

# Merger Control

The international regulation of mergers and joint ventures in 64 jurisdictions worldwide

# 2010

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# Indonesia

## Rikrik Rizkiyana, Vovo Iswanto and Albert Boy Situmorang

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### Legislation and jurisdiction

#### 1 What is the relevant legislation and who enforces it?

The legal basis for merger control in Indonesia is Law No. 5 of 1999 on the Prohibition of Monopolies and Unfair Business Competition Practices (the Indonesian Competition Law or the ICL), in particular articles 28 and 29. Article 28 of the ICL prohibits mergers, consolidations and acquisitions (hereinafter referred to as mergers) that may result in a monopoly or unfair competition practice. Accordingly, the criteria for mergers that may violate the ICL shall be set out in a government regulation. Subsequently, article 29 of the ICL provides that mergers that result in combined assets, sales or both exceeding certain thresholds as set forth under government regulation shall be notified to the Commission for the Supervision of Business Competition, an independent agency established for the enforcement of the ICL (the Indonesian Competition Agency or the ICA). Since the enforcement of the ICL in March 2000, the Indonesian government has not adopted those two regulations as required by the ICL and therefore there are certain issues concerning the enforcement of merger rules that are still unclear.

In spite of the above, the ICA has recently adopted Commission Regulation No. 1 of 2009 on Pre-Merger, Consolidation and Acquisition Notification (the Commission Regulation on Pre-merger Notification) along with its related guidelines (the Pre-merger Guidelines), which were introduced on 13 May 2009. The former stipulates that notwithstanding compulsory post-merger notification, companies may notify their merger plan to the ICA prior to its completion (pre-merger notification), while the latter provides detailed provisions for the procedure and substantive test that would apply in the merger review.

Pending government regulations on merger control, the ICA is the sole agency responsible for the enforcement of merger control rules in Indonesia. Apart from merger control, the ICA can also enforce and supervise the application of the ICL and impose administrative sanctions against any violation of the ICL.

#### 2 What kinds of mergers are caught?

The ICL only stipulates specific transactions that shall be notified to and examined by the ICA as part of the application and enforcement of merger control, as follows:

- merger of two or more previously independent companies; and
- acquisition of direct or indirect control over a previously independent company through acquisition of shares.

In addition to the above, the Pre-merger Guidelines maintain that the ICA has jurisdiction over an acquisition of assets, business unit or business division and any acquisition of control that has met the conditions as laid down in the relevant regulations.

#### 3 Are joint ventures caught?

There is no explicit rule that refers to joint ventures, in article 28 or 29, or in the Commission Regulation on Pre-merger Notification or in the Pre-merger Guidelines. However, if the establishment of a joint venture has resulted in a transfer or an acquisition of factual control of related firms, then such joint venture may be caught by the merger control regulations.

#### 4 Is there a definition of 'control' and are minority and other interests less than control caught?

At present, there is no provision that explicitly defines the term 'control' in the ICL or its implementing regulations. There are references, however, to what is considered a transfer or acquisition of control.

The Pre-merger Guidelines clarify that a transfer or an acquisition of control occurs when there is an acquisition of at least 25 per cent of the shares with voting rights, or, if it involves an acquisition of less than 25 per cent of the shares with voting rights, when it grants factual or effective control over the acquired firm to the acquiring firm. In relation to the acquisition of assets, the Pre-merger Guidelines also provide that transfer of control takes place when the acquired assets are the main assets or assets required in the operation of one of its main business processes or activities that confer factual control upon the owner or holder of such assets. In anticipation of future progress in business activities, the Pre-merger Guidelines assert that a transfer of control by means other than acquisition of shares or assets, for example, by an acquisition of rights to control or manage a company, may also be caught by merger control regulations and therefore shall be notified to the ICA.

#### 5 What are the jurisdictional thresholds?

In accordance with the Commission Regulation on Pre-merger Notification, a merger can and shall be notified to the ICA if it meets the following thresholds:

- combined national assets of the post-merger firm exceeds 2.5 trillion rupiahs for a non-financial company or exceeds 10 trillion rupiahs for a financial company (bank or non-bank);
- combined national turnover of the post-merger firm exceeds 5 trillion rupiahs for a non-financial company or exceeds 15 trillion rupiahs for a financial company; or
- resulting in the acquisition or control of more than 50 per cent shares of the relevant market.

An acquisition can and shall be notified to the ICA if it involves:

- acquisition of at least 25 per cent of the shares with voting rights;
- acquisition of less than 25 per cent of the shares with voting rights which results in a transfer of effective control; or
- acquisition of assets or any other transactions that result in acquisition of an effective control; and

- the acquisition meets one of the thresholds as set out for a merger transaction to be notified.

- 6** Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Based on the Commission Regulation on Pre-merger Notification and the ICL, the filing of a pre-merger notification is a voluntary action, while the filing of a post-merger notification is mandatory. Although merging parties have voluntarily filed pre-merger notifications to the ICA, they still have an obligation to file a post-merger notification, which shall be made within 30 days after the completion of a merger. However, the ICA has committed, as illustrated in the Pre-merger Guidelines, that it will not conduct a similar review nor will it change its opinion for the same merger that has been notified prior to the completion of the merger, provided that there is no material change to the merger plan.

- 7** Do foreign-to-foreign mergers have to be notified and is there a local effects test?

On the basis of the Pre-merger Guidelines, the ICA emphasises that it has jurisdiction over foreign-to-foreign mergers and will apply the merger control regulations, as long as the related firm having operations in Indonesia has met the thresholds and the merger affects the Indonesian market, taking into account the effectiveness of such enforcement.

#### Notification and clearance timetable

- 8** What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

There is no provision concerning the deadline for filing a pre-merger notification, and accordingly, no sanction applies. For post-merger notification, on the other hand, it has to be filed within 30 working days after the completion of merger, as laid down in article 29 of the ICL. However, pending the introduction of the government regulation, it is still unclear whether or not there will be a sanction for not complying with the deadlines.

- 9** Who is responsible for filing and are filing fees required?

In pre-merger notification, all merging parties are responsible for the filing. Together, each party to the merger plan may submit a pre-merger notification to the ICA. The ICA, however, has highlighted that each firm shall keep its own confidential information properly maintained and shall not unnecessarily disclose to the other party to the merger plan. As in other issues concerning post-merger notification, it is still unclear who will be responsible for filing in post-merger notification. In an acquisition, only the acquiring company is obliged to file the notification.

There is no filing fee for pre-merger notification under the Commission Regulation. As the government of Indonesia has not issued any implementing regulation on post-merger notification as required by the ICL, it is still unknown whether there would be fees imposed on merging parties for the notification.

- 10** What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

There are no provisions on waiting periods or suspension of the consummation of the transaction prior to a decision or opinion of the ICA.

- 11** What are the possible sanctions involved in closing before clearance and are they applied in practice?

There is no obligation under the applicable legislation for asking for an approval from the ICA as pre-merger notification is only for knowing the opinion of the agency regarding the possible anti-competitive effects of the merger plan. Because notification prior to the closing of a transaction is voluntary, there is no applicable sanction.

- 12** What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Not applicable.

- 13** Are there any special merger control rules applicable to public takeover bids?

It is likely that merger control rules on public takeover bids will be governed in the draft government regulation, as it is currently being discussed by the ICA together with other government agencies including the Capital Market and Financial Institutions Supervisory Agency.

- 14** What is the level of detail required in the preparation of a filing?

There are two standard forms of notification, namely the merger form and acquisition form. The former is used for mergers while the latter is used for acquisitions. These forms are used and shall be submitted to the ICA to meet administrative requirements. It is not clear, at this point, to what extent the ICA will require detailed data or information that shall be notified in relation to the transaction. However, from the Pre-merger Guidelines, it is clear that the ICA is entitled to ask for additional documents as it deems necessary.

The detailed information that needs to be submitted includes:

- the identity of the parties, which comprises information on the name, address, members of the board of commissioners, members of the board of directors, shareholders and their share percentages and value of sales and assets for the last three years prior to merger;
- the identity of the parent company and companies under the control of the parent company, which includes information on the name and value of sales and assets for the last three years prior to merger (this requirement is only for parties under the control of a parent company);
- a profile of merging parties' products, comprising information on the brand names, product category, market share and product description;
- profiles of competitors, consumers, and suppliers, comprising information on the name, address, brand names, market share and product description; and
- a brief explanation of the targeted outcome of the merger (maximum two pages).

- 15** What is the timetable for clearance and can it be speeded up?

The actual duration of review process will depend on how fast the parties complete the requirements described in question 14 and the complexity of the transaction. The Commission Regulation on Pre-merger Notification only prescribes the maximum period for the ICA to complete its examination and therefore the process could be done faster than the maximum statutory period (see question 16 for the time frame).

**16** What are the typical steps and different phases of the investigation?

Once a notification is filed, the ICA examines the notification form and the supporting evidence. If the ICA requires more information or additional documents, it will ask the notifying parties to make them available for the ICA.

If all requirements have been fulfilled, the ICA will commence an initial review by calculating the concentration resulting from the merger. This first phase is for a maximum of 30 working days. When HHI, as a result of the merger, is between 1800 and 3000, the ICA will undertake a full review of the merger plan lasting a maximum of 60 working days. The ICA will not undertake a full review if the concentration is below or above the interval threshold.

On the day the ICA issues a Conditional No Objection Letter or Objection Letter at the end of the first phase or the second phase, the notifying parties can have or request a consultation with the ICA within a maximum of 30 working days. At the end of the consultation phase, the ICA will issue its final opinion on the merger plan. Three possible opinions could be issued by the ICA after the consultation – a No Objection Letter, a Conditional No Objection Letter or an Objection Letter. A No Objection Letter means the ICA will not oppose the merger, a Conditional No Objection Letter means it will oppose the merger unless several conditions as it sets are met by the merging parties and an Objection Letter means it will strongly oppose the merger and open a formal investigation if the merger continues.

**Substantive assessment****17** What is the substantive test for clearance?

The ICL prohibits concentrations that would create a monopoly or would likely result in conditions that are conducive for unfair business practices, and as a result would cause harm to consumers. The ICA has no power to grant clearance of a merger, and therefore any substantive test it undertakes during a review is used only to prepare its opinion on the merger plan.

**18** Is there a special substantive test for joint ventures?

The applicable regulations do not establish a substantive test specific to joint ventures.

**19** What are the 'theories of harm' that the authorities will investigate?

In reviewing a horizontal merger plan, the ICA will consider unilateral and coordinated effects potentially resulting from it. In the event of a merger involving companies from a different level of production (value-added) chain, the ICA will focus on examining the vertical foreclosure effects regarding the access to essential inputs or possible discrimination in the form of price or terms of trade.

**20** To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

According to the Commission Regulation on Pre-merger Notification, opinions and decisions of the ICA will primarily be based on a competition perspective, except when one of the parties is going to go bankrupt or falling within one of exemptions as set out in the ICL.

**21** To what extent does the authority take into account economic efficiencies in the review process?

The Commission Regulation on Pre-merger Notification has explicitly stated that efficiencies, among other things, resulting from a merger will be assessed under a full review. The amount of the expected efficiencies claimed by the merging parties and the possibility that consumers will benefit from it will be carefully evaluated by the ICA. If, on the basis of its review, the ICA finds that the efficiencies could also

be achieved through competition mechanisms or they are less than the anti-competitive effects, then it will object to the merger plan.

**Remedies and ancillary restraints****22** What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The ICA cannot block a merger. However, it can review and issue an opinion on a merger plan. The opinion issued prior to the merger is binding to the ICA even in its compulsory post-merger review, so long as the plan has not been substantially changed. Therefore, if it finds a merger plan is objectionable, it cannot reject or block the merger, but it may, after the merger is consummated, open a formal investigation as well as impose sanctions, such as annulment of the merger, fines or damages.

**23** Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

With respect to remedies, the ICA will take the initiative in the determination of required remedies to settle its concerns. However, merging parties are given an opportunity to propose remedies during the consultation phase. ICA will then issue a Conditional Objection Letter and supervise the implementation of the remedy if it accepts the proposal. The remedies may be structural or non-structural (conduct remedies).

**24** What are the basic conditions and timing issues applicable to a divestment or other remedy?

Under the applicable regulation, there is no specific provision regarding the basic conditions and timing for a divestment or other remedies. However, taking into account the approaches used by the ICA in its recent decisions, we may expect that the ICA will consider and impose specific conditions as well as timetable when it finds it necessary, depending on the complexity of the issues under review.

**25** What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

There is no precedent regarding remedies in foreign-to-foreign mergers.

**26** In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

Not applicable.

**Involvement of other parties or authorities****27** Are customers and competitors involved in the review process and what rights do complainants have?

Although there are no statutory rights given to customers nor competitors to get involved during the review process, the ICA is entitled to and will invite customers as well as competitors in its review process so as to collect necessary information with regard to market analysis and competition impact. They may, however, submit their opinion or recommendation on the merger plan during its review.

**28** What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

A notification of a merger plan as well as the ICA's opinion will be made available to the public, at least through the official website of the ICA ([www.kppu.go.id](http://www.kppu.go.id)). As it is an obligation for the ICA to protect commercially confidential information acquired from or during its investigation, the ICA will observe this obligation in its merger review process, by keeping merging parties' trade secrets it

has acquired during the review properly secured and unavailable to the public.

**29** Do the authorities cooperate with antitrust authorities in other jurisdictions?

To the best of our knowledge, there is no specific agreement regarding cooperation to date on enforcement of merger control with competition agencies in other jurisdictions.

**30** Are there also rules on foreign investment, special sectors or other relevant approvals?

The ICL, including its merger control rules, applies to all business activities in Indonesia, except for those specifically exempted in the ICL (small businesses and cooperatives). In addition, however, there are specific rules in separate regulations applicable to foreign investment or certain sectors. For example, in the financing or banking sector, some mergers must also be notified and subject to approval from the Ministry of Finance or the Indonesian Central Bank.

#### Judicial review

**31** What are the opportunities for appeal or judicial review?

There is no provision in the Commission Regulation on Pre-mergers that explicitly provides that an appeal to the ICL's opinion as a result of a pre-merger review is possible. In relation to the result of a post-merger review, it is still unclear whether an appeal can be filed. However, if the ICA conducts a formal investigation into a merger or issues its decision, then an appeal can be filed with the district court against such decision. A formal investigation comprises procedures and measures taken by the ICA in accordance with the ICL when it finds that there is a possible violation of the ICL, generally in the form of cartels or abuse of a dominant position. The ICL provides two steps that may be taken to challenge the ICA's decision, which are objection (appeal) to the district court and finally to the Supreme Court.

**32** What is the usual time frame for appeal or judicial review?

An appeal has to be filed before the district court within 14 calendar days after the parties receive the ICA's decision. In accordance

#### Update and trends

There is one merger transaction that is being investigated by the ICA. This case involves an acquisition of a public retail company. The transaction has been closed before being reviewed by the ICA. After the closing, the ICA received a complaint from a third party. Even though there were no regulations concerning notification that had been adopted, the ICA responded to the complaint by launching an investigation and the case is now in the proceeding before the ICA.

with the time frame set out in the ICL, the district court shall issue its ruling within 30 calendar days after the commencement of the proceedings. A further appeal can be made to the Supreme Court within 14 calendar days after the district court's ruling is received by either of the parties. The time frame for this review is, by law, set at a maximum of 30 calendar days.

#### Enforcement practice and future developments

**33** What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

There is no precedent regarding the enforcement of merger control by the ICA specifically in foreign-to-foreign mergers.

**34** What are the current enforcement concerns of the authorities?

The ICA is currently focusing its enforcement on and closely monitoring sectors where there is a rigid price or shortage of supply, such as in the oil and gas, cooking oil, cement and fertilizer sectors, sectors monopolised by state-owned companies or firms holding market shares of more than 50 per cent, poor-quality public services, and highly regulated markets. The first enforcement of merger regulation was a merger between two big modern retail markets in Indonesia.

**35** Are there current proposals to change the legislation?

There has been a number of recommendations made by related institutions to amend the ICL, but no deadline has been given.

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Indonesia					
Voluntary or mandatory system	Notification trigger/filing deadline	Clearance deadlines (Stage 1/Stage 2)	Substantive test for clearance	Penalties	Remarks
Both systems are applied. Notification is voluntary before the closing of a merger and mandatory after the completion of the merger.	For mergers involving non-financial companies, when the combined national assets exceed 2.5 trillion rupiahs or combined national sales exceed 5 trillion rupiahs or combined market shares of the relevant market exceed 50%. For mergers involving financial (bank and non-bank) companies, when the combined national assets exceed 10 trillion rupiahs or combined national sales exceed 15 trillion rupiahs or combined market shares of the relevant market exceed 50%. For concentration which involves acquisition, acquisition of at least 25% of shares with voting rights, acquisition of less than 25% of shares with voting rights but entails transfer of effective control, and other agreements which give rise to transfer of effective control, for example, agreement which involve effective control through managerial positions. There are no filing deadlines for pre-merger notification, while for post-merger notification, it must be filed no more than 30 working days.	There are no clearance deadlines. However, if there is a review following a premerger notification, the process will be within a maximum of 30 working days for initial review (stage 1) and a subsequent maximum 60 working days for complete review (stage 2).	Factors to be considered are (i) level of concentration after the transaction, (ii) the possibility of unilateral, coordinated effects, or foreclosure effects and (iii) efficiencies created by the transaction.	There are no penalties for not filing before the closing of transaction. Penalties for not filing after closing are still unknown as relevant regulation has not been issued yet.	



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