

ADVISORY

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New KPPU Guidelines on Merger Control Rules

This advisory discusses the key take away points of the new KPPU Guidelines, especially regarding the matters the introduction of which under KPPU Regulation 3/2019 was controversial. How do you think they will affect your business?

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New KPPU Guidelines on Merger Control Rules

KPPU has recently issued its long-anticipated guidelines on the Indonesian merger control rules (“**KPPU Guidelines**”) under KPPU Regulation No. 3 of 2019 on The Assessment of Mergers or Consolidations of Business Entities or Acquisitions of Shares in Companies (“**KPPU Regulation 3/2019**”) issued at the end of last year. The guidelines are relatively long and detailed (almost 100 pages), and some of their content is still subject to the KPPU’s interpretation.

Below we discuss the key take away points of these new KPPU Guidelines, especially regarding the matters the introduction of which under KPPU Regulation 3/2019 was controversial.

Share Acquisitions, Asset Thresholds and Acquisitions of Instruments Deemed Similar to Shares

The KPPU Guidelines stress that in addition to conventional share acquisition transactions, merger control rules and post-acquisition notification requirements also apply to share acquisitions on the stock exchange, share acquisitions through capital increases (the issuance of new shares) and, interestingly, acquisitions of other instruments with share-like characteristics such as assets and participating interests. An example is the acquisition of a participating interest in the oil and gas sector which is now also subject to the merger control requirements. On the other hand, the KPPU Guidelines explain that the acquisition of shares without voting rights or with limited voting rights (preferred stock) does not cause a change of control in the company and therefore does not need to be notified to the KPPU.

The KPPU Guidelines confirm (implicitly, still) that the sales/revenue and asset value taken into account for threshold calculation purposes are the Indonesian sales/revenue (excluding exports) and global assets of the parties. The same assets and sales/revenue thresholds apply, i.e. audited figures of IDR 5 trillion for sales/revenue and IDR 2.5 trillion for assets (for non-banking industries) on a group basis (including the ultimate HoldCo and all controlled subsidiaries).

Criteria for Asset Acquisition Exempt from Notification

Certain asset acquisitions are exempt from the notification requirement. The exemption applies:

- a) if the transaction value is less than IDR 250 billion for non-banking industries;
- b) if the transaction value is less than IDR 2.5 trillion for banking industries;
- c) if the asset transaction is within the ordinary course of business of the acquirer depending on the business profile of the acquirer and the purpose of the acquisition, but limited to the sale of finished goods by a manufacturer/distributor to a retailer (to be distributed to consumers) and the purchase of inventory which will be used for production within 3 months;
- d) if the asset acquisition is in the property sector, if a building is bought (interestingly) to be used as the purchaser's office or for social or public facilities; and
- e) to transactions in which the assets purchased are not related to the purchaser's business, an example of which is the acquisition of assets with a CSR or non-profit objective.

Exemption for the establishment of a greenfield JV (Joint Venture)

The establishment of a Greenfield JV which does not involve any merger, consolidation, or acquisition is explicitly exempt. After the JV has been established, any merger, consolidation or acquisition by the JV will be subject to the merger control rules. This is similar to the rules under KPPU Regulation No. 2 of 2013 which was replaced by KPPU Regulation 3/2019.

If the JV involved in a merger, consolidation or acquisition, the ultimate HoldCo of the JV will be the JV itself and therefore, the asset value and sales/revenue threshold is calculated based on the financial report of the JV and the target company (including its subsidiaries).

The Reportability of Foreign transactions

One of the long-anticipated explanations is with regard to the foreign transaction reportability criteria. One of the controversial changes introduced under KPPU Regulation 3/2019 is that in order for a foreign transaction to be reportable, it is sufficient for only one party to the transaction to be doing business in or have sales to Indonesia. It is controversial since the test is too easy to satisfy, and the structure captured by the test is arguably not sufficient to establish a measurable impact on the Indonesian market within the context of merger control. The KPPU Guidelines do not clarify this point; they keep the rule that only one party to the transaction doing business or having sales in Indonesia is sufficient to satisfy the local effect test, and even left open one of the criteria to be "[the transaction] for having an impact on the Indonesian market, **including** where only one party to the transaction doing business in Indonesia while the other party does not but has sister company doing business in Indonesia".

Simple notification review process

The KPPU Guidelines introduce a simplified post-merger notification process in which the KPPU's review should be completed within 14 working days of receipt of KPPU approval for the use of a simplified post-merger notification to process the transaction. This is different from the 90 working day review process for a normal notification. The simplified post-merger notification process can apply to transactions if among other things:

- a) the parties to the transaction do not engage in the same business activities or the relevant market;
- b) the parties to the transaction do not engage in business activities which are vertically integrated; and/or
- c) it results in sole control by 1 party which initially already held joint control in the target company with the other party.

The use of a simplified post-merger notification process by the KPPU may be at the KPPU's initiatives or at the request of the party notifying the KPPU of the transaction (in which case the party must submit a request letter to the KPPU explaining why the parties believe that their submission should be a simplified post-merger notification process).

Importantly, the documents to be submitted for this simplified post-merger notification process are the same as for the normal notification process.

Pending Issues

The KPPU Guidelines do clarify several matters such as the exemption of certain asset acquisitions from the notification requirement, the exemption for establishment of a JV from the merger control rule including the calculation of the assets and sales of a JV for the threshold for reportable transactions. However, the KPPU has still left some major points unresolved, such as the fact that the asset value for the reportability threshold is (implicitly) calculated based on the global/worldwide assets and the fact that only one party's having sales/doing business in Indonesia in a foreign-to-foreign transaction causes the transaction to be reportable to the KPPU.

We are also in the process of confirming some of the provisions and the details of the guide with KPPU.

ABOUT M&T ADVISORY

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