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## Follow-up to the New Merger Control Regulation

Further to our previous client alert on the new KPPU merger regulation<sup>1</sup> (“**New Regulation**”) ([click here to read](#)), we set out below further details on asset acquisitions that are subject to KPPU notification based on several discussions with the KPPU.

The KPPU stated that it intends to publish an implementing guideline of the New Regulation and as such, the discussion below is subject to this upcoming guideline.

### 1. Criteria

Under the New Regulation, an asset acquisition is notifiable to the KPPU if the transaction:

- a. satisfies the applicable thresholds;
- b. results in a change of control over the acquired assets; and/or
- c. increases the acquirer’s ability to control certain markets.

While the statutory threshold and change of control criteria are quite clear, the third criterion is quite broad and would need to be determined objectively on a case-by-case basis.

Based on several discussions with the KPPU, we understand that not all asset acquisitions satisfying point c above are required to be notified to the KPPU. Only asset acquisition that satisfies both of the following objective criteria would need to be notified.

- a. ***The assets are not sold under an ordinary sales activity***

We understand that the KPPU does not expect a notification based on an ordinary sales activity even if such activity results in an acquisition of assets by the acquiring company. Instead, the KPPU focuses on the acquisition of assets that are already operated by the target company.

For example, if a business actor purchases a fleet of cars from a car dealer, this purchase will not be subject to KPPU notification. For the car dealer, the cars are its stocks/inventory and selling cars is its ordinary sales activity. However, if that business actor purchases a fleet of cars from a car rental company, then this purchase will be

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<sup>1</sup> KPPU Regulation No. 3 of 2019 on Assessment of Merger or Consolidation of Business Entities or Share Acquisition of Companies that could Result in Monopolistic and/or Unfair Business Competition Practices.

subject to KPPU notification. For the car rental company, the cars are its operating assets and selling them is not part of its ordinary sales activity. Its ordinary sales activity is presumably renting these cars to customers.

**b. *The asset acquisitions may potentially increase the market share of the purchaser or its group company, or potentially integrate vertically with the business activities of the purchaser or its group company***

Using the example above, if the purchaser or any entity in its group company is also a car rental company, the acquisition will be subject to KPPU notification because the purchase may increase the market share of the purchaser or its group company in the car rental market.

However, if the purchaser is a manufacturing company, and none of its group company engages in car rental business, and the purchased cars will be used for daily transportation, then the acquisition will not need to be notified to the KPPU as it will not increase the market share of the purchaser or its group company.

That being said, if the cars will be used to distribute the manufactured products of the purchaser or of its group company, the acquisition will still need to be notified to the KPPU as distribution of goods is vertically related to the manufacturing of the goods.

Therefore, the motive for the asset acquisition is vital since it may ultimately determine whether an asset acquisition is notifiable or not. KPPU will examine the intended use of the acquired assets closely, including whether the asset acquisition will lead to an increase of the purchaser's market share in certain markets.

Nevertheless, KPPU also states that a conglomerate (that is neither horizontally overlaps nor vertically integrated) asset transaction may also be subject to KPPU notification. As such, this type of asset transaction will not be automatically excluded.

## **2. Notification Thresholds**

### **a. *Calculating the threshold for a share transaction***

The New Regulation sees the fulfilment of the notifiability threshold based on either the assets or sales values. On the value of assets threshold, previously, only Indonesian assets will be calculated. However, based on several discussions, the KPPU has confirmed that the assets threshold under the New Regulation of IDR 2.5 trillion must be calculated on a worldwide basis.

On the other hand, the position in the New Regulation for sales threshold remains the same, in that the sales threshold of IDR 5 trillion is based on the calculation of the sales of the relevant parties in Indonesia.

***b. Calculating the threshold for an asset transaction***

In an assets-based transaction, we understand that the KPPU will also look at either the shares or assets values thresholds.

However, the calculation of assets threshold in an asset-based transaction is the worldwide value of the assets of (i) the acquirer group; plus (ii) the value of the purchased assets as stated in the target's financial statements. If the number (ii) above is not available, the KPPU will look at the value of the transaction.

If the asset value of the purchaser already exceeds IDR 2.5 trillion, then the value of the purchased assets or the value of the transaction would be irrelevant as the acquisition must be notified on this basis alone.

The sales threshold for an asset-based transaction will be calculated from the acquirer group only. So, if the asset threshold does not satisfy the worldwide asset threshold of IDR 2.5 trillion, it is also important to check whether the acquirer group satisfies the Indonesian sales threshold of IDR 5 trillion. If it does, then the transaction may still be subject to KPPU notification.

**3. Pre-Closing Procedure**

While the New Regulation does not specify the procedures, timeline and competition assessment of a voluntary pre-closing notification, KPPU mentioned in the course of our discussion that the procedures, timeline and completion assessment will be the same as for the mandatory post-closing notification.

Until the KPPU issues its definitive guidelines, caution should always be exercised by transacting parties, especially in light of the discussion above. As in the past, we would recommend parties to perform a self-assessment early in their transaction to determine whether their transaction would have to be notified to KPPU.

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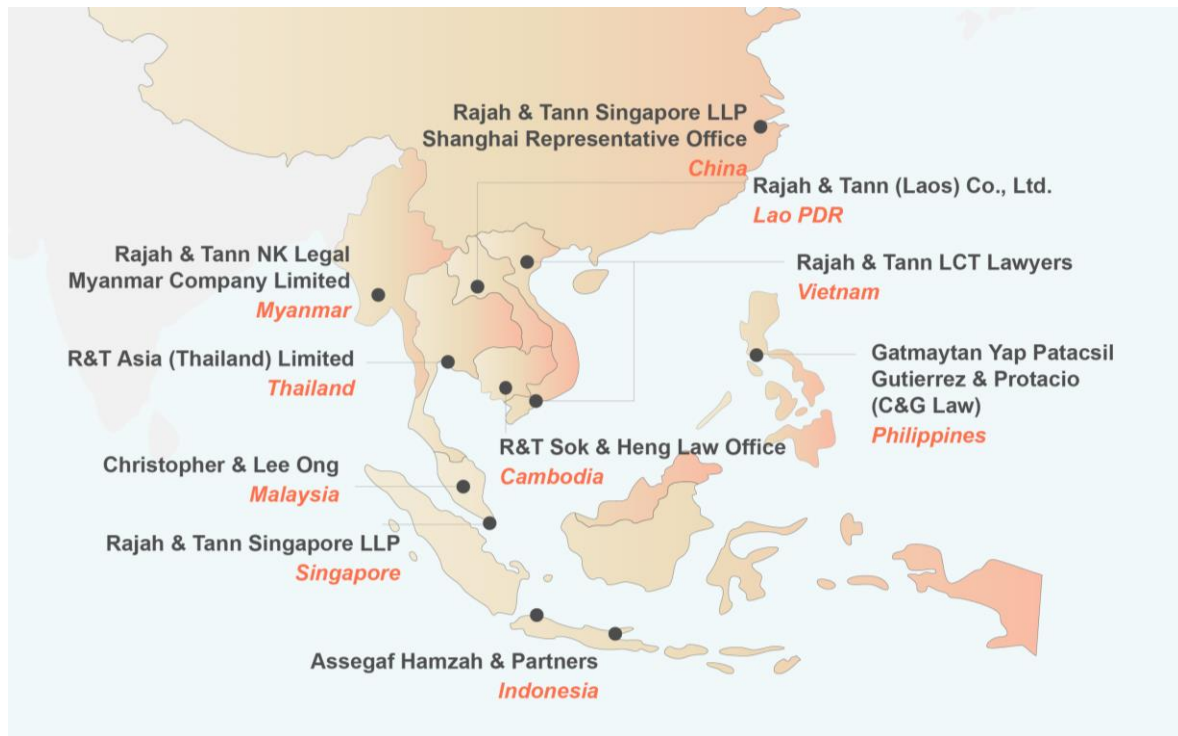
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