares (which result in a change of control) or assets occurring within the territory of Indonesia or outside the territory of Indonesia (if any of the Relevant Entities conduct business or sales activities in Indonesia).

When would the Thresholds be crossed?

The total asset value of the Relevant Entities is calculated based on the value of the Relevant Entities' assets as set out in the relevant latest financial statements – this means that the total value of the assets held by the Relevant Entities globally needs to be included, and not just the value of the assets located in Indonesia.

The total sales value of the Relevant Entities is calculated based on the sales values of the Relevant Entities within Indonesia.

As the Thresholds are based on the combined asset / sales of the Relevant Entities, it is possible for the Thresholds to be crossed by virtue of the assets / sales of just one Relevant Entity. It is also important to note that in a transaction involving two or more parties ("**Parents**") acquiring control over a target – the Thresholds can be crossed by virtue of one or more of the Parents' assets / sales, causing the transaction to be notifiable regardless of the quantum of the target's assets / sales.

What happens when a notification has to be submitted to the KPPU?

Written notifications have to be submitted to the KPPU within 30 business days of the completion of the relevant transaction. Notifications have to be made using the forms prescribed by the KPPU (as set out under the attachment to KPPU Regulation 3/2019) and must be accompanied by the supporting documents set out in such forms (which include, among others, the Relevant Entities' financial statements for the past three financial years).

Late submissions could attract fines of an amount of IDR1,000,000,000 (approximately S$95,000, based on the exchange rate prevailing on the date of this update) for each day of delay, capped at a maximum fine of IDR25,000,000,000 (approximately S$2.4 million, based on the exchange rate prevailing on the date of this update).

KPPU Regulation 3/2019 also formalises a pre-closing consultation process which parties may choose to utilise. This process involves a formal written submission to the KPPU of the plan of merger, consolidation and/or acquisition of shares and/or assets. There is no specific period provided under KPPU Regulation 3/2019 within which the KPPU must complete its assessment of such pre-closing consultation. The results of the pre-closing consultation may be used by the KPPU for its assessment process after the notification is filed following the

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closing of the transaction so long as: (a) there is no change in the information; and (b) the notification is filed within the 2-year period of the date of issuance of the pre-closing consultation result by the KPPU.

How long does the KPPU take to process a submission?

Following the submission to the KPPU:

(A) the KPPU will examine the completeness of the submission and may, within 60 business days of the initial submission, request any additional documents (if deemed necessary) to be submitted to the KPPU to complete its examination; and

(B) when the submission of the documents is considered complete by the KPPU, it will then assess whether the transaction is likely to result in monopolistic practices and/or unfair business competition. This assessment will generally take approximately 90 business days.

Accordingly, it will take approximately 150 business days to obtain the KPPU's response to the submission. However, please note that the KPPU may, at its sole discretion, request additional information and/or documents for its review during the assessment process, which may extend the time for the KPPU to issue its response. In general, the KPPU response will contain the KPPU's opinion on whether there is an indication of monopolistic practices as a result of the transaction.

How does the KPPU determine whether a transaction may result in monopolistic practices and/or unfair business competition?

Generally, the KPPU conducts its analysis by examining the following areas: (a) market concentration of the Relevant Entities, (b) barriers to market entrants, (c) whether the transaction creates a potential for anti-competitive behaviour, (d) efficacies produced by the transaction; and/or (e) bankruptcy.

Under previous implementing regulations, the KPPU issued guidance on the factors that it uses in conducting its analysis. However, this guidance has since been revoked by KPPU Regulation 3/2019. Although the KPPU has not issued new guidelines for determining market concentration, it is still common practice to use the previous guidance. We have set out below the factors that are utilised in the analysis of the various areas under the previous guidance.

Market concentration

Market concentration is assessed by calculating the Herfindahl-Hirschman Index ("**HHI**"), or if that is not possible, by utilising the Concentration Ratio valuation method or other methods that are possible to describe the level of market concentration.

HHI is obtained from the sum of squares of the market share of all business actors in the relevant market. Under the previous guidance, the KPPU divided the market concentration level into two groups based on the HHI value post-transaction as follows:

(a) Spectrum I (Low Concentration), with HHI below 1800 - This indicates no likelihood of monopolistic practices and unfair business competition as it does not affect the existing market structure; and

(b) Spectrum II (High Concentration), with HHI above 1800 - If the difference in HHI value before and after the transaction is less than 150, KPPU considers that there is no likelihood of monopolistic practices and/or unfair business competition as the market structural changes that occurred as a result of the transaction are not

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significant. However, in the event that the difference exceeds 150, KPPU will assess the other areas to determine whether the transaction may result in monopolistic practices and unfair business competition.

Market entry barriers

A new business actor to a market may find it difficult to enter the market if there are high entry barriers to the market. This may lead to a misuse of positions that could obstruct business competition or result in an exploitation of consumers. Under the previous KPPU guidance, high market entry barriers may be evidenced from, among other things, the number of business actors in the relevant market from year to year, the number of potential business actors that could enter the relevant market, a comparison between the costs required to enter the market with the estimated revenue from the market as well the time needed to cover such costs.

Potential for anti-competitive behaviour

The transaction would also be analysed to determine whether it creates any potential for the following types of anti-competitive behaviour:

(a) Unilateral effect – whether the transaction creates a relatively dominant business actor which increases the risk of a misuse of dominant position to achieve maximum income and consumer losses.

(b) Coordinated effect – even if the transaction does not create a relatively dominant business actor, whether there is potential anti-competitive behaviour if competitors in the relevant market act in a coordinated manner, both directly and indirectly.

(c) Market foreclosure – whether the transaction results in a vertical merger or consolidation which may obstruct a competitor's access to upstream and downstream markets thereby reducing the level of competition.

Efficiencies

If the purpose of the transaction is to elevate business efficiency, an evaluation of the efficiencies produced against its anti-competitive impact will be conducted. If the value of the anti-competition impact exceeds the value of the efficiency expected to be achieved from the transaction, healthy competition will be prioritised over the promotion of efficiency for business actors.

Bankruptcy

Assessment is required if the reason for the transaction is to avoid the discontinuance of the business entity from operating in the market/industry because of bankruptcy. Generally, if consumer loss is greater as a result of the business entity exiting the market/industry, compared to the loss suffered if the business entity remains, there will not be any concern of the reduced level of competition resulting from the transaction.

Others

In addition, pursuant to the KPPU Regulation 3/2019, the KPPU could, in performing its analysis, also consider the following matters:

(a) policies to increase competitiveness and strengthening of national industries;

(b) technological development and innovation;

(c) protection of micro, small and medium enterprises;

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(d) impact on manpower; and/or

(e) implementation of laws and regulations.

These areas are not exhaustive and the KPPU has broad discretion to consider other areas and/or factors in conducting its analysis.

What happens if the KPPU determines that a transaction may result in monopolistic practices and/or unfair business competition?

After completing its assessment, if the KPPU is of the opinion that the transaction may result in monopolistic practices and/or unfair business competition, the KPPU may issue conditional approval. This conditional approval will include remedial actions that the applicant would need to take to address the KPPU's concerns within a stipulated timeframe (such as changes to the applicant's business structure and/or operations), which are at the KPPU's discretion. Generally, any remedial actions are determined following discussions with the applicant and prior to the KPPU issuing its response to the submission. Failure to comply with the remedial actions stated in the conditional approval could result in fines imposed by the KPPU at its discretion.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership or Makes whom you normally work with or any of the following Partners:

Dr Yozua MAKES
Founder and Managing Partner
d: +62 21 547 7181
e: ymakes@makeslaw.com
Click here to view Dr Yozua's CV.

Mark CHOY
Partner
d: +65 6416 8014
e: mark.choy@wongpartnership.com
Click here to view Mark's CV.

Iwan SETIAWAN
Senior Partner
e: setiawan@makeslaw.com
Click here to view Iwan's CV.

Ameera ASHRAF
Head – Antitrust & Competition
d: +65 6416 8113
e: ameera.ashraf@wongpartnership.com
Click here to view Ameera's CV.

Fransisca
Partner
e: fransisca@makeslaw.com
Click here to view Fransisca's CV.

James CHOO
Partner
d: +65 6416 2418
e: james.choo@wongpartnership.com
Click here to view James's CV.

Billy BERNARDUS
Partner
e: billy@makeslaw.com
Click here to view Billy's CV.

CHAN Jia Hui
Partner – Antitrust & Competition
d: +65 6416 2794
e: jiahui.chan@wongpartnership.com
Click here to view Jia Hui's CV.

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WPG brings together a group of five prominent law firms across seven countries in a collaboration to provide clients with legal services in ASEAN, China and the Middle East. The network includes our Singapore headquarters, offices in Beijing, Shanghai and Myanmar, as well as our member firms – Al Aidarous Advocates and Legal Consultants (Abu Dhabi and Dubai), Foong & Partners (Malaysia), Makes & Partners (Indonesia) and ZGLaw (Philippines).

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AWARDS

Makes & Partners and WongPartnership are consistently recognised in various leading legal publications.

OFFICES

SINGAPORE

WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
t +65 6416 8000
f +65 6532 5711/5722
w wongpartnership.com

INDONESIA

Makes & Partners Law Firm
Menara Batavia, 7th Floor
Jl. KH. Mas Mansyur Kav. 126
Jakarta 10220, Indonesia
t +62 21 574 7181
f +62 21 574 7180
w makeslaw.com

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