M&A
Jakarta

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For More Information:

Wimbanu Widyatmoko
Senior Partner
+62 21 2960 8694
wimbanu.widyatmoko
@bakermckenzie.com

Mita Djajadiredja
Senior Partner
+62 21 2960 8689
mita.djajadiredja
@bakermckenzie.com

Mochamad Fachri
Associate Partner
+62 21 2960 8547
mochamad.fachri
@bakermckenzie.com

Merger Control Update: **Asset Acquisitions Must be Notified** and a Few Other Important Things to Mention

On Monday, 14 October, the Indonesian Business Competition Supervisory Commission published its Regulation Number 3 of 2019 on Assessment of Merger or Consolidation of Business Entities or Share Acquisitions of Companies ("**KPPU Regulation 3/2019**"). As per the unfortunate usual practice, this regulation was published late as it actually came into force on 3 October.

As you may know, KPPU Regulation 3/2019 has been the subject of a fair share of controversy, chiefly because it expanded the KPPU's scope of authority to assess acquisitions of assets. Previously, the KPPU reviewed acquisition of shares, mergers between companies and consolidation of companies only. **Now the KPPU claims that it has the authority to review acquisitions of assets as well.**

The issue is (of course) that the text of the relevant articles of Law No. 5 of 1999 ("**Antimonopoly Law**") on merger control and the text of Government Regulation No. 57 of 2010, which implements these provisions of the Antimonopoly Law, restrict the KPPU's authority to reviewing acquisitions of shares, mergers between companies and consolidation of companies only. There is no mention of acquisition of assets and it has been the long-standing view of the legal community, which the KPPU itself supported a few times (such as during the acquisition of Uber's assets in Indonesia by its competitors) that these regulations do not grant the KPPU the authority to review acquisitions of assets.

The fact that in the recently failed deliberation to review the Antimonopoly Law there was also a proposal to amend that law's merger control provisions by inserting specific wording to the effect that the KPPU is authorized to review asset acquisitions as well does not support the KPPU's novel interpretation that it has had this authority all along.

So until the Supreme Court has had a chance to rule on this in a judicial review decision, there is not much more to say, except that **businesses that acquires assets must now consider submitting a notification to the KPPU** whereas in the past it was pretty safe to say that asset deals were not subject to notice.

- The effective date for acquisition of assets is determined by KPPU Regulation 3/2019 as the effective date of the sales and purchase agreement for the assets. Notification must be submitted within 30 working days after this date.

Unfortunately, KPPU Regulation 3/2019 is also unhelpful in guiding businesses on whether they should file notice of their asset acquisitions or not. The problem is that Article 5.1 provides that acquisitions of assets that must be notified to the KPPU are those where control over the assets has changed **and/or** where the acquisition increases the acquiring business's capability to acquire control over a relevant market. Thus, in theory it is possible that the mere fact that control over the assets changes hands, without there being any impact in the relevant market, is sufficient to trigger the requirement to notify the KPPU, which is confusing.

To be fair, the new rule that asset acquisitions must be notified to the KPPU must be read in conjunction with the other thresholds for notifiable transactions under Government Regulation No. 57 of 2010 that are still in place, namely that:

1) The transaction takes place between non-affiliated parties

2) The financial thresholds are met, namely:
    a) the combined revenue of the transacting parties in Indonesia exceeds IDR 5 trillion; or
    b) the combined assets of the transacting parties in Indonesia exceed IDR 2.5 trillion, or in the case of mergers between banks, exceed IDR 20 trillion.

Only asset acquisitions that meet these thresholds are required to be notified.

Aside from the controversy on asset acquisitions, there are a few other noteworthy features of KPPU Regulation No. 3/2019:

1) There is now a useful clarification on the effective date of acquisitions of public companies by way of a rights issue. It has been clarified that the effective date is the date of the disclosure letter to the Indonesian Financial Services Authority (OJK) or the last date of payment for the shares or equity in the exercise of a right issue.

2) Also in the case of overseas transactions, Regulation No. 3/2019 provides that the effective date is either the (i) date of signing (ii) date of closing or (iii) date of approval from the authority. This is a very important point that is unfortunately drafted in a confusing manner.

The current wording appears to suggest that for overseas transactions, the earliest possible time when the clock for merger starts ticking is the date of signing of the conditional transaction documents, even before closing. But that would effectively make the filing system for overseas transactions on a pre-closing system, which would seem to conflict with the Antimonopoly Law, which clearly mandates a post-closing system.

3) The criteria of impact to the Indonesian economy in the case of overseas transactions is changed quite significantly. In the past to qualify for merger control review in Indonesia, at least one party to the transaction had to have business operations in Indonesia and the other party had to have direct sales to Indonesia. Under KPPU Regulation No. 3/2019 either both or at least one party must have business operation or sales in Indonesia. So now it appears that the threshold for notifying overseas transactions has been made more strict. **For a transaction to be notifiable, it appears to be no longer enough that there are exports to Indonesia. There must be at least sales in Indonesia.** The term sales in Indonesia indicates that both the seller and the buyer are in Indonesia.

   Of course, we hasten to add, the KPPU may clarify this point further. It does not appear to be any use to distinguish between doing business in Indonesia and making sales in Indonesia if in fact under both situations the seller and buyer are both in Indonesia. So, sales in Indonesia should actually mean, in practice, overseas export sales to Indonesia.

4) Where a transaction is found to be problematic, such as where it causes a significant decrease in competition, the KPPU has added more criteria for its review, namely:

   a. Policy to increase the competitiveness or strength of national industry - It appears that it would be OK for instance for leading local companies to merge to create a national industry champion.

   b. Development of technology and innovation - It appears that it would be possible to justify, for instance, mergers to create a vertically integrated company for the benefit of advancing technology in the relevant industry.

   c. The protection of micro, small scale and medium scale business - This is not clear, but it may be the case that a merger is required to protect the interests of these groups somewhere in Indonesia.

d. Impact to workforce - This appears to be analogous to a failing firm defence but with a focus on saving the employment of the merging company.

e. Implementation of laws and regulations - This appear to be a way of saying that a transaction that is required by a law or regulation is not subject to KPPU review.

5) There is now a requirement that **all documents for merger filing must be completed upon initial filing** and that the pre-assessment document completion review of the KPPU must be completed within 60 working days. So, it is important to note that now businesses that file to the KPPU must start their preparation for filing as early as possible so that the filing can be made before the deadline, in case the KPPU declines the initial filing because it finds some documents to be lacking.

6) There are also a few potentially significant changes to the form for notifying transactions to the KPPU. The form is now divided into two sections with detailed information on products being in section 2 which is now marked as "if required" by the KPPU. The required data on products in section 1 is now limited to a general list of products. Potentially, this could generate potential saving in time as it appears that **where there is no overlap in products, the KPPU would not require more detailed product information to be submitted**.

That said, it remains to be seen whether the KPPU can keep the promise of completing its qualifications within 60 working days after filing, and whether this new measure would result in a significant reduction of time for the KPPU to complete its review, which currently runs close to one year, and in many cases longer.

Otherwise, the documentary requirements and procedures are not changed much by KPPU Regulation No. 3/2019. Basically, businesses must make an initial submission consisting of a form and the required documents, which are then clarified and commented upon by the KPPU. This is followed by a time-limited review stage of 90 working days.

Given the issues discussed above and the fact that actual filing is likely to continue to be governed by practice as much as by written regulations, we will keep publishing updates on this topic as more details come to light. Be on the lookout for more client alerts on this topic.

www.hhp.co.id

HHP Law Firm
Pacific Century Place, Level 35
Sudirman Central Business District Lot. 10
Jl. Jenderal Sudirman Kav. 52-53
Jakarta 12190
Indonesia

Tel: +62 21 2960 8888
Fax: +62 21 2960 8999