

May 2023

# Indonesia ATD MHM Legal Insights

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## KPPU REGULATORY UPDATE: NEW REGIME OF MERGER CONTROL INTRODUCED

### Introduction

The Indonesian Competition Supervisory Commission (*Komisi Pengawasan Persaingan Usaha* or "KPPU") has issued the following regulations effective as of March 31, 2023:

- KPPU Regulation No. 3 of 2023 ("KPPU Reg. 3/2023") on the Assessment of Merger, Consolidation, or Acquisition of Shares and/or Asset that could Result in Monopolistic and/or Unfair Business Competition Practices – which supersedes KPPU Regulation No. 3 of 2019 on the same ("KPPU Reg. 3/2019"); and
- KPPU Regulation No. 5 of 2023 ("KPPU Reg. 5/2023") on the Revocation of KPPU Regulation No. 4 of 2012 on Guidelines for the Imposition of Fines for Late Notification of a Merger, Consolidation of a Company or an Acquisition of Shares in a Company.

In addition, on April 5, 2023, Government Regulation No. 20 of 2023 on Non-Tax Revenue Applicable to KPPU ("GR 20/2023") was enacted and became effective on May 5, 2023. GR 20/2023 introduces a new filing fee calculation for the submission of notification on merger, consolidation, or acquisition of shares and/or assets of a company.

Below we highlight the key changes of the above regulations:

#### 1. New criteria for mandatory notification submission to KPPU

Previously, under KPPU Reg. 3/2019, the criteria for a transaction to be subject to notification submission to KPPU was based on whether such transaction met the threshold of assets or sales value. Currently, under Article 3 of KPPU Reg. 3/2023, the applicable criteria are as follows:

- Such transaction meeting the threshold for assets and/or sales value;
- Such transaction resulting in a change of control;
- Such transaction is not an affiliated transaction; and

d. Such transaction is between parties having (directly or indirectly),<sup>1</sup> asset and/or sales generated within the Republic of Indonesia.

**(i) New calculation for assets threshold**

With respect to criteria (a) above, under KPPU Reg. 3/2023, the geographical scope to calculate the threshold for the notification is changed so that only assets and sales generated within the Republic of Indonesia for the previous year before the date of transaction are calculated<sup>2</sup>, instead of calculation of assets and sales generated worldwide as per the previous KPPU regulation<sup>3</sup>.

However, the sales and/or assets value thresholds remain the same i.e., IDR 2.5 trillion of Indonesian assets value and IDR 5 trillion of Indonesian sales value.<sup>4</sup>

**(ii) Local nexus is required for all concerned parties**

With respect to criterion (d) above, under the previous KPPU regulation, a merger filing could be required even if only one concerned party has assets and/or sales generated within the Republic of Indonesia. This situation could be typically seen in offshore transactions whereby one concerned party has minimal or zero nexus to the Indonesian market. Combined with the worldwide threshold under the previous regulation, a merger filing with KPPU was required even for transactions that were not likely to impact the competitive conditions of the relevant market in Indonesia, which eventually increased the number of filings that KPPU needed to handle.

KPPU Reg. 3/2023 now requires all concerned parties to have local nexus to Indonesia. Together with the change in the asset threshold, we expect KPPU will be able to focus on transactions that could be more likely to impact the market conditions in Indonesia, which brings more efficiency to KPPU's case handling.

**2. New online notification system, filing fee and shortened review period**

**(i) New online notification system**

KPPU Reg. 3/2023 introduces a new method of notification submission by way of an online electronic system i.e., through the website [notifikasi.kppu.go.id](https://notifikasi.kppu.go.id), which at this moment seems intended to be the means of submitting a notification post-KPPU Reg. 3/2023. The submission process through the website above shall be done within 30 business days<sup>5</sup> from the completion of relevant transactions.<sup>6</sup> Submission shall be conducted by way of creating an account for each transaction, and such notification is to be submitted on business days from 9am-2pm Indonesian Western Time – replacing the previous submission by email or hard copy.<sup>7</sup>

**(ii) Filing fee**

As introduced by GR 20/2023, currently there is a filing fee for the notification submission to be paid by the notifying party, in a maximum amount of IDR 150 Million<sup>8</sup> calculated with the following formula:<sup>9</sup>

<sup>1</sup>Article 11 of KPPU Reg. 3/2023

<sup>2</sup>Articles 7 and 8 of KPPU Reg. 3/2023. Please see Footnote 11 for elaboration on the calculation of assets and sales value threshold.

<sup>3</sup>Article 4(2) of KPPU Reg. 3/2019.

<sup>4</sup>Article 6(1) of KPPU Reg. 3/2023.

<sup>5</sup>Article 2 of KPPU Reg. 3/2023.

<sup>6</sup>Article 4 of KPPU Reg. 3/2023.

<sup>7</sup>Article 13(4) of KPPU Reg. 3/2023.

<sup>8</sup>Article 2(4) of GR 20/2023.

<sup>9</sup>Article 2(1) of GR 20/2023.

**0.004% x (assets or sales values, whichever being the lower<sup>10</sup>)**

The assets and sales values are calculated based on the total of assets or sales values of the following entities:<sup>11</sup>

- (i) The surviving entity in a merger, the resulting entity in a consolidation, or the business entity acquiring a company and the target company; and
- (ii) All business entities directly or indirectly controlling, or being controlled by any of the above business entities

However, the above tariff may be determined up to 0% subject to further KPPU regulation (as per approval from the Ministry of Finance). This 0% tariff will be determined based on certain criteria to be set out by KPPU in this upcoming implementing regulation.<sup>12</sup>

**(iii) Shortened review period**

KPPU Reg. 3/2023 also removes the 60-business days period of clarification to review completeness of documents submitted as previously stipulated under Article 11(2) of KPPU Reg. 3/2019. KPPU Reg. 3/2023 now shortens this period to three business days after a notification is submitted.<sup>13</sup> However, please note that, in the event KPPU finds a submitted notification to be inaccurate or incomplete, Article 15 of KPPU Reg. 3/2023 stipulates KPPU's authority to annul a registration receipt and/or the result of its review of a notification. If a registration receipt is annulled and results in a notification to be submitted past the 30 business days' time limit, such late submission will be subject to KPPU investigation, which will determine whether a post-notification submission is late and subject to penalty. While previous KPPU regulations stipulating specific provisions on the penalty for late notification have been revoked by KPPU Reg. 5/2023, fines for late notification as stipulated under Article 6 of GR 57/2010 are still in effect, i.e., IDR1,000,000,000 (one billion Rupiah) for each day of delay with a maximum of total IDR25,000,000,000 (twenty-five billion Rupiah). It remains to be seen whether KPPU will issue further regulations to govern specific provisions on the imposition of such fines for late notification.

While it may seem that under this new regime there should be no further back and forth clarification after a notification has been submitted, parties still need to be mindful of the possibility of KPPU requiring clarification or requesting additional documents through the system during the course of the online submission process. As such, in order to make it in time for the 30 business days submission deadline, earlier, sufficient, and careful assessment regarding completeness of submitted documents would be recommended.

On the other hand, after the notification is registered after the 3 (three) business days online submission review period (for which KPPU will issue a registration receipt that will serve as valid proof of such notification being submitted to KPPU), same as the previous regulation, KPPU would have a 90 business days

<sup>10</sup>Article 2(3) of GR 20/2023.

<sup>11</sup>Article 2(2), 7(1), 8(1) of GR 20/2023, and Article 5(4) of Government Regulation No. 57 of 2010 on Merger or Consolidation of Business Entities and Acquisition of Company Shares which may result in Monopolistic Practices and Unfair Business Competition ("GR 57/2010").

<sup>12</sup>Article 4 of GR 20/2023. In the elucidation, this 0% tariff will be determined based on certain criteria (e.g., supporting SMEs, force majeure, and government's policy).

<sup>13</sup>Article 16(3) of KPPU Reg. 3/2023.

review period to assess the relevant transaction's impact on the market conditions in Indonesia. The total timeline for KPPU to conduct the review on the notification submitted is shortened from a previous total of 150 business days to 93 business days.<sup>14</sup>

### 3. New criteria for mandatory notification submission to KPPU

Upon completion of the comprehensive assessment, if KPPU finds that the notified transaction potentially results in monopoly practices and/or unfair business competition, further examination may be carried out by panel hearing.<sup>15</sup> As a result, the panel hearing may declare:<sup>16</sup>

- (i) remedies for the transaction;
- (ii) the transaction will not potentially result in monopoly practices and/or unfair business competition; or
- (iii) to proceed to further examination.

The notifying party may accept, completely refuse, or partially refuse such result. If refused, the notifying party may provide their legal, economic, and/or technical reasoning,<sup>17</sup> and propose a revised remedy for KPPU's consideration.<sup>18</sup>

### 4. Transitional provisions

Post-KPPU Reg. 3/2023, any ongoing submissions, i.e., notifications submitted to the KPPU prior to KPPU Reg. 3/2023 becoming effective on March 31, 2023, will be processed according to the rules of the previous regulation.<sup>19</sup> For submissions post-KPPU Reg. 3/2023, irrespective of whether the transaction was closed prior to KPPU Reg. 3/2023 or not, such submissions will be subject to the new rules under KPPU Reg. 3/2023.

## Conclusion

Looking at the new thresholds for submissions (e.g., the required local nexus and change of assets threshold to be more focused on the Indonesian market) and the shorter period of the submission process, the main intention for the issuance of this new KPPU Reg. 3/2023 may be to create a more efficient process of merger control review as well as to reduce the number of M&A transactions that should be subject to KPPU notification.

Because of this, relevant parties may need to start assessment on the necessity to post-notify KPPU on a M&A transaction much earlier compared to the previous regime of these merger control regulations, which then needs to be followed by a timely and careful preparation of submission documents in order to avoid potential sanctions for late notification submission. Analysis must still be conducted on a case by case basis, combined with close discussion with KPPU, as needed.

If you have any questions in relation to the issues raised in this briefing, please contact the authors in the left-hand column.

<sup>14</sup>Article 18(2) of KPPU Reg. 3/2023. In addition, at this moment it may be safer for the notifying party to include the 3 (three) business days review period by KPPU as part of the 30-business day deadline to prevent the "registered" notification exceeding such deadline.

<sup>15</sup>Article 23(6) of KPPU Reg. 3/2023.

<sup>16</sup>Article 25(5) of KPPU Reg. 3/2023.

<sup>17</sup>Article 30(2) of KPPU Reg. 3/2023.

<sup>18</sup>Article 34 of KPPU Reg. 3/2023.

<sup>19</sup>Article 48 of KPPU Reg. 3/2023.

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