

# KPPU has issued a new merger control regulation; what does it mean for your business?

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On 2 October 2019 the Indonesian antitrust enforcer, Komisi Pengawas Persaingan Usaha (**KPPU**), issued a new merger control regulation: Regulation No. 3 of 2019 on the Assessment of the Merger Consolidation or Share Acquisition that could result in Monopolistic and Unfair Business Practices (the **New KPPU Merger Control Regulation**). The new regulation came into force on 3 October 2019. The issuance of this new regulation is yet more evidence that the current KPPU leadership is in motion to revolutionize antitrust enforcement in Indonesia.

The most notable changes introduced in the New KPPU Merger Control Regulation are as follows:

- **Defined period for the KPPU to conclude the work**

As a matter of practice, complete filing documents can be "waitlisted" for weeks until we hear something back from the KPPU. There is now a more defined period: within 60 working days of filing, the KPPU will have to conclude the clarification-and-research stage of checking completeness of the filing; and within 90 working days, the KPPU will have to conclude their substantive assessment.

That is a total of 150 working days, slightly more than six months on a rough calculation but at least there is certainty.

- **Simplified form**

There is no longer a need to complete the M1/K1/A1 form for filing or the M2/K2/A2 form for consultation; there is now a unified form for both types of procedural steps, which makes life simpler for those companies which hesitate between, or follow both, steps. Information regarding competitors, customers, and suppliers is no longer required to be filled in for the initial filing. Only if the KPPU deems this information to be material and important, the KPPU will request it during the clarification-and-research stage.

- **Clarity on the conversion rate**

The notification threshold is set in Indonesian Rupiah (IDR). However, an offshore transaction often requires conversion from the native currency used by the companies

involved to IDR. The New KPPU Merger Control Regulation provides that the reference for currency conversion is the middle exchange rate issued by the Central Bank of Indonesia.

- **All assets are now accounted for (not just the ones located within the territory of the Republic of Indonesia)**

As per Article 4 of the New KPPU Merger Control Regulation, the assets threshold calculation shall include all entities in the surviving/acquiring group in a direct ownership relationship up to the highest ultimate beneficiary and down to the lowest subsidiary as reported in the financial report.

The New KPPU Merger Control Regulation is silent about the territorial boundaries that were once provided.

Upon our informal discussion, the KPPU confirmed that they wish to see all assets as a whole, as per the financial statement, regardless on whether the assets are located within or outside the territory of the Republic of Indonesia.

Compared to the prior KPPU regulation, the New KPPU Merger Control Regulation changes the asset threshold – currently set at IDR2.5 trillion (around US\$178.62 million<sup>1</sup>) – from a local to a global asset value. In practice, this means "lowering the bar" of the merger filing obligation, in terms of asset value, considerably.

The KPPU further clarifies that, for their ease of reference, filing parties can separate the assets based on location when filing in the form.

- **What about joint ventures?**

The previous KPPU Regulation clearly provided what to do with joint ventures: if it's a newly established joint venture, there is no obligation to report. If the joint venture is created through share acquisition, then the notification threshold is met and there was an obligation to report.

Now, the New KPPU Merger Control Regulation is silent about joint ventures. It is unclear whether the prior approach to joint ventures is still the way to go. At the beginning of the enforcement of the New KPPU Merger Control Regulation, joint venturers may be advised to consult with the KPPU to gain more clarity. We hope a clearer KPPU practice will emerge in the longer term.

- **Asset transfers are now caught**

Pursuant to Article 5.1 of the New KPPU Merger Control Regulation, asset transfers are now considered in the same way as share acquisitions and may become notifiable if: (1) they cause the transfer of control of the relevant assets; and/or (2) increase the ability of the acquirer to control a relevant market.

There is no further explanation of this provision (or any guidance has not yet been published). We are yet to see how this provision will be enforced by the KPPU.

This particular provision has received considerable criticism, as it overtakes the hierarchically superior legislations – the Company Law and Competition Law, as well as the Government Regulation on Mergers and Acquisitions – that has not regulated asset transfers.

- **No nexus offshore transactions are now caught**

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<sup>1</sup> Conversion rate as of 24 October 2019

Under Article 23.1 of the New KPPU Merger Control Regulation, offshore transactions without a clear local nexus are now caught and must be reported to the KPPU - regardless of whether they have any effect in the Indonesian market. The article reads:

*"A Transaction related to Merger, Consolidation, or Acquisition of Share and/or Asset of a Company that meet the Notification threshold and took place outside of the Republic of Indonesia must be notified to the Commission [KPPU], if all of the parties or **one of the parties** who are involved in the Merger, Consolidation, or Acquisition of Share and/or Asset of a Company conduct its business or sales in the Territory of Republic of Indonesia"* (emphasis added).

A strictly literal interpretation of this article and our informal communication with the KPPU suggest that, under the New KPPU Merger Control Regulation, no local nexus is required for offshore transactions. As long as one of the parties to the transaction has a sufficiently large Indonesia presence and meets the notification threshold, any of its transactions would seem to be potentially reportable to the KPPU.

For example, if you're a Japanese company and you have a subsidiary in Indonesia, and you would like to acquire a company in India that has nothing to do with Indonesia (at all), the transaction will now be caught and must be reported to the KPPU if the thresholds are met.

### How may this impact your business?

There are some positive changes introduced in the New KPPU Merger Control Regulation and, conversely, some more challenges remain. The scope of notifiable transactions is now wider and more varied, whilst the timeframe is set stricter. This begs the question whether the KPPU will be ready to handle a large number of transactions at the same time. Will their human and other resources be available and up for the challenge?

Corporations would need to take extra caution to ensure whether their transactions are now notifiable, or to think about alternate transaction structures, and to ensure compliance with the notification obligation – if triggered.

Changing regimes and regulations should not hinder your business; we must navigate the additional complexity of the law in a more pro-active and sophisticated way.

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