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Vietnam

New Regulations on Conditions of Non-government Guaranteed Foreign Loans

ベトナム法人に対するクロスボーダーローンについて規制した通達 08 号が 2023 年 8 月 15 日に施行された。通達 08 号は、ベトナムの日系企業が親会社から貸付を受ける場合の規制などについて定めており、実務に与える影響も大きいと思われる。本稿では、通達 08 号のうち実務的に重要と思われる点について概説する。

On 30 June 2023, the State Bank of Vietnam issued Circular 08/2023/TT-NHNN (“**Circular 08**”) to replace Circular 12/2014/TT-NHNN dated 31 March 2014 regarding conditions that borrowers being enterprises, cooperatives, credit institutions and foreign bank branches in Vietnam must satisfy in order to obtain non-government guaranteed foreign loans. Circular 08 came into effect from 15 August 2023 except for regulations on short-term loan restrictions will come into effect from 1 January 2024. This article discusses certain important regulations of Circular 08 below¹.

Lending purposes**Short-term foreign loans**

Circular 08 is the first legal instrument that sets out the purposes for which short-term foreign loans (i.e., loan having a term of one year or less) may be used. Accordingly, Article 17.1 of Circular 08 only allows borrowers to use short-term foreign loans for restructuring their foreign debts and paying other due short-term debts, excluding outstanding principal amounts of domestic loans. Short-term debts are those incurred by the borrowers during the implementation of investment projects and business plans and/or other projects. In addition, borrowers are also required to ensure the satisfaction of prudential financial indicators (if any) applicable to their business.

Medium/long-term foreign loans

Borrowers may only use a medium/long-term loan (i.e., loan having a term of more than one year) for the following purposes:

- (a) Implementing their investment projects;
- (b) Implementing their business plans or other projects; and

¹ We note that Circular 08 also provides conditions and restriction for loans of credit institutions and foreign bank branches but this article discusses on regulations application to loans of enterprises only.

(c) Restructuring their foreign debts.

The usage of foreign loans for the above purposes must be consistent with (i) their licenses, approvals, certificates or equivalent documents issued by governmental authorities or (ii) the relevant regulations applicable to the establishment and operation of borrowers.

In case a foreign loan amount has been withdrawn but has not been used for the above lawful purposes, the borrower may deposit the loan amount at a credit institution or foreign bank branch operating in Vietnam provided that the term of each deposit does not exceed 1 month.

Foreign loan restrictions

Depending on the purposes of loans, Article 18 of Circular 08 sets out the following restrictions:

- (1) If the foreign loan is used for implementing an investment project, the sum of outstanding principal amounts of the borrower's medium/long-term domestic and foreign loans (including short-term loans that become medium/long-term loans, but excluding short-term loans) used for the investment project cannot exceed the limit on borrowing capital of that investment project. The limit on borrowing capital of an investment project is the difference between the total investment capital and contributed capital as specified in the investment registration certificate or the in-principal investment policy of that project. If the currency of the loan is different from the one specified in the investment registration certificate or the in-principal investment policy, the foreign exchange rate promulgated by the Ministry of Finance at the time of execution of the loan agreements (or amendments to loan agreements) will be used to calculate the limit of borrowing capital.
- (2) If the foreign loan is used for implementing business plans or other projects of the borrower, the sum of the borrower's medium/long-term domestic and foreign loans used for this purpose cannot exceed total borrowing capital specified in its plan for use of foreign loan capital approved by the authorized authority. If the currency of the loan is different from the one specified in the business plan, the foreign exchange rate promulgated by the Ministry of Finance at the time of preparation of the business plan will be used to calculate the total borrowing capital.
- (3) If the foreign loan is used for restructuring foreign debts of the borrower, the foreign loan amount shall not exceed the sum of outstanding principal, unpaid interests and relevant expenses of the existing foreign loans, and expenses associated with the new loan arrangement. If the new foreign loan is a medium/long-term foreign loan, the borrower must repay the existing foreign loans within five working days from the day on which the new loan is withdrawn. If the currencies of the loans are different, the foreign exchange rate promulgated by the Ministry of Finance at the time of preparation of the loan restructuring plan will be used to calculate the new loan amount.

It is noted that short-term foreign loans are not subject to foreign loan limit requirements under (1) and (2) above.

Transitional Provision

Borrowers entering into loan agreements before the effective date of Circular 08 (i.e., 15 August 2023) shall be allowed to comply with terms and conditions of the signed agreements and the registrations with the State Bank of Vietnam (if any) until the termination of such loans. However, any subsequent revisions to these agreements must be consistent with the provisions of Circular 08.

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Indonesia

Indonesian Competition Law: New Regulation on Foreign-to-Foreign Merger Notification

2023年3月31日、インドネシア市場競争委員会は企業結合届出に関する新規則を制定した。同規則では、外国企業間の企業結合のうちインドネシアでの届出が必要となる対象を限定し、届出の方式をオンラインに移行するなど実務上も重要な改正がなされた。そこで本稿では同規則の重要な改正点について概説する。

On 31 March 2023, the Indonesia Competition Commission or *Komisi Pengawas Persaingan Usaha* (“KPPU”) enacted a new regulation on the Assessment of Merger, Consolidation, or Acquisition of Shares and/or Assets which may Result in Monopolistic Practices and/or Unfair Business Competition (“**New Merger Regulation**”) which revokes and replaces the previous regulation, KPPU Regulation No. 3 of 2019.

Under the New Merger Regulation, a notification of foreign-to-foreign merger transaction is required to be filled to KPPU only if **both parties** have assets and/or generate sales in Indonesia. This replaces the previous regulation that mandated notification filling even if only one party to the transaction had assets and/or generated sales in Indonesia. Furthermore, the threshold of assets calculation required for the notification has also been revised from worldwide basis to Indonesia basis only.

Notification Threshold

Business actors must notify KPPU on merger, consolidation, or share/assets acquisition transactions that fulfill certain criteria via electronic system <<https://notifikasi.kppu.go.id>>. The transaction criteria is as follows:

- a. meet the threshold for asset value and/or sales value;
- b. transaction results in change of control;
- c. it is not a transaction between affiliated business actors; and
- d. transaction is between business actors **which own assets and/or generate sales in Indonesia**.

Under the previous regulation, the notification filing of foreign-to-foreign transaction would be triggered even if only one of the parties had business activities, assets, or sales in/to Indonesia. Therefore, there were an enormous number of foreign-to-foreign transactions that were being notified despite having no impact on the Indonesian market.

The New Merger Regulation imposes stricter local nexus threshold and assets value calculation analysis to be limited to Indonesian located assets instead of worldwide. The asset value and/or sales value threshold is:

- a. the asset value of the surviving business actor resulting from the merger, consolidation or shares and/or assets acquisition exceeds IDR 2,500,000,000,000. The asset value is still determined based on the parties’ combined assets on a group basis, however, unlike the previous regulation, it is **limited to assets located in Indonesia**; or
- b. the sales value of the surviving business actor resulting from the merger, consolidation or shares and/or assets acquisition exceeds IDR 5,000,000,000,000. The scope of the sales value threshold calculation remains unchanged and will continue to be based on either the Indonesian-wide sales or turnover of the relevant parties.

The New Merger Regulation also stipulates that a foreign-to-foreign transaction will only need to be notified to the KPPU if **all parties** to the transaction have assets and/or generate sales/turnover in Indonesia, on top of having fulfilled the minimum assets/sales threshold mentioned above. If only one party to the transaction has assets and/or sales in Indonesia, then the transaction is not necessarily required to be notified to KPPU.

Online Filing System and Shortened Documents Completeness Review

Under the New Merger Regulation, the notification must be filed online via KPPU's website <<https://notifikasi.kppu.go.id>>. Despite that, the New Merger Regulation clarifies that KPPU can only review the online filing documents on business days and business hours from 9 am to 2 pm West Indonesia Time. The New Merger Regulation also significantly shortens the period for document completeness review, previously from 60 business days to 3 business days after the notification has been uploaded.

From the document completeness review, assuming the documents are complete, KPPU will issue a statement letter containing the registration number of the notification, thus, indicating that the notification has been officially registered. Business actors are responsible for the completeness and accuracy of the information as inaccurate or missing documents could cause the registration to be revoked, resulting in the parties being deemed as having failed in notifying the transaction.

Layered Transaction Assessment

Identical with the previous regulation, the assessment of the transaction will be divided into initial and comprehensive assessment. If the result of initial assessment deems that the transaction leads to a significant change in market concentration, then it will be subject to comprehensive assessment. However, the New Merger Regulation is silent on the parameters as to what constitutes "significant change in market concentration".

The comprehensive assessment is a test to determine whether the transaction has the potential to result in unfair business practices. If the transaction is deemed to not potentially cause unfair business practices, then KPPU will issue a statement letter that clears the transaction. On the contrary, if the KPPU concludes that there are potential unfair business practices resulting from the transaction, the KPPU will move the case to a commissioner panel hearing. Unlike the previous regulation, the New Merger Regulation also stipulates the proceedings of the commissioner panel hearing and further examination in determining whether the transaction will result in unfair business practices.

The commissioner panel hearing will last for a maximum of 30 business days. After the hearing, the commissioner panel will:

- a. determine the conditional approval over such transaction;
- b. declare that such transaction will not potentially cause unfair business practices; or
- c. declare to proceed to further examination.

If the transaction proceeds to further examination stage, the KPPU investigator must prove that the transaction will result in unfair business practices and the business actors have the chance to defend the transaction and prove otherwise. The process will be similar to a court hearing with examination and cross-examination. The commissioner panel will decide whether the transaction will result in unfair business practices and might even unwind the transaction.

Merger Notification Filing Fee

Not long after the enactment of the New Merger Regulation, on 5 April 2023, the Government of Indonesia enacted Government Regulation No. 20 of 2023 on Types and Tariff of Non-Tax Revenue in KPPU ("GR No. 20/2023"). This regulation is effective from 5 May 2023 and stipulates the fees for the filing of merger, consolidation, or acquisition of shares and/or assets notifications to KPPU.

The formula for calculation of the fee is:

0.004% x the value of assets or sales turnover that crosses the threshold, whichever is the lower

The value of the assets or sales turnover will be calculated based on the total assets or sales of:

- a. the surviving entity, or the consolidating entity, or the acquiring entity and the acquired entity; and

- b. the entities that are directly or indirectly controlled by the surviving entity resulting from the merger, the consolidating entity, or the acquiring entity and the acquired entity.

If both the asset and sales values fulfil the statutory threshold (as mentioned beforehand), the filing fee will be calculated using whichever value is lower and payable if the KPPU finds the transaction is notifiable. Nevertheless, GR No. 20/2023 limits the maximum fee to IDR150 million or around USD10,000.

The fee can be reduced or fully waived if the transaction fulfills certain considerations, such as:

- a. it supports the development of micro, small, and medium enterprises;
- b. there are circumstances beyond the capacity of the payer, or a force majeure event has occurred; or
- c. government's policy.

Such partial or full waiver of the filing fee will be further stipulated in a KPPU regulation with prior approval from the Minister of Finance.

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