

## Indonesia: KPPU may change its approach in assessing penalties for late merger filings

### In brief

On 28 July 2023, speaking at a seminar at KPPU's head office, the competition authority's Director of Mergers and Acquisitions indicated that KPPU may consider applying a new method for calculating administrative fines taking into account the sanctioning provisions under the Government Regulation No. 44 of 2021 ("**Regulation 44**"). This would enable KPPU to impose fines of more than the nominal limit of IDR 25 billion set under the Government Regulation No. 57 of 2010 ("**Regulation 57**"), increasing the legal risks for failing to file merger notices on time.

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### Precedent for abandoning the administrative fine limit of IDR 25 billion

The penalty for failing to file a merger notice in time is an administrative fine. Originally, the Antimonopoly Law (Law No. 5 of 1999) set the maximum amount of administrative fine at IDR 25 billion. In accordance with this limit, Regulation 57 followed to set the maximum amount for administrative fines for failure to file a merger notice in time at IDR 25 billion.

Since 2020, the Omnibus Law on Job Creation (Law No. 11 of 2020, as restated by Law No. 6 of 2023) authorizes the Government to issue a regulation on the amount of administrative fines that can be imposed for violations of the Antimonopoly Law. Subsequently, the Government issued Regulation 44, which changes the method for calculating the maximum administrative fine. Under this regulation, there is no maximum nominal amount for the fine. Rather, the maximum is a percentage of either the profit or the revenue arising from the violation. The resulting fine may exceed IDR 25 billion.

Regulation 44 does not specify the maximum fine for failure to file a merger notice, and it does not revoke Regulation 57. Because of this, it can be argued that the maximum limit for administrative fines under Regulation 57 still applies for failure to file a merger notice.

In KPPU case No. 13/KPPU-M/2022, the majority of a panel of three KPPU commissioners used Regulation 44 as the basis for calculating administrative fines. One commissioner issued a dissenting opinion, arguing that the correct basis for calculating fines is Regulation 57. The fine imposed in this case was below IDR 25 billion. Nevertheless, this case illustrates the possibility that KPPU may interpret that Regulation 44 has superseded Regulation 57, thus enabling it to impose administrative fines of more than IDR 25 billion for a late merger filing.

### Incoming KPPU commissioners may follow precedent

In subsequent late merger filing cases, the KPPU has not referred to Regulation 44. That said, KPPU is currently undergoing a transition. The President has extended the term of office of the current commissioners, beyond the original expiry date of 27 April 2023, but the Antimonopoly Law requires new commissioners to begin their term by 28 April 2024, at the latest. It is likely that most commissioners will be new to their post. There are usually changes in policy after a new set of Commissioners take charge. There is an open possibility that such a change would include a possible new view on how to calculate the maximum administrative fine for late merger filing.

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