

Unclassified

English - Or. English

21 November 2024

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

Working Party No. 3 on Co-operation and Enforcement

The Use of Structural Presumptions in Antitrust – Note by Indonesia

4 December 2024

This document reproduces a written contribution from Indonesia submitted for Item 2 of the 140th meeting of Working Party 3 on 4 December 2024.

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JT03555975

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1. Competition Legal Framework

1. Law Number 5/1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition and Law (Indonesian Competition Law) expressly prohibits activities or agreements or merger transaction that can result in monopolistic practices and/or unfair business competition. In general, this can be interpreted as violations of the Competition Law are not necessarily only committed by large business actors. Business actor with a small market share can also behave or engage in agreements that violate Competition Law, for example, restricting the market from competitors. Company's ability to use market power or abuse its dominant position is characterized by its ability to determine prices and to control production or sales. In general, companies that are in a dominant position are capable, hindering effective competition in the relevant market, and on the other hand can implement an independent market strategy against its partners and competitors.

2. To prevent abuse of market power or dominance, Competition Policy and Law must be established, include instrument or standard aiming to prevent those two. In many cases, it is difficult for the antitrust authorities to differentiate between competitive behaviour and abuse of market dominance. For example, price strategy to change product price in the market, antitrust authorities to determine whether the strategy intended to exploit market, squeeze competitor out or market or just the usual price adjustment to the change in the input price, need to know what level price is competitive. For this reason, efforts are needed that require to test a series of theories and methods in the midst of limited resources.

3. It is quite reasonable to consider the application of safe harbour rules in enforcement and merger control and provides for legal presumptions where the assessment of market power or market dominance is concerned. In the sense that when certain restrictions are passed, it can be suspected that there will be competition obstacles that have a significant impact so that the provisions of the Competition Law can be applied. This needs to be considered to ease the burden on competition authorities so that cases that do not have a major impact on business competition can be ignored.

4. The Indonesian Competition Commission (ICC or KPPU) utilizes structural presumptions in assessing dominance or market power and merger transaction under Indonesian Competition Law. This presumption is in the form of specific market share thresholds to filter out agreements or activities that lead to abuse of market power and dominance. In this law, there are a number of structural presumptions, of which the rest explicitly use the term "significant" which shows that the obstacles to business competition must have a certain quantitative level. Market share and/or minimum turnover figures may help to trigger off an investigation into firm's conduct, often establishing a presumption market power and dominance.

5. In Indonesian Competition law its implementing regulations, articles that have a threshold is an article with proof of the rule of reason, it must be proven that the agreement or prohibited activities has a negative impact on competition. These thresholds are outlined in the Indonesian Competition Law as follows.

1. Monopoly/Monopsony: A single firm controlling more than 50% of the market is presumed to hold a dominant position (Articles 17(2)C and 18(2)).

2. Oligopoly/Oligopsony: When two or three firms collectively control over 75% of the market, it is presumed that they exert significant control over production and marketing (Article 4(2)).
 3. Dominant Position: A firm is presumed dominant if it controls over 50% of the market or if a group of two or three firms collectively controls over 75% (Article 25(2)).
6. In merger analysis, there is a Safe Harbor and it also comes with a market share. Mergers that result in a combination of certain nominal of asset and sales value (assets \geq 2.5 billion IDR or sales \geq 5 billion IDR) are considered to significantly increase the size of the business actors. Therefore, mergers transaction that meet this asset or sales combination threshold must be assessed by The KPPU. This also means that firms have to assess for themselves whether their conduct is eligible for a review or exemption (principle of self-assessment). However, this threshold is only used to separate transactions that are considered have less effect in the market, and certainly not enough to be used as an indicator to capture the potential anti-competitive risks in the market relevant as a result of merger. The KPPU can focus on large transactions that are assumed to increase dominance or market power. Therefore, in the merger analysis guidelines, The KPPU also adopts the market concentration calculation, which is commonly used in estimating market share, namely The Herfindahl-Hirschman Index (HHI).
7. The HHI threshold for merger transaction in Indonesia is as follows:
- Spektrum I: HHI is less than 1,500
 - Spektrum II: HHI is between 1,500 and 2,500, and the change Δ HHI is less than or equal to 250
 - Spektrum III: HHI is greater than 2,500, and the change Δ HHI is less than or equal to 150
8. The value of HHI less than 1,500 ($HHI \leq 1,500$) is considered a low concentration, but if the delta change is above 250 (Δ HHI > 250), is considered that there is a potential for monopolistic practices and/or unfair business competition due to significant changes in market power. While HHI above 2,500 ($HHI > 2,500$) is considered highly concentrated, where if value delta change greater than 150 (Δ HHI > 150) also considered for monopolistic practices and/or unfair business competition due to significant changes in market power. In this condition, a thorough assessment process is needed.
9. The HHI is a crucial metric in Indonesian merger analysis, serving to evaluate the potential anticompetitive effects of mergers. By setting clear thresholds based on HHI levels and their changes, the merger review process in Indonesia becomes more systematic. This structured approach allows regulators to effectively assess market concentration and identify potential anti-competitive risks. The KPPU can streamline its assessment of mergers and acquisitions by using specific HHI benchmarks, ensuring that transactions with the potential to harm competition are thoroughly scrutinized. This clarity enhances regulatory consistency and transparency for businesses navigating the merger landscape.
10. As well quantitative criteria, qualitative factors such as structural advantage of a firm are usually taken into account in determining whether market power or dominance actually exists, conversely, such factor as low entry barrier may rebut presumption of market power or dominance. Proving the alleged case of monopoly practices and unfair business conduct not completed only based on the presumption. In many articles, there are also criteria that must be met. In an article about monopsony, and oligopoly emphasizes the existence of "control of the production and/or marketing goods and/or utilization of

certain services”. Meanwhile, in the article on the dominant position, emphasis is placed on the “ability of companies to set trade terms that are detrimental to consumers, limit the market and technology development, or hinder competitors from entering the relevant market”. In this case, market share is only an indicator or characteristic of the market form where the ability to control or dominate the market is very likely to occur.

11. Therefore, in addition to market share thresholds, The KPPU conducts an analysis of market conditions. This comprehensive approach helps in identifying potential anti-competitive agreements and activities also ensuring that mergers do not lead to monopolistic practices. The KPPU's regulatory framework is designed to be flexible yet effective. It considers structural analysis both from quantitative aspects (market share) and qualitative aspects (barriers to entry, efficiency, innovation progress, etc) of market dynamics. This dual approach ensures that the commission can address a wide range of competition issues, from simple market dominance to complex mergers and acquisitions.

2. Implementation of a Structural Presumption in Merger Review

12. Implementing structural presumptions in merger analysis can significantly enhance the efficiency and effectiveness of antitrust enforcement. This approach, grounded in economic theory and supported by robust evidence, involves several key steps and considerations. To implement a structural presumption, In addition to using asset and sales criteria, the KPPU can also use structural indicators that serve as thresholds for triggering the presumption. These indicators can include the total revenue generated by a firm (turnover) and industry-level characteristics (factors such as industry concentration, entry barriers, and the number of competitors). Merging parties can challenge the structural presumption by demonstrating two key points, which is:

- Efficiencies will be shared with consumers: They must show that the merger will generate significant efficiencies that directly benefit consumers.
- No less anticompetitive action available: They must prove that there are no less anticompetitive actions available to achieve the same efficiencies.

13. This rebuttal process ensures that only mergers with clear benefits to consumers are allowed to proceed. The structural presumption is particularly useful in cases where the primary concern is the loss of direct competition between the merging firms, such as unilateral effects. It provides a clear and efficient tool for antitrust agencies to assess mergers, especially in highly concentrated markets. In Indonesia, where many industries are characterized by high concentration, this tool can be particularly effective in preventing anticompetitive practices.

3. Relevance of Structural Presumptions in Different Sectors

14. In the context of antitrust and competition frameworks in Indonesia, the relevance of structural presumptions varies significantly across different sectors. This variability is crucial for developing effective regulatory frameworks that promote fair competition and safeguard consumer interests.

3.1. Manufacturing Sector

15. The manufacturing sector in Indonesia has historically been a crucial driver of economic growth, particularly during the late 20th century. Due to the potential for large

firms to exert significant market power, structural presumptions related to antitrust in this sector are more stringent. This concentration of market power can lead to anti-competitive practices if not adequately regulated. The implications of mergers and acquisitions (M&A) in manufacturing are profound, as they can reshape market dynamics and consumer choices. Consequently, a robust regulatory framework is necessary to prevent monopolistic behaviors and ensure fair competition.

3.2. Service Sector

16. In contrast, the service sector in Indonesia has experienced rapid growth and transformation, significantly contributing to GDP and employment. While structural presumptions regarding antitrust activities in this sector still apply, their relevance may be less pronounced than in manufacturing. The service sector often features diverse and dynamic market structures, which can complicate regulatory approaches. For instance, understanding competition dynamics in differentiated product markets is particularly relevant for service industries where consumer preferences can vary widely. This diversity necessitates a more nuanced regulatory approach that considers the specific characteristics of service markets, rather than applying a one-size-fits-all presumption.

3.3. Agricultural Sector

17. The agricultural sector in Indonesia has seen a decline in its share of GDP and employment, transitioning to a more service-oriented economy. In this context, structural presumptions related to antitrust issues may be less relevant, as agricultural dynamics are often driven by factors such as land use policies, environmental considerations, and agricultural regulations rather than pure market competition. Research highlights how agricultural policies can significantly influence market outcomes, suggesting that regulatory frameworks should focus more on these external factors rather than on traditional market dynamics. As such, the regulatory approach in agriculture may prioritize sustainability and food security over competition concerns typically associated with M&A.

4. Impact on KPPU's Enforcement

18. The impact of structural presumption on the enforcement practices of the KPPU is significant, particularly in streamlining processes and enhancing legal clarity within Indonesia's competition law framework.

4.1. Alleviating the Burden of Proof

19. The introduction of structural presumption allows The KPPU to reduce the burden of proof required in competition cases. This shift enables quicker assessments of transactions, such as mergers, by presuming that significant changes in market structure may negatively affect competition. Consequently, this approach minimizes the need for extensive evidence collection, which is especially beneficial in fast-paced markets where delays can incur substantial costs.

4.2. Increasing Efficiency in Enforcement

20. By adopting a structural presumption, The KPPU can enhance its efficiency in identifying and addressing potential anti-competitive practices. The presumption that notable alterations in market structure could harm competition allows the authority to act

swiftly against practices that may adversely affect consumers. This proactive stance improves overall market efficiency and ensures that competitive integrity is maintained without unnecessary delays.

4.3. Reducing Legal Uncertainty

21. Structural presumption also contributes to reducing uncertainty within the enforcement framework. By establishing clear assumptions regarding the competitive implications of market changes, The KPPU can make more consistent and transparent decisions. This predictability is advantageous for businesses, enabling them to navigate the regulatory landscape more effectively and plan their strategies with greater confidence.

22. In the context of Indonesia, the major challenges in developing structural presumptions that may assist KPPU in their enforcement practice include:

- Complexity of modern markets: The dynamic and highly complex nature of modern markets, particularly in digital and technology sectors, poses significant difficulties in developing structural indicators that accurately reflect competitive conditions. For instance, market shares and concentration ratios may not fully capture the competitive dynamics in these markets.
- Evolving economic theories: The continuous evolution of economic theories and empirical methods presents a challenge for KPPU. Integrating these changes into enforcement practices requires keeping up with the latest and soundest economic principles, which can be a daunting task.
- Legal and procedural hurdles: The KPPU must meet strict legal standards of proof to enforce structural presumptions. These standards can be challenging to satisfy, especially when dealing with well-resourced companies that can afford extensive legal and economic defenses. The procedural framework, as outlined in Law No. 5 of 1999 and subsequent regulations, also presents challenges, such as the time limits for decision-making and the lack of clear procedures for filing objections to KPPU's decisions.
- Data availability and quality: Accurate and comprehensive data is essential for developing structural presumptions. However, obtaining high-quality data can be challenging due to companies' reluctance to share sensitive information, and public data sources may be incomplete or outdated. This issue is particularly relevant in Indonesia, where the availability and reliability of data can impact the effectiveness of KPPU's enforcement actions.
- Balancing predictability and flexibility: Structural presumptions provide predictability and consistency in enforcement but must also be flexible enough to account for unique market conditions and new types of competitive harm. Striking this balance is a significant challenge for KPPU, as it needs to ensure that its enforcement practices are both effective and fair.

5. Conclusion

23. The use of structural pre-assumption in the Indonesian Competition Law is still needed. With limited resources, and the increasing complexity of anti-monopoly cases, the use of structural pre-assumption can help The KPPU to focus on bigger cases whose negative impact on the market is very significant. On the other hand, it also provides certainty of law enforcement and trust that the KPPU works to reduce the potential for

abuse of market power and dominant positions that are generally easier for firms who have a higher concentration in relevant market.