

## NEW REGULATION ON THE NOTIFICATION OF MERGER AND ACQUISITION TRANSACTIONS: MATERIAL IMPLICATIONS FOR ASSETS PURCHASE AND CROSS-BORDER M&A TRANSACTIONS

### *Overview*

*In line with the goal of the Commission for the Supervision of Business Competition (KPPU) creating fair business competition to support the dynamic and expansive economic growth of the Republic of Indonesia, KPPU recently issued KPPU Regulation No. 3 of 2019 on the Evaluation of Merger or Consolidation of Business Entities, or the Acquisition of Company Shares Which May Cause Monopolistic Practices and/or Unfair Business Competition (KPPU Regulation No. 3) on 2 October 2019.*

*KPPU Regulation No. 3 might have significant implications to Indonesian business actors, such as: (i) the broadened definition of acquisition which now covers both shares and assets acquisition, and (ii) the obligation to notify KPPU on merger and acquisition transactions that occur outside the territory of the Republic of Indonesia as long as they meet the value threshold determined by KPPU.*



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## Background

The corporate action of Merger<sup>1</sup>, Consolidation<sup>2</sup>, and/or Acquisition<sup>3</sup> (M&A) have long been the main focus of KPPU in carrying out its vision and mission to monitor the implementation of Law No. 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competition (**Anti Monopoly Law**).

To prevent monopolistic practices and/or unfair business competition by business actors as a result of M&A transactions, KPPU has designed a more extensive legal construction through KPPU Regulation No. 3 which has completely replaced the previous regulations, namely KPPU Regulation No. 13 of 2010 on Guidelines for the Implementation of Merger or Consolidation of Business Entities and Acquisition of Companies that May Cause Monopolistic Practices and Unfair Business Competition, as amended several times and lastly amended by KPPU Regulation No. 2 of 2013 (**KPPU Regulation No. 13**).

## Main provisions

Consistent with the provisions of Government Regulation No. 57 of 2010 on the Merger or Consolidation of Business Entities and Acquisition of Company Shares that May Cause Monopolistic Practices and Unfair Business Competition (**GR 57**), M&A transactions that must be notified to KPPU pursuant to KPPU Regulation No. 3 are transactions that would cause the value of assets and/or sales of the relevant businesses to exceed a certain value threshold (**Value Threshold**), namely:

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<sup>1</sup>Merger is defined as: "a legal action carried by one or more business entities to merge itself with other existing business entity which cause the assets and liabilities from the merging business entity to be transferred by operation of law to business entities that receive the merger and subsequently the status of the merging business entity will cease to exist by operation of law."

<sup>2</sup>Consolidation is defined as: "a legal action carried by 2 business entities or more to consolidate itself by establishing a new business entity which will own the assets and liabilities from the consolidating business entity by operation of law and the previously consolidating business entity will cease to exist by operation of law."

<sup>3</sup>Acquisition is defined as: "a legal action carried by a business entity to acquire company shares and/or assets which cause the transfer of control of such company and/or the assets of such company."

1. the Asset<sup>4</sup> value of the relevant Business Entities<sup>5</sup> derived from the relevant M&A transaction exceeds Rp2.5 trillion; or
2. the Sales<sup>6</sup> value of the relevant Business Entities derived from the relevant M&A transaction exceeds Rp5 trillion.

In general, the relevant value of Sales will be calculated by virtue of combining the Sales value (in the territory of Indonesia), and the relevant value of Assets will be calculated by virtue of combining the Asset value (as stated in the financial statement), of the Business Actors<sup>7</sup> conducting the relevant M&A transaction and the Business Entities directly or indirectly controlling or being controlled by the Business Actors<sup>8</sup> conducting the M&A transaction.

Furthermore, the notification to KPPU must be conducted at the latest 30 days after the relevant M&A transaction becomes legally effective by:

1. the Business Actor that receives the Merger;
2. the Business Actor resulting from the Consolidation;
3. the Business Actor that conducts the Acquisition; or
4. the Business Actor that receives or acquires the Assets.

The major changes from KPPU Regulation No. 3 which differ significantly from KPPU Regulation No. 13 are as follows:

### *Acquisition of Assets*

Under KPPU Regulation No. 3, KPPU has broadened the definition of Acquisition to capture both shares and assets acquisitions. KPPU Regulation No. 3 states that the transfer of a Business Entity's Assets will be considered as an Acquisition of shares if such transfer of Assets: (i)

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<sup>4</sup> Asset is defined as: "all assets owned by a Business Actor, whether tangible or intangible which are valuable or have an economic value."

<sup>5</sup> Business Entity is defined as: "company or any form of business, in the form of legal entity or not, conducting a permanent and continuous business to receive profit."

<sup>6</sup> Sales is defined as: "the gross inflows of economic benefits arising from the activities of the Business Entity during a certain period of time which are not derived from any contribution of capital investments."

<sup>7</sup> Business Actor is defined as: "every person or business entity, in the form of legal entity or not, established and domiciled or conducting activity in the territory of the Republic of Indonesia, both individually or jointly through agreements to carry out various business activities in the economic field."

causes the transfer of control of those Assets, and/or (ii) increasing the acquiring Business Entity's capability in controlling certain market.

The introduction of Assets acquisition within the scope of Acquisition of shares will definitely change the current practice of M&A transactions in Indonesia related to business competition issues, especially because Anti Monopoly Law only regulates the prohibition of Merger, Consolidation, or Shares Acquisition (not including Asset) if such action cause monopolistic practices and/or unfair business competition.

This brings us to a very important question, namely, is there strong legal basis for KPPU to include the Assets Acquisition as part of business competition analysis? Article 29 of Anti Monopoly Law does not include the Acquisition of Assets as part of the category of M&A transaction which falls under the obligation to notify the KPPU. GR 57 (which is referred by KPPU Regulation No. 3 as one of the grounds for issuing this regulation) firmly regulates that the definition of Acquisition is limited only to the Shares of Business Entities.

More crucially, the definitions of Asset and Acquisition under KPPU Regulation No. 3 are very broad, where Article 5 Paragraph (1) (a) of KPPU Regulation No. 3 indicates that any transfer of Asset which causes the transfer of control of such Asset would trigger the mandatory notification to KPPU as long as the Value Threshold is met even though such transfer might not necessarily increase the capability of the Acquiring Business Entity to control certain market.

In other words, given the broad language of the regulation, it can be argued that each sales and purchase of Asset might fall into the category of transaction which triggers mandatory notification to KPPU. This would obviously be a problem in practice, specifically for companies whose main business activity is sale and purchase of assets (such as property companies) or companies which require large scale supplies of raw materials for manufacturing/industry.

As an example, referring to the definition of Asset which includes any form of assets that have economic value, any Business Entity which conducts manufacturing business and owns a total of Asset in the amount of more than IDR2.5 trillion and/or Sales in the amount of more than IDR5 trillion in one financial year (either individually or a group under common control) will be required to submit a notification to KPPU

for sale and purchase of raw materials (since raw materials may be interpreted to fall under the definition of Asset) regardless of whether such transaction affects business competition in Indonesia.

Last but not least, since the sanction of fines under GR 57 only applies if a Business Actor fails to submit notification to KPPU of Merger, Consolidation, or Shares Acquisition transactions, it is not clear whether the failure to submit notification for Asset Acquisition as regulated under KPPU Regulation No. 3 would cause such Business Actors to be subject to a penalty in the amount of IDR1 billion per day of lateness (maximum IDR 25 billion) as regulated under Article 6 of PP 57.

## Merger Transaction Outside the Territory of the Republic of Indonesia

Differing from KPPU Regulation No. 13 which states that M&A transactions outside of the territory of Republic of Indonesia are not a concern for KPPU if they do not affect domestic competition in Indonesia (where there are certain conditions that must be fulfilled before the mandatory notification requirement kicks in, such as the acquired foreign company having certain business activities in Indonesia), Article 23 paragraph (1) of KPPU Regulation No. 3 expressly stipulates that any M&A transaction (including Asset Acquisition) that occurs outside the territory of the Republic of Indonesia and meets the Value Threshold must still be notified to KPPU if any or all parties conducting the M&A transaction carry out their business or sales activities in the territory of the Republic of Indonesia.

Taking the above language literally, it could be interpreted that every Business Actor in Indonesia will be required to notify KPPU for every Acquisition of shares and/or Assets carried out abroad simply because such Business Actor carries out business activities or sales in the territory of Indonesia even if the acquired foreign company or Asset has no relationship with or impact on the Indonesian business and market.

This may not only impact the cross-border investment plans of Indonesian Business Actors, it also begs an important question, namely, why do Business Actors need to report cross-border purchase of shares or Asset to KPPU when there is no impact to the market and/or business competition in Indonesia?

Further, implementation of this requirement will be problematic for foreign Business Actors which may not have knowledge on this requirement, such as, a company part of a global group with operations in Indonesia.

## Closing

Given the significant changes to the reporting obligation for M&A transactions stipulated under KPPU Regulation No. 3, Indonesian Business Actors need to be aware of 2 main things. First, the potential administrative fines for failure to notify KPPU of M&A transactions (including sale and purchase of Assets) that meet the Value Threshold both inside and outside the territory of the Republic of Indonesia.

Second, assuming that the addition of Assets M&A as part of KPPU mandatory notification to be used in analyzing business competition issues has legal basis under Anti Monopoly Law and GR 57, Indonesian Business Actors now face additional antitrust risks in doing sale and purchase of Assets, particularly the annulment of such transaction if KPPU determines that the transaction cause monopoly practices or violate fair business competition.

Further clarifications concerning this regulation (along with the entire implications) will have to be discussed with KPPU. We will closely monitor this regulation and will provide further updates as may be necessary.

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