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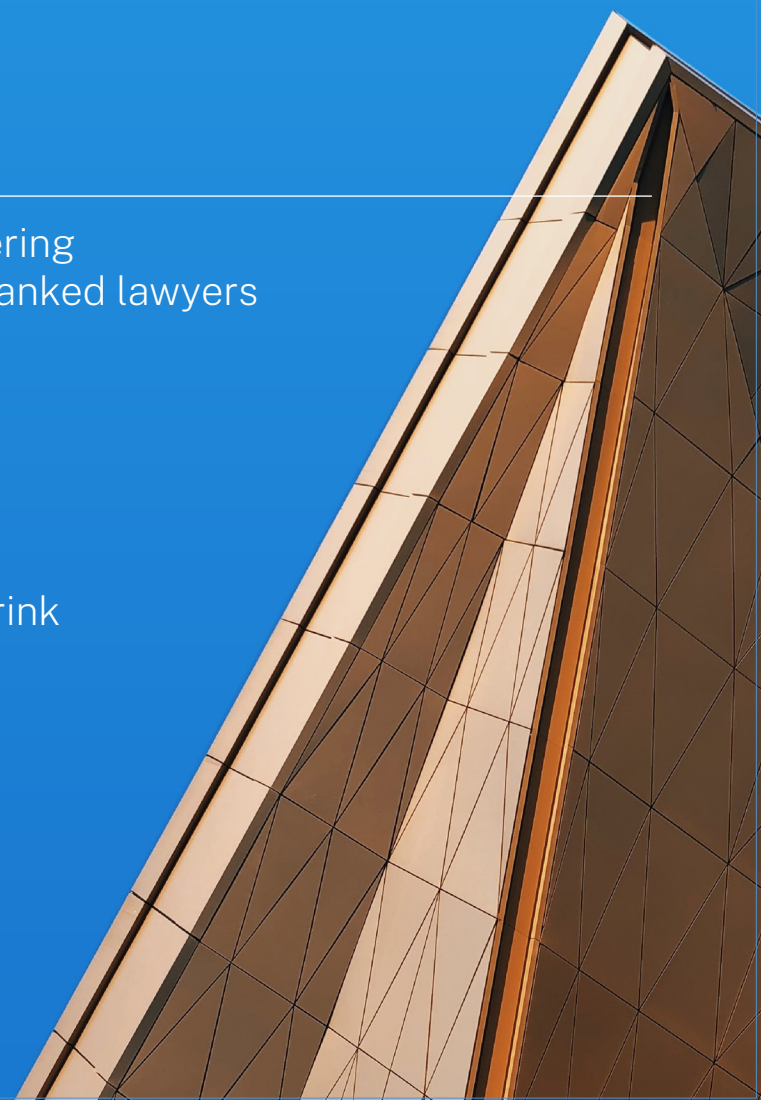

Indonesia: Law & Practice

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ABNR Counsellors at Law

INDONESIA

Law and Practice

Contributed by:
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ABNR Counsellors at Law is Indonesia's longest-established law firm (founded 1967) and pioneered 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 more than 100 partners and lawyers (including three foreign counsel), ABNR is the largest independent full-service law firm in Indonesia and one of the country's top three law firms by number of fee earners, giving it the scale needed to simultaneously handle large and complex transnational deals across a range of practice areas. ABNR also has global reach as the exclusive Lex Mundi (LM) member firm for Indonesia since 1991. LM is the world's leading network of independent law firms, with members in more than 100 countries. ABNR's position as LM member firm for Indonesia was reconfirmed for a further six-year period in 2018. ABNR is ranked as a Band 1 firm for antitrust/competition by Chambers Asia-Pacific.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

In Indonesia, the relevant merger control regime is primarily governed by:

- Law No 6 of 2023 on the Ratification of Government Regulation No 2 of 2022 (in lieu of Law No 11 of 2020 on Job Creation) into Law (the "Job Creation Law");
- Law No 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, as amended by the Job Creation Law (the "Competition Law");
- Government Regulation No 57 of 2010 on Mergers, Consolidation and Acquisition of Shares that may result in Monopolistic or Unfair Business Competition Practices ("Regulation 57/2010");
- Government Regulation No 44 of 2021 on the Implementation of Prohibition of Monopolistic Practices and Unfair Business Competition ("Regulation 44/2021");
- Government Regulation No 20 of 2023 on the Type and Rates of Non-Tax State Revenues at the Indonesia Competition Commission (*Komisi Pengawas Persaingan Usaha*, or KPPU) ("Regulation 20/2023");
- KPPU Regulation No 3 of 2023 on the Assessment of Mergers or Consolidation of Undertakings or Acquisition of Shares in a Company that May Result in Monopolistic Practices or Unfair Competition ("Regulation 3/2023");
- KPPU Guidelines for the Assessment of Mergers, Consolidation or Acquisition issued on 6 October 2020, to the extent that they do not conflict with KPPU Regulation No 3 of 2023 (the "Merger Control Guidelines"); and
- Supreme Court Circular Letter No 1 of 2021 on the Transfer of Examination of Objections to KPPU Decisions to the Commercial Court.

The following KPPU regulations are also relevant:

- KPPU Chair Regulation No 4 of 2022 on the Definition of Relevant Markets (the "Relevant Market Guidelines"); and
- KPPU Regulation No 2 of 2023 on the Case-Handling Procedure.

1.2 Legislation Relating to Particular Sectors

Indonesia has a general foreign investment regime as set out in Law No 25/2007 on Investment, as amended by the Job Creation Law (the "Investment Law"), and implementing legislation, including Presidential Regulation No 10/2021 on Investment Sectors, which was revised by Presidential Regulation No 49/2021 on Investment Sectors (the "2021 Investment List").

Under the Investment Law, all business fields are open to foreign investment, unless declared otherwise. Foreign investment must be carried out through a foreign investment company in the form of a limited liability company under Indonesian Law (*Perseroan Terbatas Penanaman Modal Asing*, or PT PMA) and domiciled within the territory of the state of the Republic of Indonesia, unless provided otherwise by the law. Foreign investors who make investment through a PT PMA should:

- subscribe to shares at the time the PT PMA is established;
- purchase shares; or
- invest through another method in accordance with laws and regulations.

The 2021 Investment List indicates:

- six business fields are completely prohibited from FDI under the Job Creation Law (narcotics, gambling/casinos, harvesting of fish listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), utilisation or harvesting of coral, chemical weapons, and chemicals that might damage the ozone layer);
- 60 business fields are reserved for co-operatives (co-ops) and SMEs;
- 46 business fields are open to FDI if in partnership with co-ops and SMEs; and
- 37 business fields are subject to specific requirements, which may be classified as:
  (a) open to FDI but subject to maximum foreign shareholding limit;
  (b) open to FDI but subject to special approval from the relevant ministry;
  (c) there is no longer any investment regulated by the provincial government such as in the alcohol/malt beverage industry; and
  (d) 100% reserved for domestic investors.

Several sectoral laws (eg, in banking, non-banking financial services (venture capital, multi-finance, securities companies), insurance, mining, oil and gas, shipping) introduce foreign investment rules and restrictions. It goes beyond the scope of this overview to discuss these sectoral laws in detail.

1.3 Enforcement Authorities

Merger control in Indonesia is enforced by the KPPU.

2. Jurisdiction

2.1 Notification

A post-merger notification is compulsory if all criteria are met. Parties involved in the transaction may carry out a voluntary pre-merger notification. However, even if parties carry out a voluntary pre-merger notification, the post-merger notification will still be mandatory once the closing of transaction occurs. No exceptions exist.

2.2 Failure to Notify

There are penalties for failing to notify the KPPU within 30 business days as of the closing date of transaction.

Under the Competition Law and Regulation 57/2010, a late notification penalty of IDR1 billion (approximately USD61,000) per day, with a maximum of IDR25 billion (approximately USD1.525 million) applies. However, there have been several occasions where the KPPU indicated that it is considering implementing a new approach for calculating administrative fines, taking into account the profit/turnover-based fines calculating method introduced by Regulation 44/2021. The regulation does not specify the maximum fine for late merger filing and thus this new method could potentially lead to fines that exceed the nominal limit of IDR25 billion (although such an amount has never been imposed in practice). In 2022, there was a KPPU decision on late submission where the tribunal referenced Regulation 44. However, the penalties imposed were less than IDR25 billion.

The KPPU's decisions on violations of the Competition Law, including late merger filings, are published on the KPPU's official website. Information on penalties can also be found in the KPPU's news articles and reports, which are also available on their website.

2.3 Types of Transactions

Several types of transactions are caught by Indonesian merger control rules – ie, mergers, consolidations, and acquisitions (both for share and asset transactions). However, only transactions that fulfil the following criteria are caught by Indonesian merger control rules:

- results in a change of control;
- meets the jurisdictional thresholds;
- meets the dual nexus requirements;
- is carried out between non-affiliated companies; and
- is not carried out to implement prevailing laws and regulations.

In line with the criterion that the transaction must be carried out between non-affiliated companies, internal restructuring or reorganisation are in principle not caught by Indonesian merger control rules, if they concern transactions between affiliated parties.

The KPPU has considered transactions involving sales and purchase of units in a trust as notifiable transactions, although they do not fall under the category of share or of asset transactions from an Indonesian law perspective. 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 ultimately result in a change of control.

2.4 Definition of "Control"

Under Indonesian competition law, a change of control occurs when the acquiring party obtains more than 50% of the shares and voting rights or obtains less than 50% of the shares and voting rights but holds factual control (allowing them to influence or direct the company's policies and management). Normally, the KPPU would look into reserved matters, veto rights and the power to nominate the majority of the directors as indications of change of control, when the acquired share capital is less than 50%. Although the law is unclear on this matter, a change from sole to joint control could also constitute a change of control.

Further, a transfer of assets – with or without shares – can be deemed the equivalent of an acquisition of shares and should be reported to the KPPU. This is the case if the following conditions are met:

- results in a transfer of management control and/or physical control over the assets; and/or
- increases the acquiring party's ability to control a relevant market.

An asset is defined as any movable or immovable object owned by an undertaking – both tangible and intangible – that has economic value (eg, bonds or stocks). Additionally, in the authors' experience, a participating interest in a joint operation in Indonesia may also be considered an Indonesian asset.

In foreign-to-foreign transactions, the question of change of control is in principle determined by the applicable law in the jurisdiction where the share or asset transaction occurs. However, it has been observed that in acquisitions of 50% or less of the shares, the KPPU will now also make its own assessment of decision-making mechanisms, the appointment of board members, and the day-to-day operation management system, to determine whether the transaction has resulted in a change of control.

Acquisitions of minority or other interests not resulting in a change of control are not subject to these rules.

2.5 Jurisdictional Thresholds

The jurisdictional thresholds for notification are:

- combined value of assets in Indonesia exceeds IDR2.5 trillion (approximately USD152.5 million or EUR132.5 million) or, if all undertakings involved in the transaction are active in the banking sector, IDR20 trillion (approximately USD1.22 billion or EUR1.06 billion); and/or
- combined turnover in Indonesia exceeds IDR5 trillion (approximately USD305 million or EUR265 million) – Indonesian turnover includes sales of products produced domestically and imported products (exported products should be excluded from the calculation).

The jurisdictional threshold is one of the major changes introduced by the Regulation 3/2023. Previously, the assets threshold was calculated on a worldwide basis, rather than an Indonesian basis – although the threshold amount remains the same.

If there is a 30% or greater change in the value of assets and/or sales from one year to the previous year, the calculation of these values will be based on the average of the values over the past three years.

Special jurisdictional thresholds are only available for the banking sector, as mentioned.

2.6 Calculations of Jurisdictional Thresholds

Jurisdictional thresholds are calculated based on assets and turnover that are exclusively in Indonesia (see **2.5 Jurisdictional Thresholds**).

If the sales or assets are booked in a foreign currency, the figures need to be converted using Bank Indonesia's middle exchange rate on the closing date or the business day in Indonesia closest to the closing date.

The thresholds should be based on book value (ie, audited financial statements of the relevant undertakings). However, if the undertakings do not record the assets and turnover that are exclusively in Indonesia in their audited financial statements, they need to submit a statement letter that includes the Indonesian sales and turnover figures and is signed by the authorised representative of the relevant undertaking.

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

The jurisdictional threshold is calculated based on the combined Indonesian sales and assets of the previous fiscal year for:

- each undertaking that carries out the merger, consolidation or acquisition (of shares and/or assets); and
- all entities, including the target and its controlled subsidiaries (if any), that directly or indirectly control (or are controlled by) the ultimate parent of the undertaking(s) carrying out the merger, consolidation or acquisition – this includes the ultimate parent entity, which is the highest controller of a group of undertakings that is not controlled by any other undertaking.

Therefore, the calculation of the jurisdictional threshold is on a group-wide basis – given that it does not only concern the transacting parties, but also includes the affiliates or subsidiaries of the transacting parties. For the avoidance of doubt, a seller's turnover and assets do not need to be included in the calculation of the threshold.

The jurisdictional thresholds are also met if only one party involved in the transaction meets the threshold.

The merger control regulations do not specify how changes in business should be reflected in the threshold calculation. In practice, with regard to other acquisitions, the KPPU usually requires the notifying party to include the sales and assets of the newly acquired entities in the threshold calculation as though they had been part of the group for the entire reference period. As regards business closures or divestments during the reference period, in practice, the figures of the closed or divested entities usually do not need to be included in the threshold calculation.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if the transaction fulfils the criteria that are caught by Indonesian merger control rules. Further, it should be assessed whether both the transacting parties have nexus in the Indonesian market. A transaction has nexus if at least two parties engaged in the transaction carry out business activities in or sales to Indonesia or have assets in Indonesia.

The term "business activities in Indonesia" can be broadly interpreted and includes:

- direct and indirect (portfolio) equity investments in Indonesian limited liability companies;
- investments in financial instruments other than shares, such as loans or assets;
- contractual rights;
- participation in units or trusts, whether direct or indirect; or
- establishing a representative office.

The dual nexus requirement for foreign-to-foreign transactions is another major change introduced by Regulation 3/2023. Under the previous regime, foreign-to-foreign transactions could be notifiable if either party (or its affiliate/subsidiary) had nexus in Indonesia (single nexus).

The KPPU's current approach is that the dual nexus criterion is only met if both the acquirer (or its affiliates/subsidiaries) and the target (or its subsidiaries) have assets or sales in Indonesia.

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 regulations, except for "Greenfield" joint ventures. However, any share or asset transactions carried out following the establishment of the "Greenfield" joint venture are considered notifiable transactions, if all notifiability requirements are met.

2.11 Power of Authorities to Investigate a Transaction

The KPPU has no authority to investigate transactions that do not meet the jurisdictional thresholds under merger control regulations. However, it can initiate an investigation into the parties

involved in the transaction with regard to cartel rules or abuse of dominance rules, or other potential violations under the Competition Law.

There is no specified statute of limitations on the KPPU's ability to investigate a transaction. This means that the KPPU is allowed to investigate and impose fines on companies for transactions that have been completed years ago. 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 requirement for clearance before implementing a transaction, as Indonesia has a post-merger notification regime.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Since the Indonesian merger control rules implement a post-merger notification system, there are no penalties imposed if the parties implement the transaction before receiving clearance.

2.14 Exceptions to Suspensive Effect

This is not applicable in Indonesia.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Indonesia has a post-merger notification regime, so closing a transaction before clearance is permitted.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

A notifiable transaction must be notified within 30 business days from the date the transaction becomes legally effective. Notifications must be submitted through the KPPU's online portal, which is only accessible between 9am and 2pm Jakarta time on business days (excluding Saturdays and Sundays, official national holidays and communal leave).

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

- for a merger – the date of approval by the Minister of Law (MoL) of the amendment of the articles of association;
- for consolidation – the date of approval by the MoL of the deed of establishment;
- for share acquisition – the date of notification to the MoL; and
- for asset acquisition – the date of the asset transfer.

If the transaction involves an Indonesian public company, it becomes legally effective on the following dates:

- for a merger, consolidation or acquisition carried out by a public company in connection with a public company – the date on which the public disclosure letter for the transaction is submitted to the Financial Services Authority; or
- for a merger, consolidation or acquisition carried out by a private company in connection with a public company – the final date of payment of shares and/or other equity securities in the exercise of a rights issuance.

If a merger or consolidation is carried out by an Indonesian entity in a form other than a limited liability company, the transaction becomes legally effective on the date of signing the agreement.

For foreign-to-foreign transactions, the legally effective date of the transaction will be determined by the law of the respective jurisdictions. The date may be based on the closing date in the agreement between the parties or the date of the government approval in the jurisdiction in which the transaction is taking place.

For late notification, the KPPU can impose a penalty of IDR1 billion per day up to a maximum of IDR25 billion. Please also see **2.2 Failure to Notify**.

The KPPU has issued penalties for late notifications in at least 62 cases – 47 of which occurred in the past five years, indicating an increase in enforcement activity. To the best of the authors' knowledge, five cases involved foreign-to-foreign transactions.

Recently imposed penalties ranged from IDR1 billion to IDR10.33 billion per transaction. A company was fined a total of IDR20.66 billion for delay in submitting notifications for acquisitions of three entities. The highest penalty for a single transaction (IDR12.6 billion) was imposed in October 2019 for a 240-day delay.

3.2 Type of Agreement Required Prior to Notification

A binding agreement and legally effective transaction are required prior to notification.

If the transaction is not yet legally effective but the parties have signed a contract, agreement, memorandum of understanding/letter of intent, or any other written documentation confirming their intention to engage in a merger, consolidation or acquisition, the parties can submit a consultation to the KPPU – even if the aforementioned documents are not legally binding.

If the parties have not entered into anything in writing, they cannot submit a consultation, but they can engage in a verbal consultation with the KPPU. However, in the case of a verbal consultation, the information provided by the KPPU may be very limited – in view of the absence of written materials.

3.3 Filing Fees

Filing fees were introduced last year by Regulation 20/2023.

The fee is calculated based on the following formula: 0.004% x the value of assets or sales in excess of the notification threshold (whichever is lower).

The value of assets or sales is calculated based on the total asset or sales value of:

- the surviving entity, or the consolidating undertaking, or the acquiring undertaking and the acquired undertaking; and
- the undertakings that are directly or indirectly controlled by the surviving undertaking resulting from the merger, the consolidating undertaking, or the acquiring and acquired undertakings.

If both the asset and sales values meet the threshold, the filing fee will be calculated using whichever value is lower and will only be payable if the KPPU finds the transaction is notifiable.

However, the regulation pegs the maximum fee at IDR150 million (approximately USD9,150).

The notification fee can be reduced to as little as 0% or fully waived based on one or more of the following considerations:

- the transaction supports the development of micro, small and medium enterprises;
- inability to pay or force majeure; or
- pursuant to a specific government policy.

These considerations are to be further elaborated in a KPPU regulation, subject to prior approval from the Minister of Finance.

The KPPU requires the notifying party to pay the maximum notification fee of IDR150 million before filing. The KPPU will refund excess payment after the notification is deemed properly submitted by the KPPU.

3.4 Parties Responsible for Filing

The responsibility for the notification filing lies with the following parties:

- in a merger – the surviving undertaking of the merger transaction;
- in a consolidation – the newly formed undertaking resulting from the consolidation transaction;
- in a share acquisition – the undertaking that acquires the shares; and
- in an asset acquisition – the undertaking that acquires the assets.

3.5 Information Included in a Filing

A filing would involve filling out an online notification form and submitting supporting documentation. A high level of detail is required. The notification form requires information on:

- the corporate details of the transacting parties, including the shareholders and management composition before and after the transaction;
- the Indonesian sales and assets value of the transacting parties and their relevant affiliates or subsidiaries;
- the product details of the parties, including descriptions and market share in Indonesia; and
- a list of competitors, customers and suppliers of the parties involved in the transaction, as well as their respective market, purchase and supply shares.

All required information (including the list of competitors, customers and suppliers) must be filled out, even if the parties have no overlapping market share.

As for the supporting documents, the KPPU requires the following:

- transaction documents and government approval evidencing the transaction is legally effective;
- corporate documents of the transacting parties;
- audited financial statements of the parties involved in the transaction;
- a company profile of the transacting parties, including their shareholders and management composition, product description and marketing coverage;
- a business plan prepared by the management of the notifying party, containing an industry analysis and the management strategy for the next three to five years;
- an economic impact analysis, including the market share of the parties involved in the transaction, the affected market, and benefits of the transaction;
- a summary of the transaction, including the description of the transaction, the legal effective date, the transaction value and list of relevant transaction documents; and
- a pre- and post-transaction group scheme.

The notifying party will also need to grant a power of attorney (notarised and apostilled, if signed outside Indonesia, or consularised depending on the jurisdiction) to the legal representatives making the filing with the KPPU. The notification form and all supporting documents must, in principle, be in Bahasa Indonesia. Any documents prepared in a foreign language must be translated into Bahasa Indonesia. However, for practical reasons, the KPPU normally allows submission of a translated summary of each submitted document.

If the parties do not record the Indonesian assets and turnover value in their audited financial statements, they would also need to submit a signed statement letter that includes these Indonesian figures.

The KPPU may ask the parties to submit supplementary documentation in addition to the foregoing.

3.6 Penalties/Consequences of Incomplete Notification

An incomplete notification will not be accepted by the KPPU and the authority will not issue a receipt of submission. If a receipt is not issued within the 30-day deadline, the notification will be considered late, and the KPPU may start a formal investigation for late submission and impose penalties.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

If the submitted information or documents are found to be false, the KPPU may cancel registration of the notification, the findings of its review, or both. This cancellation may be treated as a late notification and be subject to penalties. To the best of the authors' knowledge, to date, the KPPU has not imposed penalties for false information or documents.

3.8 Review Process

The review process involves two phases:

- an initial check of the completeness of the documents; and
- a review, which includes both initial and comprehensive review sub-phases (with the latter sub-phase being applicable only for transactions that may raise competition concerns in Indonesia).

The first phase, which is applicable to all notifications, also includes checking whether the transaction is notifiable. This initial check should be completed within three business days of submission. If the notification documents are complete, the KPPU will issue a statement that contains a registration number and confirmation of whether the transaction is notifiable. If the transaction is notifiable, it will continue to the review phase. If the documents are incomplete, the KPPU will request additional information or documentation as deemed necessary.

The KPPU has 90 business days to review the notification until the issuance of the opinion on the transaction. Therefore, for the overall timeline, the KPPU has three plus 90 business days in total to issue an opinion.

3.9 Pre-Notification Discussions With Authorities

The KPPU officials are nowadays reluctant to engage in informal pre-notification discussions with parties or their advisers. Even if they are willing to engage in such discussions, their input will not be binding on the KPPU.

A party may also choose to participate in a voluntary pre-closing consultation. The procedure will be similar to the post-closing notification, via the KPPU's portal. This process will be entirely confidential and the KPPU's opinion on the consultation will not be published.

3.10 Requests for Information During the Review Process

Requests for information during the review process are common within the first 30 business days following the submission of the notification. Normally, within two to four weeks of submission, the KPPU will invite the notifying party to attend a clarification meeting for a question-and-answer session, which is usually followed by a request for additional information.

Information requests normally are ancillary in nature. However, requests may be more complex if the transaction raises competition concerns in Indonesia. Information requests do not suspend the review.

3.11 Accelerated Procedure

Under the Merger Control Guidelines, the review process can be expedited if the KPPU determines that a notification qualifies for a simplified assessment, as the transaction is not expected to raise competition concerns. A transaction may qualify for a simplified assessment if it has the following characteristics:

- absence of overlapping business activities;
- absence of vertically integrated business activities;
- should overlapping business activities exist, a limited joint market share of those activities;
- should vertically integrated business activities exist, a Herfindahl–Hirschman Index (HHI) below the required threshold for each of those activities;
- lack of potential for tying or bundling, or a network effect;
- the notification was submitted within 30 business days of commencement of the transaction; or
- the transaction involves an acquisition resulting in an undertaking gaining sole control (from joint control with another undertaking).

A simplified assessment may be initiated either by the KPPU or at the request of the notifying party. If the KPPU approves the request for a simplified assessment, it should provide its opinion on the transaction within 14 business days. However, the authors have never seen this procedure implemented in practice.

4. Substance of the Review

4.1 Substantive Test

The KPPU uses the HHI or concentration ratio. The KPPU will carry out a comprehensive assessment and examines other factors if:

- the HHI falls between 1,500 and 2,500 and the change in the HHI exceeds 250; or
- the HHI exceeds 2,500 and the change in the HHI exceeds 150.

4.2 Markets Affected by a Transaction

The KPPU identifies which markets might be impacted by the transaction by determining the relevant products and geographical market. For relevant product markets, the KPPU identifies similar or substitute products based on demand and supply aspects. For relevant geographical markets, the KPPU assesses the distribution, selling, marketing coverage, and the location where the products can be located.

In cases where parties' activities overlap, there is no *de minimis* level below which competitive concerns are automatically deemed unlikely.

4.3 Reliance on Case Law

The notifying party may submit other jurisdiction filings that contain case law or market definition for the KPPU's consideration in performing its review. In the authors' experience, the KPPU also allows the parties to submit an economic analysis based on market definitions used by competition authorities in other jurisdictions where the transaction was also notified. However, it is not entirely clear how the KPPU arrives at certain market definitions, as this is not explained in the current format of opinions.

4.4 Competition Concerns

The KPPU will assess the following competition concerns (ie, entry barriers and potential for anti-competitive behaviour).

Entry Barriers

If the market concentration test is positive, the KPPU will assess entry barriers. This assessment normally includes factors such as the ease of entry for new market players, the strength of new entrants, the time required to enter the market, switching costs, the similarity of products, and brand loyalty.

Potential for Anti-Competitive Behaviour

In addition to entry barriers, the KPPU will evaluate the potential for anti-competitive behaviour by the relevant parties. This includes examining potential unilateral effects, co-ordinated effects, and market foreclosure.

4.5 Economic Efficiencies

The KPPU takes economic efficiencies into account. It will evaluate a transaction more favourably if it offers potential efficiency benefits to customers. These efficiency gains should be balanced against any anti-competitive effects of the transaction. The KPPU will prioritise healthy competition over efficiency.

4.6 Non-Competition Issues

Under the Merger Control Guidelines and Regulation 3/2023, the KPPU will review a transaction more positively if it can prevent a party from bankruptcy. The decrease in market players due to bankruptcy would be considered more harmful than a scenario where a market player becomes dominant as a result of the transaction.

The KPPU may also consider other non-competition factors during its review, including:

- policies to augment the competitiveness and strength of national industries;
- development of technology and innovation;
- protection of SMEs;
- impact on the labour force; and
- implementation of the relevant laws or regulations.

In Indonesia, rules for foreign direct investment are primarily governed and enforced by the Ministry of Investment/Investment Coordinating Board (*Badan Koordinasi Penanaman Modal*, or BKPM) and are separate from the merger control rules enforced by the KPPU. Foreign entities may be required to submit certain filings, such as regular investment reports. Although the BKPM predominantly governs and enforces FDI regulations, other ministries may also have sector-specific rules concerning FDI.

4.7 Special Consideration for Joint Ventures

There are no special substantive tests for joint ventures. The KPPU does not specifically examine potential co-ordination issues between joint

venture parents within the context of merger control.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere With Transactions

The KPPU does not have the authority to prohibit or interfere in transactions within the framework of merger control. However, the authority can always initiate a formal investigation within the framework of cartel rules or abuse of dominance rules or other potential violations under the Competition Law.

5.2 Parties' Ability to Negotiate Remedies

If the KPPU has concerns about a transaction, the parties can negotiate structural remedies or behavioural remedies. However, to the best of the authors' knowledge, the KPPU has so far only agreed to or imposed behavioural remedies, rather than structural remedies.

The remedies may consist of structural remedies (ie, share or asset divestment) or behavioural remedies, such as:

- access to IP rights related to essential facilities; or
- elimination of competition barriers, such as exclusive contracts, consumer switching costs, tying or bundling, and supply or purchase barriers.

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

5.3 Legal Standard

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

The KPPU's opinion must contain a description and timeline for:

- structural remedies actions by the undertaking;
- behavioural remedies by the undertaking; and/or
- implementation of fair pricing strategies.

5.4 Negotiating Remedies With Authorities

When the result of the KPPU's comprehensive review indicates that the transaction could lead to monopolistic practices or unfair competition, the KPPU will convene a commission panel that will decide on the results of the review.

The panel will then summon the notifying party to an initial hearing, where the KPPU investigator will explain the results of the comprehensive review and the proposed remedies, along with the timeline for their implementation. The notifying party will be given the opportunity to respond.

If the notifying party accepts the proposed remedies, the panel will issue a conditional approval that imposes the remedies. If the notifying party rejects the proposed remedies, it must submit a legal, economic and/or technical basis for the rejection and the case will continue to a further hearing, where the notifying party is expected to submit its counter-proposal for the remedies.

Subsequently, taking into account the counter-proposal, the panel will issue a conditional approval that requires the notifying party to accept the remedies. Although the notifying party can submit a counter-proposal, the authority to decide on the type of remedies and the timeline for the implementation rests with the KPPU panel.

5.5 Conditions and Timing for Divestitures

As Indonesia has a post-merger notification regime, a transaction will be legally effective by the time any remedies for divestitures are imposed. The KPPU will specify the timeline for complying with the remedies. For behavioural remedies, compliance is required for three years.

If an undertaking fails to comply with a conditional approval that imposes remedies, the KPPU can initiate an investigation for alleged violation of the Competition Law, which may result in penalties of IDR1 billion (approximately USD61,000) per day, with a maximum of IDR25 billion (approximately USD1.525 million). However, to the authors' knowledge, the KPPU has never imposed penalties or sanctions due to a party's failure to comply with its remedies.

5.6 Issuance of Decisions

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

- no allegation of monopolistic practice or unfair business competition;
- an allegation of monopolistic practice or unfair business competition with conditional approval; or
- an allegation of monopolistic practice or unfair business competition.

As mentioned in **5.4 Negotiating Remedies With Authorities**, if the KPPU's review indicates that the transaction could result in monopolistic practices or unhealthy business competition, it may issue conditional approval, which requires the undertaking to accept certain remedies.

Before 2019, the KPPU published its opinion on certain notifications. However, since 2019, the published information has been limited to the registration number, the date of the notification, the identity of the acquirer and the target, and the status of the notification (completed or under review).

5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions

To the best of the authors' knowledge, the KPPU has never implemented structural remedies or prohibited transactions. The KPPU has imposed behavioural remedies, usually involving reporting obligations, in at least five cases – none of which involved foreign-to foreign transactions.

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

The KPPU's opinion does not extend to related arrangements (ancillary restraints).

7. Third-Party Rights, Confidentiality and Cross-Border Co-Operation

7.1 Third-Party Rights

Competitors, customers, suppliers, industry associations and government agencies may be involved in the review process. The notifying party is required to provide contact details of the relevant third parties in the notification form and the KPPU may invite these parties for interview to gather their opinions on the transaction's impact.

There is no formal procedure for third parties to submit a complaint during the merger review process. However, any party that suffers losses due to the transaction can file a complaint with the KPPU, citing an alleged violation of Article 28 or other relevant provisions of the Competition Law. This complaint will be examined and adjudicated separately by the KPPU within the framework of a formal investigation.

7.2 Contacting Third Parties

The KPPU may reach out to third parties during its review process. The notifying party is required to include contact details of these third parties in the notification form. The KPPU may contact them via phone or email to verify the information provided and seek their views about the potential competitive impact of the transaction.

It is uncommon for the KPPU to send written questionnaires to third parties or conduct a "market test" on remedies proposed by the parties.

7.3 Confidentiality

The fact of the notification and description of the transaction are no longer made public, as of 2019. See **5.6 Issuance of Decisions**.

7.4 Co-Operation With Other Jurisdictions

The KPPU co-operates with competition authorities in other jurisdictions on general policy matters and the exchange of general information. As far as the authors are aware, the co-operation does not extend to specific transactions.

The KPPU is under an obligation to maintain the confidentiality of business secrets obtained from the notifying party.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Parties cannot appeal the KPPU opinion on merger control, which is also not binding. There is no avenue for judicial review of a KPPU opinion.

However, the KPPU's decisions on violations of the Competition Law can be appealed. Although it is rare, companies that have been subject to penalties for late notification can file an appeal on the KPPU's decision with the Commercial Court and subsequently file for cassation with the Supreme Court.

8.2 Typical Timeline for Appeals

The authority to review competition law cases was transferred from the District Court to the Commercial Court in 2021. The timeframe for the objection phase is between three and 12 months.

After receiving the Commercial Court's decision, the parties may file for cassation with the Supreme Court. The amendment to the Competition Law revoked the requirement for the Supreme Court to issue a decision within 30

days following receipt of the appeal application. Therefore, it could now take up to 250 days to receive a decision from the Supreme Court at cassation level. The Supreme Court's decision is final and binding and no further appeal can be made.

8.3 Ability of Third Parties to Appeal Clearance Decisions

Typically, third parties have no right to appeal a KPPU opinion on merger control.

Theoretically, they can challenge the KPPU opinion indirectly by filing an administrative lawsuit in the Administrative Court because the KPPU opinion could be deemed as an administrative decision. However, the authors have never seen this approach being tested in court.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

There is a separate "filing", which must be carried out by the surviving undertaking in the merger transaction, with the Ministry of Investment/BKPM through the so-called Online Single Submission (OSS) system. The surviving undertaking must update/adjust its investment data and licensing to reflect the merger. The OSS would verify the updated/adjusted investment data and finally the OSS System would issue the adjusted investment data and licensing of the surviving undertaking, covering the data of both the surviving undertaking and the non-surviving (merged) undertaking.

The regulation is silent on the timeframe for the merger filing with the OSS System. However, in practice, this filing should be carried out once the deed of merger and merger filing with the MoL is completed.

See also **4.6 Non-Competition Issues**.

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