**Country Submission for the Working Party 3, OECD Competition Division**
**Roundtable on Remedies in Merger Case, 28 June 2011**

# Topic:
# "MERGER REMEDIES ACCORDING TO INDONESIAN COMPETITION LAW AND IT'S IMPLEMENTING REGULATION"

## *Introduction*

Remedies are fundamental aspects of merger enforcement. It may determine the success of competition enforcement through defining best approach to control market structure and maintain fair competition in the relevant industries. We some called it structural and conduct remedies. The choice of both approaches is debatable and quite tricky for most competition authority. Some compare it to efficiency defense, while some debate it to potential economic cost that may arise due to the selection of which. Therefore, determining merger remedies is not an easy task.

## *The inauguration of mergers regime in Indonesia*

After more than 10 years following the enactment of Law No.5 Year 1999 Concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter briefly referred to as "Law No.5/1999"), on July 20, 2010 the Government of the Republic of Indonesia issued Government Regulation No. 57 Year 2010 Concerning Consolidation or Merger of Business Entities and the Acquisition of Company Shares Potentially Causing Monopolistic Practices and Unfair Business Competition (hereinafter briefly referred to as "GR 57/2010").

The GR No. 57/2010 has become the milestone in merger control in Indonesia, which could not be implemented effectively for more than 10 years despite the existing Articles 28 and 29 of Law No.5/99 prohibiting mergers and acquisitions which can have potentially anti-competition effects, and setting forth notification requirements. This was due to the fact that the operational implementation of Articles 28 and 29 had to be provided for in a Government Regulation.

## *The unique feature of Indonesian merger regime*

The feature that distinguishes Indonesia's merger control is its notification system, requiring to notify after a merger or acquisition becomes legally effective (post-merger notification), rather than before conducting a merger and acquisition (pre-merger notification). This is provided for in Article 29 of Law No.5/1999, explicitly setting forth that notification must be done within 30 business days following the date on which the merger and acquisition was conducted. Business actors failing to comply with the time frame are subject to rather significant fines, namely Rp.1 billion (USD 111,111) for each business day of the delay, up to the maximum fine of Rp.25 billion (USD 2.78 million).

Regardless of the above, in view of the weaknesses of post-merger notification which can potentially hamper the achievement of merger control objectives, KPPU has undertaken certain endeavors in order to ensure that GR 57/2010 provides an opportunity for notification prior to conducting merger or acquisition (pre-merger notification). This has been accommodated in GR 57/2010 Part IV Concerning Consultation. Consultation in Part IV means pre-merger notification on a voluntary basis, which can be conducted by the parties conducting merger or acquisition. By

applying the Consultation mechanism, the related parties have an opportunity to understand KPPU's opinion on a merger or acquisition before it is implemented. By doing so, any potential anti-competition effects of the merger or acquisition concerned can be prevented, and the relevant parties conducting merger are able to obtain legal certainty in the merger and acquisition process.

***The in-existence of remedies***

Upon completing the M&A assessment, KPPU issues the Commission Opinion on the Merger or Acquisition concerned, both for assessment conducted through the Consultation as well as through the Notification mechanisms. The Commission's opinion can be in the form of the following three alternatives:

1. There is no allegation of monopolistic practices or unfair business competition as a result of the merger concerned;
2. There is an allegation of monopolistic practices or unfair business competition as a result of the merger concerned;
3. There is no allegation of monopolistic practices or unfair business competition as a result of the merger concerned, provided however that certain notes in the form of advice/guidance need to be followed (this is only possible under the Consultation mechanism, it does not apply for Notification).

KPPU's opinion is published on KPPU's website, enabling the public to understand KPPU's considerations in assessing the competition effects of a merger or acquisition.

In the regard of applied remedies, it could be highlighted that **no legal remedies available** to the parties concerned in view of KPPU's Opinion, because the Law does not provide for legal remedies related to the Commission's opinion in the assessment of notified mergers and acquisitions. Based on the Merger Guidelines, non-compliance with KPPU's Opinion is subject to the formal legal procedure up to the issuance of a Decision. It is against such Decision that business actors have legal remedies by appealing to the Court in accordance with the provisions of applicable laws and regulations.

The Consultation mechanism has more flexibility in providing opportunity for the Commission to provide non-binding advices or opinions on the possibility of improvement (eq. remedies) if the merger is to be implemented. However, the result of Consultation is not obliterating Commission's authority for post mergers assessment.

***What type of sanctions related to merger?***

The Article of 47 and 48 of the law stipulates that the M&A violation subject to the cancellation of mentioned merger or acquisition, as well as financial sanction for Rp. 1 billion (USD 111,111) up to the maximum fine of Rp. 25 billion (USD 2.78 million). Criminal sanction also may be imposed by the Court during the appeal process. The sanction will vary from Rp. 25 billion (USD 111,111) up to Rp 100 billion (11.1 million) or imprisonment for up to six months. Despite of which, until today, there is no imprisonment applied by the Court for any competition violation.

As above, business actors fail to notify the M&A, could be imposed with additional fines from Rp.1 billion (USD 111,111) for each business day of the delay, up to the maximum fine of Rp.25 billion (USD 2.78 million).

Third parties or public is not expected to comment the proposed sanction as it is the full authority of the Commission. However, the Commission's Opinion as well as consulted and notified mergers are made public through the Commission's official website (www.kppu.go.id) for everyone to follow the progress of any mergers that may interest them. To date, there is 11 (eleven) mergers are notified and 2 (two) mergers are consulted. No notified mergers are denied by the Commission as it proved not to affect competition in the relevant market.

***Active M&A monitoring system***

The Commission will conduct frequent monitoring activities and cooperate with relevant agencies (eq. Ministry of Finance) to identify mergers that meet the requirements but fail to notify the mergers in 30 (thirty) working. In the case of qualified foreign mergers that failed to notify the mergers within 30 (thirty) working days, the Commission will charge the penalty to part of its business groups in Indonesia. To such, the Commission will use its authority and (if necessary) work with other related agencies to ensure the imposed fines is submitted.

Because the M&A violation is treated as other competition violations, the collection of fines is conducted by the litigation staffs, from the Execution Division of the Commission. The Commission did not have authority to collect the fine or confiscate the business's assets if they fail to pay the fines without Courts' order. Under which circumstances, the number of staff is limited (no more than five staffs).

***Conclusion***

Mergers assessment is the long awaited authority by the Commission (since 1999) that only can be carried out last year after the enactment of GR. 57/2010, with a post notification mechanism and the possibility to conduct Consultation before the merger conducted. Within nearly a year, the Commission has recorded 11 (eleven) Notifications and 2 (two) Consultations on mergers.

Mergers in the Indonesian competition law are considered as other competition violation (under abuse of dominant chapter) with no possibility to provide remedies on the notified mergers. Sanctions applied on mergers are limited to the cancellation of mergers and financial penalties. Non-binding remedies may be applied if the planned merger is consulted to the Commission.

We understand that this approach may quite different with other international practices. Therefore to maintain market stability, the Commission always put more effort in encouraging businesses to conduct Consultation prior to their merger implementation. This surely will minimize potential loss (risk) which may be suffered by the business if the mergers cancelled by the Commission when it's proved to create monopolistic practices and or unfair business competition.

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This report is prepared by the Foreign Cooperation Division with valuable inputs from the internal dedicated to contribute for series of the OECD Competition Committee Meeting in June 2011. Further information or clarification on stipulated issues may be obtained from Mr. Deswin Nur (Head of Foreign Cooperation Division) through his e-mail addresses, deswin@kppu.go.id or from our international team at international@kppu.go.id.