

Guidelines on Mergers, Consolidations or Acquisitions Assessments Issued by Indonesia's Competition Commission

Overview

The Indonesian Competition Commission (“KPPU”) recently issued Guidelines on Mergers, Consolidations or Acquisitions Assessment (“**Guidelines**”) as a follow-up to KPPU Regulation No.3 of 2019 on the Assessment of Mergers and Consolidations of Business Entities or Acquisition of Shares in Companies that May Result in Monopolistic and/or Unfair Business Competition Practices (“**Regulation 3/2019**”), which was issued last year. Please see our previous client update on Regulation 3/2019 [here](#).

Despite the title of the 94-page Guidelines suggesting that it would only provide a technical and implementing directive for KPPU officers and businesses in conducting these assessments for the notification of mergers, consolidations, acquisitions and asset transfers, the Guidelines provide various adjustments, clarifications and (in some ways) limitations, on provisions that are not sufficiently explained in Regulation 3/2019. This includes, among others, elaboration on the types of transactions that must be notified and exemption of notification requirements for the establishment of joint ventures that do not involve a merger, consolidation or share acquisition, clarification of asset transfers that do not require notification and the introduction of a simple notification procedure.

Three most significant changes

- Since the day the notification requirement in Indonesia was first introduced, KPPU had always used a ‘one size fits all’ approach to the procedure for a notification assessment, which has sometimes seemed to not take into account the complexity of each transaction. As the Guidelines introduce a notification with a simple assessment, which is subject to meeting certain criteria, this will accelerate the procedure for a notification assessment, from 60 to 150 business days down to just 14 business days, thereby reducing the required time and, ultimately, costs for the parties involved in the transaction.
- The Guidelines elaborate on asset transfers that do not require notification, which has given clarity to businesses, as under Regulation 3/2019, it seemed that all transactions that met the criteria set out in it, which in our view was too broad, needed to be notified to KPPU.
- The Guidelines also set out more stringent prerequisites for KPPU to review a foreign-to-foreign transaction by re-introducing a local nexus which requires KPPU to consider whether such transaction has an impact on the Indonesian domestic market. This is not clearly stipulated in Regulation 3/2019 and seems to be an expansion of KPPU authority

Key differences in the notification assessment due to the Guidelines

We set out below the main changes brought about by the Guidelines.

1. **An expansion of the transactions that must be notified**

Regulation 3/2019 defines only two types of transactions that had to be notified to KPPU, namely share acquisitions and transactions that were equivalent to share acquisitions (i.e., asset transfers).

The Guidelines expand such definition of share acquisition to include the following:

- (a) share acquisitions directly from the shareholders;
- (b) share acquisitions through capital markets; or
- (c) capital injections.

Further, the Guidelines also include the acquisition of a participating interest as a transaction that is equivalent to a share acquisition. Although in practice we understand that these types of transactions were in fact recognised as types of transactions that must be notified, the inclusion of these transactions in the Guidelines provides clarity for businesses. However, it remains to be seen whether the definitions of shares acquisitions are exhaustive, as KPPU has, from time to time, loosely interpreted their own regulations to cover types of transactions that are not strictly regulated.

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In relation to the above, the Guidelines further clarify that a share acquisition is deemed to require notification only if:

- (a) the acquisition results in a change of control;
- (b) the shares acquired are shares with voting rights; or
- (c) the shares acquired have special rights (e.g., for appointing members of the company's Board of Directors and/or Board of Commissioners).

Please be advised that a share acquisition without voting rights (e.g. preferred stocks) is not considered to be a change of control.

2. Exemption of notification requirements for joint ventures

Prior to the issuance of Regulation 3/2019, the previous regulation expressly exempted the establishment of joint ventures from KPPU notification requirements, where the joint venture did not involve a merger, consolidation or share acquisition. Such exemption is absent in Regulation 3/2019; however, further research at KPPU has indicated that the establishment of joint ventures, as mentioned above, are still exempted from KPPU notification requirements.

In relation to the above, the Guidelines explicitly include provisions exempting the establishment of joint ventures from KPPU notification requirements, to the extent that such transactions do not involve a merger, consolidation or share acquisition. This clarification once again provides clarity for exemptions to the establishment of joint ventures, which do not involve a merger, consolidation or share acquisition.

3. Statement of not requiring notification

The Guidelines provide a further explanation in relation to KPPU's discretion in issuing a 'statement of not requiring notification' under Regulation 3/2019. Under the Guidelines, KPPU may issue such statement during the clarification and research phase within 60 business days after the notification submission date, provided that the transaction:

- a. does not meet the statutory thresholds;
- b. is a transaction between affiliated companies;
- c. does not result in a change of control;
- d. is for the establishment of a joint venture that does not involve a merger, consolidation or shares acquisition;
- e. falls under the category of exempted asset transfer; or
- f. is exempted from notification requirements under the implementing laws and regulations.

Despite the above, businesses should be aware that KPPU has sole discretion in issuing a statement of not requiring notification and it has no obligation to explain its decision to the notifying parties, if they decide to proceed to the next stage of the assessment phase, even if the notifying party believes that the transaction has met all of the above conditions.

4. Clarification on asset transfers that do not require notification

Although asset transfers are one of the major issues regulated under Regulation 3/2019, the regulation did not provide a detailed explanation of the notification requirements for asset transfers. As such, the Regulation left much room for interpretation, creating confusion and uncertainty for businesses intending to conduct such transactions.

The Guidelines provide the criteria for transfers of assets that do not need to be notified to KPPU, thereby providing certainty to businesses. Such criteria are as follows:

- a. for a non-banking business, the asset transfer value is less than Rp250,000,000,000 (two hundred fifty billion rupiah);
- b. for a banking business, the asset transfer value is less than Rp2,500,000,000,000 (two trillion five hundred billion rupiah);
- c. the asset transfer is conducted over the ordinary course of business (e.g. transfer of consumer goods);

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- d. the asset is industrial property that meets specific criteria (e.g. buildings designated by the buyer as an office or assets designated as social and/or public facilities); or
- e. the transferred assets are not directly related to the acquirer's business activities.

Consequently, the implication of the above is that there is now greater certainty for businesses to assess whether they are required to notify KPPU of their planned transaction, and potentially avoid needlessly engaging in the time-consuming and costly notification process.

5. ***Limitations to notifiable foreign-to-foreign transactions***

The Guidelines clarify KPPU's authority to review foreign-to-foreign ("**FTF**") transactions.

Regulation 3/2019 gave KPPU very flexible prerequisites to review an FTF transaction and seemed to remove the local nexus for an FTF transaction, stipulating that KPPU must be notified if one of the parties thereto conducts business activities or has sales in the Indonesian market.

The Guidelines introduce more stringent prerequisites for KPPU to review an FTF transaction by incorporating the local nexus and requiring KPPU to consider whether such FTF transaction has an impact on the Indonesian domestic market (e.g. the target is a company that does not conduct any business activities in Indonesia but has a subsidiary that does conduct business activities and/or sales in Indonesia). As the Guidelines only provide an example of an FTF transaction that must be notified to KPPU, we understand that such definition may be interpreted by KPPU on a case-by-case basis.

6. ***Summary report and the language of supporting documents***

The Guidelines stipulate that all of the submitted supporting documents for a notification and consultation (e.g. financial statements, deeds of establishment and other transactional documents) must be in the Indonesian language. Consequently, such provision may cause certain businesses (especially foreign companies) that only have non-Indonesian versions of such documents to incur additional costs for translation.

However, the Guidelines also provide an alternative in the form of a 'summary report' if such documents are not available in the Indonesian language. A summary report must be written in Indonesian and currently is only available as an option for financial statements and articles of association, and must at least contain the following information:

- a. Financial statements: Reasons for using the summary report format, asset value, sales value, and statement and signature of the management or head of the company.
- b. Articles of association: Company identity, shareholders' composition of the company, the composition of the Board of Directors and Board of Commissioners of the company, and the business activities of the company.

The option to use the summary report format (which would likely be only a few pages) will be less time-consuming and more cost effective for businesses, especially for companies that only have non-English and non-Indonesian versions of financial statements and/or articles of association. In the past, they had to have hundreds of pages of documents translated into the English and/or Indonesian languages.

7. ***Notification and consultation results***

Under the Indonesian Competition Law, the results of a notification or consultation to KPPU will be provided to the applicant in the form of an opinion issued by KPPU ("**Opinion**").

Pursuant to Regulation 3/2019, such Opinion would state either of the following:

- a. there is no indication of alleged monopolistic practices or unfair business competition in the transaction; or
- b. there do exist elements of alleged monopolistic practices or unfair business competition in the transaction.

If the Opinion includes (b) above, such transaction would be subject to necessary measures, such as conducting an investigation and imposing administrative penalties, and even unwinding the transaction.

However, this is further clarified by the Guidelines, which provides for an additional statement that KPPU may insert into an Opinion, stating that "there is an element of alleged monopolistic practice or unfair business competition, with conditional approval". This statement will allow KPPU to issue Opinions that accommodate transactions that may contain alleged violations of the Competition Law but may still be

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approved by KPPU, provided that the business entity remedies/resolves such alleged violations. Further, our recent notification results and interview with a KPPU official indicate that the Opinion issued by KPPU will no longer use a format that details the assessment that KPPU had carried out on the transaction. Moreover, the public version of such Opinion will no longer be published on the KPPU website, which, in our view, will protect the confidentiality of the transactions.

8. **Conditional approval**

Further to paragraph 7 above, under the Guidelines, conditional approval is defined as an option offered by KPPU, if KPPU discovers alleged or unfair business competition in the course of reviewing a notification or consultation, and deems that this discovery may still be remedied. Such remedies would include (i) structural adjustment measures and/or (ii) adjustments to the business behavior, as set out below:

Structural adjustments

- a. Share divestment; or
- b. Divestment equivalent to shares (e.g. assets).

Behavioral adjustments

- a. Providing access to intellectual property rights that are related to essential facilities;
- b. Eliminating potential barriers to competition (e.g. an exclusive contract or barriers to supply);
- c. Implementing a reasonable price strategy;
- d. Complying with the relevant regulations.

If the offered conditional approval is not agreed to or there is no change in behavior, KPPU will initiate an investigation of the alleged violation.

9. **Notification with a simplified assessment**

The Guidelines provide an alternative to the time-consuming and costly notification and consultation procedures under Regulation 3/2019, in the form of a notification with a simplified assessment ("**Simplified Notification**"). To be eligible for a Simplified Notification, which is initiated on KPPU's initiative or at the request of the parties to the transaction, the transaction must meet the following requirements:

- a. the parties to the transaction are not engaged in the same business activities or vertically integrated business activities;
- b. the parties to the transaction are not engaged in the same business activities or vertically integrated business activities, but have a limited joint market share;
- c. the transaction does not have the potential to result in a violation in the form of tying and/or bundling or behavior that impacts on network externalities;
- d. the notification is submitted no later than 30 business days as of the effective date of the transaction; and/or
- e. the transaction is an acquisition of jointly controlled companies which results in sole control by one of its previous controllers.

Supporting documents

In addition to the supporting documents required for the submission of a notification, the Guidelines stipulate that a Simplified Notification also requires the following supporting documents:

- a. cover letter stating the need for a Simplified Notification;
- b. transaction impact analysis; and
- c. financial assessment for all of the controlling parties up to the ultimate shareholders.

Period

The time period for the issuance of a Simplified Notification is 14 business days after KPPU approves the procedure for the Simplified Notification, during the clarification and research stage. This new time

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period is a significant reduction compared to the 150 business-day period allowed for a 'full' notification under Regulation 3/2019, and ensures that a simple transaction can comply with notification requirements in a timely manner.

Notwithstanding the above, as the simplified assessment procedure is still quite new to KPPU, further research needs to be carried out to fully understand the implementation of this procedure. For example, it is possible that KPPU will request more documents and data, that are not regulated in the Guidelines, to help them expedite the assessment process and comply with the time frame set out for a simplified assessment.

Conclusion

Should you have any queries on how the above amendments may affect your transactions in Indonesia, please do not hesitate to get in touch with us. We are proactively monitoring developments and will keep you updated as more information becomes available.



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If you would like to discuss any aspect of this update, or your business activities or plans, please feel free to contact us.



Ardian Deny Sidharta
Partner
deny_sidharta@soemath.com



Robert Reid
Foreign Counsel
robert_reid@soemath.com



Oene J. Marseille
Foreign Counsel
oene_marseille@soemath.com



Verry Iskandar
Senior Associate
verry_iskandar@soemath.com



I Gusti Adika Satriawan Ranuh
Associate
adika_ranuh@soemath.com