

Type: REGULATION (PER)

By: SUPERVISORY COMMISSION FOR BUSINESS COMPETITION

Number: 02 YEAR 2013

Date: APRIL 5, 2013 (JAKARTA)

Title: THIRD AMENDMENT TO THE REGULATION OF SUPERVISORY COMMISSION FOR BUSINESS COMPETITION NUMBER 13 YEAR 2010 REGARDING IMPLEMENTATION GUIDELINES OF CONSOLIDATION OR MERGER OF BUSINESS ENTITIES AND ACQUISITION OF COMPANY'S SHARES THAT MAY CAUSE MONOPOLISTIC PRACTICES AND UNFAIR BUSINESS COMPETITION

SUPERVISORY COMMISSION FOR BUSINESS COMPETITION,

Considering:

- a. whereas to support effectiveness of implementation of Notification of Consolidation or Merger of Business Entities and Acquisition of Company's Shares, it is deemed necessary to improve the Regulation of Supervisory Commission for Business Competition Number 3 Year 2012 regarding Second Amendment to the Regulation of Supervisory Commission for Business Competition Number 13 Year 2010 regarding Implementation Guidelines on Consolidation or Merger of Business Entities and Acquisition of Company's Shares that may cause Monopolistic Practices and Unfair Business Competition;
- b. whereas based on the consideration as intended in letter a, it is necessary to stipulate the Regulation of Supervisory Commission for Business Competition on Third Amendment to the Regulation of Supervisory Commission for Business Competition Number 13 Year 2010 regarding Implementation Guidelines for Consolidation or Merger of Business Entities and Acquisition of Company's Shares that may cause Monopolistic Practices and Unfair Business Competition;

In view of:

1. Law Number 5 Year 1999 regarding Prohibition of Monopolistic Practices and Unfair Business Competition (State Gazette of the Republic of Indonesia Year 1999 Number 33, Supplement to State Gazette of the Republic of Indonesia Number 3817);
2. Government Regulation Number 57 Year 2010 regarding Consolidation or Merger of Business Entities and Acquisition of Company's Shares that may cause Monopolistic Practices and Unfair Business Competition (State Gazette of the Republic of Indonesia Year 2010 Number 89, Supplement to State Gazette of the Republic of Indonesia Number 5144);
3. Presidential Decree Number 75 Year 1999 regarding Supervisory Commission for Business Competition, as has been amended by Presidential Regulation Number 80 Year 2008 regarding Amendment to Presidential Decree Number 75 Year 1999 regarding Supervisory Commission for Business Competition;

4. Presidential Decree Number 112/P Year 2012;
5. Regulation of Supervisory Commission for Business Competition Number 1 Year 2010 regarding Procedures for Case Handling;
6. Decision of Supervisory Commission for Business Competition Number 04/KPPU/Kep/I/2010 regarding Organization and Working Procedures for Secretariat of Supervisory Commission for Business Competition of the Republic of Indonesia;

HAS DECIDED:

To stipulate:

REGULATION OF THE SUPERVISORY COMMISSION OF BUSINESS COMPETITION REGARDING THIRD AMENDMENT TO THE REGULATION OF SUPERVISORY COMMISSION FOR BUSINESS COMPETITION NUMBER 13 YEAR 2010 REGARDING IMPLEMENTATION GUIDELINES OF CONSOLIDATION OR MERGER OF BUSINESS ENTITIES AND ACQUISITION OF COMPANY'S SHARES THAT MAY CAUSE MONOPOLISTIC PRACTICES AND UNFAIR BUSINESS COMPETITION

#### Article 1

To change Enclosure to Regulation of Supervisory Commission for Business Competition Number 3 Year 2012 regarding Second Amendment to the Regulation of Supervisory Commission for Business Competition Number 13 Year 2010 regarding Implementation Guidelines of Consolidation or Merger of Business Entities and Acquisition of Company's Shares that may cause Monopolistic Practices and Unfair Business Competition, which reads as set out in the Enclosure to this Decision of Supervisory Commission for Business Competition.

#### Article 2

This Commission's Regulation shall start to come into force on the date of stipulation.

Stipulated in Jakarta  
On April 5, 2013

SUPERVISORY COMMISSION FOR BUSINESS COMPETITION

Chairman,

Signed

M. Nawir Messi

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Note

CHAPTER I  
BACKGROUND

The actions of Consolidation, Merger, and/or Acquisition, realized or not shall influence competition among business performers in relevant market and will bring impact to consumers and communities. Consolidation, Merger, or Acquisition can cause increase or decline of competitions that may potentially harm consumers and communities. Consolidation, Merger, or Acquisition that may cause asset value and or sales value exceed certain amount must be notified to Commission, not later than 30 (thirty) days since the date of Consolidation, Merger, or Acquisition. Provisions on asset value and or sales value as well as notification procedures concerned have been regulated through Government Regulation Number 57 Year 2010 regarding Consolidation or Merger of Business Entities and Acquisition of Company's Shares that may cause Monopolistic Practices and Unfair Business Competition (PP Number. 57/2010) as the implementation of mandate in Articles 28 and 29 Law Number 5 Year 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition (Law Number 5/1999).

In order to provide transparency to business performers, Commission stipulates clear guidelines regarding assessment stages implemented by Commission which are carried out by Commission on Consolidation, Merger, or Acquisition including the description of aspects to be evaluated by Commission in determining whether certain Consolidation, Merger, or Acquisition may cause Monopolistic Practices or Unfair Business Competition.

This guideline shall explain about which Consolidation, Merger, or Acquisition can be notified to Commission, notification procedures for Consolidation, Merger, or Acquisition, and aspects to be assessed by Commission in giving opinion as well as consultation procedures for Consolidation, Merger, or Acquisition plan by business performers to Commission.

## CHAPTER II OBJECTIVE AND SCOPE

Commission is established as an independent institution which by Law Number 5/1999 is given a mandate to supervise the implementation of the said Law. One of the Commission's duties in Article 35 of Law Number 5/1999 is to arrange guidelines in relation to the implementation of Law Number 5/1999.

### A. Objective

The objective of preparing Guidelines for Consolidation, Merger, or Acquisition is:

1. In order to have similarity of interpretation of Article 28 and Article 29 of Law Number 5/1999 and (Government Regulation) PP Number 57/2010, so as there is a legal certainty and any confusions or disputes in its application can be avoided.
2. In order that Article 28 and Article 29 of Law Number 5/1999 and (Government Regulation) PP Number 57/2010 can always be applied consistently, accurately and fairly.
3. To maintain Consolidation, Merger, and Acquisition, constantly improve efficiency of economy as one of the efforts to increase national welfare.

4. To prevent monopolistic practices and/or unfair business competition by business performers as result of Consolidation, Merger, or Acquisition.
5. To encourage Consolidation, Merger, or Acquisition that aim at improving effectiveness and efficiency in business activities.

B. Scope of Guidelines

This Implementation Guidelines of (Government Regulation) PP Number 57/2010 covers philosophy, spirit and provision direction in promoting fair business competition through Consolidation, Merger, or Acquisition . This Guideline also briefly describes forms of Consolidation or Merger and Acquisition of Shares including the notification and consultation procedures for Consolidation or Merger and Acquisition of Shares.

C. Systematics of Guidelines

CHAPTER I Background

CHAPTER II Objective and Scope of Guidelines

This chapter explains the objective of preparing Guidelines and matters that are covered in the scope of guidelines.

CHAPTER III Definition and Spelling Out

This Chapter explains about the definition of Consolidation, Merger, and Acquisition in accordance with Articles 28 and 29 of Law Number 5/1999 and PP Number 57/2010 as well as other definitions associated with the process of Consolidation, Merger, and Acquisition.

CHAPTER IV Notification and Consultation Procedures for Consolidation, Merger, and Acquisition.

This chapter explains the procedures for notification and consultation in accordance with the Law Number 5/1999 and PP Number 57/2010.

CHAPTER V Consolidation, Merger, and Acquisition Assessment

This chapter explains the assessment on Consolidation, Merger, and Acquisition by Commission after being informed/consulted with by business performers.

CHAPTER VI Assessment with Conditions (Remedies)

This Chapter explains the efforts of business performers on Notification or Consultation which potentially creates anti-competitive behavior.

CHAPTER VI Regulation of Sanctions

This Chapter explains about sanctions on Violation of Articles 28 and 29 Law Number 5/1999 and PP (Government Regulation) Number 57/2010.

CHAPTER VII Case Example

This Chapter describes examples of Consolidation, Merger, and Acquisition cases that should be notified to Commission.

## CHAPTER VIII Closing

### CHAPTER III DEFINITION AND SPELLING OUT

#### A. Referred to in these Guidelines as:

1. Consolidation is a legal action which is conducted by one Business Entity or more to consolidate with other existing Business Entities that cause assets and liabilities of the merged Business Entities are legally transferred to Business Entities that accept Consolidation and further, the status of the consolidated Business Entities shall terminate due to law.
2. Merger is a legal action which is conducted by two Business Entities or more to merge through the establishment of a new Business Entity that due to law will get assets and liabilities from the merged Business Entities and the status of the merged Business Entities shall terminate by law.
3. Acquisition is a legal action which is conducted by Business Performers to take over the shares of Business Entity which cause transfer of control on the Business Entity concerned.
4. Monopolistic practices are the concentration of economy power by one or more business performers which cause the domination of production and or marketing of certain goods and or services so that it causes unfair business competition and can harm public interests.
5. Unfair business competition is the competition among business performers in carrying out the activities of production and or marketing of goods or services which are conducted unfairly or against the law or hinders business competition.
6. Business Entities are companies or business establishments, either in form of legal entities or non-legal entities, that perform a certain business type constantly and continuously with the aim to gain profit.
7. Business performers are individuals or Business Entities either in form of legal entities or non-legal entities which are established and domiciled or doing activities in jurisdiction of the Republic of Indonesia, either independently or jointly through an agreement that organizes several business activities in economic sector.
8. Commission is Supervisory Commission for Business Competition as intended in Law Number 5 Year 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.
9. Dominant position is a situation in which business performers have no significant competitors in relevant market in relation to a controlled market segment, or business performers having highest position among competitors in relevant market in relation to financial capacity, the ability

of access to supply or sales as well as the ability to adjust supply or demand of specific goods or services.

10. Market Concentration is the function of total of business performers and their respective market segment from total sales value, total value of production capacity, total reserve value or total customers value in a relevant market.
11. Business Controllers are business performers who own shares or control votes more than 50% (fifty percent) in Business Entities; or own shares or control votes less from or same as 50% (fifty percent) but can influence and determine the policy of Business Entities Management and/or influence and determine the Management of Business Entities.
12. Consultation is a request for advice, guidance, and or a written opinion filed by business performers to Commission on the plan of Consolidation, Merger, or Acquisition prior to Consolidation, Merger, or Acquisition are legally effective.
13. Law is the Law Number 5 Year 1999 regarding Prohibition of Monopolistic Practices and Unfair Business Competition.
14. Fine for Administration Delay is a fine imposed to business performers who are late in submitting written notice on legal action of Consolidation or Merger of Business Entities or Acquisition of Company's Shares up to the period as specified in Government Regulation.
15. Notification is the submission of official information in writing which shall be conducted by business performers to Commission on Consolidation or Merger of Business Entities, and Acquisition of Company's Shares after Consolidation or Merger of Business Entities or Acquisition of Company's Shares are legally effective.

#### B. Use of Terms

There are lots of terminologies used to describe an event that is essentially the same. Law Number 40 Year 2007 regarding Limited Liability Company (Law Number 40/2007) uses the terms of Consolidation, Merger, and Acquisition,. While Government Regulation Number 28 Year 1999 regarding Merger, Consolidation and Acquisition of Banks uses the terms of Merger, Consolidation and Acquisition as equivalent of Consolidation, Merger, and Acquisition. Several countries use the term of business concentration and *takeover*. In this Guideline, Commission uses the terms of 'Consolidation, Merger, and Acquisition' which also includes Consolidation, Merger, and Acquisition, unless this Guideline of Consolidation, Merger, and Acquisition explicitly indicates one of particular form of events.

Even though Law Number 40/2007 has defined what is meant by Consolidation, Merger, and Acquisition, but Commission believes that Consolidation, Merger, and Acquisition as intended in Law Number 5/1999 covers a wider meaning compared to the definition in Law Number 40/2007 which is only effective for Limited Liability Company. Therefore, Commission needs to explain the description of Consolidation, Merger, and Acquisition as intended by Law Number 5/1999.

Consolidation, Merger, and Acquisition simply are the actions of business performers which cause:

- 1) The creation of control concentration of several business performers who are previously independent to one business performer or a group of business performers; or
- 2) A shift of certain control from one business performer to other business performer who are previously independent respectively so as to create control concentration or market concentration.

Consolidation, Merger, and Acquisition can be in form of Consolidation, Merger, and Acquisition, which are in accordance with the provision in Law Number 40/2007 or in form of Consolidation, Merger, and Acquisition, in accordance with the provision in Laws and Regulations regarding banking or in other form such as Consolidation, Merger, and Acquisition among several firms (for example, a public accountant firm).

C. Forms of Consolidation, Merger, and Acquisition:

In general, Consolidation, Merger, and Acquisition occur when two companies or more which are respectively independent, then merge into one company, either due to the merger of one company into another company, or several companies merge into a new company or the shift of control on one company to other business performers. Graphically, Consolidation, Merger, and Acquisition can be described as follows:

1<sup>st</sup> Type /Consolidation

Explanation of 1<sup>st</sup> Type/ Consolidation

In this type, X unites with Y, so that legally X is disbanded while all assets and liabilities of X are transferred legally to Y.  
Likewise the shareholders, all shareholders of X are legally transferred to be the shareholders of Y.

2<sup>nd</sup> Type/Merger

Explanation of 2<sup>nd</sup> Type/Merger

In this type, both X and Y, are legally disbanded while all assets and liabilities of X and Y are transferred legally to Z, a new entity.  
Respectively, all shareholders of X and Y are legally shifted into the shareholders of Z.

3<sup>rd</sup> Type/Acquisition of Shares

Explanation of 3<sup>rd</sup> Type/Acquisition of Shares

In this type, X takes over the control on B so that X becomes the shareholder and controller of B. There is no transfer of assets and liabilities both from B to X or vice versa.

#### 4<sup>th</sup> Type/Acquisition

##### Explanation of 4<sup>th</sup> Type/Acquisition

In this type of Acquisition, X has bought a big part of Y shares directly from the owner so that Y becomes the subsidiary of X. The transfer of control from Y shareholder to X occurs. Legal entities of X and Y remain to exist without any transition of assets and liabilities from X to Y and vice versa.

#### 5<sup>th</sup> Type/Public Takeover

##### Explanation of 5<sup>th</sup> Type/Public Takeover

Take-Over of this type is same as Type IV/Acquisition and the difference is that in this type transaction of shares occurs through capital market. Y becomes the subsidiary of Company X and X holds control on Y.

#### 6<sup>th</sup> Type/Capital Increase

##### Explanation of 6<sup>th</sup> Type/Capital Increase

In Take-Over of this type, Company X adds a capital amount to Company Y, so that there is a change of control in Company Y. Company Y then becomes a subsidiary company of company X. There is no transfer of assets and liabilities both from Y to X and vice versa

## CHAPTER IV PROCEDURES FOR NOTIFICATION, CONSULTATION AND MONITORING OF CONSOLIDATION, MERGER, AND ACQUISITION

### A. Introduction

In accordance with the provision of Article 29 Law Number 5/1999 and Article 5 PP Number 57/2010, notification of Consolidation, Merger, and Acquisition to Commission must be carried out within maximum 30 (thirty) working days since the date of Consolidation, Merger, and Acquisition comes into force legally. However, Article 10 PP Number 57/2010 gives right to business performers to conduct Consultation to Commission voluntarily either in writing or orally, before implementing Consolidation, Merger, and Acquisition.

Therefore, based on Article 29 Law Number 5/1999, Article 5 and Article 10 PP Number 57 /2010 on supervision of Consolidation, Merger, and Acquisition shall be carried out by Commission in two types, namely:

1. Post-evaluation (Notification);
2. Pre- evaluation (Consultation).

### B. Notification



In accordance with the provision of Article 29 Law Number 5/1999 jo. Article 5 paragraph (1) PP Number 57/2010, regulated supervision on Consolidation, Merger, and Acquisition is supervision after Consolidation, Merger, and Acquisition are implemented (*post-evaluation*). That means, after business performers conducted Consolidation, Merger, or Acquisition of the shares then the company as result of Consolidation, Merger, and Acquisition shall notify Commission.

## 1. Notification Requirements

Business Performers must conduct notification of Consolidation, Merger, and Acquisition to Commission in case they meet following requirements:

### a. Limitation of Value

Limitation of Value to execute notification of Consolidation, Merger, and Acquisition to Commission if:

- 1) Asset value of Business Entity resulted from Consolidation or Merger or Acquisition exceeds IDR 2.500.000.000.000,00 (IDR two trillion five hundred billion); or
- 2) Sales value (turnover) of Business Entity resulted from Consolidation or Merger or Acquisition exceeds IDR 5.000.000.000.000,00 (IDR five trillion);

While if two or more parties that conduct Consolidation, Merger, and Acquisition are engaged in banking sector, business performers must conduct notification to Commission if asset value of Business Entity as result of Consolidation or Merger or Acquisition exceeds Rp20.000.000.000.000,00 (twenty trillion rupiah).

If one of the parties that conduct Consolidation, Merger, and Acquisition is engaged in banking sector and other parties in non-banking sector, business performers must conduct Notification to Commission if asset value of Business Entity as result of Consolidation or Merger or Acquisition exceeds Rp2.500.000.000.000,00 (two trillion five hundred billion rupiah).

If certain Business Entities already have sales value and/or asset value over the limit of value which is stipulated by PP 57/2010 prior to the process of Consolidation, Merger, and Acquisition, then those Business Entities are not exempted from the provision of PP 57/2010. Then if asset value or sales value resulted from Consolidation or Merger or Acquisition does not exceed the value limit, Business Entities are not required to conduct Notification to Commission as regulated in Provision of Article 29 Law Number 5/1999. However, in that condition, Business Entities that conduct Consolidation, Merger, and Acquisition shall not be immune/free from the violation of Article 28 Law Number 5 Year 1999.

Violation of Article 28 Law Number 5 Year 1999 can occur even if asset value or sales value as result from Consolidation, Merger, and Acquisition conducted are less than the stipulated value limit.

Sales value and/or asset value as result from Consolidation or Merger or Acquisition are total of sales value and/or asset value which are calculated based on total of sales value and/or asset value of the latest year that have been audited from respective parties who conduct Consolidation, Merger, and Acquisition plus sales value and/or assets value of all Business Entities which directly or indirectly control or are controlled by Business Entities that conduct Consolidation, Merger, and Acquisition.

Thus, asset value and/or sales value cover not only asset value and/or sales value from the companies that conduct Consolidation, Merger, and Acquisition, but also asset value and/or sales value from the companies that directly relate to companies concerned vertically, namely, holding companies up to Parent Business Entities and subsidiaries up to the lowest level of subsidiaries. Calculated asset value and/or sales value of Parent Business Entities are asset value and/or sales value of all subsidiaries. Economically, this is because asset value of subsidiaries are asset value of holding companies.

Parent Business Entities are the highest controller of business entities that conduct Consolidation, Merger, and Acquisition, while the lowest level of subsidiaries are Business Entities which are indirectly controlled by company that will conduct Consolidation, Merger, and Acquisition. The definition of the term “controller” and “be controlled” can be seen back in CHAPTER III Definition and Spelling Out.

Calculated asset value is the value of assets located in Indonesian Territory. Similarly, calculated sales value is the value of sales located in Indonesian Territory (excluding export), both sales from within and outside Indonesian Territory. In this case, the calculated asset value or sales value is asset value or sales value of all subsidiaries either directly or indirectly from Parent Business Entities.

In case one of the parties that conducts Consolidation, Merger, and Acquisition has significant discrepancy between sales value and/or asset value of the latest year with sales value and/or asset value of the previous year (there is a difference greater than 30%), then sales value and/or asset value shall be calculated based on the average of sales value and/or asset value of the last 3 years

b. Consolidation, Merger, and Acquisition among non-affiliated companies

Consolidation, Merger, and Acquisition are basically actions of business performers which cause:

- 1) The creation of concentration of control by several business performers who were previously independent to one business performer or one group of business performers; or
- 2) A control shift of one business performer to other business performer who were previously independent respectively thereby creating concentration of control or market concentration.

Consolidation, Merger, and Acquisition among affiliated companies do not change the structure of market and existing competition condition so they

fail to meet the criteria of Consolidation, Merger, and Acquisition as intended in this Guideline.

Based on explanation in Article 7 PP Number 57/2010, referred to as “affiliated” is:

- a. the relation among companies, both directly and indirectly, to control or being controlled by the companies concerned;
- b. the relation between 2 (two) companies that are controlled, both directly or indirectly, by same party; or

If a company increases shares ownership in a company so that the company becomes controller, the addition of the shares ownership concerned must be notified to Commission.

Consolidation, Merger, and Acquisition occurring among companies of which shares are controlled by Government (State Owned Enterprises) are not considered as Consolidation, Merger, and Acquisition among affiliated companies.

This refers to the Decision of KPPU Number 07/KPPU-L/2007 on Alleged Violation of Law Number 5/1999 carried out by Temasek Business Group. The KPPU decision concerned is affirmed by the Cassation Decision of Supreme Court Number 496 K/Pdt.Sus/2008 dated September 10, 2008, which stated that Government as the owner of shares in a company cannot be categorized as business performer.

- c. Consolidation, Merger, and Acquisition on a Joint Venture *company* (JV).

JV is essentially a form of a joint undertaking which is conducted by two or more companies. JV is the action of two or more companies which have same level of control to establish a new company. Following is the example of a JV scheme:

In the scheme above, it is shown that A and B have same capital value and controller level in C. A and B will jointly bear the risk from capital investment in C. A and B shall then put their representatives as a member of the Board of Directors in company C with same authority.

In the event a change of control occurs either from shares value and or total of controllers in JV Company due to the actions of Consolidation, Merger, and Acquisition, then said action is not excluded from PP (Government regulation) 57 Year 2010.

But in the case that two or more companies establish a JV company without the process of Consolidation, Merger, and Acquisition, therefore the corporate action shall not be reported or notified to Commission.

## 2. Notification Period

Business Performers must perform the notification not later than 30 (thirty) days since the date Consolidation, Merger, and Acquisition has legally come into effect. Date of Consolidation, Merger, and Acquisition shall be legally effective as follows:

- 2.1. For Business Entities in form of limited liabilities, in accordance with the provision in Article 133 Law Number 40/2007 in the explanation part shall be the date of:
- a. Minister's approval on amendment of articles of association in case a Consolidation occurs;
  - b. Notification is accepted by Minister either in case of amendment of articles of association as intended in Article 21 paragraph (3) Law Number 40/2007 or which is not accompanied by the amendment of articles of association; and
  - c. Ratification of Minister on the Deed of Company's Establishment in case Merger occurs.
- 2.2. If one of the parties that conduct Consolidation, Merger, and Acquisition is a limited liability company and other parties are non-limited liability companies, the announcement shall be carried out not later than 30 (thirty) days since the signing date of ratification of Consolidation, Merger, and Acquisition by the parties. The ratification date is the effective date of consolidation or merging of Business Entities and the shift of shares ownership in the company which is acquired (*closing date*);
- 2.3. Specifically for Acquisition of shares at Stock Exchange, notification shall be carried out by no later than 30 (thirty) days since the date of informative disclosure letter of Acquisition of shares of a limited liability company.
- 2.4. In the case that Business Entities that conduct Consolidation, Merger, and Acquisition are not in the form of limited liability companies, the announcement shall be carried out maximum 30 (thirty) days since the signing date of ratification of Consolidation, Merger, and Acquisition by the parties.

The date of ratification is the effective date a certain Business Entity consolidates or merges and the occurrence of shift of shares ownership in the company acquired (*closing date*);

Commission will carry out the assessment of company resulting from Consolidation, Merger, and Acquisition concerned to give opinion whether allegation of monopolistic practices and/or unfair business competition exists or not.

### 3. Notification Procedures

- a. Business performers who are eligible for Notification as intended in point 1 above, must inform in writing to Commission within a maximum period of 30 (thirty) working days.
- b. Business performers who must conduct Notification are:
  - i. Business Performers as result of Consolidation;

- ii. Business Performers that acquires the shares;
  - iii. Business Performers as result from Merger.
- c. The notification concerned should be done in writing by business performers resulting from Consolidation, Merger of Business Entities or Acquisition of Shares by filling in M1 Form for Consolidation of Business Entities, K1 Form for Merger of Business Entities and A1 Form for Acquisition of Company's Shares.
  - d. Notification form must be completed with required documents and other necessary documents considered necessary by Commission.
  - e. Commission shall issue a receipt of notification and study the completeness of required form and documents.
  - f. Commission has the right to request additional documents from business performers if it is deemed necessary for making assessment.
  - g. Business Performers must submit documents which are relevant to *Business Plan* required in Notification Form. The Business Plan concerned contains document which is related to the policies of the parties 3 years ahead including industrial condition of the parties as group that explains industrial condition as well as competition map in the relevant industry;
  - h. Business Performers must submit data of all industrial market structures in which all parties are carrying out their business activities. Data concerned includes the data of market segment of all parties and data of market segment of competitor companies. Commission shall evaluate the completeness of data whether to proceed to Assessment Stage or not. Commission shall not conduct Assessment which is related to the Notification of Consolidation, Merger, and Acquisition of Shares if the parties do not meet the market data;
  - i. Whereas Commission shall conduct confirmation in relation to market data submitted by business performers in Stage of Document Completeness Evaluation before entering the Assessment Stage. In stage of document completeness evaluation, Commission can carry out data verification to relevant parties, such as competitors, government as industrial regulators, practitioners/market observers, including other parties associated with the relevant market.

#### C. Consultation on the Plan of Consolidation, Merger, and Acquisition

In accordance with the provision in Article 10 PP (Government Regulation) Number 57/2010 that business performers are given the right to consult with Commission on the plan of Consolidation, Merger, and Acquisition . Consultation shall be conducted both in writing and orally. Consultation can be proposed to

Commission if the limit of value of Consolidation, Merger, and Acquisition meet the provision as regulated in Article 5 PP (Government Regulation) Number 57/2010. Consulting with Commission is done voluntarily by business performers regarding plan of Consolidation, Merger, and Acquisition. Commission encourages business performers to conduct Consultation for minimizing the risk of loss that may be suffered by business performers if Consolidation, Merger, and Acquisition can cause monopolistic practices and or unfair business competition, because in future it will be cancelled by Commission.

Evaluation given by Commission for Consultation on Consolidation, Merger, and Acquisition does not abolish Commission's authority to conduct assessment after the Consolidation, Merger, and Acquisition. However, to avoid assessment redundancies on same Consolidation, Merger, and Acquisition through Consultation and Notification, Commission commits to only conduct onetime assessment on one event of Consolidation, Merger, and Acquisition, as long as there is no material change of data submitted by business performers during Consultation of Consolidation, Merger, and Acquisition or material change in market condition at the time of notification. In case there is material change on the submitted data by business performers or market condition, then Commission shall use its authority to make re-assessment on the Notification after Consolidation, Merger, and Acquisition are implemented.

Change of data or market condition is considered as material, among others:

- a. Decrease of total of business performers in relevant market which has high concentration (spectrum 2) level, so it reduces significant competition level which is characterized by the change of HHI value that is over 500;
- b. Change of policy plan post Consolidation, Merger, and Acquisition , as set out in sub-paragraph f of Notification Form; or
- c. HHI Value post Consolidation, Merger, and Acquisition during Consultation is under 1800, but at time of Notification, HHI value is above 1800.

Therefore, if Business Performers have voluntarily conducted Consultation, Commission shall not change the evaluation on Notification. However, to meet the provision in Article 29 Law Number 5/1999, Business Performers who conducted Consultation still have obligation to perform Notification to Commission in accordance with the provision in Article 5 paragraph (1) PP (Government Regulation) Number 57/2010 that regulates the obligation of Business Performers to convey Notification of Consolidation, Merger, and Acquisition to Commission.

#### 1. Consultation Requirements

Business Performers can execute Consultation on Consolidation, Merger, and Acquisition to Commission in case of fulfilling the provisions;

- a. Written Consolidation, Merger and Acquisition Documents  
Business Performers can conduct Consultation of Consolidation, Merger, and Acquisition to Commission as long as there is a written agreement among Business Performers who will conduct Consolidation, Merger, and Acquisition, such as Memorandum of

Understanding (MoU), Letter of Intent (LoI), or other forms of Agreement. .

b. Limitation of Value

Limitation of value to carry out Notification of Consolidation, Merger, and Acquisition to Commission shall be if:

- 1) Asset Value of Business Entities as result of Consolidation or Merger or Acquisition exceeds IDR 2.500.000.000.000,00 (IDR two trillion five hundred billion); or
- 2) Sales value (turnover) of Business Entities as result of Consolidation or Merger or Acquisition exceeds IDR 5.000.000.000.000,00 (IDR Five trillion); or

If two or more parties conduct Consolidation, Merger, dan Acquisition are engaged in banking sector, business performers can Consult with Commission if asset value of Business Entities resulted from Consolidation or Merger or Acquisition exceeds Rp20.000.000.000.000,00 (twenty trillion rupiah).

If one of the parties that conduct Consolidation, Merger, and Acquisition is engaged in banking sector while other parties are engaged in non-banking sector, business performers can Consult with Commission if asset value of Business Entities resulted from Consolidation, Merger or Acquisition exceeds IDR 2.500.000.000.000,00 (IDR two trillion five hundred billion)

Provision on calculation procedures for asset value and sales value for Notification is also effective with respect to the calculation procedures for asset value and sales value for Consultation.

c. Consolidation, Merger, and Acquisition among non-affiliated companies

Provision regarding Consolidation, Merger, and Acquisition among non-affiliated companies in Notification is also effective for the provision of Consolidation, Merger, and Acquisition among non-affiliated companies in Consultation.

2. Consultation Period

There is no time limit when Consultation can be carried out with Commission, therefore, Consultation can be carried out at any stages before Consolidation, Merger, and Acquisition are accomplished. However, Commission shall encourage Business Performers to conduct Consultation as early as possible with Commission by considering transaction certainty from parties who will conduct Consolidation, Merger, and Acquisition by taking into account the evaluation period of Consultation.

3. Consultation Procedures

- a. Business Performers who meet Consultation requirements as intended in point 1 above can Consult with Commission, both in writing as well as orally.
- b. Consultation in writing is carried out by all Business Performers who will conduct Consolidation or Merger or by Business Performers who conduct acquisition by filling in M2 Form for Consolidation of Business Entities, K2 Form for Merger of Business Entities, and A2 form for Acquisition of Company's Shares.
- c. Consultation Forms must be completed with required documents as well as other documents deemed necessary by Commission.
- d. Commission shall issue a receipt of Consultation and study the completeness of forms including other documents required.
- e. Forms and documents which have been declared complete by Commission will be followed up with Preliminary Process of Evaluation. The start of Evaluation Process will be informed in writing by Commission to Business Performers.
- f. Commission is entitled to request additional documents from business performers when it is deemed necessary for making assessment.
- g. Business Performers must submit relevant documents of Business plan which are required in Consultation Form. This Business plan contains documents which are related to the policy of parties 3 years ahead including industrial condition of the parties as a group that explains the condition of industry and map of competition in the relevant industry;
- h. Business Performers must submit data of all industrial market structures where the parties carry out business activities. Those data include market segment of the parties and data of market segment of competitor companies. Commission shall evaluate the completeness of those data to be continued or not to Assessment Process. Commission shall not make Evaluation in relation to the Consultation of Consolidation, Merger, and Acquisition of Shares if the parties do not meet the market data concerned;
- i. Whereas Commission shall conduct confirmation in relation to market data which is submitted by business performers in the stage of Checking Completeness of Documents before entering into Assessment Process. In the stage of checking completeness of documents, Commission can also confirm data authenticity to related parties, such as competitors, government as industrial regulators, practitioners/observers in market, as well as other parties in relation with market concerned.

D. Foreign Consolidation, Merger, and Acquisition



Principally, Commission has the right to control Consolidation, Merger, and Acquisition, that influences competitive condition in domestic market of Indonesia.

Foreign Consolidation, Merger, and Acquisition and Take-Over occurring outside the jurisdiction of Indonesian territory shall not become the attention of Commission as long as it does not influence domestic competitive condition. However, Commission has authority and will implement its authority on Consolidation, Merger, and Acquisition if the said Consolidation, Merger, and Acquisition influence Indonesian domestic market by considering implementation effectiveness of authority owned by Commission.

Referred to as Foreign Consolidation, Merger, and Acquisition are Consolidation, Merger, and Acquisition that fulfill the following factors:

1. Consolidation, Merger, and Acquisition committed outside the jurisdiction of Indonesia
2. Have direct impact on Indonesian market namely:
  - 2.1. All parties that perform Consolidation, Merger, and Acquisition are conducting business activities in Indonesia both directly and indirectly, for example, through the control of companies in Indonesia; or
  - 2.2. Only one party that conducts Consolidation, Merger, and Acquisition is carrying out business activities in Indonesia, but other parties in the Consolidation, Merger, and Acquisition have sales to Indonesia; or
  - 2.3. Only one party that conducts Consolidation, Merger, and Acquisition is carrying out business activities in Indonesia and other parties that conduct Consolidation, Merger, and Acquisition do not perform any activities but have sister companies that have business activities in Indonesia.
3. Consolidation, Merger, and Acquisition meet value limitation
4. Consolidation, Merger, and Acquisition among non-affiliated companies.

Commission has authority on Consolidation, Merger, and Acquisition that meets above four factors. Business performers who conduct Foreign Consolidation, Merger, and Acquisition have same legal obligations to perform Notification to Commission and have the right to Consult with Commission on the plan of Consolidation, Merger, and Acquisition.

While Consolidation, Merger, and Acquisition which are carried out by foreign parties on Indonesian business performers (such as acquisition of local Company's Shares by foreign companies), are not considered as a Foreign Consolidation, Merger, and Acquisition, but are considered as Consolidation, Merger, and Acquisition in general, since Consolidation, Merger, and Acquisition concerned occur outside the jurisdiction of Indonesia.

For type of Consolidation, Merger, and Acquisition with other foreign elements, Commission shall conduct evaluation case by case whether Consolidation,

Merger, and Acquisition concerned bring impact on competition in domestic market and whether the authority of Commission can be implemented effectively.

E. Determination of Notification Delay and Administrative Fines for Delay

In case Commission finds an indication of delay in performing Notification, Commission can stipulate fines for the delay in accordance with the prevailing laws and regulations. Procedures regarding monitoring and imposition of fines for Notification delay is regulated in Commission's Regulation which is separate from this Guideline.

F. Monitoring of Consolidation, Merger, and Acquisition

1. Commission conducts Monitoring activities in framework of obtaining information on the occurrence of legal actions of Consolidation, Merger of Business Entities or Acquisition of Company's Shares which are assumed to have met the requirements but have not been informed to Commission. This monitoring is carried out by Secretariat of Commission by the Commission's assignment.
2. Monitoring sources come from:
  - a. people's report and/or complaints;
  - b. news from mass media;
  - c. official letter from related institutions; or
  - d. other relevant sources.
3. Monitoring is conducted periodically without limit of time.
4. Monitoring result is set out in Report of Monitoring Result of Consolidation, Merger, and Acquisition, containing at least as follows:
  - a. Identity of Business Performers who conduct Consolidation/Merger/Acquisition;
  - b. Assumption of asset value and/or sales value of respective business performers who conduct Consolidation/Merger/Acquisition;
  - c. Assumption of scheme of ownership of each business performer who conduct Consolidation/Merger/Acquisition; and
  - d. Assumption of legally effective Date of Consolidation/Merger/Acquisition is.

## CHAPTER V EVALUATION OF CONSOLIDATION, MERGER, AND ACQUISITION

A. Commission Assessment

Article 28 Law Number 5/1999 declares that Consolidation, Merger, and Acquisition are prohibited if these cause monopolistic practices and unfair business competition. Monopolistic practices and unfair business competition occur if after Consolidation, Merger, and Acquisition, Business Performers can be alleged to make prohibited agreements, activities, and/or misuse of dominant position. To evaluate whether a Consolidation, Merger, and Acquisition can cause monopolistic practices and or unfair business competition, Commission will conduct assessment on Notification as well as Consultation on Consolidation, Merger, and Acquisition based on following analysis:

1. Market Concentration;
2. Market Entry Barrier;
3. Anti Competitive Behavior Potency;
4. Efficiency; and/or
5. Bankruptcy

1. Market Concentration

Market concentration is an early indicator to evaluate whether Consolidation of Business Entities, Merger of Business Entities, Acquisition of Company's Shares can cause Monopolistic Practices and/or Unfair Business Competition. Consolidation of Business Entities, Merger of Business Entities, Acquisition of Company's Shares which cause low market concentration has no potency to cause Monopolistic Practices and/or Unfair Business Competition. On the other hand, Consolidation of Business Entities, Merger of Business Entities, Acquisition of Company's Shares which cause high market concentration has potency to cause Monopolistic Practices and/or Unfair Business Competition that relies on other analysis of relevant market.

Market concentration analysis step begins by first defining the relevant market. The relevant market in accordance with Article 1 point 10 Law Number 5/1999 is market that relates to certain range or marketing area specified by business performers on same goods and or services or substitution of goods and or services concerned.

Complete explanation regarding Relevant Market can be seen in Supervisory Commission regulation for Business Competition Number 3 Year 2009 regarding Application Guidelines of Article 1 Number 10 on Relevant Market (Perkom Number 3/2009) on Relevant Market issued by Commission.

In general, there are several ways to evaluate certain market concentration, namely, by calculating *Concentration Ratio* (CRn) or by using Herfindahl-Hirschman Index (HHI). For the purpose of evaluation of Consolidation, Merger, and Acquisition, Commission shall use HHI but in case HHI application is impossible, Commission shall use CRn evaluation or other possible methods to describe market concentration level.

HHI value is derived from total quadrate of market segment of all business performers in relevant market. For example, in relevant market there are 6 business performers with respective market segment as follows: A: 15%, B: 20%, C: 10%, D: 30%, E: 10%, and F: 15%. Then HHI value at relevant market before Consolidation, Merger, and Acquisition is  $15^2 + 20^2 + 10^2 + 30^2 + 10^2 + 15^2 = 1950$ . If companies A and B conduct Consolidation, Merger, and Acquisition, then HHI post Consolidation, Merger, and Acquisition at relevant market is  $(15+20)^2 + 10^2 + 30^2 + 10^2 + 15^2 = 2550$ .

In the event that Commission fails to calculate total of HHI in relevant market, Commission shall focus the calculation of HHI based on company majority of which the market segment is known even though market segment from small company is unknown.

In general, Commission divides market concentration level into two spectrums based on HHI value post Consolidation, Merger, and Acquisition, namely, spectrum I (low concentration) with HHI value below 1800, and spectrum II (high concentration) with HHI value above 1800. In above illustration if A and B conduct Consolidation, Merger, and Acquisition then market concentration post Consolidation, Merger, and Acquisition enter into spectrum II because it already exceeds 1800.

In 1<sup>st</sup> spectrum, Commission evaluates that there is no concern for monopolistic practices and or unfair business competition which are caused by the plan of Consolidation, Merger, and Acquisition. This is based on industrial HHI average in Indonesia which is over 2000, and therefore, the Consolidation, Merger, and Acquisition which produce HHI less than 1800 shall not change existing market structure and eliminates Commission's concern for monopolistic practices and unfair business competition post Consolidation, Merger, and Acquisition.

In spectrum II, if the change of HHI before and after Consolidation, Merger, and Acquisition has not reached 150, then Commission evaluates that there is no concern for monopolistic practices and or unfair business competition since the change of market structure is not sufficiently significant. In consultation process, Commission's evaluation will not proceed to Overall Evaluation stage. However, in the event that HHI change exceeds 150, then Commission shall evaluate other aspects for determining whether Consolidation, Merger, and Acquisition can cause monopolistic practices or unfair business competition. Other intended aspects are market entry barriers, the possibility of potential anti competitive behavior, efficiency performance, and the possibility of business performers exit from market without conducting Consolidation, Merger, and Acquisition. In Consultation process, Commission will continue the evaluation process to Comprehensive Assessment Stage.

In illustration of above HHI calculation, if A and B perform Consolidation of Consolidation, Merger, and Acquisition, then Commission will continue evaluation to Comprehensive Assessment Stage because change of HHI before and post Consolidation, Merger, and Acquisition has exceeded 150, namely 300.

In spectrum II with the change above 150, market concentration created by Consolidation, Merger, and Acquisition is increasingly higher, but high

market concentration alone cannot be used as the only one factor to declare that the conducted Consolidation, Merger, and Acquisition have negative impact on competition. It is necessary to make assessment on other criteria in evaluating whether Consolidation, Merger, and Acquisition concerned can cause monopolistic practices and/or unfair business competition.

## 2. Market Entry Barrier

Without Market Entry Barrier, Business Performers post Consolidation, Merger, and Acquisition with large market segment domination shall face difficulties to perform anti competitive behavior, because any time confrontation with competition pressure from new players in market can occur.

On the other hand, with high existence of Market Entry Barrier, Business Entities as result of Consolidation, Business Entities as result of Merger, or Business Performers who perform Acquisition of other Company's Shares with medium market domination have the possibility to misuse their position to hold up competition or to exploit consumers because new players will find difficulties in entering market and give competition pressure on existing business performers in the market.

Commission evaluates that Market Entry Barrier at least consists of: (1). Absolute Barriers in form of government regulation, government license, intellectual property rights. (2). Structural Barriers such as offer and demand conditions, in this case, if an incumbent controls supply which is needed for production (for example, natural resources), the existing company controls access of high technology, a strong network effect, economic scale, large sunk cost and cost to be incurred if consumers switch to other products (high consumer's switching cost). (3) Barriers in form of strategic advantages enjoyed by incumbent, for example, first mover advantage, aggressive incumbent behavior towards new comers, a lot of product differentiation, tying and bundling, or exclusive distribution agreement.

Indication of high Market Entry Barrier can be seen from historical data of number of business performers in Relevant Market from year to year, total of potential business performers who enter Relevant Market, comparison between required cost for entering market with expected revenues from market and required time to replace these costs and others.

Analysis on Market Entry Barrier shall consider not only the ease of new players to enter market, but the power of new players must also be balanced in giving competitive pressure and time required to enter market should not be too long in order to be able to give competitive pressure. If those three things are fulfilled, it is very difficult for companies post Consolidation, Merger, and Acquisition to behave anti competitive, since competitive condition can be maintained by the new players' existence in the market.

Anti competitive actions which might be performed by business performers in high condition of Market Entry Barrier can be

self-performed (unilateral action) or together with competitors (collusive action).

### 3. Potency of Anti Competitive Behavior

#### Unilateral Effect

Consolidation, Merger, and Acquisition that give birth to business performers who are relatively dominant to other business performers in market, facilitate those business performers to misuse their dominant position to achieve maximum benefits for company and cause a loss to consumers (unilateral action).

Unilateral action can be carried out both to other smaller business performers as well as directly to consumers as a whole. Those actions cause hindrance to competition which is indicated through higher price, decline in quantity of product or decrease of after sales service.

Common scenario on unilateral action which is anti competition is the Consolidation, Merger, and Acquisition of Company A with Company B, whereas without Consolidation, Merger, and Acquisition if Company A increases its selling price, consumers can switch to buy product from Company B and other Competitors. By conducting Consolidation, Merger, and Acquisition between companies A and B, the loss borne by company A by increasing selling price will still be enjoyed since consumers switch to buy B products which is one business unity with A Company A.

Furthermore, other companies in market shall increase their selling price because it is still profitable by taking into account that consumers switch their purchase due to price increase of Company A post Consolidation, Merger, and Acquisition. In this scenario, all consumers will suffer loss because they have to pay more on same products during post Consolidation, Merger, and Acquisition when Consolidation, Merger, and Acquisition are implemented.

Other scenario is the impact of anti competition from unilateral action which is not caused by price increase. Namely, post Consolidation, Merger, and Acquisition then competitive condition does not give incentive to companies to create products of best quality or to add its product type in market, so that Consolidation, Merger, and Acquisition shall suppress innovation for existing companies in market.

Other important thing to be considered in evaluating the possibility of unilateral action post Consolidation, Merger, and Acquisition is the existence of Buyer Power. Even though post *Consolidation*, Merger, and Acquisition companies become dominant in market, buyer's existence with big force shall prevent company's capacity post Consolidation, Merger, and Acquisition to use their market power.

Commission will carry out analysis on all relevant factors to evaluate whether incentives exist or not for business performers as result of Consolidation, Merger, and Acquisition in conducting anti competitive actions unilaterally. Commission among others will take notice and consider business plan of companies which conduct Consolidation, Merger, and Acquisition , document of Consolidation, Merger, and

Acquisition plan, market analysis document, market intelligent document, including other documents that may show a tendency of unilateral action post Consolidation, Merger, and Acquisition implemented.

#### Coordinated Effect

On the other hand, in case Consolidation, Merger, and Acquisition do not give birth to dominant Business Performers in market, but still several significant competitors exist, then Consolidation, Merger, and Acquisition concerned shall facilitate the occurrence of anti competitive actions in a coordinated manner with the competitor either directly or indirectly (collusive action).

In the event that Consolidation, Merger, and Acquisition do not give birth to dominant business performers in market, but still several significant competitors exist, it is difficult for business performers as result of Consolidation, Merger, and Acquisition to behave anti competitive because it will get effective competitive pressure from competitor business performers.

However, the decrease of number of business performers in market as result of Consolidation, Merger, and Acquisition that occur can facilitate or can further increase anti competitive action which is jointly undertaken with competitor concerned as indicated by high price, reduction of product quantity or decline of after sales service.

To successfully implement coordinated action among competitors, there are at least three conditions that must be fulfilled: (1). an identifiable coordination requirement such as price reference (2). An effective penalty mechanism for participants who violate coordinated behavior (3). Competitive pressure is too weak to cause coordinated behavior to becomes unstable. Historical condition in certain market becomes important to be recognized in evaluating the tendency of existence or non-existence or the increase of strengthening of coordinated behavior post Consolidation, Merger, and Acquisition.

In conducting analysis on the three criteria above, Commission will take into account among others, to what extent market transparency exists so that competitors can be mutually aware of the respective competition strategy, how homogeneous or differentiated products are which are sold in market, the existence of "maverick" company in market that may cause instability of coordinated behavior, close linkages among competitors, for example, through cross-shareholdings or similarity of commissioners and directors, historical data on ease of new players entry into market, existing buyer power in market that can break coordinated behavior, and other things which can indicate a tendency for arising or further strengthening of coordinated behavior post Consolidation, Merger, and Acquisition.

#### Market Foreclosure

Consolidation, Merger, and Acquisition carried out vertically can create obstruction of competitors' access both to upstream as well as

downstream market so that it will decrease competition level in the upstream and downstream markets concerned.

In general vertical Consolidation, Merger, and Acquisition do not cause impact as serious as horizontal Consolidation, Merger, and Acquisition, since horizontal Consolidation, Merger, and Acquisition directly changes market structure while vertical Consolidation, Merger, and Acquisition do not directly change market structure.

Vertical Consolidation, Merger, and Acquisition are Consolidation, Merger, and Acquisition that occur in certain link of production or marketing process, for example between business performers as suppliers of raw material and business performers of manufacturing, or wholesaler business performers and retailer business performers, and so on.

In certain condition, the company as result of Consolidation, Merger, and Acquisition is able to raise cost which is required by competitors to sell products to market, for example, by not giving access to distribution network to competitors, or to give access but with a discriminative price. Or the company as result of Consolidation, Merger, and Acquisition dominates input market so that it refuses to supply or provides supply with a higher price to its competitor.

On the other hand, vertical Consolidation, Merger, and Acquisition has also the potency to facilitate coordinated behavior in vertical Consolidation, Merger, and Acquisition causing market transparency to increase more, the existence of shares cross-holding or more intense interaction among competitors through companies in other markets (multi-market contacts). Impact caused is same as impact from coordinated behavior which can arise from horizontal Consolidation, Merger, and Acquisition.

The first thing to be considered by Commission in terms of Vertical Consolidation, Merger, and Acquisition is market power or dominant position held by a company that conducts Consolidation, Merger, and Acquisition, both in upstream market and downstream market. Without power market existence or dominant position, there is small possibility for vertical Consolidation, Merger, and Acquisition to lead to action that can cause unilateral or coordinated impact in market. Therefore, in procedures for Consultation, vertical Consolidation, Merger, and Acquisition Commission will not continue evaluation to comprehensive assessment stage if business group conducting Consolidation, Merger, and Acquisition has no dominant position in upstream and downstream markets.

Other thing that will be considered by Commission is incentive for company resulted by Consolidation, Merger, and Acquisition to close competitors' access to both upstream and downstream markets. Besides, Commission shall take into account whether consumers benefit from or suffer loss by the occurrence of vertical Consolidation, Merger, and Acquisition through calculation of efficiency post Consolidation, Merger, and Acquisition.

#### 4. Efficiency



In case of Consolidation, Merger, and Acquisition are aiming at increasing efficiency, it is necessary to execute a comparison between efficiency resulted and anti competitive impact arising therefrom. In the case that the value of anti competitive impact exceeds the expected efficiency value achieved by Consolidation, Merger, and Acquisition, therefore a healthy competition will be more prioritized compared to encouraging the efficiency for Business Performers. Healthy competition both directly and indirectly will automatically give birth to more efficient Business Performers in market.

Efficiency argument must be proposed by Business Performers who will conduct Consolidation, Merger, and Acquisition by showing calculation of efficiency resulted from related Consolidation, Merger, and Acquisition and benefit that will be enjoyed by consumers as result of those efficiencies. Commission will conduct a comprehensive survey on efficiency argument proposed by the business performers concerned.

Efficiency argument which is put forward by Business Performers may include cost saving, the increase of use of existing capacity, the increase in economic scale or scope, increase of network or product quality, and other matters as result from implemented Consolidation, Merger, and Acquisition.

Efficiency tends to affect price decrease within a short term if the company as result of Consolidation, Merger, and Acquisition conducts savings on variable cost or marginal cost. On the other hand, saving on fixed cost generally does not affect price decrease in short term therefore in this case, efficiency is not enjoyed by consumers directly. Therefore, Commission emphasizes the importance of efficiency argument to be clearly distinguished between savings on variable cost, marginal cost, or fixed cost.

## 5. Bankruptcy

In case the reason of business performers for conducting Consolidation, Merger, and Acquisition is to avoid Business Entities to stop operation in markets/industries, an evaluation shall be required. In terms that consumers' losses are bigger if those Business Entities exit from markets/industries than if those Business Entities are still available and operate in markets/industries, there will be no concern for competition level declination at markets in form of monopolistic practices and/or unfair business competition caused by Consolidation, Merger, and Acquisition concerned.

Bankruptcy argument must be submitted by business performers who will conduct Consolidation, Merger, and Acquisition by showing that without Consolidation, Merger, and Acquisition, business performers concerned will face bankruptcy and only through Consolidation, Merger, and Acquisition bankruptcy can be avoided.

In evaluating this bankruptcy argument, Commission will consider several factors among others: (1) company's financial condition cannot be saved so that without Consolidation, Merger, and Acquisition it will cause the exit of company from market within a short period. (2) It is impossible for

company to perform reorganization of business to save the continuity of company. (3) There is no other non-anti-competition alternative except Consolidation, Merger, and Acquisition in efforts of rescuing from bankruptcy.

In the case Commission thinks that competitive condition will not decrease or will not change if Business Entities do not exit from market/industry compared to if those Business Entities exit from market/industry, then Commission will likely not see any concerns for monopolistic practices or unfair business competition caused by Consolidation, Merger, and Acquisition concerned.

## B. Notification Assessment Procedure

In accordance with Article 29 Law Number 5/1999, business performers are required to notify the result of Consolidation, Merger, and Acquisition not later than 30 (thirty) days since the date of Consolidation or Merger of Business Entities and Acquisition of Company's Shares are legally effective.

If business performers do not perform Consultation earlier, then Commission shall conduct assessment on the company resulting from Consolidation, Merger, and Acquisition in accordance with provision on assessment performed on business performers who conduct Consultation.

### 1. Notification Assessment Process

Commission shall perform comprehensive assessment on Business Entities as result of Consolidation, Merger, and Acquisition of which the result is issued not later than 90 (ninety) days since the completion of Notification forms and documents. Assessment result includes whether allegation of monopolistic practices and or unfair business competition is available or not as result of Consolidation or Merger of Business Entities and Acquisition of Company's Shares which are based on Market Concentration, Market Entry Barrier, Potency of Anti Competitive Behavior, Efficiency; and/or Bankruptcy.

Assessment Procedures by Commission on Notification of Consolidation, Merger, and Acquisition can be illustrated through following scheme:

Explanation of Assessment Flow on Notification of Consolidation, Merger, and Acquisition

1. Business performers who conduct Consolidation, Merger, and Acquisition that have met requirements must perform Notification to Commission not later than 30 (thirty) days since Consolidation or Merger of Business Entities and Acquisition of Company's Shares are legally effective. The said requirements can be seen in Chapter IV.B.1
2. The notification concerned is performed in writing by business performers resulted from Consolidation or Merger of Business Entities or Acquisition of shares by filling in M1 form for the Consolidation of Business Entities, K1 form for Merger of

Business Entities, and A1 form for Acquisition of Company's Shares.

3. Notification Form must be completed with required documents and other documents which are considered necessary by Commission.
4. Commission shall issue a receipt of Notification and study the completeness of form and documents required.
5. Commission has the right to request additional data and/or documents to business performers when required during assessment process.
6. Form and documents which are already complete will be followed up by Commission with assessment process. The start of assessment process will be notified in writing by Commission to Business Performers.
7. Within a period of no later than 90 (ninety) working days, Commission shall conduct Assessment of Notification which is conducted by Business Performers.  
The assessment concerned shall be in form of evaluation whether there is concern or not for monopolistic practices and or unfair business competition on Consolidation or Merger of Business Entities and/or Acquisition of Company's Shares
8. In assessment process, Commission shall collect data and information from several parties such as competitors, consumers, government and other parties considered necessary.
9. Commission shall issue Commission's Opinion on result of Consolidation, Merger, and Acquisition that will be conveyed to business performers concerned and announce it at least through website of Commission.

## 2. Notification Assessment Output

Result of assessment performed by Commission is in form of Commission's Opinion on Consolidation, Merger, and Acquisition. There are three possibilities of Commission's Opinion, namely:

- a. Opinion that there is no allegation of monopolistic practices or unfair business competition resulted by Consolidation, Merger, and Acquisition.
- b. Opinion that there is an allegation of monopolistic practices or unfair business competition resulted by Consolidation, Merger, and Acquisition.
- c. Opinion that there is no allegation of monopolistic practices or unfair business competition resulted by Consolidation, Merger, and Acquisition with a note that must be fulfilled by business performers.

## C. Consultation Assessment Procedures

Business Performers who already have mature plan to perform Consolidation, Merger, and Acquisition and have fulfilled requirements which have been stipulated by Commission can carry out Consultation with Commission. Consultation can be carried out either in writing or orally. However, for certainty of business performers, Commission will encourage that each Consultation must always be carried out or poured into written Consultation with Commission.

### 1. Consultation Assessment Process

Assessment of written Consultation is performed in two stages, namely, Preliminary Assessment Stage which is within maximum 30 working days since Consultation form and documents in writing are complete. If necessary, Commission can extend to Comprehensive Assessment Stage of maximum 60 working days.

Assessment Procedures by Commission on the plan of Consolidation, Merger, and Acquisition can be illustrated through following schemes:

Explanation of Assessment Process of Consolidation, Merger, and Acquisition Consultation.

1. Business Performers who will conduct Consolidation, Merger, and Acquisition and have met requirements can Consult with Commission
2. Consultation is executed in writing by Business Performers on the plan of Consolidation or Merger of Business Entities and Acquisition of Company's Shares by filling in M2 form for Consolidation of Business Entities, K2 form for Merger of Business Entities, and A2 form for Acquisition of Company's Shares.
3. Consultation Form must be completed with documents which are required and other documents deemed necessary by Commission.
4. Commission shall issue a receipt of Notification and study the completeness of form including required documents.
5. Commission has the right to request additional data and/or documents to business performers if needed in assessment process.
6. Complete forms and documents will be followed up with Preliminary Assessment Process. Start of Assessment Process will be notified in writing by Commission to Business Performers.
7. Preliminary Assessment shall be carried out within a period not later than 30 (thirty) days to evaluate market concentration degree before and after Consolidation, Merger and Acquisition through the measurement of HHI (for horizontal Consolidation, Merger,

and Acquisition) and dominant position existence (for vertical Consolidation, Merger, and Acquisition).

8. Based on evaluation of HHI post Consolidation, Merger, and Acquisition (horizontal Consolidation, Merger, and Acquisition) and dominant position existence (vertical Consolidation, Merger, and Acquisition), there are two possibilities of Preliminary Assessment Result, namely:

a. The opinion that there is no allegation of monopolistic practices or unfair business competition caused by Consolidation, Merger, and Acquisition if

- HHI post Consolidation, Merger, and Acquisition is below 1800;
- HHI post Consolidation, Merger, and Acquisition is above 1800 with change (delta) of below 150; or
- There is no dominant position held by business group who performs vertical Consolidation, Merger, and Acquisition.

b. Proceed to Comprehensive Assessment if:

- HHI post Consolidation, Merger, and Acquisition is above 1800 with change (delta) of above 150;
- There is a dominant position held by business group who performs vertical Consolidation, Merger, and Acquisition

9. Within a maximum period of 60 (sixty) days, Commission shall perform a Comprehensive Assessment by collecting data and information from several parties such as competitors, consumers, government and other parties as deemed necessary.

10. Commission will issue Commission's Opinion on the plan of Consolidation, Merger, and Acquisition which is conveyed to relevant business performers and announce it at least through the Commission's website.

## 2. Consultation Output

In Written Consultation performed by Business Performers who will conduct Consolidation, Merger, and Acquisition, there are three possibilities of Commission Opinions, namely:

a. An Opinion that no allegation exists on monopolistic practices or unfair business competition caused by Consolidation, Merger, and Acquisition.

b. An Opinion that allegation exists on monopolistic practices or unfair business competition caused by Consolidation, Merger, and Acquisition.

- c. An Opinion that there is no allegation on monopolistic practices or unfair business competition caused by Consolidation, Merger, and Acquisition with a note in form of advice and/or guidance that must be fulfilled by business performers.

For opinion in letter c above, Commission shall conduct monitoring activities on the implementation of notes which have been made by Commission in their opinion.

Furthermore, Commission shall conduct assessment to evaluate whether or not business performers post Consolidation, Merger, and Acquisition have implemented the notes of Commission concerned.

#### E. Case Handling on Violation of Article 28 Law Number 5 Year 1999

Commission confirms that Consolidation, Merger, and Acquisition which have not met the requirements to carry out Notification to Commission shall not be immune/free from violation of Article 28 Law Number 5 Year 1999. Violation of Article 28 Law Number 5 Year 1999 may take place even though asset value or sales value as result of Consolidation, Merger, and Acquisition are carried out below the stipulated limit of value.

Commission can start the case of violation allegation of Article 28 Law Number 5 Year 1999 as the case of violation allegation of other Articles in Law Number 5 Year 1999 for Consolidation, Merger, and Acquisition that fail to meet requirements for implementing Notification.

Besides, if business performers have conducted Consultation as well as Notification to Commission and Commission issues: (1). Allegation opinion of monopolistic practices and/or unfair business competition, or (2). Opinion of no allegation on monopolistic practices and/or unfair business competition with a note, but business performers do not fully implement the note or do not fulfill the essence of Commission's note or still implement Consolidation, Merger, and Acquisition which are assumed to cause monopolistic practices and/or unfair business competition, then Commission has the right to start initiative case on Consolidation, Merger, and Acquisition with alleged violation of Article 28 Law Number 5 Year 1999.

## CHAPTER VI ASSESSMENT WITH CONDITIONS (*REMEDIES*)

#### A. Introduction

1. Commission evaluates whether a Consolidation, Merger, and Acquisition may cause monopolistic practices and or unfair business competition. Commission shall conduct assessment on Notification as well as Consultation of Consolidation, Merger, and Acquisition based on following analysis:
  - a. Market Concentration;
  - b. Market Entry Barrier;
  - c. Potential Anti Competition Behavior;

- d. Efficiency; and/or
  - e. Bankruptcy.
- 2. If during assessment process Commission finds allegation of substantial lessening competition in market due to Consolidation, Merger, and Acquisition, , then Commission can issue conditions to parties doing Consolidation, Merger, and Acquisition;
  - 3. The conditions issued by Commission must be obeyed by the parties conducting Consolidation, Merger, and Acquisition, so that the process of Consolidation, Merger, and Acquisition, is not in contradiction with Anti-Monopolistic Law.
- B. Purpose of Conditions
- 4. Commission issues conditions to Business Entities who conduct Consolidation, Merger, and Acquisition in framework to prevent the potency of substantial lessening competition in market as result of Consolidation, Merger, and Acquisition;
  - 5. In determining conditions, Commission must consider solution that is comprehensive, has appropriate reason and is practicable by Business Entities of Consolidation, Merger, and Acquisition Take-Over;
- C. Submitting Conditions Process
- 6. After Commission evaluates the impact of substantial lessening competition due to Consolidation, Merger, and Acquisition , Commission requests Business Entities that conduct Consolidation, Merger, and Acquisition to provide proposal of conditions (*remedies*);
  - 7. Commission provides comprehensive assessment on the impact of lessening competition due to Consolidation, Merger, and Acquisition to Business Entities of Consolidation, Merger, and Acquisition ;
  - 8. Proposal of conditions (*remedies*) shall be submitted by Business Entities of Consolidation, Merger, and Acquisition to Commission and Commission will evaluate whether this proposal will prevent the occurrence of anti competition potentials;
  - 9. Commission shall decide to accept or not accept conditions (*remedies*) proposal in Meeting of Commission;
  - 10. If Commission accepts conditions (*remedies*) proposal submitted by Business Entities of Consolidation, Merger, and Acquisition , Commission shall issue no allegation opinion on monopolistic practices or unfair business competition caused by Consolidation, Merger, and Acquisition, with a note that must be fulfilled by business performers;
  - 11. If Commission refuses conditions (*remedies*) proposal which are proposed by Business Entities of Consolidation, Merger, and Acquisition , Commission shall issue Opinion that allegation of monopolistic practices

or unfair business competition caused by Consolidation, Merger, and Acquisition exists.

D. Terms for submitting Conditions (Remedies)

12. Business Entities of Consolidation, Merger, and Acquisition can submit conditions (remedies) proposal to Commission not later than 14 working days after submission date of Assessment Report of conditions (remedies) proposal sent by the Commission's Secretariat;
13. Commission must submit Assessment Report of conditions (remedies) proposal that at least: contain:
  - Identity of parties conducting Consolidation, Merger, and Acquisition;
  - Analysis and comprehensive reasons related to the allegation of substantial lessening competition due to Consolidation, Merger, and Acquisition.

E. Type of Conditions (Remedies)

14. Business Entities of Consolidation, Merger, and Acquisition can submit remedies to Commission in order not to be contrary to anti-competitive behavior;
15. Types of remedies that can be proposed by Business Entities of Consolidation, Merger, and Acquisition among others are:
  - 17.1 Structural remedies;
    - 17.1.1 Assets Divestment; or
    - 17.1.2 Shares Divestment; or
    - 17.1.3 Other requirements that can create competition.
  - 17.2 Behavioral remedies;
    - 17.2.1 Intellectual Property Rights Remedies (HAKI) on Business Entities of Consolidation, Merger, and Acquisition can give HAKI license to all consumers in market.
    - 17.2.2 To create competition by eliminating obstacles such as:
      - o Exclusive contact;
      - o Consumer switching cost;
      - o Bundle/Tie in of certain product;
      - o Obstacles to supply or to purchase;



17.2.3 Submission of proposal of price and output/production quantity;

17.2.4 Other conditions which can create competition.

16. Besides, Commission can also provide recommendation and advice to Government related to condition of industry that conducts Consolidation, Merger, and Acquisition;
17. Commission shall implement Assessment of remedies proposal submitted by Business Entities of Consolidation, Merger, and Acquisition.

## CHAPTER VII CASE EXAMPLE

### 1. Consolidation

PT B consolidated with PT Y, so that Y becomes a company as result of Consolidation. PT A is controller of PT B, PT B is controller of PT C. PT Y is controller of PT Z, and PT Y is controlled by PT X. Therefore, assets value as consolidation result of PT Y and PT B is a total of assets value of PT A plus PT B plus PT C plus PT X plus PT Y and PT Z. If assets value of Consolidation result of PT Y and PT B exceeds IDR 2.500.000.000.000,00 (IDR two trillion five hundred billion), then based on the provision of Government Regulation (PP) Number 57/2010, the said Consolidation must be notified to Commission within maximum 30 (thirty) working days after the Consolidation, Merger, and Acquisition are legally effective.

Or if sales value as result of Consolidation of PT A plus PT B plus PT C plus PT X plus PT Y plus PT Z exceeds IDR 5.000.000.000.000, 00 (IDR five trillion), then in accordance with Government Regulation (PP) Number 57/2010, the said Consolidation must be notified to Commission within maximum 30 (thirty) working days after the Consolidation, Merger, and Acquisition are legally effective.

### 2. Merger of Business Entities

PT B and PT Y conduct Merger of Business Entities to PT S. PT A is the controller of PT B, PT B is the controller of PT C. PT Y is the controller of PT Z, and PT Y is controlled by PT X. Therefore, assets value as result of Acquisition of PT Y and PT B is a total of assets value of PT A plus PT B plus PT C plus PT X plus PT Y and PT Z. Assets value as the result of Merger of PT Y and PT B, to be PT S exceeds IDR 2.500.000.000.000, 00 (IDR two trillion five hundred billion), then the result of Merger must be notified to Commission within maximum 30 (thirty) working days after Merger is legally effective.

Or if sales value resulted from Merger of PT A plus PT B plus PT C plus PT X plus PT Y plus PT Z, to be PT S exceeds IDR 5.000.000.000.000,00 (IDR five trillion), then the result of Merger must be notified to Commission not later than 30 (thirty) days after Merger is declared as legally effective.

### 3. Acquisition of Company's Shares

PT B acquires 75% shares of PT Y. PT A is the controller of PT B, PT B is the controller of PT C. PT Y is the controller of PT Z, and PT Y is controlled by PT X. Therefore, assets value as result of Acquisition of PT Y by PT B is total of assets value of PT A plus PT B plus PT C plus PT Y and PT Z. Assets value as result of Acquisition of PT Y by PT B exceeds IDR 2.500.000.000.000, 00 (two trillion five hundred billion), then Acquisition of shares must be notified to Commission within maximum 30 (thirty) working days after Acquisition is legally effective.

Or if sales value as result of Acquisition of PT Y by PT B exceeds IDR 5.000.000.000.000,00 (IDR five trillion), then the result of Acquisition of shares must be notified to Commission maximum 30 (thirty) days after Take-Over of shares is legally effective.

#### 4. Acquisition

PT B acquires 70% shares of PT Y directly from the shareholder namely PT X. PT A is controlling PT B, PT B is controlling PT C. PT Y is controlling PT Z, and PT Y is being controlled by PT X. Therefore, assets value of shares acquisition of PT Y by PT B are the total of asset value of PT A plus PT B plus PT C plus PT Y and PT Z. Asset value as result of Acquisition of PT Y by PT B exceeds IDR2.500.000.000.000, 00 (IDR two trillion five hundred billion), therefore, the purchase of shares of PT Y must be notified to Commission within maximum 30 (thirty) days since Consolidation, Merger, and Acquisition are legally effective.

Or the value of shares purchase of PT Y by PT B above, results in sales value that exceeds IDR5.000.000.000.000,00 (IDR five trillion), then the result of shares purchase must be notified to Commission not later than 30 (thirty) days since the shares purchase is legally effective.

## CHAPTER VIII REGULATION OF SANCTION

### A. Sanction for Violaton of Article 28 Law Number 5 Year 1999

In accordance with Law Number 5 Year 1999, Commission has the right to impose sanction in form of administrative sanction on the violation of the provision in Law Number 5 Year 1999. The complete Article 47 Law Number 5 Year 1999 is as follows:

#### Article 47

- (1) Commission has the right to impose sanction in form of administrative measure towards business performers who violate the provision in this Law.
- (2) Administrative measure as intended in paragraph (1) can be in form of:
  - a. Stipulation on cancellation of agreement as intended in Article 4 up to Article 13, Article 15, and Article 16; and or
  - b. Order to business performers to stop vertical integration as intended in Article 14; and or

- c. Order to business performers to stop activities proven to cause monopolistic practices and or to cause unfair business competition and or to harm community; and or
- d. Order to business performers to stop misuse of dominant position; and or
- e. Stipulation on cancellation of Consolidation, Merger of Business Entities and Acquisition of shares as intended in Article 28; and or
- f. Stipulation on compensation payment; and or
- g. Imposition of fines minimum IDR 1.000.000.000, 00 (IDR one billion) and maximum IDR 25.000.000.000, 00 (IDR twenty five billion).

Specifically for violation of Article 28, namely, Consolidation, Merger, or Acquisition of shares which cause monopolistic practices or unfair business competition, a cancellation can be determined on Consolidation, Merger, or Acquisition of shares concerned. In addition to order for cancellation, Commission can also impose fines from IDR 1 Billion up to IDR 25 Billion towards Business Performers who are proven to violate Article 28.

In addition to sanction in form of administrative measure, Law Number 5 Year 1999 also regulates criminal penalties that can be imposed through criminal case handling mechanism of Article 48 Law Number 5 Year 1999 which in complete is as follows:

#### Article 48

- (1) Violation of provisions in Article 4, Article 9 up to Article 14, Article 16 up to Article 19, Article 25, Article 27, and Article 28 is imposed with criminal penalty minimum IDR 25.000.000.000,00 (IDR twenty five billion) and maximum IDR100.000.000.000,00 (IDR one hundred billion), or imprisonment to substitute fine maximum 6 (six) months.
- (2) Violation on provisions in Article 5 up to Article 8, Article 15, Article 20 up to Article 24, and Article 26 of this Law shall be imposed with fine minimum IDR 5.000.000.000,00 ( IDR five billion) and maximum IDR 25.000.000.000,00 (IDR twenty five billion), or imprisonment to substitute fine maximum 5 (five) months.
- (3) Violation of provision in Article 41 of this Law shall be imposed with criminal penalties minimum IDR 1.000.000.000, 00 (IDR one billion) and maximum IDR 5.000.000.000, 00 (IDR five billion), or imprisonment to substitute fine maximum 3 (three) months.

#### B. Sanction for not submitting Notification (Article 29 Law Number 5 Year 1999)

In case Business Performers do not meet their obligations to submit Notification in writing on Consolidation, Merger, and Acquisition which have met the requirements, then Commission has the right to impose sanction vide Article 6 PP (Government Regulation) Number 57 Year 2010 in form of administrative measure in amount of IDR 1.000.000.000,00 (IDR one billion) for each one day

delay, based on provision that total administrative measure maximum amounts to IDR 25.000.000.000,00 (IDR twenty five billion).

Commission will conduct monitoring activities from time to time and cooperate with related institution to identify Consolidation, Merger, and Acquisition that meet requirements but within a period of 30 (thirty) working days does not inform the Notification of Consolidation, Merger, and Acquisition to Commission.

In case foreign Consolidation, Merger, and Acquisition have met requirements to conduct notification to Commission but within a period of 30 (thirty) working days do not submit notification of Consolidation, Merger, and Acquisition to Commission, then penalty for the delay will be borne by part of their business group existing in Indonesia..

Commission will use its authority and if necessary will cooperate with other authorized institutions to ensure fines which are imposed by Commission on delay of submitting Notification are fulfilled by business performers concerned.

## CHAPTER IX CLOSING

This Guideline governs about Consolidation, Merger, and Acquisition which are regulated in Article 28 and Article 29 Law Number 5/1999 and PP (Government Regulation) Number 57/ 2010 which can cause monopolistic practices and/or unfair business competition. To obtain a clearer picture regarding Consolidation, Merger, and Acquisition, business performers can use this Guideline as one of the guidelines in conducting the process of Consolidation, Merger, and Acquisition in order that it will not violate the provision of Law Number 5/1999. There is a possibility that this Guideline has not accommodated all activities of Consolidation, Merger, and Acquisition which are prohibited by Article 28 and Article 29 Law Number 5/1999 and PP (Government Regulation) Number 57/2010, therefore, it will be completed in line with the development of business world which enables to find other forms of Consolidation, Merger, and Acquisition which have not been clearly described in this Guideline but can cause monopolistic practices and/or unfair business competition that will harm public interests.

Source: LOOSE LEAF OF SUPERVISORY COMMISSION REGULATION FOR  
BUSINESS COMPETITION YEAR 2013