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JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

-- Note by Indonesia --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm

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INDONESIA

1. Application by Indonesian competition law

1. Merger control in Indonesia has been an article since the enactment of competition law, the Law No. 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Competition (the Law). The Article 28 and 29 who served as main provisions for merger control in the Law was upheld by unavailability of the required implementing government regulation. It takes 10 (ten) years for Indonesian government to pass an implementing regulation on merger control, names the Government Regulation No. 57/2010 on Merger and Acquisition which lead to Monopolistic Practices and Unfair Competition. To guide the implementation of such new merger regime, Indonesian Commission for the Supervision of Business Competition (KPPU) issued a regulation No. 13/2010 on the Guidance for Merger and Acquisition according to the competition law, which later revised by KPPU Regulation No. 3/2012 and No. 2/2013.

2. The scope of merger in Indonesian competition law constitutes three type of mergers, namely a merger of one company to other company, a merger of two companies to form one new company (dissolution), and a share acquisition (take over). The supervised merger and acquisition in a more general term serves as, the act of companies which creates concentration of control by independent company to other company/ies; or transfer of control from one company to independent company which causes concentration of control or market concentration. The adapted merger regime is a mandatory post-merger notification and voluntary pre-merger notification (or so calls by the Law as a consultation).

2. Subject of Indonesian Merger Control (Local nexus)

3. Merger control by Indonesian competition law applies to all companies with legal entity, which formed and has an office or performed activity in Indonesian territory, either individually or jointly by an agreement, performs business activities in economics[1]. Two stressed points are provided by this provision. First is a legal entity who established and has an office in Indonesia, and second, a legal entity performs (business) activity in Indonesia. It means that mergers by foreign company who is not establish and without an office in Indonesia, but has an activity in Indonesia (through its affiliation in Indonesia) subject to the application of competition law.

4. Not all mergers subject to the legal application, as like many other merger regimes, it shall be those exceeding a threshold for notification. Based on the regulation, the notified mergers shall beyond certain number of assets and sales turnover. For assets, they should surpassed IDR 2.5 trillion and IDR 20 trillion for M&A in banking. KPPU did not put different threshold for sales turnover, where it applies equally at IDR 20 trillion for their yearly sales turnover.

5. The notification also cannot apply to a merger between the affiliated companies. Affiliated by Article No. 7 Government Regulation No. 57/2010 means relation between companies, both direct or indirect relations, control or being controlled by each companies; or relation between two companies, both direct or indirectly, by one single company. It believes that mergers between affiliated companies will not alter market structure and existing competition. However, when the mergers performed by companies owned by the Government (state-owned company), it cannot be

[1] Article 1.5 – Business actor is any individual or enterprise, both take form of legal entity or not which establish and has an office or doing activity in Indonesia, both independently of jointly under an agreement, conduct a business activity in economic.

treated as an affiliation[2]. By this jurisprudence, all M&A by state-owned companies shall fall to notification threshold, even when the merging companies belong to the same government.

6. In the case of joint venture, KPPU rules that the obligation for notification can applied to a new joint venture company that builds by two companies with equal share. However, this obligation cannot be applied to a completely newly establish joint venture company. For example, when company A and company B cooperate and contribute their share for 50% each in a newly establish company C, and then this joint venture shall comply with notification threshold.

3. Extra-Juridical Application

7. In principle, KPPU has an authority to assess M&A which affect domestic market. Thus, any foreign merger which occurs outside of Indonesia may not create concern for KPPU when they did not affect competition in Indonesia. Such mergers will be assessed by considering the effectiveness of authority owned by the commission.

8. Foreign M&A defines by KPPU as mergers conducted outside of Indonesia and create direct affect to domestic market through their affiliation in Indonesia (whether they both have affiliations in Indonesia, or just one of the merging parties), or has a sister company[3] in Indonesia. Currently, foreign mergers occupy almost half of notification at KPPU (25 of 51 notifications in 2015).

9. The debate on extra jurisdictional nexus is a debate on the definition of subject of competition law. Jurisdictional issue rarely challenged by legal practitioners in Indonesia. Given multi interpretation of definition of business actor in competition law, KPPU able to define its perspective based on international practices. As abovementioned, the subject for the application of Indonesian competition law is any business actor which *establishes and has an office*, or *performs economic activities in Indonesia*. But indeed, the supervision is based on publicly available information (like domestic newspaper or international newsletter) and availability of resources. An assessment which solely based on effect (effect doctrine) without any business relation (both direct and indirect relation) cannot be performed in Indonesia.

10. It was concurrently occurred that the definition of performing economic activities did raised public debate which sometime decrease awareness for notifying their mergers to KPPU. Awareness by foreign company considers limited, and thus sometime creates issue on the implementation. One of the latest issues was the case of share acquisition of Woongjin Chemical Co. by Toray Advanced Materials Korea Inc, two South Korean-based companies.

11. This is a case of delay in notification by Toray Advanced Materials Korea Inc. which acquired the significant share (56.21%) of Woongjin Chemical Co. Due to the delay on notification for 5 (five) working days, KPPU imposed financial fine of IDR 5 billion to the acquiring company. The central focus in the case is Toray Industries, Inc. who owns 100% of Toray Advance Material Korea, Inc. Both companies are Korean-based. In Indonesia, Toray Industries, Inc. owns 8 (eight) direct subsidiaries that mostly doing activities in textile and chemical. Meanwhile, Wongjin Chemical

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2 KPPU Decision No. 07/KPPU-L/2007 (Temasek Case), affirmed by Supreme Court Decision No. 496K/Pdt.Sus/2008 dated 10 September 2008 declared that government as the share owner on a company cannot defined as a business actor.

3 Sister companies are subsidiary companies that are related by virtue of being owned by the same parent company. Each sister company is independent of the other sister companies, and the only relationship between them may be their common relationship to the parent company. Sister companies may produce a range of products that are quite different from each other or from those of the parent company. Sister companies may even be competitors, in some instances. However, there are sometimes arrangements between sister companies for information sharing or special pricing. In instances where sister companies have a common target market, the companies can reap the benefits of reduced costs from sharing marketing and advertising materials. (Investopedia - http://www.investopedia.com)

Co. (which also based in Korea), owns most of share at PT. Woongjin Textile, an Indonesian based company. Through the acquisition of Wongjin Chemical Co., Toray Advance Material Korea, Inc. can own almost all share of PT. Woongjin Textile in Indonesia. So, in addition to another Indonesian company own by Toray Advance Material Korea, Inc., in overall, Toray Industries, Inc. owns 10 (ten) subsidiaries companies in Indonesia. This transaction later combined joint asset and sales value of all subsidiary companies of Toray Industries, Inc. in Indonesia. Based on their financial report from 2011-2013, the joint asset value of Toray Industries, Inc. subsidiaries in Indonesia was IDR 4.3 trillion, with the joint sales value of IDR 5.6 trillion. The number is preceding the threshold by law[4]. Thus, the merger shall be notified to KPPU within 30 (thirty) days of its juridical effective date. At the case, one of the defences by the merging parties was ineligibility of merger notification, since the merging companies are not established in Indonesia.

12. Like the abovementioned, the debate on jurisdictional nexus (in merger assessment or other type of competition infringement) is a debate on the definition of "business actor" as the subject of competition law. As stipulated by Article 1.5 of competition law, business actor is any individual or enterprise, both take form of legal entity or not which established and has an office or doing activity in Indonesia, both independently of jointly under an agreement, conduct a business activity in economic. The debate can take place because inexistence of "*a comma*" or "*an and* " or "*an or*" within the article. Therefore, under the KPPU Regulation No. 13/2010 on the Guidance for Merger and Acquisition[5], KPPU strongly addressed the definition of foreign mergers which adapted by Indonesia competition law. This own interpretation is allowed by the Law, specifically under article 35 letter "f", which provided KPPU with a task to prepare and develop a guidance/guideline and other form of publications related to the application of competition law.

13. It is agreeable that there is need for a clearer definition of business actor in Indonesian competition law, especially to strictly define the scope of its application. It is important considering robust economic development in Indonesia which beyond what the law can overcomes. The amendment of competition law foreseens to be the only option for extending a clearer and wider application of competition law (with regard to its extra-juridical application). Recent proposal raised an issue of moving from single economic entity doctrine which currently adapted, to an effect doctrine which mostly adapted by American and European competition law.

4. Conclusion

14. Merger control considers new feature of Indonesian competition law regime. The formal application of Article 28 and 29 which served as the framework for merger control by competition agency was started by the implementing regulation passed in July 2010, ten years after the competition agency, KPPU, is established. Increased number of notification and consultation is an important landmark for increasing demand of M&A in Indonesia, and the region.

15. Indonesian competition law is currently applying mandatory post merger notification system, and a voluntary pre merger consultation. The regulation applies to three types of M&A with specific thresholds, and put aside M&A between the affiliated companies from its obligation for notification. Extra-juridical application known to adapt single economic entity doctrine, as the commission is striving to promote the effect doctrine system through the on-going amendment of its competition law. It was better said that, something written is better then something implied.

16. Meanwhile, foreign business awareness of Indonesian merger control need to be improved, as the debate on extra-juridical application of Indonesian competition law (including merger review) was never leave the headline. It is expected that the amendment along with proper advocacy to the business association can provide significant level of awareness in the juridical application of Indonesian competition law.

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4 Merger notification threshold of IDR 2.5 trillion asset and or IDR 5 trillion sales turnover for non-banking companies

5 Later revised by KPPU regulation No. 3/2012 and No. 2/2013