IMPLEMENTATION GUIDELINES FOR MERGER, CONSOLIDATION, AND ACQUISITION PRE-NOTIFICATION

Table of Contents

Chapter I  Background

Chapter II  Objectives and Scope

2.1 Objectives

2.2 Legal Basis

2.3 Use of Terminology

2.4 What is a Merger?

2.5 General Forms of Merger

Chapter III  Merger Pre-Notification Procedure

3.1 Merger Pre-Notification

3.2 Notifiable Merger

3.3 Notifiable Share Acquisition

3.4 Notifiable Asset Acquisition

3.5 Other Acquisitions That Cause Transfer of Control

3.6 Limits of Transaction Value

3.7 When to Conduct Pre-Notification

3.8 Who Conducts Pre-Notification
Chapter IV Merger Assessment

4.1 Assessment Procedure

4.2 The Commission’s Assessment of Merger (Substantive Test)

4.3 Pre-Notification Output

4.4 Consultation on Pre-Notification Output

4.5 Post-Merger Notification

4.6 The Commission’s Authority to Commence an Initiative Case

Chapter V Foreign and Specific Industry Mergers

5.1 Foreign Mergers

5.2 Specific Industry Mergers

Attachment

1. Attachment I : Merger or Consolidation Pre-Notification Form

2. Attachment II : Share Acquisition Pre-Notification Form
CHAPTER I

BACKGROUND

Regardless of whether we are aware of it, merger, consolidation, and/or acquisition acts will influence the competition among between business actors in the relevant market and affect the consumers and the community. The Commission is aware that merger, consolidation, and/or acquisition may increase or decrease competition which may potentially harm the consumers and the community. Therefore, pursuant to the mandates of Article 28 and 29 of Law No. 5 Year 1999, the Commission will exercise control on merger, consolidation and/or acquisition, especially merger, consolidation and/or acquisition which decrease competition in the relevant market and which harm the community.

In order to provide business actors with transparency, the Commission also stipulates clear procedures on the stages of assessment conducted by the Commission on merger, consolidation and/or acquisition pre-notification, which also include the descriptions of aspects which will be assessed by the Commission in determining whether a proposed merger, consolidation and/or acquisition may result in monopolistic practice or unfair business competition.

This implementation guideline will discuss the types of merger, consolidation and/or acquisition which can be notified to the Commission, merger, consolidation and/or acquisition pre-notification procedures, and aspects that will be assessed by the Commission in rendering its opinion.
This implementation guideline constitutes an inseparable part of Commission Regulation Number 1 Year 2009 on Merger, Consolidation and/or Acquisition Pre-Notification.
CHAPTER II

OBJECTIVES AND SCOPE

2.1 Objectives

The objectives of the establishment of Commission Regulation and Implementation Guidelines for Merger, Consolidation and/or Acquisition Pre-Notification are to:

1. Ensure that merger, consolidation and acquisition continue to improve economic efficiency as one of the efforts to improve national welfare.

2. Provide legal certainty for business actors who will conduct merger, consolidation and/or acquisition.

3. Prevent monopolistic practices and/or unfair business competition by business actors as a result of merger, consolidation and/or acquisition.

4. Encourage merger, consolidation and/or acquisition aimed at improving the effectiveness and efficiency of business activities.

2.2 Legal Basis

The legal bases of the Commission Regulation and Implementation Guidelines for Merger, Consolidation and/or Acquisition Pre-Notification are Article 28 and Article 29 of Law No. 5 Year 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition.

Article 28 paragraph (1) and (2) reads:

(1) Business actors shall be prohibited from conducting mergers or consolidations of business entities resulting in monopolistic practices and or unfair business competition;
(2) Business actors shall be prohibited from conducting the acquisition of shares in other firms if such action may result in monopolistic practices and or unfair business competition.

and Article 29 paragraph (1) reads:

(1) The Commission must be notified of mergers or consolidations of business entities, or acquisition of shares as intended in Article 28 resulting in the assets value and or sales value exceeding a certain amount, by no later than 30 (thirty) days from the date of such merger, consolidation or acquisition.

On the basis of such articles, the Commission may impose an administrative sanction according to Article 47 paragraph (2) sub-paragraph e by:

\textit{e. stipulation of the cancellation of mergers or consolidations of business entities and share acquisition as intended in Article 28.}

Pursuant to Article 47 paragraph (2) sub-paragraph e above, the Commission has the authority to stipulate the cancellation of merger, consolidation and acquisition which may lead to monopolistic practices and/or unfair business competition.

Nevertheless, in order to provide certainty in the business world, the Commission will provide opportunities to business actors to notify the Commission before they conduct merger, consolidation and/or acquisition. The Commission will then evaluate the impacts thereof, and render its opinion on notified merger, consolidation and/or acquisition plan.

If the Commission considers that the proposed merger, consolidation and/or acquisition will not reduce the level of competition, the Commission will be bound by its assessment and will not use its authority to cancel notified merger, consolidation and/or acquisition in the future. Therefore, business actors will be spared from
uncertainties as to whether the merger, consolidation and/or acquisition they conduct will be cancelled by the Commission due to the assumption that it leads to monopolistic practices and/or unfair business competition.

2.3 Use of Terminology

There are many essentially similar terminologies used to describe an event. Law No. 40 Year 2007 on Limited Liability Companies uses the terms penggabungan (merger), peleburan (consolidation) and pengambilalihan (acquisition), whereas Government Regulation on Banking uses the terms merger (merger), konsolidasi (consolidation) and akuisisi (acquisition). Several other countries use the terms concentration and takeover. Although Law No. 5 Year 1999 uses the term penggabungan (merger), peleburan (consolidation) and pengambilalihan (acquisition), for the purpose of this implementation guidelines, the Commission will use the term merger which also includes konsolidasi (consolidation) and akuisisi (acquisition), penggabungan, peleburan and/or pengambilalihan otherwise a certain form of incident is expressly referred to herein.

Nonetheless Law No. 5 Year 1999 uses the term share acquisition, the Commission views the term share acquisition as including the definition of asset and business division/unit acquisitions as well, and therefore the term acquisition or share acquisition herein also refers to asset and business division/unit acquisitions.

2.4 What is a Merger?

Despite Law No. 40 Year 2007 has provided the definitions of merger, consolidation and acquisition, the Commission is of the opinion that the merger intended in Law No. 5 Year 1999 encompasses a wider definition compared to the definition in Law
No. 40 Year 2007 which only applies to Limited Liability Companies. Therefore, the Commission needs to describe the term merger as intended by Law No. 5 Year 1999.

In simple terms, merger is an act of business actors which causes:

1) A concentration of control of several previously independent business actors in one business actor or a group of business actors; or
2) Transfer of control from one previously independent business actor to another, leading to control or market concentration.

Merger may take the form of penggabungan (merger), peleburan (consolidation) and pengambilalihan (acquisition) according to the provisions in Law No. 40 Year 2007 or laws or in the form of merger, konsolidasi dan akuisisi pursuant to the provisions of the banking laws and regulations or in other forms such as the merger of several firms (such as public accountant firms).

2.5 General Forms of Merger

Generally, merger occurs when two or more previously independent firms amalgamate into a firm, whether due to the merging of one firm into another, or the consolidation of several firms into a new one, or the transfer of control of a firm to another business actor. Graphically, merger can be described as follows:

Form I/Merger

[Diagram showing the process of merger with labels for 'Before' and 'After']
Explanation of Form I/Merger

In this merger form, X amalgamate itself into Y, therefore X is legally liquidated while all its assets and liabilities are legally transferred to Y. Accordingly, all X shareholders legally change into Y shareholders.

Form II/Consolidation

Explanation of Form II/Consolidation

In this merger form, both X and Y are legally liquidated, while all their assets and liabilities are legally transferred to Z, a new entity. Respective shareholders of X and Y will then legally become shareholders of Z.

Form III/Share Acquisition
Explanations of Form III/Share Acquisition

In this merger form, X acquires control of B and therefore X becomes the shareholder and controller of B. There is no transfer of asset and liabilities, whether from B to X or vice versa.

Form IV/Asset Acquisition

Explanation of Form IV/Asset Acquisition

In the asset acquisition form, X acquires asset A from B, and Y acquires asset B from X.
In this merger form, asset acquisition occurs instead of share acquisition. An asset previously belonging to Y is bought by X, therefore causing transfer of control of such assets. Through share transaction in the capital market, X becomes a controller of Y.

Form V/Takeover

Explanation of Form V/Takeover

In this merger form, X purchases most of Y’s shares directly from the shareholders, causing Y to become a subsidiary of X. Transfer of control occurs from Y shareholders to X. X and Y legal entities continue to exist without transfer of asset and liabilities from X to Y or vice versa.

Form VI/Public Takeover
Explanation of Form VI/Public Takeover

This form of merger is similar to form V/Takeover, except that the share transaction occurs through the capital market. Y becomes a subsidiary of X and X gains control over Y.

*The Commission does not limit the possibility of merger forms other than the six common merger forms above. As long as the essence of merger has been fulfilled, the Commission can use its authority to assess the merger in order to prevent potential impact of anti-competition.*
CHAPTER III
MERGER PRE-NOTIFICATION PROCEDURE

3.1 Merger Notification

There are two forms of merger notification to the Commission, namely:

1. Pre-Notification
2. Post-Notification

This implementation guideline, however, will only explain about Pre-Notification, whereas Post-Notification will be further regulated in Government Regulation spelling out the provision of Article 29 of Law No. 5 Year 1999.

Pre-Notification is a voluntary notification given by business actors to the Commission on a proposed merger. The Commission encourages business actors to conduct pre-notification in order to minimize the risk of loss they may suffer provided that the merger is considered as potentially leading to future monopolistic practices or unfair business competition and consequently cancelled by the Commission.

In order to avoid the redundancy of assessment on the same merger through pre-notification and post-notification, the Commission is committed to only one assessment on one merger event, insofar as there is no substantive change in the data submitted by business actors conducting the merger. Therefore, if the business actors have voluntarily submitted Pre-Notification, the Commission will not change its assessment on Post-Notification. Nevertheless, in order to meet the provisions of Article 29 of Law No. 5 Year 1999, Business Actors that have conducted Pre-Notification are remain obliged to give Post-Notification to the Commission.
according to Government-issued Government Regulation regulating Merger Notification.

3.2 Notifiable Merger

Not all mergers can be notified to the Commission. The Commission stipulates several criteria for notifiable mergers, namely:

a. the combine asset value of consolidated or merged business entities shall exceed Rp.2,500,000,000,000.00 (two trillion five hundred billion rupiah); or
b. the combine sales value (turnover) of consolidated or merged business entities shall exceed Rp.5,000,000,000,000.00 (five trillion rupiah); or
c. the merger shall produce more than 50% (fifty percent) control of market share in the relevant markets.

Whereas for (bank and non-bank) financial service industry, the following provisions shall apply:

d. the combine asset value of consolidated or merged business entities should exceed Rp.10,000,000,000,000.00 (ten trillion rupiah); or
e. the combine sales value (turnover) of consolidated or merged business entities should exceed Rp.15,000,000,000,000.00 (fifteen trillion rupiah); or
f. the merger shall produce more than 50% (fifty percent) control of market share in the relevant markets.

Parties conducting the Merger

For the purpose of merger pre-notification, parties conducting the merger are defined as business actors or a group of business actors, depending on the independence of the relevant business actors. The Commission views several legally independent business
actors as a group of business actors insofar as such business actors are controlled by the same party or by an ultimate parent business entity. Business actors are controlled means that voting shares on those business actors are possessed no less than 25%. Therefore, the calculation of asset value and sales value of a group of business actors will comprise the total asset value and sales value of the ultimate parent business entity along with those of the business actors controlled by such entity.

**Sales value resulting from merger or consolidation**

Sales value resulting from merger or consolidation is the total sales calculated based on the sum of audited recent year’s sales of respective parties conducting the merger.

If one of the parties conducting the merger has a significant discrepancy between recent year’s and the previous year’s sales value (more than 30%), the sales value will be calculated based on the average sales value of the last 3 years.

**Asset value resulting from merger or consolidation**

Asset value resulting from merger or consolidation is the total asset value calculated based on the sum of audited recent year’s asset value of the respective parties conducting the merger.

When one of the parties conducting the merger has a significant discrepancy between recent year’s and the previous year’s asset values (more than 30%), the provision in calculating sales value shall apply *mutatis mutandis*.

**Market Share**

In accordance with Law No. 5 Year 1999, Market Share is a percentage of certain goods or service sales or purchase value controlled by business actors in the relevant market in a certain calendar year. Market share is calculated from the combination of
recent year’s market share of business entities conducting the merger. In the event of significant discrepancy between the recent year’s and the previous year’s market share (more than 10%), the provision in calculating sales value shall apply *mutatis mutandis*.

*Relevant Market*

In accordance with Law No. 5 Year 1999, Relevant Market is a market related to a certain reach or market area of a business actor on the same or similar goods or services or substitution of such goods and/or services. Further explanations on the definition of relevant markets can be observed in the Guidelines on Relevant Markets issued by the Commission.

### 3.3 Notifiable Acquisition of Shares

Share acquisition which causes the transfer of control over a company from the previous owner of the acquired company to the new owner of the acquiring company and causes the acquiring firm or business actor and the acquired firm to meet the threshold of sales value or asset value or market share can be notified to the Commission.

The commission considers the transfer of control is fulfilled if a share acquisition of at least 25% (twenty five percent) of the total value of voting shares issued by the company has caused the transfer of control to the acquiring company, therefore enabling it to be notified to the Commission.

If the share acquisition is lower than 25% (twenty five percent) of the total value of voting shares, but factually transfers control to the acquiring company or business
actor, the Commission will consider the transfer of control as having occurred and fulfilled the share acquisition criteria.

Share acquisition as outlined above which results in combined asset value and sales value or market share in the relevant market meeting the criteria referred to in part 3.2. Notifiable Merger can be notified to the Commission.

Share acquisition which is only intended as an investment can be exempted from notification. Share acquisition which is only intended as an investment must be indicated by non-existence of transfer of control to a company or business actor acquiring the shares. Generally, this type of share acquisition occurs through Stock Exchange, which only aims to obtain financial gain.

3.4 Notifiable Asset Acquisition

The change of control of a company can be conducted not only through share acquisition, but also through asset acquisition. Asset is defined as all forms of company property, whether tangible or intangible.

Asset acquisition which causes the change of control of a company is considered to have occurred if the asset acquired is used by the acquired company to conduct one of its main business activities, or if the company’s main asset or an asset important to the company in conducting its business activities provide factual control of whoever possesses the asset.

If the asset acquisition causes the acquired and acquiring companies to meet the threshold of sales value or asset value or market share in part 3.2 Notifiable Merger, the asset acquisition can be notified to the Commission.
3.5 Other Acquisitions Causing Transfer of Control

The Commission aware that the transfer of control of companies can occur without share or asset acquisition, such as through the acquisition of control/management rights of a firm. Therefore, acquisitions other than share and asset acquisition which nevertheless factually causes the transfer of control of a company can be notified to the Commission insofar as the acquisition has met the threshold of sales value or asset value or market share in part 3.2. Notifiable Merger.

3.6 Threshold of Transaction Value

The Commission does not provide restrictions on which transaction value can be notified to the Commission. Insofar as the provision of part 3.2. Notifiable Merger above has been fulfilled, the proposed merger can be notified to the Commission regardless of the value of the transaction itself. This is intended to protect micro, small and medium businesses from merger acts by major business actors which may be detrimental to the continuity of micro, small and medium businesses. Without limiting the merger transaction value, the Commission can conduct an assessment on merger of micro, small and medium businesses by major firms.

3.7 When to conduct Pre-Notification

The Commission encourages business actors to pre-notify the Commission as early as possible insofar as there is a contract, agreement, memorandum of understanding, letter of intent, or other written documents demonstrating the proposal of merger between business actors before the business actors report such merger proposal to BAPEPAM, BKPM, Bank Indonesia, the Ministry of Law and Human Rights, or other authorities. However, the Commission considers pre-notifications that are
conducted too early may be subject to substantial changes that render the pre-notification assessment ineffectual. Therefore, the Commission encourages business actors to pre-notify the Commission as early as possible by considering the certainty of the transaction from the parties conducting the merger.

### 3.8 Who Conducts Pre-Notification

For business actors that will conduct merger or consolidation, each of the business actors can collectively notify the Commission of the proposal. The Commission will commence the assessment if all parties conducting merger or consolidation have submitted all necessary documents. However, the Commission warns that sensitive firm data are not to be disclosed to parties which will conduct pre-notification collectively. This is intended to prevent abuse of sensitive data of a company by parties collectively conducting pre-notification or to prevent the data from facilitating anti-competition collusive acts in the event of proposed merger abandon by the parties.

In the event of acquisition, only business actors planning to conduct the acquisition will notify the Commission of their proposal. The business actors to be acquired are not obliged to give such notification.
CHAPTER IV
MERGER ASSESSMENT

4.1 Procedure of Assessment by the Commission

Procedure of Assessment by the Commission of the merger can be illustrated through the following chart:
<table>
<thead>
<tr>
<th>Rencana Merger/Akuisisi</th>
<th>Proposal Merger/Acquisition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Memenuhi threshold</td>
<td>Fulfilling the threshold</td>
</tr>
<tr>
<td>Tidak</td>
<td>No</td>
</tr>
<tr>
<td>Tidak perlu pranotifikasi</td>
<td>Pre-notification is not required</td>
</tr>
<tr>
<td>Ya</td>
<td>Yes</td>
</tr>
<tr>
<td>Pranotifikasi...</td>
<td>Pre-notification to KPPU</td>
</tr>
<tr>
<td>Dokumen...</td>
<td>Complete Document</td>
</tr>
<tr>
<td>Permintaan kelengkapan...</td>
<td>Request for Document Completeness</td>
</tr>
<tr>
<td>Penilaian awal</td>
<td>Initial assessment</td>
</tr>
<tr>
<td>HHI</td>
<td>Hirschman Herfindahl Index (HHI)</td>
</tr>
<tr>
<td>30 hari</td>
<td>30 days</td>
</tr>
</tbody>
</table>
Penilaian menyeluruh
Pendapat awal
60 hari
Konsultasi
Pendapat akhir
30 hari
Monitoring pelaksanaan syarat-syarat
Laporan dan Rekomendasi

Comprehensive Assessment
Initial opinion
60 days
Consultation
Final opinion
30 days
Monitoring of the Implementation of Conditions
Report and Recommendations

Pendapat Akhir
Explanation on Merger Assessment Flow

1. Business actors that have proposal for merger and have fulfilled the threshold stipulated by the Commission conduct pre-notification to the Commission.

2. The Business Actors complete the Pre-notification Form, submit the required documents stipulated by the Commission.

3. The Commission is entitled to request for additional documents to the business actors if necessary.

4. After the documents have been completed and the administrative requirements have been fulfilled, the Commission issues the statement of document completeness and commences initial assessment of the proposed merger, consolidation and or acquisition of shares.

5. In a period by no later than 30 (thirty) days, the Commission provides the initial assessment of the Notification conducted by the Business Actors. Such initial assessment is in the form of: whether or not there is a concern for monopolistic practice or unfair business competition in the proposed merger or consolidation or acquisition based on the change of market concentration level before and after the merger in accordance with the Hirschman-Herfindahl Index (HHI) spectrum.

6. Based on the assessment of HHI after the merger, there are four follow-up actions on the pre-notification of merger, namely as follows:
   i. HHI below 1800 : The Commission issues a No Objection Letter
   ii. HHI between 1800 to 3000 : The Commission conducts a comprehensive assessment
   iii. HHI between 3000 to 4000 : The Commission issues a Conditional No Objection Letter
iv. HHI above 4000: The Commission issues an Objection Letter

7. In the event that the Commission conducts a comprehensive assessment of the merger plan submitted by the Business Actors, the Commission will collect data and information from various parties such as the competitors, consumers, government, and other parties as may be needed.

8. In a period by no later than 60 (sixty) days, the Commission will conduct a comprehensive assessment and issue the Commission’s Initial Opinion.

9. With respect to the initial assessment or Commission’s Initial Opinion in the form of Objection Letter and Conditional No Objection Letter, business actors may consult with the Commission, particularly in relation to the reasons for the Commission’s objection to the proposed merger or the conditions stipulated by the Commission for the proposed merger.

10. In a period by no later than 30 (thirty) days as from the commencement of consultation phase, the Commission will issue the Commission’s Final Opinion on the proposed merger to the merging business actors and at least publish it through the Commission’s website.

11. In the event that the Commission’s Final Opinion is in the form of Conditional No Objection Letter, the Commission will conduct monitoring of the implementation of the determined merger conditions in a period adjusted to the length of time for implementation of such conditions as well as prepare the report and further recommendations for the merger concerned to the Commission.
Commission’s Assessment of the Merger plan (Substantive Test)

Article 28 of Law No. 5 Year 1999 states that a merger shall be prohibited if it creates monopolistic practice and unfair business competition. To assess whether a merger can potentially create monopolistic practice or unfair business competition, the Commission will conduct the assessment steps as follows:

Relevant Market

Relevant market in accordance with Article 1 paragraph 10 of Law No. 5 Year 1999 is a market related to certain marketing scope or area of a business actor on goods and or services which are similar or of the same type or substitutes of such goods or services.

Markets related to certain marketing scope or area is known in the competition law as geographic markets. Whereas the goods and or services which are similar or of the same type or substitutes of the goods and/or services concerned are known as product markets. Hence, the analysis of the relevant market will be conducted through the analysis of product market and geographic market.

In principle, the analysis of product market is intended to determine the type of goods and or services of the same type or not of the same type but constitute their substitutes which are competing with one another. To conduct this analysis, a product must be observed from several aspects, namely: intended use, characteristic, and price. Whereas the analysis of geographical market is intended to describe any area where the defined product markets are competing with one another.

This analysis is generally based on previous experience and knowledge of the Commission, applicable regulations, available secondary data, and statements from
business actor associations, business actors, consumers and/or the proxy of the consumers.

In order to substantiate the certainty of the Commission of the accuracy of the results of the analysis of the relevant market, the Commission may conduct a series of market surveys. The surveys are conducted whether on the consumers or their proxies and the producers which are likely to be in the relevant market. These surveys are intended to obtain information concerning the behavior of consumers and producers in the market in response to the occurring change of price so that the Commission can predict the substitutability of certain goods and or services.

A Complete description regarding the definition of the relevant market can be observed in the Guidelines on the Relevant Market issued by the Commission.

**Market Concentration**

Market concentration constitutes an initial indicator for the Commission to conclude whether or not comprehensive assessment of a merger is necessary. Significant difference in the market concentration before and after the occurrence of merger will become the concern of the Commission in conducting the assessment.

In general, there are several ways to assess market concentration, namely by calculating the CRn or by using the HHI. For the purpose of merger assessment, the Commission will use the HHI, but in the event that the implementation of HHI is impossible, the Commission will use the CRn assessment. The Commission will measure the concentration level after the occurrence of merger as well as observe the extent of occurring difference value.
Generally, the Commission divides the concentration level after the merger into four spectrums based on the HHI value after the merger, namely spectrum I with HHI value below 1800, spectrum II with HHI value from 1800 to 3000, spectrum III with HHI value of 3000-4000, and spectrum IV with HHI value above 4000.

In spectrum I, the Commission assesses that there is no concern about the occurrence of monopolistic practice or unfair business competition caused by the proposed merger. This is based by the Commission on the market indicating that the average HHI in Indonesia is still above 2000, and hence the merger resulting in HHI of less than 1800 does not change the existing market structure and eliminates the Commission’s concern about the impact of monopolistic practice and unfair business competition after the merger.

In spectrum II, the Commission will conduct a comprehensive assessment with respect to the aspects of entry barrier to the market, possible actions adversely affecting the consumers both unilaterally or collusively, efficiency achievement, as well as possible exiting of the business actor from the market without conducting merger.

In spectrum III, the Commission assesses that the market concentration created has been quite high so that the Commission will determine the conditions that must be performed by the business actors who will conduct the merger in order to prevent the birth of a market structure heading to monopolistic practice or unfair business competition after the merger.

In spectrum IV, the Commission assesses that the market concentration created has been very high so that the Commission will issue a letter of objection to the merger resulting HHI of above 4000.
Entry Barrier to the Market

Analysis of the existence of entry barrier will indicate the behavior of the business actor resulting from the merger. Without entry barrier, the business actor resulting from the merger with large market share control will find it difficult to behave in an anti-competition manner, as they may face competitive pressure anytime from new entrants in the market.

On contrary, with the existence of high entry barrier in the market, business actors resulting from the merger with medium market control have a chance to abuse their positions to impede competition or exploit the consumers.

The Commission assesses that entry barriers can be created though various instruments, which among others are: regulations, high capital, high technology, intellectual property rights, and high sunk cost.

Anti-competitive action which are likely to be conducted by business actors in high entry barrier condition can be conducted independently (unilateral action) or jointly with their competitors (collusive action).

Possible Consumers’ Loss through Unilateral Action

A merger giving birth to a business actor who is relatively dominant to other business actors in the market facilitates the business actor concerned to abuse his/her dominant position to obtain the greatest possible advantage for the company and inflict loss to the consumers.

Unilateral action can be performed whether to other smaller business actors or directly to the consumers as a whole. Such actions result in the hindered competition as
indicated by high price, reduction of product quantity, or decrease of after-sale services.

The Commission will in a predictive manner analyze the probability of business actors resulting from merger conducting unilateral anti-competitive actions.

Possible Consumers’ Loss through Collusive Action

In the event the merger does not give birth to a dominant business actor in the market while there are still some significant competitors, then it would be difficult for the business actors resulting from the merger to behave in an anti-competition manner as they will obtain effective competition pressure from their competing business actors.

However, the decrease of business actors in the market due to the occurring merger will facilitate the occurrence of anti-competitive action conducted jointly with the competitors, as indicated by high price, reduction of product quantity, or decrease of after-sale services.

The Commission will in a predictive manner analyze the probability of business actors resulting from the merger in conducting anti-competitive actions collusively.

Efficiency

In the event that the proposed merger is intended to increase the efficiency, then the Commission will conduct research on two issues, namely: (1) how high is the efficiency expected to occur, and (2) how such efficiency can be enjoyed by the consumers.

The Commission will conduct an in-depth research on the arguments on efficiency filed by the business actors who will perform the merger. The Commission will also
consider the efficiency that can be achieved in respect of the impact of competition in
the market. In the event that the anti-competition impact exceeds the expected
efficiency value obtained from the merger, then the Commission will prioritize fair
competition rather than promoting efficiency for business actors. Fair competition,
both directly or indirectly, will give birth to business actors that would automatically
become efficient in the market.

Possibility that the Business Entity Would Exit From the Market/Industry

The Commission will consider whether the reason for the business actor conducting
the merger of business entity is to prevent such business entity from ceasing its
operation in the market/industry. If the Commission is of the opinion that the
community’s loss and public interests are bigger if such business entity is exiting
from the market/industry compared to those if such business entity still exists and
operates in the market/industry, it is likely that the Commission may not see any
concern of the decrease of competition level in the market in the form of monopolistic
practice or unfair business competition due to such merger.

Vertical Merger

In general, vertical merger does not pose an impact as serious as the impact of
horizontal merger, as horizontal merger directly changes the market structure while
vertical merger does not directly change the market structure.

Vertical merger is a merger occurring in the production process chain, such as
between a raw material supplier business actor and a manufacturer business actor, or a
wholesaler business actor with a retailer business actor and so forth.
The focus of attention of the Commission in conducting vertical merger assessment is the maintenance of access owned by downstream business actors to the supply obtained from upstream business actors or otherwise, so the competition condition after the merger is still maintained.

In the event that such access is hindered or still can be obtained but with possible discriminatory treatment as a result of the merger and that the substitutes are difficult to be obtained in the market. Thus the competition at downstream or upstream level will decrease, so it will adversely affect the consumers at downstream market or upstream market.

**Pre-notification output**

As seen in the assessment procedure, there are two stages of assessment conducted by the Commission in the pre-notification process, namely initial assessment stage and comprehensive assessment stage. Both in the stage of initial assessment or comprehensive assessment, there are three possible results from the assessment process conducted, namely as follows:

1) **No Objection Letter**, namely that there is no objection from the Commission to the merger plan so the plan of merger concerned can be continued.

2) **Objection Letter**, namely that there is an objection from the Commission to the merger plan, so that although the business actors can still proceed with the plan of merger concerned, the Commission will conduct a formal examination on the merger after it has been completely performed subject to determination of cancellation of such merger. Objection Letter can also be issued by the Commission in the event the business actor conducting the pre-notification
causes the Commission to have difficulties to obtain necessary data in conducting the analysis.

3) *Conditional No Objection Letter*, namely that there is no objection from the Commission to the merger plan, insofar as it complies with the requirements determined by the Commission. If the merger is continued without fulfilling such requirements, then the Commission will conduct a formal examination after the merger has been completed subject to determination of cancellation of such merger.

**Consultation on Pre-notification Output**

Since the pre-notification output is in the form of an opinion which only binds the Commission and does not bind the business actors, then there is no remedy that can be taken against the Commission’s opinion concerned. However, business actors may conduct consultation with the Commission in the event that the Commission issues the opinion of Objection Letter or Conditional No Objection Letter. This consultation is intended to give business actors an opportunity to convey their analysis regarding the result of competition from the merger that will be performed to the Commission. In addition, the consultation phase is also intended to find the meeting point between the business actors and the Commission so as to achieve the balance between the interest of business actors and the level of competition in the market, particularly in relation to the merger requirements determined by the Commission. For the assurance of the Commission and business actors, the consultation phase is limited in a period by no later than 30 (thirty) working days.

After going through this consultation, the Commission will issue the final opinion regarding the merger plan. The final opinion of the Commission will be notified to the
relevant business actors and will be announced publicly at least through the Commission’s website on the date and at the hour which have been determined previously.

Even though the Commission’s opinion is not legally binding in nature, the Commission encourages the business actors to observe the Commission’s opinion in order to avoid the possibility that examination process in the Commission will be performed on such merger. Since the Commission’s opinion is binding to the Commission, then the Commission will conduct a formal examination of the merger which is still performed by the business actors if they obtain the Final Opinion of the Commission in the form of Objection Letter or Conditional No Objection Letter but do not comply with the requirements determined by the Commission. The Commission has authority to cancel the merger after it has been completed if such merger is deemed likely to induce monopolistic practice and or unfair business competition in accordance with the provision of Article 47 paragraph (1) sub-paragraph e of Law No. 5 Year 1999.

Post-Merger Notification

In accordance with Article 29 of Law No. 5 Year 1999, business actors are obligated to report the merger result by no later than 30 (thirty) days following the date of merger, consolidation or acquisition. In the event that the business actors have conducted pre-notification, then the Commission will not conduct reassessment of the merger post-notification filed by the business actors.

Authority of the Commission to Commence Initiative Case
The Commission is entitled to determine the commencement of initiative case with regard to the alleged violation of Law No. 5 Year 1999 regarding merger, consolidation or acquisition of shares despite the non-existence of pre-notification from the business actors.
CHAPTER V
FOREIGN AND SPECIFIC INDUSTRY MERGERS

5.1 Foreign Merger

In principle, the Commission has the authority to control the merger affecting the competition condition in Indonesian domestic market. Foreign mergers taking place beyond Indonesian jurisdiction do not become the Commission’s concern insofar as they do not affect the condition of domestic competition. However, the Commission has the authority and will exercise its authority on such mergers if they affect the Indonesian domestic market by taking into account the effectiveness of the exercise of authority possessed by the Commission.

Foreign mergers are considered to be affecting the domestic market if one of the conditions in Section 3.2 Notifiable Merger has been fulfilled by the party operating in Indonesia. Hence, such foreign merger can be notified to the Commission before the merger is consumated.

Foreign merger is defined as follows:

1. Merger between two foreign business entities where both operate or one of them operates in Indonesia.
2. Merger between a foreign business entity operating in Indonesia with an Indonesian legal entity.
3. Merger between a foreign business entity which does not operate in Indonesia with an Indonesian business entity.
4. Other forms of merger involving foreign elements.
The definition of *operating* is conducting business activities directly, such as through a representative office or by being domiciled in Indonesia or through subsidiaries whether directly or indirectly.

The Commission assesses that the aforementioned four forms of merger which have fulfilled the merger value threshold will have a direct impact to the domestic market in Indonesia so that the Commission will conduct an assessment of such mergers and use the authority it owns to control them.

For other forms of foreign mergers, the Commission will conduct case per case assessment and concludes whether the relevant mergers have an impact on the competition in the domestic market and also whether the authority of the Commission can be performed effectively.

5.2 Merger of Specific Industries

Except as otherwise provided by the Commission, there is no industry specifically exempted by the Commission in this merger control, and hence, the merger of banks, merger of telecommunication companies, merger of broadcasting companies, merger of public companies, merger of foreign capital investment companies, and other mergers are subject to regulations concerning this merger control.
CHAPTER VI

CLOSING

These implementation guidelines constitute the elucidation of Commission Regulation Number 1 Year 2009 regarding Pre-notification of Merger, Consolidation and Acquisition. If deemed necessary, the Commission may amend these implementation guidelines at any time in accordance with the progress and practice taking place in the field. Hence, the Commission encourages business actors to always visit the Commission’s website so as to find out the changes made to these implementation guidelines.