

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Suspensory Effects of Merger Notifications and Gun Jumping - Note by Indonesia

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This document reproduces a written contribution from Indonesia submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

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Indonesia

1. Form of Supervision of Merger di Indonesia

1. Indonesian business competition law has been put into effect since 1999 through Law No. 5 Year 1999 regarding Prohibition of Monopolistic Practices and Unfair Business Competition. Supervision of merger has been provided by an Articles 28 and 29 in the said law, wherein further regulating has been provided by The Government Regulation No. 57 Year 2010. This shows that the supervision of merger under the new business competition law has just become effective since 2010.

2. Article 29 paragraph (1) of Law No. 5 Year 1999 (Law No. 5/1999) says that “Merger or consolidation of business entities or acquisition of shares as intended in Article 28 causing the value of assets and or that of the sales thereof to exceed a certain amount must be notified to the Commission by no later than 30 (thirty) days as of such merger date, consolidation date, or acquisition date”. Based on the said in Article, Commission for the Supervision of Business Competition (KPPU) shall supervise mergers and acquisitions (M&A) by adhering to a post-notification regime. This means that business actors shall be obligated to report merger and acquisition activities to KPPU following the declaration of the said merger and acquisition legally effective.

3. Based on Article 29 above, the deadline for the reporting of the M&A is 30 (thirty) days as of the declaration of the M&A legally effective. The output of the reporting is the assessment by KPPU set forth in the Opinion of KPPU. If business actors are delayed or do not report the M&A that has met the provisions, then KPPU has the authority to impose penalty for the delay in a minimum amount of Rp1 billion (one billion rupiah) per delayed day and a maximum amount of Rp25 billion (twenty-five billion rupiah).

2. Pre-Merger Consultations

4. Although Law No. 5/1999 states that business actors shall be obligated to make a report following the M&A transactions, however, Article 10 of Government Regulation Number 57 Year 2010 (Government Regulation No. 57/2010) opens the opportunity to business actors to consult KPPU voluntarily so as to obtain opinion of KPPU with regard to the M&A plan. The objective of such consultation is to know whether or not such M&A plan has a potential of violating Law No. 5 Year 1999. Business actors are not charged with any costs for such consultation as commonly adhered to by merger control regimes in other countries.

5. Nonetheless, since it is voluntary in nature, the opinion of KPPU with regard to such consultation is not an approval or rejection of the M&A plan and does not eliminate the obligation of business actors to report the M&A following its declaration legally effective. This means although business actors conduct consultations prior to the implementation of the M&A, they still have to fulfil their obligation to notify such M&A after it becomes legally effective.

6. In light of the approach or analysis conducted towards such consultation and notification is the same, consequently in order to avoid a duplication of analysis and extending the analysis process, then KPPU is allowed not to change the opinion based on

the consultation result in the said notification assessment phase provided that there are no significant changes to the transaction.

7. Referred to as significant changes are among other things (i) decreased number of business actors in the relevant market that has a high concentration, hence, the change of the value of the market concentration is more than 500; (ii) the change of policy plan in the aftermath of the M&A; or (iii) the value of the market concentration during the consultation is below 1800, however, at the time of notification is 1800. This incentive is granted to encourage business actors to conduct consultations prior to the implementation of the M&A.

3. Gun Jumping in Mandatory Post Merger Notification?

8. The term “gun jumping” is used when business actors settle the M&A transactions before obtaining clearance from the competition authority. In such a context, the merger supervision regime does not only use a mandatory pre-merger notification system, but must be followed with the regulating of the standstill-clause. This issue has not being recognized in the supervision of the M&A in Indonesia, due to the following three factors:

1. Pre-merger notification is named as consultation in the Indonesian system, thus, it is voluntary in nature and business actors are not obligated to do it.
2. Mandatory post-merger approach causes the opinion of KPPU not to serve as an approval or rejection of the M&A plan.
3. During the assessment process of the pre-merger consultation, business actors may still conduct the M&A process. KPPU does not have authority to stop an M&A process, either.

9. The question that might arise is what does KPPU do when an M&A is conducted without giving a notification to KPPU? In this regard, KPPU may take actions based on Article 28 paragraphs 1 and 2 of the Competition Law that reads as follows: (i) business actors shall be prohibited from conducting mergers or consolidations that may result in the occurrence of monopolistic practices and or unfair business competition; and (ii) business actors shall be prohibited from acquiring the shares of other companies if such action may result in the occurrence of monopolistic practices and or unfair business competition.

10. In the said context, if an M&A that is alleged to result in the occurrence of monopolistic practices and or unfair business competition is still conducted, then KPPU may commence an investigation on the alleged violation by focusing the substantiation process thereof on various forms of monopolistic practices or unfair business competition that have been brought about by the enhanced market concentration through such M&A.

11. Article 29 in business competition law regulates that business actors shall be obligated to give a notification to KPPU following the date of the implementation of the said M&A. A delay of notification shall entitle KPPU to impose administrative penalty in the amount of Rp1 billion for every delayed day. Notification delay cases today constitute one of the violation forms that is frequently dealt with and for the year 2018 alone, KPPU has decided 4 (four) notification delay-related cases.

12. So, we can conclude that Indonesia does not adhere to the term gun jumping in controlling mergers. However, any action taken by business actors that leads to monopolistic practices and or unfair business competition through M&A actions can be

enforced by KPPU. In the meantime, the absence of notification will open the opportunity for the imposition of penalty on business actors and it is expected that the said two models of merger control can prevent detrimental market concentration increase in Indonesia.

4. Changes in the Near Future

13. Currently, people's representatives holding seats at the House of Representatives (DPR) are working together with the government to discuss an amendment to business competition law wherein one of the points discussed in the amendment is to change M&A notification from mandatory post-merger to mandatory pre-merger. One of the efforts so that business actors conduct pre-merger notification and do not settle M&A transactions before obtaining an approval from KPPU or gun jumping is by way of working together with other regulators in order not to grant permits to business actors before obtaining clearance from the KPPU. This effort does require collaboration among KPPU and other regulators such as the Financial Services Authority, the Ministry of Law and Human Rights, Bank Indonesia, and the like. It is hoped that a synergy among KPPU and other regulators can reduce or prevent business actors from doing gun jumping in the future.