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PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by Indonesia --

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More documents related to this discussion can be found at http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm

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INDONESIA

1. Introduction

1. Indonesia Commission for the Supervision of Business Competition (KPPU) is an independent state agency formed by the Law No. 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Competition. One of the mandates to KPPU is to conduct assessment on merger and acquisition as stipulated by the article 28 and 29 of the Law. Even though the Law has been implemented from year 2000, but the beginning of merger control regime by Indonesian competition law only can be started in 2010, after ten years waiting for its implementing regulation. As mandated by the above articles, KPPU has mandate to supervise mergers and acquisitions in Indonesia, but its implementation is further regulated by a government regulation.

2. It was later in July 2010; the Government Regulation No. 57/2010 concerning Merger and Acquisition is established after intensive approaches by the Commission. The regulation stipulates that any mergers meeting the threshold requirement must be notified to the KPPU within 30 days after the merger is effective by law/regulation. The threshold involves merged asset value over IDR 2.5 trillion and/or sales value over IDR 5 trillion. As for banking sector, the asset threshold is IDR 20 trillion. For failing to notify, businesses can lead to an administrative fine of IDR 1 billion for each due day, with an IDR 25 billion maximum. Apart from mandatory notification, the Government Regulation also regulates consultation or voluntary procedure. This procedure provides business actors and opportunity to business to let them know in advance whether their merger plans comply with the regulation. The consultation procedure uses similar standards of those post notification.

3. To further regulate the implementation of such regulation, KPPU issued a technical guidance on the assessment of merger and acquisition transaction, namely the KPPU Regulation No. 13 Year 2010 on the Guidance for the Implementation of Merger and Acquisition which may Caused Monopolistic Practices and Unfair Business Competition. This regulation then revised by the KPPU Regulation No. 3/2012 and No. 2/2013.

2. Merger Analysis in KPPU

4. KPPU guideline on merger assessment explains about technical mechanism of elements for assets and or sales value, definition of affiliated companies, foreign merger arrangement, fine for delay on notification, and other factors used as parameter in merger assessment like notification and consultation's procedure.

5. Elements use by KPPU in merger assessment includes market structure (calculation of market share and concentration, and changes in market structure following the mergers transaction), entry barrier (absolute and structural barrier), unfair business competition (*unilateral conduct*, *coordinated conduct*, and *unilateral effect*), efficiency, and *failing firm defence*.

6. On the market structure, the analysis will base on the assessment of market concentration. In this sense, KPPU rely heavily on the Concentration Ratio (CR) and or the Herfindahl Hirschman Index (HHI). The HHI always come first heading the CR analysis. The KPPU use the value of 1800 as the threshold for HHI. If the mergers accounted to score lower than 1800, then the mergers may not lead to monopolistic practice and unfair business competition. This is because; the average HHI of most of industries in Indonesia is 2000.

7. In determining entry barrier, the KPPU will focus on three factors, namely (1) absolute barrier through government regulation, licensing, and intellectual property right; (2) structural barrier through industry characteristic (high technology, high economic of scale, high sunk cost, and high switching cost); and (3) strategic advantage by the incumbent. High entry barrier may indicate from historical number of entrepreneur in the relevant market, number of potential entrepreneur, consideration of entry cost with expected market return, as well as estimated return on investment.

8. Impact of mergers could be indicated from two different effects, unilateral and coordinated effect. The KPPU use buyer power as main measurement for unilateral effect, by considering business plans, mergers documents, market analysis, market intelligent, and other relevant document. Coordinated effect is a different thing, because the KPPU has to measure market transparency, product differentiation, the existence of maverick entrepreneur, interlocking directorate, and level of market entry.

9. Efficiency defence will be analyzed through potential price reduction after the mergers. The measurement will focus on the variable, marginal, and fixed cost of merging parties. The bankruptcy will carefully be analyzed through different factors like dreadful financial condition where merging is the only option available; no opportunity to reorganize their business; and no alternative other than anti-competitive attempt.

10. Based on the guidance, we can identify that public interest is not a primary factor in the merger assessment at KPPU. The analysis mostly based on the impact of such merger to the concentration and its potential impact to competition from their competitors. Currently there is no case in KPPU which can explain how public interest may inflict the judgement by competition authority. Public interest is seen as the outcome or result of specification used in merger assessment. Higher market concentration may lead to an increased likelihood of unilateral conduct that may impact the general public. Even though it can be said to create an impact to the public, but the key assessment is the market structure and potential price increased, not an impact to the public at large.

3. External Coordination

11. With an attempt to minimize the impact of merger to the public, KPPU considers cooperation or coordination with relevant counterpart is important. Thus, during the merger assessment, KPPU entered into coordination with relevant government bodies to talk about their issues. Dealing with cases in banking and financial services, for example, KPPU will consider Indonesian Central Bank, and Financial Services Authority. Other sector and agencies involves Ministry of Agriculture, Ministry of Energy and Mineral Resource, and Ministry of Transportation. Such coordination exists since the agencies also deal with merger and acquisition in their work. In addition, competition agency continuously coordinate with Investment Coordination Board on any merger and acquisition related to investment activities.

12. Technical policies on relevant industry, and other factors in consumer the industry, as well as the sustainability of business actor, are those of consideration by the government in performing a review on merger and acquisition activity. KPPU uses public interest as an integrated part of the 4 (four) indicator uses in the above merger guideline.

4. Moving Forward

13. KPPU sought weaknesses in its merger regulation after facing robust economic development than the regulatory environment. For instance, the value of assets and sales may no longer relevant in current development, in-existence of assets take-over as the scope of supervision, and in-existence of regulation for joint venture, and in-existence of application of merger and acquisition outside of Indonesia with significant impact to domestic market (effect doctrine).

14. These weaknesses inspired KPPU to submit an amendment proposal for the existing competition law, including those govern merger and acquisition. The proposal promotes a shifting from *mandatory post merger notification system* and *voluntary pre merger notification system* into *mandatory pre merger notification system*, revaluation of assets and sales, additional arrangement on assets take over, establishment of joint venture, and the review method itself. These changes will demand further coordination and synergy with other line ministries who perform merger review (in the sense of administrative, legal, nor economics). It is hoped that through these changes, Indonesian merger regime can perform at its best to prevent monopolistic practices and unfair competition, and create harmony with other relevant ministries.