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### **For First Time, KPPU Imposes Fine for Late Notification of M&A Deal**

In a decision announced on 11 December 2012, the Competition Supervisory Commission (“KPPU”) has imposed a fine of Rp 4,600,000,000 (approximately USD 476,932) for failure to report a notifiable transaction within the required period of 30 days under Article 29 of the Competition Act (No. 5 of 1999).

While little information is available as yet as to the background to the case or the reasoning adopted by the KPPU Tribunal (thus far, only a brief note has been published on the commission’s website), it is clear that the decision signals something of a new departure for the enforcement of fair-trading laws in this country. Accordingly, it may be instructive to briefly consider some relevant aspects of Indonesian competition law.

#### **Notification**

Under Government Regulation No. 57 of 2010, Indonesia requires mandatory post-notification for certain merger, consolidation and acquisition (“MCA”) transactions. There is also a pre-notification system, but this is not relevant to the present discussion.

The mandatory post-notification requirement arises in the case of an MCA transaction that satisfies the following parameters: (i) a total asset value of Rp 2.5 trillion; or (ii) a total sales value of Rp 5 trillion on the part of the surviving entity; and (iii) the companies involved in the transaction are not affiliates. A higher threshold applies if two or more of the parties operate in the banking sector, in which case the transaction must be notified should the surviving entity have assets exceeding Rp 20 trillion in value. Should only one the parties operate in the banking sector, then notification must be made if the surviving entity has assets in excess of Rp 2.5 trillion.

#### **30-Day Rule**

Transactions that qualify for notification must be reported to the KPPU within 30 working days following their consummation.

This 30-day rule remained something of a paper tiger for long after the coming into effect of the Competition Act, but that changed radically in February 2011 with the issuance of KPPU Regulation No. 2 of 2011 (now superseded by Regulation No. 4 of 2012) (“Notification Regulation”), which imposes a minimum fine of Rp 1 billion for each day of delay up to an overall maximum fine of Rp 25 billion.

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The Notification Regulation provides that the 30-day period starts to run from the legally effective date of the transaction, which is defined as follows:

- a) in case of a Merger: the date on which approval is given by the Ministry of Law and Human Rights for the amended articles of association of the surviving entity or on which notice of amendment is received by the ministry, as the case may be;
- b) in case of an Amalgamation: the date on which approval is granted by the Ministry of Law and Human Rights for the deed of incorporation of the new entity;
- c) in case of a Qualified Transaction in the form of an acquisition of a public company's shares: notice must be furnished within not more than 30 days subsequent to the date of the Stock Acquisition Disclosure; and
- d) where one of the parties to the MCA deal is an unincorporated entity, notice must be furnished within not more than 30 days subsequent to the deal's closing date.

No guidance is provided as to what constitutes the effective date of a foreign MCA deal that could have competition implications for the Indonesian market. This is an obvious loophole that needs to be closed for the sake of legal certainty.

### **Determination of Delay and Possibility of Appeal**

On receipt of an MCA notification, the KPPU will check to see whether there has been any delay in its submission. As regards MCA deals that are not notified, the Notification Regulation authorizes the KPPU to conduct monitoring of M&A activity on an ongoing basis using such tools as media reports, complaints from the public and other justifiable sources. Any prima facie evidence of late notification will be submitted to the KPPU commissioners, and should the commissioners determine that the matter needs to be acted upon, a preliminary inquiry will be launched, the findings of which will then be brought before the KPPU Tribunal for a determination. An appeal lies against such determination to the District Court within whose jurisdiction the offending party has its principal place of business.

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