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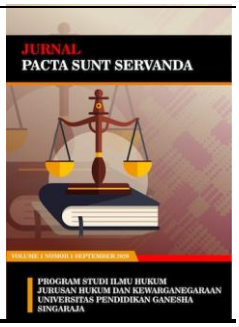

IMPLEMENTATION OF PRE-NOTIFICATION IN THE COMPANY'S MERGER & ACQUISITION: PREVENTIVE ACTION ON NOTIFICATION DELAYS

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Abstract

The development of the era and intense competition stimulate business actors to make the best possible efficiency and innovation. Various business actors try to create the best business strategies and schemes to dominate the existing market share. This condition certainly has implications for more stiff business competition, which requires business actors to carry out preventive and repressive efforts to survive and maintain their business activities. One of the ways for business actors to create innovation and economic efficiency is to collaborate and synergize with other business actors to increase market power. Supervision of mergers & acquisitions is carried out in the form of notifications. The notification system adopted in the Business Competition Law in Indonesia is mandatory for post-corporate action notification (Post Notification) and before corporate action (pre-notification) through consultation with KPPU/Komisi Pengawas Persaingan Usaha (Indonesian Business Competition Supervisory Commission). However, the problem is that pre-notification is only considered an added side, not the primary obligation. It does not provide optimal preventive action compared to being an obligation. This research is a descriptive type of juridical-normative research. The type of approach used is the statutory approach and the conceptual approach.

Kata kunci:
Pra-Pemberitahuan; Merger & Akuisisi; Kompetisi Bisnis

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Abstrak

Perkembangan zaman dan persaingan yang ketat mendorong para pelaku usaha untuk melakukan efisiensi dan inovasi sebaik mungkin. Berbagai pelaku usaha berusaha menciptakan strategi dan skema bisnis terbaik untuk menguasai pangsa pasar yang ada. Kondisi ini tentunya berimplikasi pada persaingan usaha yang semakin ketat, yang menuntut pelaku usaha untuk melakukan upaya preventif dan represif untuk tetap bertahan dan mempertahankan kegiatan usahanya. Salah satu cara pelaku usaha untuk menciptakan inovasi dan efisiensi ekonomi adalah dengan berkolaborasi dan bersinergi dengan pelaku usaha lain untuk meningkatkan kekuatan pasar. Pengawasan merger & akuisisi dilakukan dalam bentuk notifikasi. Sistem notifikasi yang dianut dalam Undang-Undang Persaingan Usaha di Indonesia bersifat wajib untuk pemberitahuan setelah tindakan korporasi (Post Notification) dan sebelum tindakan korporasi (pre-notification) melalui konsultasi dengan KPPU/Komisi Pengawas Persaingan Usaha (Komisi Pengawas Persaingan Usaha Indonesia). Namun, masalahnya, pra-pemberitahuan hanya dianggap sebagai sisi tambahan, bukan kewajiban utama. Itu tidak memberikan tindakan pencegahan yang optimal dibandingkan dengan menjadi kewajiban. Penelitian ini merupakan jenis penelitian deskriptif yuridis-normatif. Jenis pendekatan yang digunakan adalah pendekatan perundang-undangan dan pendekatan konseptual.

INTRODUCTION

The development of the era and intense competition stimulate business actors to make the best possible efficiency and innovation. Various business actors entered a period of freedom and openness at the end of the 20th century. No longer distances or obstacles could limit all business activities, especially between regions and between countries. The most critical changes in the business environment, such as globalization, deregulation, technological advances, and market fragmentation, have created very tight competition (fierce competition).[1] Such conditions require companies to develop strategies to survive continuously.

[1] Nadirah, I. (2021). Perspektif Hukum Persaingan Usaha Terhadap Merger Dan Akuisisi Perusahaan Di Era New Normal *Sintesa: Seminar Nasional Teknologi Edukasi dan Humaniora*, 1(1), 968-973..

Companies' responses to this increasing competition are very diverse. Some choose to focus on resources for smaller segments, some stick with what they have been doing so far, and some are merging into big companies in the industrial world.[2]

Creating the best business strategies and schemes is intended to dominate the existing market share.[3] This condition certainly has implications for more stiff business competition, which requires business actors to carry out preventive and repressive efforts to survive and maintain their business activities.[4] One of the ways for business actors to create innovation and economic efficiency is to collaborate and synergize with other business actors to increase market power. The legal scheme commonly used is corporate restructuring through a merger or acquisition of the Company.[5]

Definitively Merger is a process of diffusion or merging of two companies with one of them still standing (survive Company) with the name of the Company.[6] At the same time, the other disappears as a merged company (merge Company) with all its names and assets included in the Company that remains standing (Article 1 number 9 of Indonesian Law Number 40 of 2007 concerning Companies from now on referred to as Law 40/2007). Generally, the Companies that carry out mergers are influential to the related Company or bank and the country's economic situation. Many companies have merged to save or rehabilitate their business by collaborating with other entrepreneurs with similar problems.[7]

The acquisition is a legal action that is carried out by a person (naturlijkepersoon) or a legal entity (rechtpersoon) to take over the shares of the Company, which results in the transfer of control over the Company (Article 1 number 11 of Law 40/2007). In general, the acquisition is defined as a Company's shares trading, which can be carried out directly (existing stock) by the shareholders or by the issuance of new shares (issuance/unissued shares).[8] Based on the demands of the reform, then the Indonesian Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (from now on referred to as Law 5/1999) was born. The establishment of these laws and regulations then mandates the establishment of the Business Competition Supervisory Commission of the Republic of Indonesia. One of the Business Competition Supervisory Commission's duties is to supervise mergers, consolidations, and acquisitions.[9]

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[2] Nadirah, I. (2021). *Ibid*.
[3] Zakiyah, N., Prananingtyas, P., Disemadi, H. S., & Gubanov, K. (2019). Al-Hisbah Contextualization in the Business Competition Law in Indonesia. *Al-'Adalah*, *16*(2), 249-262.
[4] Fuady, F. (2008). *Hukum tentang Merger*. Bandung: Citra Aditya Bakti, p. 13.
[5] Kustanto, A. (2018). Upaya Perusahaan dalam Menempuh Efisiensi dan Kinerja melalui Merger, Akuisisi, dan Pemisahan. *QISTIE: Jurnal Ilmu Hukum*, 11(1), 1-11.
[6] Disemadi, H. S., & Winata, A. S. (2020). Legal Review of the Late Notification of Acquisition of Commission for Supervision of Business Competition (Study of KPPU Case Decision No: 07/KPPU-M/2018). *Yurisdiksi: Jurnal Wacana Hukum Dan Sains*, *15*(2), 123-134.
[7] Ginting, S. B. (2015). Dampak Hukum Notifikasi Merger Menciptakan Persaingan Usaha Yang Sehat. *Jurnal Law Pro Justitia*, 1(1), 45.
[8] Fuady, M. (n.d). *Hukum Tentang Akuisisi, Takeover, dan LBO*. Bandung: Aditya Bakti, p. 3-4.
[9] Prananingtyas, P., Disemadi, H. S., & Zakiyah, N. (2020). The Indonesian Business Competition Law: How the Police Plays a Role. *Jurnal Hukum Novelty*, *11*(1), 105-113.

The institution supervising the corporate action merger & acquisition is the Business Competition Supervisory Commission (from now on, referred to as *KPPU/Komisi Pengawas Persaingan Usaha*). The task of *KPPU* is explicitly stated in Article 35 letter c of Law 5/1999, which states that *KPPU* makes an assessment (appraisal) of the dominant position abuse indication that can emerge as a result of mergers & acquisitions, which can lead to monopolistic practices and unfair competition. However, in this context, mergers & acquisitions include mergers, takeovers, and consolidations (from now on are only referred to as mergers & acquisitions). Supervising mergers & acquisitions is carried out in notifications (Articles 28 and 29 of the Indonesian Business Competition Law). This notification system adopted in the Indonesia Business Competition Law is mandatory before (Pre-notification) and after (Post Notification) the corporate action through consultation with *KPPU*.

The post notification has been causing problems in its development. It can harm business actors because *KPPU* can cancel the corporate action that has been completed if it is judged to have monopolistic practices and unfair business competition.[10] For business actors, especially those who have completed corporate actions, such notification causes no legal certainty because, in its development, the *KPPU* may cancel it.[11] Notification of corporate action aims to prevent monopolistic practices and unfair business competition. Such a goal will be challenging because the notification will only be made after the business actor has completed his corporate action. However, the problem is that pre-notification is only considered an added side, not the primary obligation.

RESEARCH METHOD

This research is a descriptive type of juridical-normative research.[12] The type of approach used is the statutory and the conceptual approach. A statutory approach refers to the provisions of laws and regulations such as the Indonesia Company Law, the Indonesia Business Competition Law, and the Indonesia Business Competition Supervisory Commission Regulation Number 3 of 2019 concerning Assessments of Mergers or Consolidations of Business Entities, or Acquisition of Company Shares which can Result in Practices Monopoly and Unfair Business Competition. The conceptual approach is used to understand the theories and concepts related to this research. This research uses secondary data divided into primary legal materials, secondary legal materials, and tertiary legal materials. The secondary data was obtained through library research collection techniques, then analyzed qualitatively.

RESULTS AND ANALYSIS

Company Merger & Acquisition Arrangements in National Law

The term merger & acquisition is not found in the definition or terminology of any legal provisions because this term is a legal term for business and corporate

[10] Manalu, H. (2019). Notifikasi Aksi Korporasi Sebagai Instrumen Hukum Pencegah Praktik Monopoli dan Persaingan Usaha Tidak Sehat. *Undang: Jurnal Hukum*, 2(1), 33-67.
[11] Manalu, H. (2019). *Ibid*.
[12] Disemadi, H. S. (2022). Lenses of Legal Research: A Descriptive Essay on Legal Research Methodologies. *Journal of Judicial Review*, *24*(2), 289-304.

activities.[13] However, the meaning of merger & acquisition still refers to the term that Indonesia Company Law defines as a merger, consolidation, and takeover activities. Corporate action activities in the form of mergers & acquisitions are widespread in the Company's business activities. It is because this legal action has several benefits, including:[14]

1) Improving the internal quality of the Company. Improving the Company's internal quality is generally the primary motivation for business actors to work together. Quality improvement can be made by implementing operational efficiency. Operational efficiencies such as reducing production and marketing costs can be carried out by companies conducting mergers, acquisitions, and consolidations because there are additional human and financial resources;
2) Strengthening the bargaining position; Influence the performance of a company. Getting more attention from various layers of consumers increases the Company's bargaining position. This improvement effort by several business actors is carried out by combining their businesses with foreign companies to expand their market share geographically on an international scale;
3) Technology transfer facilities. The addition of assets and resources can develop the usage of technology applications to support company performance;[15] and
4) Restructuring for the recovery/rejuvenation of the Company. Merger & acquisition transactions can be used to recover/rescue the Company during a crisis. Increasing financial resources after merger & acquisition transactions can be a solution for companies experiencing liquidity difficulties. That is why the merger & acquisition transaction can protect the Company's vital elements, including employees and creditors, and from bankruptcy.

The existing benefits provide fresh air for entrepreneurs to create competitive and rescue strategies for their business activities.[16] Especially in the Corona Virus Disease 2019 (Covid-19) pandemic era, the economic recession has given implications for productivity and profits received.[17] Based on 2021 data from *KPPU* released by Investors, there were 187 merger & acquisition notifications received by *KPPU*, and 58 of them were foreign companies.[18] This phenomenon shows that entrepreneurs make awareness and efforts to create efficiency, collaboration, or rescue business activities during the current pandemic.

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[13] Ciobanu, R. (2015). Mergers and acquisitions: does the legal origin matter?. *Procedia: Economics and Finance*, 32.

[14] Lubis, A. F. *et.al.* (2017). *Buku Teks Hukum Persaingan Usaha.* Jakarta: Komisi Pengawas Persaingan Usaha, p. 268.

[15] Yenewan, S. T. J, & Natalia, G. (2017). *Merger & Akuisisi: Perspektif Strategis dan Kondisi Indonesia.* Yogyakarta: Ekuilibria, p.8.

[16] Nasir, M. (2018). Analisis Perbandingan Kinerja Keuangan Pada Perusahaan Sebelum dan Sesudah Merger dan Akuisisi (Studi Perusahaan yang Melakukan Merger dan Akuisisi yang Terdaftar di BEI 2013-2015). *Pusat Penerbitan dan Publikasi Ilmiah FEB UMI*, 1(1), 73-74.

[17] Kontan. (2020). Aktivitas Merger dan Akuisisi Masih Ramai di Tengan Pandemi Corona (Covid-19). https://industri.kontan.co.id/news/aktivitas-merger-dan-akuisisi-masih-ramai-di-tengah-pandemi-corona-covid-19 diakses 27 April 2022.

[18] Investor. (2021). KPPU Tangani 187 Kasus Merger dan Akuisisi. https://investor.id/business/271998/kppu-tangani-187-kasus-merger-dan-akuisisi diakses 27 April 2022.

Theoretically, particular legal actions for mergers have the following classification:[19] a). Horizontal Merger. A horizontal merger is two or more companies in the same line of business or business activities; b). Vertical Merger. A vertical merger is two or more companies in which the merged companies have a linear correlation from production to distribution in the market; c). Congenitive Merger. A Congenitive merger is two or more companies with similar business activities or in the same industry. However, they do not produce the same product, and there is no correlation with suppliers; and d). Conglomerate Merger. A conglomerate merger is two or more companies with different business activities.

The existence of several classifications of mergers above aims to determine what corporate strategy a business actor wants to achieve and its correlation with aspects of healthy or unhealthy business competition. Before carrying out a merger & acquisition, several requirements must be met. Article 126 paragraph (1) of the Indonesia Company Law regulates that legal-actions of Merger, Consolidation, Acquisition, or Separation must take into account the interests of: a). The Company, minority shareholders, employees of the Company; b. Creditors and other business partners of the Company; and c. Society and healthy competition in doing business

The provisions regarding the terms of the merger & acquisition can be interpreted as a cumulative obligation. If one point of the provisions above cannot be implemented, the corporate action cannot be continued or has the potential to be canceled. Furthermore, the procedure for conducting a Company merger includes the following steps:

1) Preparation of the Merger Plan. Based on Article 123 of the Indonesia Company Law, the Company must prepare a merger plan. The Directors of the Company that will merge and those who accept the Merger are responsible for preparing this plan. The merger plan contains at least: a) Name and domicile of each Company, reasons, and explanations of the Board of Directors that will carry out the Merger, Merger requirements, procedures for evaluating and converting shares of each Company, as well as draft amendments to the articles of association of the Company accepting the Merger if any; b). Financial statements for the last 3 (three) years of each Company, plans for the continuation or termination of the business activities and the performance balance sheet of the Company that accepts the Merger following accounting principles applicable in Indonesia; c). How to settle the status, rights, and obligations of members of the Board of Directors, Board of Commissioners, and employees of each Company, how to settle the rights and obligations of the Company that will be merging against third parties and how to settle the rights of shareholders who disagree with the Merger of the Company; d). The names of the members of the Board of Directors and the Board of Commissioners, as well as the salaries, honoraria, and allowances for members of the Board of Directors and Board of Commissioners of the Company receiving the Merger, the estimated timeframe for the implementation of the Merger, reports on the conditions, developments, and results achieved from each Company that will carry out the Merger; and e. The main activities of each Company, changes that

[19] Harahap, Y. (2016). *Hukum Perseroan Terbatas*. Jakarta: Sinar Grafika, p. 484-485.

occur during the current financial year, and details of problems that arise during the current financial year that affect the Company's activities will be formulated. Furthermore, the formulation of the merger plan is submitted for permission to the Board of Commissioners of each Company that will merge.

2) Approval of the *RUPS/Rapat Umum Pemegang Saham/RUPS* (General Meeting of Shareholders/GMS). After the Board of Commissioners of each company approves the merger plan, the next stage is to submit the draft to the GMS of each company for approval. Article 127 of the Indonesia Company Law provides regulations regarding the requirements for a quorum of attendance and the decision-making of the GMS in the merger of companies. The requirements for quorum and decision making refer to Articles 87 and 89, paragraph (1) of the Law.
3) Announcement of Merger Draft Summary. Referring to Article 127 paragraph (2) of the Indonesia Company Law, the Board of Directors of a company that will conduct a merger must publish a summary of the Company's proposed merger. The announcement is made in writing to the Company employees that would conduct the merger. The Company notifies the announcement to employees no later than 30 days prior to the summons for the GMS.
4) Preparation of the Deed of Merger. After the announcement of the proposed merger summary that shows that there are no objections from creditors, and after the GMS approves the proposed merger plan, then, based on Article 128 paragraph (1) of the Indonesia Company Law, the next step is to draw up a merger deed. The merger deed is drawn up before a Notary in the Indonesian language. Then a copy of the Deed of Merger is attached to the notification of the merger to the Indonesian Minister of Law and Human Rights to be recorded in the Company register. Furthermore, under Article 129 of the Indonesia Company Law, a copy of the merger deed is attached to the notification or application for approval to the Minister. This approval by the Minister must be carried out if accompanied by changes to the Articles of Association following the provisions of Article 21 paragraph (1) of the Company Law.
5) Announcement of Merger Results. Based on Article 133 paragraph (1) of the Indonesia Company Law, the Board of Directors of the Company must announce the results of the merger in at least 1 (one) newspaper or more and have a deadline of not later than 30 (thirty) days from the effective date of the merger.

In contrast to the procedure for conducting a merger, the procedure for conducting an acquisition of the Company is divided into two types as follows:

1) Direct Acquisition (Direct Takeover). Based on Article 125 paragraph (1) of the Indonesia Company Law, a Takeover is carried out by taking over issued shares and/or will be issued by the Company. This Takeover is carried out directly by the Directors or shareholders. The issued shares means the shares owned by previous shareholders, so the Company does not need to issue new shares. This type of transaction is called direct acquisition. The procedure for conducting a direct acquisition is carried out through the following steps:
   a) Negotiations and Agreements. The indirect acquisition procedure that has been issued through the direct shareholders begins with negotiations and

agreements by the parties who will take over with the shareholders. Of course, with due regard to the articles of association of the Company, which were taken over regarding the provisions for the transfer of rights to shares and agreements made by the Company with other parties (Article 125 paragraph (6) and (7) of the Company Law). Suppose a legal entity carries out the Takeover in the form of a Company. In that case, the Board of Directors must first obtain approval from the GMS before conducting negotiations and an agreement to purchase shares directly from the shareholders following Article 125 paragraph (5) of the Company Law.

b) Announcement of Deal Plan. Although the acquisition of shares is carried out directly through the shareholders, the next stage does not prepare the acquisition plan first. However, it is obligatory to announce the planned acquisition agreement in 1 (one) newspaper and announce it in writing to the employees of the Company. They will carry out the Takeover at the latest 30 (thirty) days prior to the summons for the GMS. It is done based on Article 127 paragraph (8) of the Company Law. The provisions apply mutatis mutandis and apply to announcements in the context of stock acquisitions made directly from shareholders in the Company.

c) Submission of Objections. The provisions of Article 127 paragraphs (2), (3), (5), (6), and (7) of the Company Law also apply to the acquisition. If a creditor who wishes to file an objection to the Company can file it within a period of no later than 14 (fourteen) days after the announcement, but if the creditor does not file an objection within that period, the creditor is considered to have approved the acquisition. If the Board of Directors cannot resolve the objection of creditors up to the date of the GMS, the objection must be submitted to the GMS for resolution. The acquisition cannot be carried out as long as the settlement has not been reached.

d) Making a Deed of Direct Acquisition before a Notary. Based on Article 128 paragraph (2) of the Company Law, the shareholder's share acquisition deed carried out directly must be stated by a notarial deed in Indonesian. Because the takeover is carried out directly by the shareholders, according to Article 131 paragraph (2) of the Company Law, the takeover is carried out directly by the shareholders. It is called a deed of transfer of rights to shares. According to Article 131 paragraph (2) of the Company Law, a copy of the deed of transfer of rights to shares must be attached to the submission of a notification to the Minister regarding changes in the composition of shareholders.

e) Announcement of Acquisition Results. In the last stage, based on Article 133 paragraph (2) of the Company Law, Directors of the Company whose shares are taken over are obliged to announce the takeover results in 1 (one) or more newspapers. The announcement period is no longer than 30 days after the takeover date.

2) Indirect Acquisition. Based on Article 125 paragraph (1) of the Company Law, a Takeover is carried out by taking over shares that have been issued and/or will be issued by the Company through the Company's Board of Directors or directly from the shareholders. The one who carries out the takeover can be a

legal entity or an individual. As referred to in Article 125 paragraph (1), the share takeover results in the transfer of control over the Company, as referred to in Article 7 number 11 of the Company Law. The following is the Takeover process through the Company's Board of Directors:

a) GMS Decision. Article 125 paragraph (4) of the Company Law regulates the Takeover carried out by a legal entity in the form of a Company. Before taking legal action of the Takeover, the Board must act based on the GMS that meets the quorum of attendance and the provisions regarding the requirements for GMS decision-making as referred to in Article 89 of the Company Law, which is at least 3/4 (three quarters) of the total shares with voting rights are present or represented at the GMS. The resolution is valid if approved by at least 3/4 (three quarters) of the total votes cast (unless the articles of association specify a quorum for attendance and provisions larger GMS). According to Article 125 paragraph (5) of the Company Law, if the Board of Directors carries out the Takeover, the party who will take over conveys his intention to carry out the Takeover to the Company's Board of Directors to be taken over.
b) Preparation of the Acquisition Plan. According to Article 125 paragraph (6) of the Company Law, the Company's Board of Directors which will be taken over with the approval of the commissioners of each Company, shall prepare a takeover plan which contains at least the following matters: 1) The name and domicile of the Company that will be taken over and the Company that will take over; 2) The reasons and explanations of the Board of Directors of the Company who will take over and the Board of Directors of the Company that will be taken over; 3) The Financial Statements as referred to in Article 66 paragraph (2) of the Company Law for the last financial year of the Company that will take over and the Company that will be taken over; 4) Procedure for appraising and converting shares of the Company to be taken over to the exchanged shares if the payment for the Takeover is in shares; 5) The number of shares to be acquired; 6) Funding readiness; 7) Consolidated balance sheet of the performance of the Company that will take over, which is prepared following accounting principles generally accepted in Indonesia; 8) How to settle the rights of Shareholders who disagree with the Takeover; 9) How to settle the status, rights, and obligations of the members of the Board of Directors, Commissioners, and Employees of the Company that are taken over; 10) Estimated period of execution of the Takeover, including the period of granting power of attorney to transfer shares from the Shareholders to the Board of Directors of the Company; and 11) Draft amendments to the Company's Articles of Association resulting from the Takeover, if any.
c) Announcement of Acquisition Draft Summary. Referring to Article 127 paragraph (2) of the Company Law, the Company's Board of Directors is required to announce the draft summary in at least 1 (one) newspaper and announce it in writing to the employees of the Company. They will carry out the Takeover at the latest 30 (thirty) days before the GMS summons. As referred to in this paragraph, the announcement also contains a notification that interested parties can obtain the takeover plan at the

Company's office from the announcement date until the GMS is held. Creditors may file an objection to the Company within a period of no later than 14 (fourteen) days after the Takeover announcement following the draft. If the creditor does not file an objection within that period, the creditor is deemed to have agreed to the Takeover.

d) Making the Deed of Acquisition. According to Article 128 paragraph (1), the Proposed Takeover, which the GMS has approved, is stated in the Deed of Takeover, which is drawn up before a notary in the Indonesian language. Furthermore, a copy of the deed of Company Takeover must be attached to the submission of a notification to the Minister regarding the amendment to the articles of association as referred to in Article 21 paragraph (3) of the Company Law.
e) Announcement of Acquisition Results. In the last stage, as referred to in Article 133 paragraph (2) of the Company Law, the Board of Directors of the Company whose shares were taken over is required to announce the results of the Takeover in 1 (one) or more newspapers within a period of no later than 30 (thirty) days from the effective date of the Takeover.

Based on the description above, it is clear that rigid procedures must be followed to carry out the Company's merger & acquisition transaction. However, referring to Article 126 paragraph (1) letter c of the Company Law, it is obligatory to pay attention to the community and fair business competition. In the Business Competition Law, which regulates mergers, consolidations, and takeovers, corporate action mergers & acquisitions are required to avoid monopolistic practices and unfair business competition.

One of the efforts taken is to provide mandatory obligations to the Company, with the obligation to notify *KPPU* of the asset value and/or sales exceeding a specific limit as referred to in Article 29 paragraph (1) of the Business Competition Law. However, the notification mechanism underwent a system change to provide preventive measures to prevent monopolies and unfair business competition practices.

Implementation of Pre-Notification Obligations in the Company's Merger & Acquisition

Business competition policy cannot be separated from the discussion on mergers & acquisitions because it can increase the market power of one or a group of actors in the same relevant market.[20] Mergers and acquisitions are the means of choice and can easily be distorted, resulting in violating the prohibition in Law number 5 of 1999. In other words, mergers & acquisitions are legal tools for business actors to get rid of their competitors and/or reduce competition. Although mergers are legal acts, mergers will become illegal if the transactions cause negative impacts.[21]

The objective of the merger & acquisition policy is to ensure that the efficiency gains generated by the merger are higher than the increase in market

[20] Disemadi, H. S., Roisah, K., & Prananingtyas, P. (2020). Realizing The Legal Certainty Of Calculating Fines Business Competition Law. *Tadulako Law Review*, *4*(2), 202-215.
[21] Murniati, R. (2021). Ketidaktahuan Pelaku Usaha sebagai Alasan Keterlambatan Notifikasi Merger dan Akuisisi. *Jurnal Persaingan Usaha*, 2(1), 43-54.

power. It can be done by prohibiting a merger & acquisition activity or providing several recommendations for changes before the merger is allowed. However, the national legal regime does not prohibit or limit corporate actions in the form of mergers & acquisitions. However, it provides a mandatory obligation to notify the *KPPU* as an institution that has the duty and authority to supervise business competition.[22]

The *KPPU*'s Duties and Authorities are generally regulated in Indonesia Law Number 5 of 1999. The *KPPU*'s duties are:[23] 1) Assessing agreements that may result in monopolistic practices and or business competition (Articles 4 to 16 of the Business Competition Law); 2) Conduct an assessment of the business activities and/or actions of business actors that may result in monopolistic practices and or unfair business competition (Article 17 to Article 24); 3) Assessing the presence or absence of an abuse of dominant position, which may result in monopolistic practices and or unfair business competition (Article 25 to Article 28); 4) Taking action following the authority of the Commission (Article 36); 5) Providing advice and considerations on Government policies related to monopolistic practices and or unfair business competition; 6) Preparing guidelines and/or publications related to monopolistic practices and unfair business competition; and 7) Providing periodic reports on the Commission's work to the President and the House of Representatives.

One of the duties and authorities related to merger & acquisition notifications is to assess the presence or absence of an abuse of a dominant position, which later, the notification will become a reference in assessing the presence or absence of an abuse of a dominant position. Based on the legal provisions in Indonesia, initially, the notification was only based on post-notification. The obligation to provide notification to *KPPU* only applies after the effective date of the merger & acquisition. It is regulated in Article 29 paragraph (2) of the Business Competition Law, which states that if a merger & acquisition activity results in an asset value and/or sales value exceeding a certain amount, it must be notified to the Commission, no later than 30 (thirty) days from the date of the merger. Such consolidation or acquisition.[24]

The limit on asset value and/or sales value exceeding the specified amount is regulated in the provisions of Article 5 paragraph (2) of PP 57/2010, as follow: "The certain amount, as referred to in paragraph (1), consists of: a) Asset value of Rp.2,500,000,000,000.00 (two trillion five hundred billion rupiah); and/or b) The sales value is IDR 5,000,000,000,000.00 (five trillion rupiah)". Furthermore, based on Article 5 paragraph (3) of PP 57/2010, specifically for business activities in the banking sector, notification is required if the combined asset value has reached Rp. 20,000,000.00- (twenty trillion).

In general, the output of the notification to the *KPPU* is an assessment or opinion regarding the transaction being carried out, which reviews the potential

[22] Murniati, R. (2021). *Loc.Cit.*

[23] Sabrina, A. N. (2020). Penerapan Prinsip Ekstrateritorialitas terhadap Pengawasan Pengambilalihan Saham dalam Hukum Persaingan Usaha. *Jurist-Diction*, 3(4), 1 285-1310.

[24] Nugraha, X., Achmadi, R. I., dan Sari, N. A. N. (2019). Urgensi Notifikasi Pratransaksi 3p (Penggabungan, Peleburan, Pengambilalihan) Upaya Preventif Persaingan Usaha Tidak Sehat. *LEGISLATIF*, 2(2), 86-87.

for violations of monopolistic practices and unfair business competition. Based on Article 3 of PP Number 57/2010, *KPPU* will evaluate the merger & acquisition that has been legally effective, in which the assessment uses several analytical parameters as follows:[25] 1). Market concentration; 2). Barriers to market entry; 3). Potential anti-competitive behavior; 4). Efficiency; and/or 5). Bankruptcy.

The assessment method used by *KPPU* is the Substantial Lessening of Competition (SLC) test. The competition authorities have used this SLC test in the United States, followed by many countries. The *KPPU*, whose supervisory authority is over merger & acquisition transactions, will use this evaluation method to assess whether the effective merger & acquisition may result in abuse of dominant position or monopoly and unfair business competition practices.[26]

Apart from the post-notification system in the Business Competition Law in conjunction with PP 57/2010, there is another notification system regulated in Article 2 of *KPPU* Regulation Number 11 of 2010 concerning Consultation on the Merger or Consolidation of Business Entities and Acquisition of Company Shares. The Business Competition Supervisory Commission (In Indonesia: *Perkom/Peraturan Komisi* 11/2010) is called consultation or pre-notification.

The pre-notification system is a request for advice, guidance, and/or written opinion submitted by business actors to the *KPPU* on the merger & acquisition plan before it becomes legally effective. It minimizes errors, violations, or delays in submitting post-notifications later. If it is viewed from the statistical data compiled by *KPPU* in the 2020 annual report, the types of cases handled and decided by *KPPU* have the following percentages:[27] 1) Late notification (60%); 2). Tender conspiracy (33%); and 3). Cartel (7%). Furthermore, the number of fines imposed by the *KPPU* on the above cases reached Rp. 65,911,000,000.00 (sixty billion nine hundred and eleven million rupiahs). This figure is undoubtedly a fantastic nominal, which business actors must bear. Interestingly, the most frequent violations of business competition provisions are related to delays in notification of post-merger & acquisition transactions.

The notification obligation is essentially not a prohibition on actions or agreements made by business actors but rather a mandatory obligation which is a preventif effort by the *KPPU* from monopolistic practices and unfair business competition. Therefore, it is essential to implement pre-notification as a preventive action effort so that there is no delay in the notification obligation to *KPPU*.[28] In *KPPU*'s Regulation Number 3 of 2019 concerning Assessment of Merger or Consolidation of Business Entities or Acquisition of Company Shares Which Can Result in Monopolistic Practices and/or Unfair Business Competition (*Perkom* 3/2019), Article 1 paragraph (5) in conjunction with Article 20 *Perkom* 3/2019 changed the terminology of consultation to written consultation and refined *Perkom* 11/2010.

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[25] Dhaneswara, A. N. (2021). Urgensi Penerapan Sistem *Pre-Merger Notification* sebagai Sistem Pengawasan Merger, Akuisisi, dan Konsolidasi di Indonesia. *Jurist-Diction*, 4(2), 523-524.

[26] Balqis, W. G. (2020). Penanganan Perkara *Pre-Notification* Oleh Kppu Dalam Kerangka Hukum Persaingan Usaha Di Indonesia.*Jurnal Yustisiabel*, 4(2), 144-145.

[27] Komisi Pengawas Persaingan Usaha. (2020). Laporan Tahunan KPPU Tahun 2020. Jakarta: Komisi Pengawas Persaingan Usaha, p. 15.

[28] Amboro, F. Y. P., & Hermanto. (2018). Tinjauan Yuridis Penerapan Notifikasi Akuisisi Sebagai Upaya Pencegahan Persaingan Usaha Tidak Sehat. *Journal of Judicial Review*, 10(1), 49-59.

Perkom 3/2019 stipulates that business actors conduct written consultations before taking corporate action through a written request for consultation by attaching plans for a merger, consolidation, and/or takeover. The results of the written consultation or the so-called pre-notification can be used as a basis for consideration during the notification assessment process for a maximum of 2 years if there are no changes. For this reason, business actors are persuaded to be able to pre-notify first, which will later facilitate the merger & acquisition transaction process. However, there are transaction parameters that must be notified as stated in Article 2 of *Perkom* 3/2019, which include the following: (1) Merger of Business Entities, Consolidation of Business Entities, or Acquisition of shares of another company which results in the value of the Assets and/or sales value exceeding a certain amount must be notified in writing by filling out a form to the Commission; (2) A certain amount that must be notified as referred to in paragraph (1) if: a). the value of the assets of the Business Entities resulting from the Merger, Consolidation, or Acquisition of Company Shares exceeds Rp.2,500,000,000,000.00 (two trillion five hundred billion rupiahs); or b). the value of Sales of Business Entities resulting from the Merger, Consolidation, or Acquisition of Company Shares exceeds Rp5,000,000,000,000.00 (five trillion rupiahs); (3) Merger, Consolidation, or Acquisition of Shares and/or Company Assets between business actors in the banking sector, notification obligation applies to transactions with Assets value exceeding Rp. 20,000,000,000,000.00 (twenty trillion rupiah); and (4) If only one of the parties conducting the Merger, Consolidation, or Acquisition of Shares and/or Assets of the Company is engaged in banking and the other party is engaged in other fields, the Business Actor is required to provide Notification to the Commission if the value of the assets of the Business Entity resulting from the Merger is, Consolidation, or Acquisition of Shares and/or Company Assets exceeding Rp.2,500,000,000,000.00 (two trillion five hundred billion rupiahs) or the sales value of the Business Entity resulting from the Merger, Consolidation, or Acquisition of Shares and/or Company Assets exceeds Rp. 5,000,000. 000,000.00 (five trillion rupiahs).

In Article 20 of *Perkom* 3/2019, the meaning of written consultation as pre-notification is only in the form of providing written information. *KPPU* can finally assess the merger & acquisition process early (preliminary appraisal) through the proposed merger, consolidation, and takeover process. Viewed from the theory of legal objectives, it can be analyzed that the arrangements regarding merger & acquisition notifications assessment at least realizes three legal objectives: justice, certainty, and benefit. In realizing the objectives of the law, it must meet these three elements.

Manifestations of legal objectives are also included in implementing the existing identification obligations. However, if reviewed further, the two systems adopted by *KPPU* have a normative dualism. The notification system in post-notification (notification) is mandatory, while the notification system in the form of pre-notification (written consultation) is only voluntary. So then, there are differences in concepts and procedures for implementation that cause uncertainty.[29] Such arrangements can be considered as partial or repetitive pre-

[29] Chusna, F. A. (2021). *Lex Minus Quam Perfecta* Pembatalan Merger Oleh KPPU Pasal 47 Undang-Undang Nomor 5 Tahun 1999. *Jurist-Diction*, 4(2), 637-638.

notification provisions. The reason is that even though the Company that will carry out the corporate action has made a pre-notification, they are still given the obligation to continue to report the notification after the signing of the merger & acquisition (post-notification) transaction.

This assessment of the merger & acquisition notification can cause uncertainty due to the obligation to notify the notification only after the merger & acquisition has been carried out effectively (effective date). Suppose *KPPU* is late or refuses to approve the merger & acquisition, then following the authority possessed by *KPPU* in imposing sanctions. In that case, *KPPU* may impose an administrative fine of Rp. 1,000,000,000.00 (one billion rupiahs) for each day of delay, with the provisions of an acceptable overall administrative maximum amounting to Rp25,000,000,000.00 (twenty-five billion rupiahs) or cancellation of the merger & acquisition deed by *KPPU*.[30]

CONCLUSION

Based on the description above, it is known that after carrying out corporate actions in the form of mergers, consolidations, and acquisitions, the Company is given the obligation to notify *KPPU* (Article 28 of the Business Competition Law) or what is called post-notification. Indonesian legal arrangements have also adopted the concept of pre-notification or so-called written consultation in Article 10 of *Perkom* 3/2019; an application is submitted to *KPPU* accompanied by plans for merger, consolidation, and takeover. However, this provision is partial and repetitive, the Company is still required to carry out post-notification, even though it has carried out pre-notification.

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[30] Arifin, Muchamad. (2017). Pertanggungjawaban Hukum atas Keterlambatan Pemberitahuan Akuisisi Asing kepada Komisi Pengawas Persaingan Usaha. *Lex Renaissance*, 2(2), 263-264.

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