SOME NOTES FOR MERGER NOTIFICATION

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I. INTRODUCTION

Merger notification to the business competition authority is a normal practice in various countries in the world that already have anti-monopoly laws, including Indonesia which also implementing a similar practice. The objective is simple, namely not to let uncontrolled economic concentration occur which can lead to unfair business competition or anti competition behavior.

In Indonesia the legal basis are:

- Articles 28 and 29 of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (Law No.5 / 1999)
- Government Regulation Number 57 of 2010 concerning Merger or Consolidation of Business Entities and Acquisition of Company Shares Which May Result in Monopolistic Practices and Unfair Business Competition (PP No. 57/2010)

- Regulation of The Commission for the Supervison of Business Competition, Republic Indonesia Number 3 Year 2019, about Assesment of Merger and Consolidation

In the regulation or legal basis above, various definitions are regulated such as what is merger, consolidation, acquisition, forms of amalgamation and others, which I don't need to explain here.

I will provide notes in theory and practice so that this good goal will have a positive impact on the national economy.

The objectives of this law:

a. to maintain public interest and improve the efficiency of the national economy as one of the means to improve public welfare;
b. to create a conducive business climate through healthy business competition, thus securing equal business opportunity for large, middle and small scale entrepreneurs;
c. to prevent monopolistic practices and / or unfair business competition by the entrepreneurs; and
d. to create effectiveness and efficiency in business activities.

Thus, if the implementation of merger supervision does not lead to that goal, then the supervision will instead be counterproductive for efforts to realize national economic prosperity.

Regarding post merger notification and pre merger notification. In substance I will discuss below. Pre merger notification is certainly better, at least for Indonesia. Because from the beginning we know whether this merger will later deal with competition law or not. In theory, the KPPU could cancel a merger if it actually creates anti-competitive practices. In a post-merger regime like now it is certainly not easy

to do. That is why until now there has been no merger canceled by KPPU. So that the notification process so far seems an administrative process which only adds to costs. Even though the KPPU's approval is always accompanied by post-merger guidelines and recommendations, it also seems trivial. However, the opening of the consultancy forum prior to the merger has actually accommodated the deadlock aspects regarding the positive aspects of the pre merger notification.

II. NOTES CONCERNING MERGER NOTIFICATIONS

1. Must increase economic efficiency both at the micro and national levels. Mandatory notification and supervision has consequences for transaction costs, not only costs for preparing documents, costs for legal consultants, but most importantly the cost of lost opportunities which in an economy is referred to as "opportunity cost", the economic opportunity lost due to administrative procedures. For example, if there are transactions that clearly will not cause concentration, industry and there will be no impact on anti-competitive behavior, but because the threshold is reached either because of asset size or turnover, it is still imperative to submit a notification. Obviously this creates inefficiencies, both for the company and for the KPPU, because the funds and energy are spent. Furthermore, it will also have an impact on the national economy, especially during times of crisis like today.

2. This dynamic is also important because it can create legal uncertainty which in turn

can lead to an increase in transaction costs. This legal uncertainty has two records: First, when a company is verifying in a jurisdiction, it must ask a law firm to perform this verification. Second, is an unpredictable schedule when the assessment by KPPU is completed, some experiences can be more than 1 year.

3. Merger supervision eventually became an art in the implementation of antitrust law. A notification regime that is too permissive can have a detrimental effect on social welfare, by allowing anti-competitive mergers to take place. However, a regime that is too restrictive can impose very high administrative and financial burdens on interested parties, including competition authorities, which hinders merger activities to improve economic welfare. Therefore, the optimal regime is the concentration on mergers that have a "significant potential" for anti-competitive behavior to be detrimental to the economy as a whole.

4. I my opinion I believe strongly that the merger notification is very important but convergence and improvement towards standard procedures and practices that lead to the achievement of the objectives of this competition law is very very urgent. Do not let it prevent mergers which are actually needed in order to increase the competitiveness of the national economy. My view is to prioritize efficiency and legal certainty.

5. Industry concentration is an important consideration in conducting the assessment. For mergers, acquisitions, joint ventures that provide high concentration are the main considerations for KPPU in making decisions. The low spectrum of HHI <1800 is of no concern. HHI high spectrum> 1800, further assessment is needed a. if the HHI change delta is below 150 points there is no problem b. If the HHI delta is above 150 points, a comprehensive assessment will be carried out to predict the incidence of monopolistic practice behavior. Calculation of this concentration requires data on the market. This creates uncertainty. In general, business actors do not know the market share, because for business actors sales and production data is strictly confidential data, especially from competitors. What is clear is that these data are generally not publicly available. It is even more dilemma when a business actor has market data, it even raises the suspicion of a cartel, because it is suspected that communication and information exchange have occurred, in many cases KPPU has always used it as evidence. So that questions or answers to issues in the notification form become transvestites. This is a difficult dilemma and let's find a solution.

6. Furthermore, market measurement must take into account the market share in the relevant market, this is a very critical issue. Without clear boundaries about the relevant market, the enforcement of business competition law cannot be done. Herein is the problem, because the definition of the relevant market has always been a source of conflict between KPPU and the Reported Party. There is always a miss understanding of the definition of product market and geographic market. When there is a conflict about the market, what happens next is the art of argument, not in the material aspect itself. In the end, the lawyer or the Reported Party was helpless when the KPPU persisted with its own arguments. That is an aspect that business actors,

including lawyers, always complain about, that they need justice in the legal due process.

7. Limits on asset value and turnover as notification requirements:

a. Value Limits.Assets and turnover for notification of Merger, Consolidation and Acquisition to the Commission are if: the asset value of business entities resulting from the merger or consolidation or acquisition exceeds IDR 2,500,000,000,000.00 (two trillion five hundred billion rupiah); or the sales value (turnover) of the merger or consolidation or acquisition of business entities exceeds Rp. 5,000,000,000,000.00 (five trillion rupiah);

b. In the banking sector the assets of a business entity resulting from a merger or consolidation or acquisition exceed Rp. 20,000,000,000,000.00 (twenty trillion rupiah). If one of the parties conducting the Merger, Consolidation and Acquisition is engaged in banking and the other party is not engaged in banking, the business actor is required to notify the Commission if the asset value of the business entity resulting from the merger or consolidation or acquisition exceeds Rp. 2,500,000,000,000.00 (two trillion five hundred billion rupiah).

The asset value and turnover are calculated from all group companies under the control of the ultimate business entity (BUT). The calculated asset value and turnover are those in the territory of Indonesia (excluding exports). If there is a difference in the value of assets or sales in the last year and the previous year (more than 30%) then the average is calculated for the last 3 years.

8. What if the threshold is reached but the acquisition is made at a small company, or even for an unrelated industry. The point is that it will not pose a threat to fair business competition. But this is still mandatory to report, because the rules are like that. The reason KPPU has certainly entered is, "how do we know whether it is small and not anti-competitive if we do not check".

This clearly creates inefficiency both for business actors and for KPPU as I explained above.

9. The following is referred to as a business group or the so-called ultimate business entity (BUT) as the basis for calculating the asset threshold and turnover or aspects of market power. In reality, if an acquisition is carried out on a certain product that has absolutely nothing to do with concentration, why is the assessment so broad that it creates inefficiency and is prone to business secrets. I tend to think it's not the group that is the main consideration but the target market for something with the type of product being transacted.

10. The Merger Notification Procedure, clarity, and simplicity should be the "essential" features of the notification threshold to allow the parties to easily determine whether a transaction is notifiable.

11. Time and Process Must Be Efficient and Reasonable. Merger reviews must be completed within a "reasonable period of time," and jurisdictions should include procedures that provide expedited review and permit transactions that are notified primarily of transactions that do not raise competitive issues (commonly known as a "waiting period"). Too long time can thwart the transaction process, because in general the negotiation process, due diligent, and price quotes and others are always limited by time. If the preliminary agreement deadline is over, it will be canceled.

12. This situation is particularly risky in the case of multi-filing because the information required to respond to requests from different

authorities must often be collected by the same person and from the same source. If the requests are varied and difficult to respond to in a limited time.

13. Transparency and fairness procedures are two important principles that the process must be “transparent. Frequently the question arises why business actors who are delay in reporting are fined differently, with almost the same case and character. There are suspicions that negotiations are taking place. This is a challenge for all of us.

14. Confidentiality should be applied with a "high level of transparency", but must be subject to the protection of confidential information. Ultimately, the rules must strike the right balance between confidentiality and procedural justice considerations. To some degree, most jurisdictions pursue transparency, fairness procedures, confidentiality, and judicial review. These rules must be regulated in comprehensive guidelines that bind the respective competition authorities. Confidential information is only requested when absolutely necessary and is specifically limited to the need for merger analysis.

15. Global Cooperation. Competition authorities have recognized the need to integrate with best practice and therefore decided to create an International Competition Network during their meeting in Ditchley Park in 2001.According to the ICN Practice Recommendations, competition agencies, although not required to do so, should seek coordination and convergence. merger review to exchange experiences on best practice.

III. CONCLUSION

In conclusion I want to return to the objectives of this law:

a. to maintain public interest and improve the efficiency of the national economy as one of the means to improve public welfare;
b. to create a conducive business climate through healthy business competition, thus securing equal business opportunity for large, middle and small scale entrepreneurs;
c. to prevent monopolistic practices and / or unfair business competition by the entrepreneurs; and
d. to create effectiveness and efficiency in business activities.

Every Step in the merger supervision process should be in order to achieve that goal. thank you