

## Voluntary Pre-Notification for Mergers, Consolidations, and Acquisitions

### Overview

The Commission for the Supervision of Business Competition (*Komisi Pengawas Persaingan Usaha / KPPU*) in its efforts to provide greater legal certainty while simultaneously endeavoring to increase control over the processes of merger, consolidation, and acquisition in order that monopolistic and unfair business practices do not occur has issued Regulation No. 1 of 2009 on Pre-Notification on Mergers, Consolidation, and Acquisition. The KPPU Regulation is explicitly clear that the pre-notification is voluntary and as such there is no specific penalty in place for not notifying the KPPU before undertaking a merger, consolidation, or acquisition.

The fact that the regulation and the attached guidelines are voluntary begs the question; why bother in the first place? The answer to this question seems to be that the purpose of the regulation and guidelines is not to bind relevant companies or institutions to any specific obligation, but rather provide an opportunity for the relevant companies and institutions to have any merger, consolidation, or acquisition vetted for compliance to the prevailing laws and regulations in order to ensure that there are no future issues with the validity of the merger, consolidation, or acquisition once the transaction has been completed.

Simply, the KPPU envisages that companies and institutions will take advantage of the pre-notification system so as not to encounter any legal problems at a later date as a result of a breach.

For example, if pre-notification had been in-place then where a problem or potential breach exists this can be identified and the necessary changes made or the merger, consolidation, or acquisition can be abandoned before any breach occurs. In essence, cases such as Temasek, where post-transaction problems arose, will not occur in the future.

The KPPU has already set-up a sub-directorate for the purposes of receiving merger, consolidation, and acquisition pre-notification reports.

### Table of Contents

Issue 118, 22/5/2009

Overview	1
Pre-Notification Reports	2
Preliminary / Initial Assessment	2
Full Assessment	2
Pre-Notification Assessment Results / Outputs	3
Enforcement	3
Conclusion	3

## Pre-Notification Reports

Not all mergers, consolidations, or acquisitions qualify for prior notification. The Regulation sets out different criteria for mergers and consolidations, and acquisitions. Furthermore, mergers and consolidations are classified into two types: (i) mergers and consolidations for businesses, and; (ii) mergers and consolidations for the financial services sector (such as banks or non-banks).

In this regard, companies that may submit a pre-notification report are those companies that fulfill the following criteria:

- a. The combined assets of the merged or consolidated company is more than IDR 2.5 trillion; or
- b. The sales value of the merged or consolidated company exceeds IDR 5 trillion; or
- c. As a result of the transaction the surviving company controls more than 50% of the relevant market.

In the financial services sector, the following conditions must be fulfilled:

- a. The combined assets of the merged or consolidated company is more than IDR 10 trillion; or
- b. The sales value of the merged or consolidated company exceeds IDR 15 trillion; or
- c. As a result of the transaction the surviving company controls more than 50% of the relevant market.

In terms of an acquisition, a pre-notification can be undertaken where the following conditions are met:

- a. Where the acquisition of shares totals at least 25%; or
- b. Where the acquisition of shares is less than 25% but the acquisition results in the transfer of effective control; or
- c. Where there is an acquisition of assets or some other transaction that results in the transfer of effective control; and
- d. Where the acquisition results in the value of assets or sales noted earlier (Article 3 of the regulation) has been achieved.

The assessment phase is split into two distinct parts: a preliminary assessment and a full assessment. It is worth noting that a full assessment is only undertaken once the preliminary assessment is complete and there is some indication that any proposed merger, consolidation, or acquisition will result in a breach of the prevailing laws and regulations with respect to monopolistic and unfair business practices.

## Preliminary / Initial Assessment

Pre-notification can be undertaken once there is an agreement or understanding (MoU), or some other written document in place that evidences intent / plan to carry out a merger, consolidation, or acquisition.

The basic purpose of the preliminary assessment is to make a determination as to whether there are justifiable concerns that the proposed merger, consolidation, or acquisition will give rise to a monopoly or some form of unfair business practice. Generally, it is expected that at this stage the focus will be on the degree of market concentration that results due to the merger, consolidation, or acquisition.

The KPPU can call experts throughout the preliminary assessment process.

A preliminary assessment is not to take longer than 30 days once an application has been received and all of the administrative requirements have been satisfied.

Once the preliminary assessment is complete, if it is determined that market concentration is significantly altered to the extent that this market concentration would result in a breach of the prevailing laws and regulations with respect to monopolistic and unfair business practices, then the second phase of the process is triggered, namely: a full assessment.

## Full Assessment

The full assessment is designed to provide a more complete evaluation of the proposed merger, consolidation, or acquisition in order that a definitive response can be made on any suspicions that the merger, consolidation, or acquisition will result in a breach of the prevailing laws and regulations.

The full assessment phase will include, at least, the following considerations:

1. The possibility that the merger, consolidation or acquisition will result in anti-competitive behavior either unilaterally or jointly with competitors;
2. The efficiency that results from the proposed merger, consolidation, or acquisition; and
3. Whether a bankruptcy or other event will occur that results in losses either to the community or the public interest if the merger, consolidation, or acquisition is not allowed to proceed.

Once again, the KPPU may call expert testimony in order to gain further clarifications on the proposed merger, consolidation, and acquisition.

A full assessment is to be completed within 60 days.

## Pre-Notification Assessment Results / Outputs

The pre-notification assessment results are to be construed as the opinion of the KPPU. Therefore, the assessment results are binding on the KPPU. Interestingly, the pre-notification assessment result is not binding on the businesses or institutions that submit their intent to undertake a merger, consolidation, or acquisition.

Nevertheless, in essence the result is in effect binding on the business or institution that requested it if those businesses or institutions undertake a merger, consolidation, or acquisition without making the necessary modifications to the process in order to ensure compliance.

Therefore, the result is indicative of how the KPPU would determine any matter that came before it where the above noted modifications were not made prior to the proposed merger, consolidation, or acquisition being undertaken.

The results will take three basic forms:

1. No objection Letter - the KPPU has no objections to the proposed merger, consolidation, or acquisition;
2. Objection Letter - the KPPU has objections towards the proposed merger, consolidation, or acquisition, and if the transaction takes place without any modifications then the KPPU will initiate an official examination once the merger, consolidation, or acquisition has been completed. An objection letter will also be issued if the business or institution is not forthcoming with any data requested by the KPPU; and
3. Conditional No Objection Letter - is issued where the KPPU is satisfied that the merger, consolidation, or acquisition is going to proceed according to the conditions set out by the KPPU. However, if the merger, consolidation, or acquisition proceeds without fulfilling all the conditions stipulated by the KPPU, then the KPPU will proceed to an official examination once the merger, consolidation, or acquisition is completed.

The business or institution that undertakes the pre-notification process have 30 days once the assessment has been received by them to consult with the KPPU with respect to the outcomes of the assessment process.

If no consultation is undertaken by the relevant businesses or institutions, then the KPPU will announce its final opinion on the proposed merger, consolidation, or acquisition.

## Enforcement

The Regulation has been in force since 13 May 2009.

## Conclusion

It is clear that this regulation is in essence a public service in that it permits businesses and institutions to test the waters of any proposed merger, consolidation, or acquisition before taking any steps necessary to effect such a transaction. Furthermore, it is equally clear that the KPPU sees this measure as a means of effecting greater control over the merger, consolidation, or acquisition process. By default, this exercise in control will also provide greater legal certainty for the participants in any proposed merger, consolidation, or acquisition.

In a practical sense, the opportunity for businesses and institutions to get a preliminary and full assessment of their proposed merger, consolidation, or acquisition prior to undertaking a transaction of that nature means that businesses and institutions are forewarned and as such forearmed as well. If the preliminary or full assessment indicates a possible breach of the prevailing laws and regulations with respect to monopolistic and unfair business practices then the relevant business or institution can make the necessary modifications to ensure that the possible breach does not occur.

Nevertheless, it seems that the process could be an endless one if the relevant businesses were to continually return to the KPPU for a preliminary opinion. However, this should be averted if the relevant businesses and institutions properly utilize the KPPU consultation process. It is expected that the consultation process is designed to allow the KPPU to have input on the modifications to a proposed merger, consolidation, or acquisition. If this is the case then the KPPU will be bound by those inputs if the matter was to ever come before the KPPU for adjudication in the future.

The regulation and guidelines are expected to provide options to businesses and institutions seeking to ensure their compliance with the prevailing laws and regulations with respect to monopolistic and unfair business practices. In essence, the opportunity conceivably is a time and money saver over the long-term for businesses and institutions intending to undertake a merger, consolidation, or acquisition. 