

Updating the Mechanism on Supervising Mergers and Acquisitions in Indonesia

As in implementing regulation of Law of the Republic Indonesia No.5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition and Government Regulation of the Republic of Indonesia No.57 of 2010 on Mergers and Consolidations of Business Entities and Shares Acquisition of Companies that may result in Monopolistic Practices and Unfair Business Competition (“GR 57/2010”), the Business Competition Supervisory Commission (Komisi Pengawas Persaingan Usaha, “KPPU”) promulgated KPPU Regulation No. 3 of 2019 concerning the Assessment on Merger or Consolidation of Business Entities, or Acquisition of Companies Which May Result in Monopolistic Practices and Unfair Business Competition (“KPPU Regulation No. 3”) on 3 October 2019, as one of the measures to align with similar authorities worldwide within the field of corporate action and in the spirit of the antitrust law, to better supervise any merger and acquisitions in Indonesia.



Objectives of KPPU Regulation No. 3

The regulation was issued with the objective of increasing the stringency of mergers and acquisitions, which activities were previously regulated rather leniently under the several previous regulations as the implementation of the antitrust law.

As a result of KPPU not being able to keep fully aware of and to keep an eye on the numerous asset transfers in Indonesia which have essentially conflicted with the spirit of the antitrust law, KPPU Regulation No. 3 has focused mainly on the provisions of asset transfers and acquisitions which weren't expressly regulated in the previous regulations.

What's New in Regulation No. 3?

1. Transfer of Assets Provisions

As in comparison to GR 57/2010 and KPPU Regulation No. 13 of 2010 as amended by KPPU Regulations No.10 of 2011, No. 3 of 2012 and No. 02 of 2013. which such KPPU regulations were all revoked by KPPU Regulation No. 3, (“Revoked Regulations”) the definition of acquisition both in GR 57/2010 and the Revoked Regulations has been set

to have broader meaning, where it is now defined as a legal action made by a business actor to acquire shares and/or assets of a company which results in the transfer of the company's control and/or its asset. This indicates that other than transfers of shares, business actors now have to keep an eye on any transfer of assets they make which potentially results in the total value of their assets becoming more than IDR2.5 trillion or if the value of the sale of assets being sold exceeds IDR5 trillion.

However, it is understood that KPPU Regulation No. 3 defines asset to include both tangible and intangible asset, which seems to be very broad and general and inevitably suggests any business actor will have to make to set a consultation appointment with KPPU to determine whether or not it is required to submit a notification after the transaction.

Further on the asset transfer, under KPPU Regulation No. 3, any transfer of assets will be considered an acquisition, to the extent such transfer results in the transfer of control over such assets or such transfer increases the ability of a business entity to control a market.

Nevertheless, KPPU is yet to provide further details on what determines whether a business entity will be deemed 'capable' of controlling a market by receiving and/or having a certain value of assets.

2. New Assessment Analysis

KPPU Regulation No. 3 provides a set of new analysis indicators to assessing companies. As reflected in the Revoked Regulations on the analysis used for assessment of mergers or consolidations of business entities, or shares acquisition of companies were analyze of market concentration, barrier of entering a market, antitrust attitude potential, efficiency, and/or insolvency.

As conveyed in KPPU Regulation No. 3, there has been an effort by KPPU to keep the regulation up to date with the country's economic development elements. This is manifested in the new analyze, which among others are analyze of technology and innovation development, micro, small, and medium enterprises protection, and impacts on manpower.

3. Overseas Mergers, Consolidations, or Acquisitions of Shares and/or Asset of Companies ("Overseas Transactions")

One of the differences between the Revoked Regulations and KPPU Regulation No. 3 lies in the form itself. It shows that KPPU has attempted to set out the details which were previously regulated in the Revoked Regulations in a form of guidance supplementing KPPU Regulation No. 3 as an attachment.

There has been a reduction in details shown particularly in Overseas Transactions provisions of which were previously described in detail in the Revoked Regulations, while on the other hand, KPPU Regulation No. 3 seems to limit the provisions on such matters to be rather general.

In the Revoked Regulations, Overseas Transactions were detailed as an ease of reference, which stipulated further the jurisdiction and the determination of its impact on Indonesian market, while the details for such matters are not stated further in KPPU Regulation No. 3.

Issues on Business Actors

Notwithstanding a firmer supervision by KPPU on mergers or consolidations of business entities, or shares acquisition of companies, which is good on the government side, the minimal details on the transfer of assets provisions may cause confusion for business actors as to whether they are required to submit a notification during their post-transaction process.

In addition, the absence of further provisions on Overseas Transactions in KPPU Regulation No. 3 may give rise to further uncertainty regarding which matters should be classified as Overseas Transactions.

Conclusion

KPPU Regulation No. 3 provides relatively more stringent provisions on the supervisions of merger or consolidation of business entities, or shares acquisition of companies, but KPPU still needs to set out further guidance on several details in the Regulation, particularly on the transfer of assets and Overseas Transactions.

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