Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Merger Control

Indonesia
Chandrawati Dewi, Gustaaf Reerink and Bilal Anwari
ABNR Counsellors at Law

chambers.com

2020

INDONESIA

Law and Practice

Contributed by:
Chandrawati Dewi, Gustaaf Reerink and Bilal Anwari
ABNR Counsellors at Law see p.14

Contents

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Relevant merger control legislation in Indonesia consists of:

- Law No 5 of 1999 on the Prohibition of Monopolistic Practices and Unhealthy Business Competition (the "Indonesian Competition Law" or ICL);
- Government Regulation No 57 of 2010 on Mergers, Consolidation and Acquisition of Shares that May Result in Monopolistic or Unfair Business Competition Practices ("GR 57/2010"); and
- KPPU Regulation No 3/2019 on the Assessment of Mergers and Consolidation of Undertakings or Acquisition of Shares in a Company that may result in Monopolistic Practices or Unhealthy Competition (the "Merger Control Guidelines").

Other relevant KPPU Regulations include:

- KPPU Regulation No 1/2009 on Guidelines for Pre-Notification of a Merger, Consolidation or Acquisition, KPPU Regulation No 3/2009 on Guidelines for the Interpretation of Relevant Markets (the "Guidelines on Relevant Markets");
- KPPU Regulation No 4/2012 on Guidelines for the Imposition of Fines for Late Notification of a Merger, Consolidation of a Company or an Acquisition of Shares in a Company (the "Guidelines on Fines for Late Notification"); and
- KPPU Regulation No 1/2020 on Electronic Case Handling.

1.2 Legislation Relating to Particular Sectors

Indonesia has enacted legislation that puts restrictions on certain foreign investment. These restrictions normally come in the form of restrictions on foreign shareholding in Indonesian companies, depending on the companies' business activities. Separate or additional rules may apply to foreign investment in particular industries, including the financial services, mining, and oil and gas industries, and telecommunications.

1.3 Enforcement Authorities

The Indonesian Competition Commission (KPPU) enforces the relevant legislation.

2. Jurisdiction

2.1 Notification

Indonesia's merger control regime distinguishes between two types of filings:

- voluntary consultations, before a transaction becomes legally effective; and
- mandatory notifications, upon the transaction becoming legally effective.

If the transaction is a notifiable transaction, even if the parties have done a consultation and the KPPU has issued an opinion within the framework of the consultation, the transaction must still be notified to the KPPU after the transaction has become legally effective, to comply with the Indonesian Competition Law.

Mandatory notification finds its basis in Articles 28 and 29 of the ICL. Article 28 of the ICL prohibits businesses from carrying out a merger, consolidation or acquisition, which may cause the occurrence of monopolistic practices and/or unfair business competition. Article 29 of the ICL obliges a business engaged in a merger, consolidation, or acquisition to notify the transaction to the KPPU within 30 business days of the closing of the transaction.

GR 57/2010 and the Merger Control Guidelines elaborate on Articles 28 and 29 of the ICL, confirming that notification is compulsory if the following four conditions have been met cumulatively:

The Transaction Involves a Merger, Consolidation or Acquisition of Shares and/or Assets

Merger is defined as the legal act of one or more undertakings merging with another undertaking resulting in assets and liabilities being transferred by operation of law to one undertaking and the legal status of the other to cease by operation of law.

Consolidation is defined as the legal act of two undertakings or more to consolidate by establishing a new undertaking that obtains the assets and liabilities from the consolidating undertaking by operation of law, with the legal status of the consolidating undertakings ceasing by operation of law.

An acquisition of shares and/or assets would involve a change of control. See **2.4 Definition of "Control"**.

Thresholds of Sales and Assets

A notifiable transaction should still meet the following thresholds:

- the combined asset value worldwide exceeds IDR2.5 trillion (around USD175 million) (in the banking sector, the threshold is IDR20 trillion or around USD1.4 billion); and/or
- the combined sales value in Indonesia exceeds IDR5 trillion (around USD350 million).

Relevant to the calculation are the assets and/or sales of:

- each undertaking that carries out the merger, consolidation or acquisition (of shares and/or assets); and
- all undertakings (including the target) that directly or indirectly control or are controlled by the undertaking(s) that carries/carry out the merger, consolidation or acquisition.

Direct Impact on Indonesian Market
The transaction involves an Indonesian undertaking or one or more of the parties involved in the transaction (including their affiliates; see also definition below) is engaged in business activities in or sales to the territory of the Republic of Indonesia.

Carried out Between Non-affiliated Companies
If the transaction is carried out between affiliates, the transaction is exempted. A company is an affiliate of another if:

- it either directly or indirectly controls or is controlled by that company
- both it and the other company, directly or indirectly, are controlled by the same parent company; or
- there is a "main principal shareholder" relationship with the counterparty (*pemegang saham utama*).

The main principal shareholder should be a controlling shareholder. Affiliation means a relationship of control that occurs due to share ownership of more than 50%, or less than 50% but with the ability to influence or direct the company's policy and/or management.

In addition, parties carrying out a consolidation, merger or acquisition may jointly submit in a voluntary, pre-merger consultation with the KPPU. A consultation must be accompanied with a plan of the transaction. The result of the consultation can be used in the assessment stage of the notification, if there is no change in data for a maximum of two years. However, the KPPU's opinion issued as part of a consultation procedure is not binding.

2.2 Failure to Notify

In accordance with GR 57/2010 and the Merger Control Guidelines, the KPPU can impose a penalty of IDR1 billion (around USD700,000) per day with a maximum of IDR25 billion (around USD1.75 million) for late notification. Penalties are calculated as of the date the KPPU initiates an investigation in respect of the late notification.

The KPPU has imposed penalties for late notification in at least 29 cases, 21 of which occurred in the past two years, showing an increase in enforcement activity. At least one of these cases related to a foreign-to-foreign transaction.

The penalties imposed recently were in the range between IDR1 billion (around USD700,000) and IDR10.33 billion (around USD730,000) per transaction and IDR29.99 billion (around USD 2.1 million) in total for the same company that acquired three different entities. None of the penalties related to foreign-to-foreign transactions within the last two years.

The penalties are made public. In fact, naming and shaming is part of the KPPU's policy and intended to have a deterrent effect on other parties involved in notifiable transactions.

2.3 Types of Transactions

Mergers, consolidations and acquisition are caught by the Indonesian merger control rules. Acquisition can involve share and asset transactions. Internal restructuring or reorganisations are in principle not caught by the Indonesian merger control rules, if these concern transactions between affiliated parties.

Operations not involving the transfer of shares or assets should in principle not be caught by the Indonesian merger control rules. However, the KPPU has in the past considered a transaction involving a Vietnam entity as a notifiable share transaction, although it did not involve the sale and purchase of shares. Shareholders' agreements and changes to articles of association could be caught by the Indonesian merger control rules if such agreements and changes to articles of association would result in a change of control.

See **2.1 Notification**, which addresses the point of affiliated parties' transactions and the definition of control.

2.4 Definition of "Control"

There is a change of control in the meaning of the Indonesian Competition Law if the acquiring party will own more than 50% of the shares and voting rights or hold factual control, ie, the ability to influence or direct the company's policy and/or management. In one case, the KPPU concluded that a minority shareholder had gained control over an Indonesian company because the shareholder had certain veto rights and a right to nominate the majority of directors, including the president director, and was deemed to have more expertise in the business in which the company was engaged. While the law is unclear in this regard, one conservative interpretation is that there could also be a change of control if there is a change from sole to joint control.

A transfer of assets (with or without shares) is tantamount to an acquisition of shares and, accordingly, should be notified to the KPPU, if it:

- results in a transfer of management control and/or physical control over the assets; and/or

- increases the ability of the undertaking acquiring the assets to control a relevant market.

Assets include any that are owned by an undertaking (the target), both tangible and intangible, that are valuable or have economic value.

In a foreign-to-foreign transaction, the question whether an acquisition results in a change of control is determined by, in case of an acquisition of shares, the law applicable in the jurisdiction in which the share transaction is taking place, and in case of an acquisition of assets, the law applicable in the jurisdiction in which the asset transaction is taking place. Acquisitions of minority or other interests less than control are not caught.

2.5 Jurisdictional Thresholds

A notifiable transaction should meet the following jurisdictional thresholds:

- the combined asset value worldwide exceeds IDR2.5 trillion (around USD175 million) (in the banking sector, the threshold is IDR20 trillion or around USD1.4 billion); and/or
- the combined sales value in Indonesia exceeds IDR5 trillion (around USD350 million).

If a party has a difference in the value of assets and/or sales of 30% of more in a year, as compared to the year before, then the calculation of the value of assets and/or sales will be calculated on the basis of the average of the value of assets and/or sales in the past three years.

2.6 Calculations of Jurisdictional Thresholds

Relevant to the calculation are the assets and/or sales of:

- each undertaking that carries out the merger, consolidation or acquisition (of shares and/or assets); and
- all undertakings (including the target) that directly or indirectly control or are controlled by the undertaking(s) that carries/carry out the merger, consolidation or acquisition.

Sales or assets booked in a foreign currency should be converted on the basis of the Bank Indonesia mid-rate per the date of closing of the accounting year of the relevant company (usually December 31st).

The threshold for the calculation of the value of assets is based on book value.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Relevant for the purpose of calculating the jurisdiction threshold are:

- each undertaking that carries out the merger, consolidation or acquisition (of shares and/or assets); and
- all undertakings (including the target) that directly or indirectly control or are controlled by the ultimate parent of the undertaking(s) that carries/carry out the merger, consolidation or acquisition.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if one or more of the parties involved in the transaction, ie, the notifying party, the existing shareholder of the target who becomes a joint controller (if any), or the target, and/or one or more of their affiliates, is engaged in business activities in or sales to the territory of the Republic of Indonesia. In other words, a filing can be required when a target has no sales and/or assets in the jurisdiction.

See **2.1 Notification**.

2.9 Market Share Jurisdictional Threshold

Indonesia does not have a market share jurisdictional threshold.

2.10 Joint Ventures

Joint ventures are subject to merger control, unless they concern "Greenfield" joint ventures. Any shares and asset transactions carried out upon the establishment of the "Greenfield" joint venture are not exempted from notification, if all conditions that trigger notification have been met.

See **9.1 Recent Changes or Impending Legislation**, including on the bill that is to replace the Indonesian Competition Law. The bill introduces a notification requirement on companies establishing a "Greenfield" joint venture (provided all other relevant conditions have been met).

2.11 Power of Authorities to Investigate a Transaction

The KPPU has no power to investigate a transaction that does not meet the jurisdictional thresholds within the framework of merger control. That said, it could initiate an investigation on the parties involved in the transaction within the framework of cartel or abuse of dominance rules under the Indonesian Competition Law. Indonesian competition law is silent on the statute of limitations on the authorities' ability to investigate a transaction. However, in the past year the KPPU has investigated transactions that became legally effective as many as five years before.

2.12 Requirement for Clearance Before Implementation

There is no explicit requirement to suspend the implementation of a transaction until clearance. This would also be impracti-

cal, considering that Indonesia has a post-merger notification regime.

2.13 Penalties for the Implementation of a Transaction Before Clearance

There are no penalties if the parties implement the transaction before clearance.

2.14 Exceptions to Suspensive Effect

This is not applicable in our jurisdiction.

2.15 Circumstances Where Implementation Before Clearance is Permitted

The KPPU will permit closing before clearance. In fact, notification of a transaction is only required after closing of a transaction.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

The deadline for notification is within 30 business days of the transaction becoming legally effective. Business days here means Indonesian business days, not counting Saturdays and Sunday, official national holidays (*hari libur nasional*), and joint leave (*cuti bersama*).

If the target is an Indonesian limited liability company, a transaction becomes legally effective:

- for a merger, the date of approval of the Minister of Law and Human Rights of the amendment of the articles of association;
- for a consolidation, the date of approval of the Minister of Law and Human Rights of the deed of establishment;
- for an acquisition of shares, the date of notification of the Minister of Law and Human Rights; and
- for an acquisition of assets, the date of the assets purchase agreement.

A transaction involving a target that is a public company becomes legally effective on the date of public disclosure letter of the transaction. The legal effectiveness of foreign-to-foreign transactions is to be determined based on the law applicable in the jurisdiction in which the transaction is taking place.

3.2 Type of Agreement Required Prior to Notification

A binding agreement and legal effectiveness of the transaction are required prior to notification.

For a voluntary consultation, which can be made before the transaction is legally effective, a notification can be submitted to the KPPU if the parties have signed a contract, agreement (*kesepakatan*), Memorandum of Understanding/Letter of Intent (*Nota Kesepahaman*), or other written documentation between the parties that confirms the plan to enter into a merger, consolidation or acquisition. Such document does not need to have a binding character.

3.3 Filing Fees

There are no filing fees.

3.4 Parties Responsible for Filing

The following parties are responsible for a notification filing:

- for a merger: the surviving undertaking of the merger;
- for a consolidation: the undertaking resulting from the consolidation;
- for an acquisition of shares: the undertaking that acquires the shares; and
- for an acquisition of assets: the undertaking that acquires the assets.

In the event of a consultation, the parties carrying out a consolidation, merger or acquisition may jointly submit the filing to the KPPU. To ensure that parties do not exchange sensitive business information, the information to be submitted within the framework of a consultation can be sent separately by each party to the transaction. Sensitive information should be exchanged on a counsel-to-counsel basis.

3.5 Information Included in a Filing

The following documents are required to be submitted:

- a notification form, in which the notifying party is required to provide information on:
  - (a) the profile of the surviving, consolidated/acquiring entity, including details on shareholding, contact details, the ultimate beneficial owner, sales and assets values of the ultimate beneficial owner and all entities which directly or indirectly control or are controlled by the notifying party, product and marketing coverage of each of these entities (in principle even if there is no overlap with the product or geographical markets of the target company) for the last three years (in Rupiah);
  - (b) the profile of the target, including details on shareholding, contact details, the ultimate parent, sales and assets values of the ultimate parent and all entities that directly or indirectly control or are controlled by the target, product and marketing coverage of each of these entities (in principle even if no overlap with the product or geographical markets of the target) for the

last three years (in Rupiah);
(c) the transaction and terms of notification, with a self-assessment of whether the transaction reaches the value threshold, results in a change of control, is conducted between affiliated parties, the Market Concentration Ratio (HHI Index) is above 1800, and the change in Market Concentration (HHI Index) is above 150; and
(d) Based on the KPPU's request, the notifying party can be required to provide additional information on competitors, customers, and suppliers of the notifying party and the target;

- a power of attorney, by which the notifying party grants power of attorney to the law firm that represents the notifying party in the notification (if any);
- constitutional documents of the notifying party and the ultimate parent down to Indonesian subsidiaries or subsidiaries that are engaged in business in Indonesia, showing:
  (a) the duly incorporated and legal existence of the entities (and its amendments);
  (b) the business activities of the entities; and
  (c) the authorised person to represent the entities (including the relevant appointment document of the authorised person);
- constitutional documents of the target and its Indonesian subsidiaries or subsidiaries that are engaged in business in Indonesia, showing the matters mentioned above or, if the entities are Indonesian companies, all relevant approvals from and/or evidence:
  (a) notification/reporting to the Minister of Law and Human Rights (MOLHR);
  (b) registrations with the Company Registry at the Ministry of Trade; and
  (c) all publications in the State Gazette of the Republic of Indonesia (if any): if the seller of the target continues to be a controller (ie, joint control with the notifying party), the notifying party will need to provide the constitutional documents of the target and its original ultimate parent down to its subsidiaries;
- company profile of the notifying entity, which should at least contain details of the entity, including the shareholding, board composition, list and details of products manufactured by the company, distribution coverage;
- company profile of the target, which should at least contain details of the entity, including the shareholding, board composition, list and details of products manufactured by the company, distribution coverage;
- audited Financial statements of the last three years prior to the effective date of the transaction of the notifying party and its ultimate parent down to its to its Indonesian subsidiaries or subsidiaries have sales to Indonesia;
- audited Financial Statements of the last three years prior to the effective date of the transaction of the Target and its Indonesian subsidiaries or subsidiaries that have sales to Indonesia. If the seller of the target continues to be a controller of the target (ie, joint control with the notifying party), the notifying party will need to provide the Financial Statements of the target and its original ultimate parent up to its subsidiaries;
- business group structure scheme before and after the legal effectiveness of the transaction;
- business plan after the legal effectiveness of the transaction. The business plan should contain an industry analysis and the management's strategy for the next three to five years;
- transaction impact analysis, which contains at least an estimated market share of the parties, the affected markets related to the transaction, and the benefits of the transaction to the parties;
- summary of the transaction; and
- documents evidencing that the transaction is legally effective.

The business plan and, in particular, the transaction impact analysis will normally need to be prepared by an economist.

Additional Documents

The KPPU may and commonly does ask parties to submit documents in addition to the above.

If the constitutional documents and financial statements are in a language other than English or Indonesian, these documents will in principle need to be translated into English or Bahasa Indonesia. For practical reasons, the KPPU normally allows the notifying parties to prepare a summary of key aspects of each document and translate the summary into Bahasa Indonesia.

However, usually the KPPU only requires a summary of the constitutional documents of each relevant entity, which comprises the date of establishment, objective and purpose of the entity; capital amount; latest board composition and other essential information for the KPPU's review.

3.6 Penalties/Consequences of Incomplete Notification

If the notification is deemed incomplete, the KPPU will not accept the notification. This may result in a late notification, after which the KPPU may impose sanctions. See **2.2 Failure to Notify**.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If the notifying party is deemed to have submitted inaccurate or misleading information in the filing, the KPPU may carry out its assessment on the basis of the KPPU's own assumptions, supporting documents and/or data that it has or obtains. The

approach is based on the new Merger Control Guidelines, so it is not yet clear how the KPPU will apply this in practice.

3.8 Review Process

Upon submission of the notification, the KPPU will have 60 business days to review the information and supporting documents submitted and seek clarification for the notifying party.

The KPPU may request the notifying party to provide the additional information referred to in the notification form and provide documents deemed necessary for the assessment process. If the notifying party fails to provide the additional information and required supporting documents, the KPPU may carry out its assessment on the basis of the KPPU's own assumptions, supporting documents and/or data that it has or obtains.

If the KPPU is of the opinion that the transaction does not meet the asset or sales value or is a transaction between affiliates, the KPPU will issue a Statement of No Required Notification in respect of the transaction that has been notified to the KPPU.

After the 60 business days period, the KPPU has 90 business days to carry out its initial assessment and, if necessary, comprehensive assessment, and issue its opinion. In practice, the KPPU will often need more time to issue its opinion. In most cases, it will take around one year from the date of submission before an opinion is issued. See **3.10 Requests for Information During Review Process**.

3.9 Pre-notification Discussions with Authorities

Parties can engage in pre-notification discussions with KPPU officials on an informal and no-name basis.

For formal discussions, the parties can choose to submit a voluntary pre-merger consultation. This process will be treated confidentially until the moment of the publication of the KPPU's opinion. However, prior to publication, the KPPU will normally afford the notifying party an opportunity to review the opinion and to blackline parts that it wishes not to be published.

3.10 Requests for Information During Review Process

Requests for information during the review process are common within the first 60 business days after submission of the notification. Such requests do, in practice, suspend the review.

3.11 Accelerated Procedure

There is no short-form, fast-track or other type of accelerated procedure for review. Currently, there is also no other way to expedite clearance. However, we understand that the KPPU is now formulating new guidelines that will create the basis for a summary assessment (*pemeriksaan sederhana*) in the near future.

Further, as discussed in **3.8 Review Process**, if the KPPU is of the opinion that the transaction does not meet the asset or sales value or is a transaction between affiliates, the KPPU will issue a Statement of No Required Notification in respect of the transaction that has been notified to the KPPU.

In addition, if as part of its substantive review, the KPPU concludes that the Market Concentration Ratio (HHI Index) is 1800 or below, and/or the change in Market Concentration (HHI Index) is 150 or below, the KPPU will in principle not carry out a comprehensive assessment.

4. Substance of the Review

4.1 Substantive Test

The KPPU applies the Hirschman-Herfindahl Index (HHI), Delta HHI, or if no data available, other approaches to measure concentration, eg, CR4. Only if HHI > 1800 or Delta HHI > 150, the KPPU will look at other aspects. See **4.4 Competition Concerns**.

4.2 Markets Affected by a Transaction

The KPPU will determine which markets may be affected by the transaction on the basis of the Guidelines on Relevant Markets.

Where parties' activities overlap, there is no de minimis level below which competitive concerns are deemed unlikely.

4.3 Reliance on Case Law

The KPPU frequently relies on case law, such as market definitions, from other jurisdictions. It tends to follow market definitions used in other jurisdictions in which the transaction is notified. These market definitions are usually known, as most jurisdictions apply a pre-merger notification regime, while Indonesia has a post-merger notification regime, usually resulting in the KPPU being one of the last competition authorities that review the transaction.

4.4 Competition Concerns

The KPPU will investigate the following competition concerns.

Entry Barriers

If the market concentration test is positive, the KPPU will consider entry barriers. In doing so it will, for instance, look at: the ease for new players to enter the market; strength of new players; time needed to enter market; switching costs; homogeneity of products; and brand loyalty.

Potential for Anti-competitive Behaviour
Apart from entry barriers, the KPPU will also assess the potential of anti-competitive behaviour by the relevant parties, looking at potential unilateral effects, co-ordinated effects and market foreclosure.

4.5 Economic Efficiencies
The KPPU does consider economic efficiencies. It will assess a transaction more positively if it has potential efficiency effects, benefiting customers. Efficiency gains should be compared against the anti-competitive effects of the transaction

4.6 Non-competition Issues
The KPPU will assess a transaction more positively if the transaction can prevent one of the relevant parties from bankruptcy. Decrease of market players by bankruptcy would be deemed less beneficial than decrease of market players by the transaction.

Other than that, it seems that the KPPU may take into account the following other non-competition issues as part of the review process, in accordance with Article 13 of the Merger Control Guidelines:

- policy to augment the competitiveness and strength of national industry;
- technology and innovation development;
- protection of small and medium enterprises;
- impact to the labour force; and/or
- implementation of the relevant laws and/or regulations.

4.7 Special Consideration for Joint Ventures
There are no special considerations in the substantive review of joint ventures. The KPPU will not examine possible co-ordination issues between joint venture parents within the framework of merger control.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere with Transactions
The KPPU does not have the ability to prohibit or otherwise interfere with a transaction within the framework of merger control. However, the KPPU can always initiate a formal investigation within the framework of cartel or abuse of dominance rules under the Indonesian Competition Law.

5.2 Parties' Ability to Negotiate Remedies
When the KPPU has concerns about a transaction, the parties are able to negotiate structural remedies (ie, divestitures) or behavioural remedies.

However, to the best of our knowledge, the KPPU has so far only agreed to or imposed behavioural, not structural remedies. See **5.4 Typical Remedies**.

5.3 Legal Standard
There is no legal standard that remedies must meet in order to be deemed acceptable.

5.4 Typical Remedies
The remedies may consist of structural remedies, ie, share or asset divestment, or behavioural remedies, eg:

- relating to intellectual property rights; or
- eliminating competition barriers, eg:
  (a) exclusive contracts;
  (b) consumer switching cost;
  (c) tie-in or bundling;
  (d) supply or purchase barriers; and
  (e) relating to price or output.

The KPPU has so far imposed behavioural remedies in at least five cases, usually consisting of reporting requirements. To the best of our knowledge, no remedies have so far been required to address non-competition issues.

5.5 Negotiating Remedies with Authorities
The KPPU can propose remedies at their own initiative. If the KPPU deems that the transaction has an indication to result in monopolistic practices or unhealthy business competition, the authority may issue a conditional approval in the form of a notification statement, which requires the undertaking to accept certain remedies.

The undertaking has 14 business days from its receipt, to accept or reject the conditional approval. If the undertaking accepts the conditional approval, the KPPU will start supervising implementation of the remedies. If the undertaking does not respond or refuses to accept the conditional approval, the KPPU can initiate an investigation on the basis that the transaction violates the ICL.

The current Merger Control Guidelines do not make clear if, and if so, when parties can begin negotiating remedies with the KPPU in the framework of a notification. However, it is believed that it should be possible to negotiate remedies before the KPPU finalising its comprehensive assessment.

5.6 Conditions and Timing for Divestitures
Considering that Indonesia has a post-merger notification regime, a transaction will already be legally effective by the time the remedies are imposed. The KPPU will state in its notification statement the timing to comply with the remedies. In the

cases in which the KPPU has imposed behavioural remedies, it required the notifying party to comply with them for a period of three years.

If the undertaking does not respond or refuses to accept the conditional approval, which imposes the remedies, the KPPU can initiate an investigation on the basis that the transaction violates the Indonesian Competition Law. The investigation may result in penalties of between IDR25 billion (around USD1.7 million) and IDR100 billion (around USD7 million) or a prison sentence for the management of the undertaking of maximum six months as the substitute for penalties, and other sanctions, ie:

- a revocation of the business license;
- a prohibition for the board members of the relevant undertaking to occupy the position of director or commissioner for a period of at least two up to five years; and
- an order to cease the activities or actions that cause loss to other parties.

To the best of our knowledge, the KPPU has never imposed such penalties and sanctions as a result of a party's failure to comply with remedies imposed by the authority.

5.7 Issuance of Decisions

Unlike in other jurisdictions, a merger notification in Indonesia does not result in the KPPU issuing a formal decision permitting or prohibiting a transaction to the parties. Instead, the KPPU will render a non-binding opinion, which can be:

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

As mentioned in **5.5 Negotiating Remedies with Authorities**, if the KPPU deems that the transaction appears to result in monopolistic practices or unhealthy business competition, it may issue conditional approval in the form of a notification statement, which requires the undertaking to accept certain remedies.

A non-confidential version of the KPPU's opinion will normally be made public by publication of the opinion of the KPPU's website. Prior to publication, the KPPU will normally afford the notifying party an opportunity to review the opinion and to blackline parts that it wishes not to be published.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

To the best of our knowledge, the KPPU has never imposed structural remedies or prohibited transactions.

The KPPU has so far imposed behavioural remedies in at least five cases, usually consisting of reporting requirements, nor has the KPPU ever required behavioural remedies in foreign-to-foreign transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

An opinion of the KPPU will not cover related arrangements (ancillary restraints).

7. Third-Party Rights, Confidentiality and Cross-border Co-operation

7.1 Third-Party Rights

Third parties such as customers, suppliers and competitors, industry associations, government agencies are permitted to be involved in the review process.

7.2 Contacting Third Parties

The KPPU does contact third parties as part of its review process. The notifying party is requested to provide contact details of these third parties in the notification form and the KPPU may contact these third parties by telephone or email to verify the information provided and hear their opinion about the potential competitive effects of the transaction.

It is not common for the KPPU to send written questionnaires to third parties, nor is it common for the KPPU to "market test" any remedies offered by the parties.

7.3 Confidentiality

The fact of the notification and the description of the transaction (the notifying party and target, the type of transaction, and the status of the notification) is in principle made public by the KPPU through publication of such information on the KPPU's website.

There is always a delay in the publication of such information, but normally, this will be published on the KPPU's website before the KPPU's issues its opinion. The KPPU will give the notifying party the opportunity to review and redact commercial information in the KPPU's opinion, to be kept confidential.

7.4 Co-operation with Other Jurisdictions

The KPPU co-operates with competition authorities in other jurisdictions. This co-operation is on general policy matters and the authorities also share information with other jurisdictions, but as far as we are aware, not in the context of specific transactions.

The KPPU is under an obligation to keep confidential information that has been obtained from the notifying party that may be categorised as business secrets, in accordance with prevailing laws and regulations.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Under Indonesian Competition Law the appeal upon the KPPU's decision is defined as an Objection (*Keberatan*) and this legal effort should be submitted to the relevant District Court. After that, parties may file for cassation to the Supreme Court.

Parties cannot file an objection against a KPPU opinion rendered within the framework of merger control. There is also no other access to judicial review. It is possible for parties that have been imposed with a fine for late notification to file an objection to the KPPU's decision.

8.2 Typical Timeline for Appeals

Article 45 of the Indonesian Competition Law provides that the District Court should issue its decision within 30 working days of the initiation of the Objection case. In practice, it would take at least two months to obtain a court decision. There are examples in practice of successful objections, but these are rare.

8.3 Ability of Third Parties to Appeal Clearance Decisions

This is not applicable in our jurisdiction.

9. Recent Developments

9.1 Recent Changes or Impending Legislation

The Indonesian Parliament plans to enact a competition bill that will replace the current Indonesian Competition Law.

The current version of the bill introduces a mandatory pre-merger regime. It also imposes the pre-merger notification requirement on companies establishing a "Greenfield" joint venture or engaged in an asset acquisition transaction (provided that all other relevant conditions have been met). Fines are increased in the bill to be calculated as a percentage of the parties' turnover, ranging from minimum 5% to 30%. However, we understand that some stakeholders are now arguing that the current post-merger regime should be maintained, as Indonesia is said not to have the resources to apply a pre-merger regime.

The bill was originally planned to be enacted this year but, due to the COVID-19 emergency, the Parliament decided early in July to stop the deliberations. The bill is still listed in the 2020-24 National Legislation Program. However, at the time of writing it is unclear when the deliberations will continue.

9.2 Recent Enforcement Record

The KPPU has so far imposed fines for late notification in at least 29 cases, 21 of which occurred in the past two years, showing an increase in enforcement activity. To the best of our knowledge, only one case related to a foreign-to-foreign transaction.

The KPPU has so far imposed behavioural remedies in at least five cases, usually consisting of reporting requirements. None of these cases related to a foreign-to-foreign transactions. To date, the KPPU has never imposed any structural remedies.

9.3 Current Competition Concerns

Current competition concerns of the KPPU are now related to asset acquisitions. Until October 2019, asset acquisitions would not trigger a notification requirement in Indonesia. However, after a number of high-profile asset acquisitions that the KPPU believed had a significant impact on the Indonesian market, which it could not review under the existing merger control guidelines, it decided to amend the same. As discussed in **2.1 Notification**, under the current Merger Control Guidelines, asset acquisitions could trigger a notification requirement in Indonesia.

The Merger Control Guidelines do not clearly define what kind of asset acquisitions are to be notified. As a result, the authority is current overwhelmed by the many asset acquisition notifications that they are currently receiving.

We understand that the KPPU is now looking at reformulating the criteria for the notification of asset acquisitions. In essence, asset acquisitions that would not result in additional market share of the acquiring company are to be exempted. However, it is not clear when the KPPU will publish the updated merger control guidelines with these new criteria for asset acquisitions.

Sales and Asset Thresholds

As far as the sales and asset thresholds are concerned, the KPPU would like to amend GR 57/2010, which requires that the combined asset value is calculated on the basis of the total assets of the direct and indirect entities of transacting parties. According to the KPPU, as a result of this approach, the notification requirement is triggered too easily. However, it will take

a while before the Government Regulation will be amended. This is likely only after the new bill replacing the Indonesian Competition Law has been enacted.

9.4 COVID-19

There was a temporary halt to KPPU activities between 17 March 2020 and 6 April 2020, but the agency resumed its activities as normal after that period. Since then, it has received a significant number of notifications. ABNR has also been able to make notifications and submit relevant documents electronically without the necessity to hold face-to-face meetings with KPPU staff.

Beginning of the Outbreak

At the beginning of the COVID-19 outbreak in Indonesia, around March 2020, the KPPU issued KPPU Decree No 10/KPPU/Kep.1/III/2020 on Temporary Cessation of Law Enforcement Activities within the Secretariat of the KPPU ("KPPU Decree No 10/2020"), resulting in the temporary halting of enforcement activities until 31 March 2020. The KPPU extended this period until 7 April 2020 on the basis of KPPU Decree No 11/KPPU/Kep.1/III/2020 (on the Amendment of KPPU Decree No 10/2020).

In the period 17 March to 6 April 2020, the KPPU also ceased to accept notifications and to assess notified transactions. During this period, the KPPU did not apply the 30 business day notification deadline, or follow the 60 business day period to review information and supporting documents submitted within the framework of a notification, or the 90 business day period for the assessment of transactions.

During and Beyond COVID-19

On 6 April 2020, the KPPU issued KPPU Regulation No 1 of 2020 on Electronic Case Handling. There is no reference in the regulation to the COVID-19 pandemic. Therefore, it seems that electronic case handling is going to be the norm, even after the COVID-19 pandemic in Indonesia.

On 7 April 2020, the KPPU issued Regulation No 12 /KPPU/Kep.1/IV/2020 on Case Handling in the Event of an Emergency Disaster due to the COVID-19 Outbreak in Indonesia, on the basis of which it resumed its activities. Under this regulation, enforcement action taken by the KPPU will be carried out by prioritising the use of electronic media.

On 5 June 2020, the KPPU issued a press release, in which it stated that the notification process during the COVID-19 pandemic was continuing smoothly, even though most KPPU employees were working from home. The KPPU noted that from March to 5 June 2020, it had received 56 notifications of various types of transaction, including mergers, share acquisitions, and transfers of productive assets. This appears to indicate that the KPPU notification process has not been hampered by the pandemic.

ABNR Counsellors at Law is one of Indonesia's longest-established law firms (founded 1967) and helped pioneer the development of international commercial law in the country following the reopening of its economy to foreign investment after a period of isolationism in the early 1960s. With over 100 partners and lawyers (including two foreign counsel), ABNR is one of the largest independent, full-service law firms in Indonesia, giving it the scale needed to simultaneously handle large and complex transnational deals across a range of practice areas. The firm also has global reach as the Lex Mundi (LM) member firm for Indonesia since 1991. ABNR's position as LM member firm for Indonesia was confirmed for a further six-year period in 2018.

Authors

Chandrawati Dewi is a partner who focuses on M&A, foreign direct investment (FDI), competition/antitrust and capital markets. In M&A and FDI, she advises high-end domestic and international clients operating in various sectors including agriculture and plantations, trading, multi-level-marketing, automotive and groundside aviation. She is also head of ABNR's competition/antitrust practice, where she focuses on cartel, dominant-position and merger-control matters for multinational clients and international and regional law firms, including advising on deal structuring to avoid triggering mandatory post-notification. In capital markets, she specialises in offshore debt and equity offerings by Indonesian companies and multinational corporations with operations in Indonesia.

Bilal Anwari is a senior associate and a seasoned commercial litigator. He is a member of the firm's disputes and ADR department, which focuses on competition and anti-trust, restructuring and insolvency, arbitration and alternative dispute resolution, manpower disputes, shipping and maritime, cybercrime, corporate crime and environmental disputes, anti-corruption and compliance matters in a variety of industries. Bilal has handled many merger control matters before the KPPU. In 2008, he successfully defended a well-known Singaporean State-owned enterprise in a ground-breaking class action in the telecommunications sector. Prior to joining the firm, Bilal worked with other Indonesian prominent law firms.

Gustaaf Reerink is a foreign counsel who specialises in corporate and M&A, and competition/antitrust, advising clients across a broad range of industries, including automotive, aviation, consumer goods, education, financial services, pharmaceuticals and healthcare, power and renewables, real estate and construction, telecoms and tourism. Gustaaf has assisted a long list of high-end multinational clients with their M&A and FDI deals in Indonesia, the Indonesian aspects of global M&A deals, and the drafting of transaction documents, such as share-purchase agreements, share-sale agreements and internal shareholders agreements. In competition/antitrust, he focuses on cartel, dominant-position and merger-control matters, and has worked on several landmark merger-control cases in Indonesia.

ABNR Counsellors at Law

Graha CIMB Niaga 24th Floor
Jl. Jenderal Sudirman Kav. 58
Jakarta 12190
Indonesia

Tel: +62-21-250-5125
Fax: +62 21 250 5001
Email: info@abnrlaw.com
Web: www.abnrlaw.com