

Pre-Notification Mechanism for Merger, Consolidation and Acquisition

The Commission for the Supervision of Business Competition, or 'KPPU,' has finalized the Draft Government Regulation that will, at long last, elaborate an implementation of Articles 28(3) and 29(2) (relating to mergers and acquisitions) of Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition. Most critically, the draft regulates and is the provenance of a pre-notification process for mergers and acquisitions, whereby companies that intend to undertake a merger or acquisition of certain sizes and types must notify (report to) the KPPU within 30 days of reaching an initial agreement - before any transaction takes place.

Mergers or acquisitions will need to be reported if they involve exchanges that meet or exceed any of the three following criteria: (1) IDR 2.5 trillion 'value of assets'; (2) IDR 5 trillion 'value of sale', and; (3) lead to the possession of equal or more than 50% of the relevant market share. This is known as the 'minimum threshold limitation' at which a prospective transaction must be reported. Although there had been talk amongst the drafters of establishing subject categories, such as oil and gas, for stipulating reporting obligations, this instead focuses more generally on the size of the transaction.

Article 14 of the draft Regulation makes an exception for the banking sector with respect to criteria (1) specifically: mergers or acquisitions only need be reported if they involve a transaction of assets exceeding IDR 20 trillion. However, the other two criteria still apply without exception. Amendments to the banking sector minimum threshold limitation may only be made by way of a KPPU Regulation in coordination with Bank Indonesia.

The report of a merger or acquisition will require a form to be submitted, the format for which will be determined by the KPPU. This will likely be contained in the Regulation's Attachments. The form must be signed by all leaders of relevant parties, and requires additional supporting documents including: company profiles, articles of association, and various financial reports.

As the Regulation will provide, the KPPU will in turn examine the report to determine whether it will compromise a market's healthy activity. Two stages of examination will be provided: (1) Preliminary examination will attend to market concentration (the number and size of actors competing in a market); (2) Approval for the merger, consolidation, or acquisition will be granted on the basis of relatively low market concentration (no one actor controls - or will control - too much of the market).

If the KPPU analysis determines that a high market concentration will result from a merger, consolidation, or acquisition, they will conduct further

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examination, and either issue approval, conditional approval, or a rejection of the proposal. Rejections can be appealed with the KPPU in accordance with Supreme Court Regulation No. 3 of 2005.

The pre-notification approval process will allow the KPPU to shift to a preventive role, whereas until now it has been restricted to punitive actions against deals that had already been made. Always acting in hindsight, the KPPU's actions have been difficult to anticipate, and it has failed to develop a standardized approach for the maintenance of healthy markets. That has contributed in part to a broader lack of legal certainty in the Indonesian corporate world, and has encumbered the KPPU in messy court proceedings in the past. Both the KPPU and the business sector may thus have reason to welcome the coming Regulation.

The Draft Government Regulation was lastly updated on 14 January 2010, and it should be issued within the first 6 months of this year. 

⚙ Documents

Draft Government Regulation on Pre-Notification
Mechanism for Merger
(PP_MERGER_F_2010.pdf - 49.Kb)

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