

In New Departure, KPPU Approves Acquisition Subject to Conditions

In its Opinion No. 18/KPPU/PDPT/VII/2013, dated 10 July 2013, the Indonesia Competition Commission (KPPU) attached conditions to its approval for a merger for the first time since the issuance of merger control implementing regulations in 2010.

Background

The Opinion was issued in relation to Switzerland-based food and beverage manufacturer Nestlé S.A.'s acquisition of Wyeth (Hong Kong) Holding Company Limited from US-based pharmaceutical firm Pfizer.

Both the acquirer and the target company produce infant formula milk in Indonesia.

The deal was notified to the KPPU on 11 January 2013 in accordance with Indonesia's post-notification system of merger control.

Normally in determining whether an acquisition will result in potential violations of competition law, the KPPU analyzes the following issues:

- relevant market;
- market concentration;
- barriers to market entry;
- potential for anti-competitive behavior;
- Considerations of efficiency; and
- "Failing-firm" considerations^[1]

In this particular case, the KPPU did not find it necessary to conduct an analysis of the efficiency and "failing-firm" factors.

1. Relevant Market

The KPPU found that the relevant geographical market was Indonesia, and that the acquisition would result in horizontal overlap in the production and distribution of infant formula milk in three different market segments: (1) formula milk for children aged 0-6 months; (2) follow-up formula for children aged 7-12

months, and (3) follow-up formula for children of 1 year old and over.

2. Market Concentration

Through an application of the Hirschman Herfindahl Index (HHI)^[2], based on data from Euro Monitor and AC Nielsen, the KPPU arrived at the following findings:

- The level of concentration in the market for infant formula for children aged 0-6 months both before and after the acquisition was above the threshold set by KPPU Regulation No. 3/2012, thus requiring the KPPU to conduct analyses of market entry barriers and the potential for anti-competitive behavior, among other things.
- That the level of market concentration in the market for follow-up formula for children aged 7-12 months did not exceed the threshold and accordingly no further analysis was necessary.
- That the market concentration level in the market for follow-up formula for children of over 1 year old post acquisition would exceed the threshold and accordingly the KPPU would need to conduct further analyses of market entry barriers and the potential for anti-competitive behavior, among other things.

3. Market Entry Barriers

In its analysis of market entry barriers, the KPPU arrived at the following findings:

1) Infant formula for children aged 0-6 months:

- Government regulations aimed at reducing the use of infant formula milk and on nutrition content and quality present an absolute entry barrier to the market for infant formula for children aged 0-6 months. However, these regulations do not impede market penetration provided the producer is able to comply and has the necessary technical capacity.
- The market is also characterized by a number of structural entry barriers in the form of high-cost R&D, the need for sophisticated technology, and consumer reluctance to switch brands.

2) Follow-up formula for children of 1 year old or over

No barriers to market entry resulting from government regulations and no restrictions on distribution.

4. Potential for Anti-Competitive Behavior

In analyzing the potential for anti-competitive behavior, the KPPU took into consideration the following factors:

1) Possibility of Consumer Detriment as a result of Unilateral Practices

While the formula market for children aged 0-6 months is currently dominated by another producer, the KPPU concluded that the possibility of unilateral practices was remote as the post-acquisition market share of that other producer and the combined market share of Nestle and Wyeth would be almost the same.

2) Possibility of Consumer Detriment as a result of Collusive Behavior

In the infant formula market for children aged 0-6 months, the KPPU noted that the acquisition would result in a change in market structure, which would become more concentrated and thus increase the risk of collusive behavior. The same applied in the market for formula milk aimed at children aged 1 year old or above.

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In line with its findings that the acquisition would result in concentration of the markets for formula milk aimed at children aged 0-6 months old and 1 year old and over, the KPPU ruled that tight monitoring of the acquisition's outcomes would be required. Accordingly, it directed the parties to submit monthly pricing and sales data (for each market) every 6 months for a period of 3 years counting from the date of the Opinion.

Conclusion

The KPPU's decision in this case sends a clear signal that the competition authority in Southeast Asia's largest economy is adopting a more activist approach to upholding fair competition and monitoring post-M&A outcomes than may have been the case in the past. With a boom in M&A activity expected to follow the launch of the Asean Single Market in 2015, this is something that both businesses and competition lawyers around the region would do well to note.

¹ Also known as the “failing-firm defense.” This refers to a situation where the KPPU may permit a merger or acquisition to go ahead, even though it may have anticompetitive implications, if one of the firms is likely to go out of business if the deal is blocked.

² Increases in the HHI normally reveal a decrease in market competition, while decreases usually show the opposite. The index is calculated using the formula: $HHI = \sum (S_i)^2$, where S is the market share of each company in the market.

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