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Indonesian Merger Control Re-Evaluation: Twenty Years' Experience in Legal Limbo

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Abstract

This paper not only discusses the issue of the approach used, the issue of ex-post and ex-ante merger control regulation usage, issues of conflict of norms, overlapping legal rules, and the existence of legal vacuum which complicates the enforcement of rules regarding merger control in Indonesia. The legal issues examined in this paper concern the characteristics of merger control based on the ratio decidendi of KPPU decisions during the 20 years of enforcing business competition law in Indonesia and the ius constituendum of the ex-ante and ex-post approach. This research is based on normative legal research using a statute approach, conceptual approach, case approach, and comparative approach method. These methods lead to the conclusion of the research, which is, that in the past 20 years, Indonesia has experienced a change in the ex-post merger control approach, resulting in partiality in the articles applied that are not entirely used in KPPU decisions. Furthermore, the idealized rules (ius constituendum) on the control of mergers in Indonesia, outlined in Law No. 5 of 1999, will be examined based on the principles and objectives of competition law enforcement in the country.
Keywords: Merger; Merger Control; Indonesia Merger Control.

Introduction

It has been 20 years since the enactment of the regulation on mergers under the Business Competition Law. Law Number 5 of 1999 on The Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter referred to as Law Number 5 of 1999) has been in effect since 5 March 2000. During these two decades, the regulation on merger control in this law has come a long way in carrying out the mission of realizing the enactment of business competition law in Indonesia. Because it aims to encourage and improve the competitive environment, create a favorable environment for investment, and encourage

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the transfer of benefits to customers, competition law is crucial in providing a framework for competitive activity. In addition, it is also the Government's way to be engaged in a competitive effort to improve the business climate and so encourage investment.[1] While the primary objectives of the law include protecting the public interest, enhancing economic efficiency, and preventing monopolistic practices, it also addresses the issue of abuse of dominant position. The abuse of dominant position involves using one's market power to engage in practices that harm competitors and distort fair competition.[2] In the context of this paper, the companies mentioned in this paper abuse their dominant market position by merging, consolidating, and acquisitioning.

The objective of the enactment of Law Number 5 of 1999 is mentioned under Article 3, which consists of:

a. Protecting the public interest and enhancing the efficiency of the national economy as one of the endeavors aimed at improving the people's welfare;
b. Creating a conducive business climate by regulating fair business competition in order to ensure certainty in equal business opportunities for large-, middle- as well as small-scale undertakings;
c. Preventing monopolistic practices and or unfair business competition caused by undertakings; and
d. Creating effectiveness and efficiency in business activities.

The enforcement of business competition law on merger has faced constraints that originate from the law itself, resulting in juridical constraints in its application. This paper provides an overview over the journey of legal enforcement of mergers in Indonesia. The Business Competition Supervisory Commission (KPPU), as the main body responsible for controlling mergers, is required to make accurate decisions on merger activities undertaken in Indonesia. Merger activities include, but are not limited to, mergers, consolidations, and acquisitions of company shares.

[1] Rian Saputra and Silaas Oghenemaro Emovwodo, 'Indonesia as Legal Welfare State: The Policy of Indonesian National Economic Law' (2022) 2 Journal of Human Rights, Culture and Legal System 1 <https://www.jhcls.org/index.php/JHCLS/article/view/21> accessed 27 December 2023.

[2] Aarne Puisto and Hamed Alavi, 'Abuse of Dominant Market Position by Predatory Pricing; The Valio Case' (2016) 1 Hasanuddin Law Review.[24] <http://pasca.unhas.ac.id/ojs/index.php/halrev/article/view/212> accessed 1 January 2024.

Merger, consolidation, and acquisition of a company are corporate actions taken by undertakings to build capital strength, improve production efficiency, expand their marketing range, maximizing profits[3] because in, in theory, mergers can create efficiencies to reduce the companies' production costs resulting from the merger. In general, consolidation, merger, and acquisition of companies may be referred to as mergers. In a more straightforward definition, a merger is the merge of two or more companies into one company.[4]

There are legal issues related to regulation in Indonesia, such as legal vacuum (*leemten in het recht*), conflict of norms (legal antinomies), and vague norms (*vage normen*) or obscure norms.[5] The ambiguity of norms can result in unclear laws, which in turn can lead to legal uncertainty in the application of merger control regulations. Obscurity of law refers to a lack of clarity that makes the law difficult to apply precisely,[6] exacerbating the legal limbo surrounding merger control in Indonesia.

Based on the background of the existing problems, there are two legal issues regarding the characteristics of merger control regulations in the perspective of business competition law, namely:

a. The characteristic of merger control in the study of the *ratio decidendi* of KPPU decisions within the 20 years (2000 to 2020) of business competition law enforcement in Indonesia;
b. *Ius constituendum* of *ex-ante* and *ex-post* approach as the effort to control the merger, consolidation, and acquisition under Business Competition Law.

This research is a legal research, which is a scientific procedure to find

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[3] Bayu Adhimastha, Budi Kagramanto and Endang Prasetyowati, 'Urgence of Regulations for The Acquisition of Limited Company Share in Indonesia' (2023) 2 Journal of World Science. [726] <https://jws.rivierapublishing.id/index.php/jws/article/view/262/799> accessed 28 December 2023.

[4] Alison Jones and Brenda Sufrin, *EU Competition Law* (Oxford University Press 2011).

[5] Ahmad Rifai, *Penemuan Hukum Oleh Hakim : Dalam Perspektif Hukum Progresif* (Sinar Grafika 2011) <https://simpus.mkri.id/opac/detail-opac?id=240>.

[6] Dr Mr JJ H Bruggink, *Refleksi Tentang Hukum (Pengertian-Pengertian Dasar Teori Hukum* (Citra Aditya Bakti 1995) <9789794910665>.

the truth based on the scientific logic of Law from a normative perspective.[7] In other words, this research aims to find the coherent truth. Coherent truth will result in finding the answers to the conformity of legal rules with norms, legal norms and principles, as well as assessing an individual's actions by reviewing the legal norms or legal principles.[8] To address legal issues, this research will identify the issues, conduct legal reasoning and analysis, and propose solutions.[9]

The Characteristics of Merger Control in Indonesia

The legal rules governing merger protocol are set out in Article 28 of Law Number 5 of 1999 on The Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter referred to as Law Number 5 of 1999). Article 28 of Law Number 5 of 1999 prohibits companies from conducting mergers or consolidations of business entities or acquiring shares, which may lead to monopolistic practices or unfair business competition. Article 29 paragraph (1) of Law Number 5 of 1999 requires that: "Merger or consolidation of business entities, or acquisition of shares as referred to in Article 28 resulting in the asset value and/or selling price thereof exceeding a certain amount, must be notified to the Committee by no later than 30 (thirty) days from the date of such merger, consolidation or acquisition".

Under the aforementioned Article there is an obligation to notify the Business Competition Supervisory Commission (KPPU) after conducting a merger, consolidation, or company acquisition if the sales value reaches a certain amount. This means that the Article adopts a post-notification approach. Article 29 paragraph (2) of Law Number 5 of 1999 stipulates that provisions related to asset value and/or sale value, as well as the notification

[7] Adhimastha, Kagramanto and Prasetyowati (n 3).

[8] Peter Mahmud Marzuki, *Penelitian Hukum* (Kencana Prenada Media Group 2013) <http://katalogarpusprovaceh.perpusnas.go.id/detail-opac?id=37384>.

[9] *ibid.*

procedure, are regulated under a Government Regulation. The mandate of this Article only implemented 10 years after its enactment, through the ratification on Government Regulation Number 57 of 2010 on Merger or Consolidation Business Entity and Company Shares Acquisition which May Result in Monopolistic Practices and Unfair Business Competition (hereinafter referred to as PP Number 57 of 2010).

The pre-notification implemented by some countries ensures legal certainty. Undertakings planning to merge will not hesitate after submitting notification and receiving the competition authority's response before conducting the merger. Merger Control has its fundamental challenge in that it is a predictive exercise in which, if one is trying to seek identifying the subset of proposed mergers that "may substantially lessen competition", one should assess the likely competitive effects of a proposed merger before it is consummated. On the other hand, if the notification obligation is carried out after the merger, a problem will arise if the competition authority response declines the merger that has already been conducted. It is different if the notification referred to under Article 29 of Law Number 5 of 1999 is an administrative requirement that must be fulfilled after undertakings have conducted a merger.

When the merger notification is used as instrument to exercise control over the merger, all cases related to the merger become a series of decisions regarding the non-compliance of undertakings to notify after the merger. The sanctions given are only related to the delay, such as the length of the delay calculated from the notification period specified as the late limit. The notification period in Indonesia is 30 (thirty days) after the merger, which is in line with the contents of Article 29 of Law Number 5 of 1999.

Within 10 years since the enactment of PP Number 57 of 2010, KPPU decisions have concerned the late notification after 30 days of merger. The following is a list of KPPU decisions related to mergers:

Table 1. List of KPPU Decisions on Violations of Article 29 of Law Number 5 of 1999

No.	Case Number	Reported Party's Identity	Case Position	Sanction
1	23/KPPU-M/2019	PT PLN Batubara	Share acquisition of PT Jambi Prima Coal	Financial penalty at IDR 1.000.000.000,00 (one billion Rupiah).
2	19/KPPU-M/2019	PT FKS Multi Agro, Tbk	Share acquisition of Terminal Bangsa Mandiri	Financial penalty at IDR 1.000.000.000,00 (one billion Rupiah).
3	20/KPPU-M/2019	PT FKS Multi Agro, Tbk.	Share acquisition of Kharisma Cipta Dunia Sejati	Financial penalty IDR 1.438.000.000, 00 (one billion four hundred thirty eight million Rupiah).
4	28/KPPU-M/2019	PT Sarana Farmindo Utama	Share acquisition of PT Prospek Karyatama	Financial penalty IDR 2.250.000.000,00 (two billion two hundred fifty million Rupiah).
5	10/KPPU-M/2019	PT Lumbung Capital	Share acquisition of PT Bintan Mineral Resources	Financial penalty IDR 1.200.000.000 (one billion two hundred million Rupiah).
6	06/KPPU-M/2019	PT Metro Pacific Tollways Indonesia	Share acquisition of PT Nusantara Infrastructure, Tbk.	Financial penalty IDR 1.063.000.000 (one billion sixty three million Rupiah).
7	18/KPPU-M/2019	PT Astra Agro Lestari, Tbk.	Share acquisition of PT Mitra Barito Gemilang.	-
8	27/KPPU-M/2019	PT Matahari Pontianak Indah Mall.	Share acquisition of PT Gita Aditya Graha	Financial penalty IDR 1.025.000.000 (one billion twenty five million Rupiah).
9	29/KPPU-M/2019	PT Dharma Satya Nusantara Tbk.	Share acquisition of PT Agro Pratama	Financial penalty IDR 1.250.000.000 (one billion two hundred fifty million Rupiah).
10	17/KPPU-M/2019	PT Merdeka Copper Gold, Tbk.	Share acquisition of PT Pani Bersama Jaya	Financial penalty IDR 1.000.000.000,00 (one billion Rupiah).

The list of KPPU Decisions in Table 1 above should not be used as a reference to determine whether KPPU approved all mergers for undertakings that have met the threshold, as long as the notification is carrying out in accordance with the objective of Article 29 of Law Number 5 of 1999 in conjunction with PP Number 57 of 2010. At the very least, from the decisions mentioned above, it can be concluded that the *ratio decidendi*, which underlies it, is related to whether or not all articles regarding the regulations on mergers, consolidations, and acquisitions of companies exist. Regulations on merger control should not merely focus on notification obligations.

While KPPU decided on the timing of mistakes for undertakings who were late in notifying them after mergers between 2010 and 2019, in December 2012, Semen Gresik officially changed its name to Semen Indonesia. Semen Indonesia is a super holding and serves as the holding company of PT Semen Gresik, PT Semen Padang, PT Semen Tonasa, Thang Long Cement, and PT Solusi Bangun Indonesia Tbk. Within six years after its establishment, Semen Indonesia acquired 80.6% of the shares of PT Holcim Indonesia Tbk,[10] which gave Semen Indonesia a 55% market share in Indonesia.[11] According to Kurnia Toha, Chairman of the KPPU, the acquisition conducted by Semen Indonesia did not violate the rules of business competition law.[12] However, referring to Article 28 of Law Number 5 of 1999 regarding merger, consolidation, and acquisition of company shares, KPPU should also investigate allegations of violations of this article, rather than only investigating notifications that have been delivered by Semen Indonesia, which have fulfilled the notification administration procedure of an undertaken acquisition.

Article 28 and 29 of Law Number 5 of 1999 should not be used separately. Article 28 of Law Number 5 of 1999 should serve as an entry point to examine whether a merger should be allowed or if it would affect market performance. Article 29 of Law Number 5 of 1999 serves to regulate the notification of mergers that have been conducted and are indicated to have violated Article 28. Legal obscurity arises when the rules on merger control are only partially implemented.

From the enactment of PP Number 57 of 2010 until the present, all KPPU decisions related to violations of Articles 28 and 29 of Law Number 5 of 1999 concern late notification after a merger has been conducted. Sanctions are imposed per day starting from 30 days after the merger was conducted, according to Article 29 of Law Number 5 of 1999 and Government Regulation Number 54 of 1999. However, the essence of the regulation on merger control is also addressed in Article

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[10] Ihya Ulum Aldin, 'Semen Indonesia Kuasai Pasar, KPPU: Persaingan Tidak Anti Besar' (*katadata.co.id*, 2018) <katadata.co.id/happyfajrian/berita/5e9a558b8dde3/semen-indonesia-kuasai-pasar-kppu-persaingan-tidak-anti-besar> accessed 5 December 2020.

[11] *ibid*.

[12] *ibid*.

28 of Law Number 5 of 1999. 10 KPPU decisions related to the effort to control mergers were made during the enactment of PP Number 57 of 2010 until 2019. All of them concern violations of Article 29 of Law Number 5 of 1999 in conjunction with PP Number 57 of 2010, which relates to late notification after a merger has been conducted.

While KPPU found undertakings guilty of late notification after mergers between 2010 and 2019, in December 2016, KPPU did not take any control measures after Semen Gresik acquired PT Holcim Indonesia based on the fulfillment of Semen Indonesia's obligations to notify its merger within the period less than 30 days. It is undeniable that, even before acquiring PT Holcim Indonesia, Semen Indonesia was a super holding company consisting of several cement companies in the same relevant market. PT Holcim Indonesia also exists in this market and being in the same market as a super holding company like Semen Indonesia will undoubtedly impact market share domination. PT Holcim Indonesia would not be able to survive in the same relevant market as Semen Indonesia. The right step not to be thrown out of the market is to allow itself to be acquired by a large company that becomes its competitor. If there was only one merger activity conducted by Semen Indonesia in 2012, and there was no control over the merger that took place in 2018, it can be said that the meaning of merger control in Article 28 of Law Number 5 of 1999 becomes opaque, unclear, or blurred.

Uniquely, the KPPU decision on the acquisition of shares by PT Carrefour in 2009 instead used Article 27 of Law Number 5 of 1999 as a basis for the sanction to PT. Carrefour for the abuse of dominant position.[13] At the time of the case, PP Number 57 of 2010 had not yet entered into force. The KPPU's analysis of this case was utterly unrelated to the violation of Article 28 regarding Carrefour's acquisition, or the violation in Article 29 regarding the late notification. Thus, the KPPU decision

[13] Komisi Pengawas Persaingan Usaha (KPPU). (2009). Putusan Nomor 09/KPPU-L/2009 tentang Pengakuisisian Perusahaan PT. Alfa Retailindo dan Prime Horizon Pte. Ltd oleh PT. Carrefour Indonesia. (28 September 2009) https://www.kppu.go.id/docs/Putusan/putusan_carrefour_09_2009.pdf.

was an indication of the use of the *ex-post* merger control approach. However, after the enactment of PP Number 57 of 2010, KPPU decisions that lead to the late notification are efforts to use an *ex-ante* merger control approach, even though the notification obligation is post-notification, which should not be recognized in merger regulation using the *ex-ante* merger control approach. If the KPPU does not apply certainty to the articles used in a merger, there will be legal uncertainty.

Legal Issue in the Application of Sanction

The sanctions for violations of Article 28 and Article 29 of Law Number 5 of 1999 are regulated in Article 47 Letter e of Law Number 5 of 1999 in conjunction with Article 118 of the Job Creation Law (hereinafter referred to as the Job Creation Law) concerning annulment determination. This means that KPPU can impose sanctions in the form of annulment on mergers that have been conducted.

In implementing Article 28 and 29 of Law Number 5 of 1999, KPPU asserts the obligation of undertakings to make a notification after conducting a merger, consolidation, or acquisition. KPPU decisions related to the violation of Article 28 and 29 of Law Number 5 of 1999 concern the late notification.

The consequence of applying the *ex-post* approach to mergers in Indonesia is that KPPU will examine a merger that has already been conducted. Suppose during the examination, KPPU finds that the said merger could result in monopolistic practices and unfair business competition. In that case, according to Article 47 Paragraph 2 Letter of Law Number 5 of 1999 in conjunction with Article 118 of the Job Creation Law, KPPU has the authority to decide on the annulment for the merger and/or impose a fine of at least Rp 1,000,000,000.00 (one billion Rupiah).

The application of sanctions under Article 118 of Job Creation Law must be parallel to the provision under Article 142 paragraph (2) of Law Number 40 of 2007 on Limited Liability Companies (hereinafter referred to as Law Number 40 of 2007). Article 142 paragraph (1) of Law Number 40 of 2007 regulates the termination of a company. If a merger of two or more companies will form a new corporate entity, then for its annulment, it refers to the provisions under Chapter X

of Law Number 40 of 2007. The impossibility of KPPU in conducting an annulment of a merger that has been conducted leads to a situation where there is not a single decision of KPPU that has successfully punished the reported party and annulled its merger. Sanction regulations that cannot solve legal problems mean that the rules are imperfect, or *law imperfecta*.

Article 28 and 29 of Law Number 5 of 1999 are supposed to be a form of merger control that attempts to prevent the concentration of economic power, which can lead to a monopoly and unfair business competition or known as *ex-ante* merger control. However, the notification model used is post-notification, which is not recognized under the nations' legal regulations that use the *ex-ante* merger control approach. Thus, there is a confusion of norms related to the use of *ex-post* or *ex-ante* approaches in exercising control over the merger.

If the regulation related to the control of mergers in Indonesia uses an *ex-post* approach in resolving control over a merger, problems arise related to the regulation of sanctions. The authority to annul a merger by KPPU in Law Number 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition, in conjunction with the Job Creation Law, must deal with the rules related to the dissolution of a company regulated under Law Number 40 of 2007. Therefore, there are overlapping legal rules. In matters related to the application of fines stipulated under the Job Creation Law, it is mandated that the application of regulations related to sanctions will be further regulated in a Government Regulation. It means that there is a legal vacuum as long as the mandated Government Regulation, which must exist to implement Article 118 of the Job Creation Law, has not been passed.

Ius Constituendum of Indonesia Merger Control Approaches

The explanation on the juridical approach related to Article 28 of Law Number 5 of 1999 in this paper provides an opening explanation that the rule of reason approach is very appropriate to be used in an article with prohibition norms for a merger action. A merger action does not always harm the competitive market. Merger control is concerned about negative effects in the future, when there is a

possibility that the market will be less competitive and more concentrated, thus regulators of competition law should be provided with sufficient powers and control tools to constantly check for periodic amendments and improvements.

The control of a merger should include a study of a fair market structure and the theory of imperfect competition. The following describes the explanation on a perfect and imperfect competition market:

First, the perfect competition market. The term fair business competition refers to a free and open market condition, where there is competition between undertakings in similar business fields with several parameters or benchmarks such as price, quality, number of undertakings, etc. Competition itself is essential for a market economy. This action is reflected in the rivalry or competition between undertakings over the production and sale of similar products that are most profitable for them. Therefore, business competition can even be an absolute requirement for implementing a market economy, although there are times when such business competition is carried out in a fair or unfair manner. Fair business competition is closely related to the concept of a perfect competition market.

Merger control is a form of government effort to ensure that the market mechanism works well. A mechanism will work very well when the market is perfectly competitive. On the other hand, the market mechanism will be lame in an imperfect competitive market.

A merger can be the reason for the imbalance in a fair competitive market so that it is no longer perfect. Mergers are prohibited for two reasons, as follows:

1. A merger that will result in the market structure change.[14]

   When the business competition law only supervises existing undertakings to maintain a healthy business competition, undertakings in conducting the merger will likely take into account the market power they have after conducting the merger. They also take into account changes in the market structure after they have merged.

[14] C Graham, *EU and UK Competition Law* (Pearson Education 1993).

2. Undertakings conducting merger to control the market.

   Undertakings may choose to merge with their business competitors, which essentially means eliminating competition from their competitors. Without any significant competitors after the merger, the company can take control of a market.

These two factors are the reasons that will lead mergers to place undertakings into dominant positions.

The same matter is also regulated in Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, particularly in Article 28, which prohibits business actors from engaging in mergers and consolidations with other companies (1). It also prohibits business actors from acquiring the shares of other companies (2), as such actions may lead to monopolistic practices and/or unfair business competition.[15]

Ex-Post Merger Control Approach in Indonesia

Catalin Stefan Rusu divides the types of ex-post-merger control into three categories, which are:[16]

1. *Ex-post* administrative regime: The competition authority will analyze whether or not a merger will be held to enter the market.
2. *Ex-pos*t judiciary regime: companies that impede business competition by conducting mergers will be submitted to the judiciary body based on merger activity that harms a fair competitive market.
3. *Ex-post* strict liability: a company that conducted a merger that brings impact to the market will be sued under tort law, civil law, and even criminal law.

Article 28 of Law Number 5 of 1999 provides signs prohibiting mergers which may result in monopoly and unfair business competition. Up to this point, the

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[15] Komisi Pengawas Perlindungan Usaha (KPPU), 'Undang-Undang No. 5 Tahun 1999' (2007) <https://www.kppu.go.id/docs/UU/UU_No.5.pdf>.

[16] CS Rusu, 'European Internal Market Law' (Dictatencentrale Radboud Universiteit Nijmegen 2012).

model approach used in controlling the merger has not been seen. In the next article, which is Article 29 of Law Number 5 of 1999, it can be seen that the approach desired by policymakers is *ex-post* merger control regulation. This is evident from the content of Article 29 of Law Number 5 of 1999, which regulates notifications that must be made by merger parties 30 days after the merger is conducted. Ten years after the enactment of the regulation on mergers under Law Number 5 of 1999, PP Number 57 of 2010 was enacted as the implementing regulation for the enforcement of Article 29 of Law Number 5 of 1999. Ten years prior to the enactment of this government regulation, law enforcement regarding mergers was dependent on 1 article only, which is Article 28 of Law Number 5 of 1999, in which there is no clarity as to when KPPU should exercise control over the merger.

The interpretation of Article 28 of Law Number 5 of 1999 related to the approach used in controlling mergers can be seen at least from the *ratio decidendi* of KPPU decisions related to merger acquisitions before 2010 (the period before the enactment of PP Number 57 of 2010). The *Carrefour Case* and the *Temasek Case* can be used as benchmarks that show KPPU uses the *ex-post* merger control approach. KPPU investigates the acquisitions made by Temasek and Carrefour after both of them have completed their acquisition of business competitors in the same relevant market.

After the enactment of PP Number 57 of 2010, merger control was emphasized in regulations related to notifications. In Article 29 of Law Number 5 of 1999, undertakings are obliged to issue notifications within 30 days after the merger is conducted. The notification procedures are described under the PP. Undertakings conducting a merger must comply with administrative rules related to the notifications on the merger they undertake.

During these 20 years, enforcement of merger regulations in Indonesia used the *ex-post* merger control model. In reviewing the KPPU decisions over 20 years, it can be seen there is a change in the form of the control model toward the merger. Prior to the enactment of PP Number 57 of 2010, enforcement of the merger control used the *ex-post* judiciary regime model.

Indonesia also applies articles on the abuse of dominant position in cases concerning mergers. Two cases that occurred before the enactment of PP No. 57 of 2010 are the *Temasek Case* and the *Carrefour Case*.

In its 2007 decision, KPPU found that Temasek Holdings Pte. Ltd., Singapore Technologies Telemedia Pte. Ltd., STT Communications Ltd., Asia Mobile Holding Company Pte. Ltd., Asia Mobile Holdings Pte. Ltd., Indonesia Communications Limited, Indonesia Communications Pte. Ltd., Singapore Telecommunications Ltd., Singapore Telecom Mobile Pte. Ltd. (Temasek et al.) were legally and convincingly proven to have violated the prohibition on cross-ownership as stipulated under Article 27 letter a of Law Number 5 of 1999. Due to the violation, KPPU ordered Temasek et al. to stop the ownership of shares in Telkomsel and Indosat by releasing all of its share ownership in one of these companies, no later than two years since the KPPU decision was final. Temasek et al. were also ordered to determine which companies to release their share ownership, as well as to release voting rights and the right to appoint directors and commissioners in one of those companies until the whole share ownership was released. The use of Article 27 letter a of Law Number 5 of 1999 in the *Temasek Case* can be seen as a form of supervision over mergers that have been conducted by using the article of cross-share ownership in competing companies as part of the abuse of dominant position action. In deciding the *Temasek Case*, KPPU did not apply Article 28 and Article 29 of Law Number 5 of 1999, although this case had fulfilled the elements of a merger that was prohibited according to the provisions of Article 28 of Law Number 5 of 1999. This decision to ignore Articles 28 and 29 of Law Number 5 of 1999 could be due to the fact that, at the time of the case, these two articles were still in the form of the *lex imperfecta*, as there were no government regulations to implement them.

The KPPU Commission Council in 2009 stated that Carrefour was legally and convincingly proven to have violated Article 17 (1) and Article 25 (1) letter a of Law Number 5 of 1999 on the prohibition of monopolistic practices and unfair business competition. Article 17 of Law Number 5 of 1999 contains provisions on the prohibition of monopolistic practices, while Article 25 (1) of Law Number 5

of 1999 contains provisions on the abuse of dominant position. The Commission Council stated that, based on evidence obtained during the company's investigation, the retail company's market share increased to 57.99% (2008) after acquiring Alfa Retailindo. In 2007, the company's market share was 46.30%. Based on the investigation, according to the KPPU Assembly, this market control and dominant position were abused by the suppliers by increasing and forcing discounts on the purchase price of suppliers' goods through the trading terms scheme. After the acquisition of Alfa Retailindo, the trading terms discount to suppliers increased in the range of 13-20%. According to the commission council, suppliers were powerless to object to the increment since suppliers' sales value at Carrefour was quite significant. Once again, KPPU did not use Article 28 of Law Number 5 of 1999, even though Carrefour's merger had fulfilled the elements of violation of the article regarding the merger.

The *Temasek Case* and the *Carrefour Case* can be considered an indication that KPPU can use articles on the abuse of a dominant position to overcome merger action, which disrupts fair competition in the market. However, this control can only work when the undertaking holding the dominant position resulting from the merger commits anti-competitive practices. Judging from the *ratio decidendi* of the Temasek and Carrefour decisions, it can be concluded that the approach related to the merger before the enactment of PP Number 57 of 2010 used the concept of an *ex-post* judicial regime.

The weakness of using the *ex-post* judicial regime approach in Indonesia is that KPPU is passive, damage in the competitive market has occurred, and it is more challenging to return the situation to normal. The losses of consumers and public welfare resulting from the merger action during implementing anti-competitive measures by undertakings will not be recoverable. It is stated that the restoration of public welfare is not possible since the nature of the sanctions in business competition law is not to pay losses to consumers due to anti-competitive practice.

After the enactment of PP No. 57 of 2010, the regime changed, which formerly used the *ex-post* judicial regime and then switched to the *ex-post* administrative

regime. These changes exist in 10 KPPU decisions over 10 years, starting from 2010 to 2020. All decisions were related to the late notification of mergers conducted by undertakings.

The Idealized Rules (Ius Constituendum) in Merger Regulations in Indonesia

After analyzing the two approaches, the *ex-post* and *ex-ante* merger control approach, both weaknesses and strengths are discovered. When faced with the inquiry of which approach is better to be used, it is necessary to re-examine the reasons for applying the merger control in question.

According to Catalin Stefan Rusu, the functions of all control policy models for mergers are:

a. The disciplinary function:[17]
The legal policy on mergers should be able to discipline undertakings to jointly maintain business competition in the relevant market into a fair and equal business environment for all elements in it.

b. The punitive function:[18]
The legal policy on mergers should provide sanctions based on justice for undertakings that negatively impact fair competition and for undertakings that violate the procedural rules on their merger.

c. The educational function:[19]
The legal policy on mergers is adequate to educate the undertakings and the public in a more obvious way as guidance on legal and illegal mergers knowledge, including the consequences that will be faced from legal and illegal mergers.

d. The preventive function:[20]
Merger policies must be able to identify merger actions that can hinder a fair competition at the earliest time to prevent all forms of possibilities that will cause damage to the market function.

Referring to the objective of the implementation of the business competition law policy stipulated under Article 3 of Law Number 5 of 1999, the regulation on merger control should be able to protect the public interest and increase the efficiency of the national economy as an effort to increase the people's welfare. In

[17] Graham (n 14).
[18] *ibid.*
[19] *ibid.*
[20] *ibid.*

addition, regulations on merger control must create a conducive business climate, maintain fair business competition, and provide equal certainty for large, medium, and small undertakings. Merger control policies must be based on the prevention of monopolistic practices and unfair business competition. Furthermore, this policy must be able to help create effectiveness and efficiency in business activities.

The drawbacks of the ex-post merger control approach are: *first*, it is passive, meaning that the competition authority will not make any efforts regarding the merger plan. *Second*, adjustments are made after the damage has occurred, which means that the new competition authority will take control measures when damage to the market function has already happened. The situation faced by the competition authority is an impossibility to restore society's welfare that has been lost due to anti-competitive practices carried out by undertakings who conduct the merger. *Third*, there is no legal certainty, which brings restlessness to undertakings who will conduct a merger. Undertakings will not be aware for sure when conducting the merger. They will not get accurate information on whether the merger they are doing is included in the illegal merger or not. If it is related to the function of control policy on mergers, the *ex-ante* approach does not function as a deterrent to the deterioration of market function.

Both forms of approach, *ex-post* and *ex-ante*, require a punitive function to create a deterrent effect for the illegal merger perpetrators. The problem of implementing sanctions for violations of legal rules on merger control in Indonesia is currently in the *lex imperfecta* condition due to the enactment of the Job Creation Law which regulates sanctions, and government regulations for implementing these sanctions regulations do not yet exist.

Conclusion

The efforts of KPPU in enforcing business competition law on merger regulations for two decades have experienced several constraints. During the first 10 years KPPU had to take control of mergers by using incomplete legal rules, especially in relation to the absence of government regulations that are used as the

basis for implementing Article 28 and 29 of Law Number 5 of 1999. The characteristic of merger control in the study of the *ratio decidendi* of KPPU decisions within these twenty years (2000 to 2020) of business competition law enforcement in Indonesia uses the *ex-post* merger control regulation approach. In the past 20 years, Indonesia has experienced a change in its *ex-post* merger control approach. In the first decade, KPPU used an *ex-post* judicial regime, while in the following decade, KPPU used an *ex-post* administrative regime approach. In the *ex-post* judicial regime, KPPU applied articles on monopolistic practices and the abuse of dominant position upon an anti-competitive practice carried out by undertakings conducting the merger. In the *ex-post* administrative regime approach, KPPU applied the rules regarding post-notification mergers regulated in Article 29 of Law Number 5 of 1999 and PP Number 57 of 2010.

The characteristics of the idealized merger control rules should be in line with the objectives of business competition law enactment as stipulated in Article 3 of Law number 5 of 1999. Both *ex-post* and *ex-ante* approaches have deficiencies in their application. As long as the control policy fulfills its function of disciplining, educating, punishing, and preventing to maintain the market function for the greatest welfare of the people, any approach can be used, even though the ideal form is *ex-ante* merger control.

Bibliography

Adhimastha B, Kagramanto B and Prasetyowati E, 'Urgence of Regulations for The Acquisition of Limited Company Share in Indonesia' (2023) 2 Journal of World Science 726 <https://jws.rivierapublishing.id/index.php/jws/article/view/262/799> accessed 28 December 2023.

Aldin IU, 'Semen Indonesia Kuasai Pasar, KPPU: Persaingan Tidak Anti Besar' (*katadata.co.id*, 2018) <katadata.co.id/happyfajrian/berita/5e9a558b8dde3/semen-indonesia-kuasai-pasar-kppu-persaingan-tidak-anti-besar> accessed 5 December 2020.

Bruggink DMJH, *Refleksi Tentang Hukum (Pengertian-Pengertian Dasar Teori Hukum* (Citra Aditya Bakti 1995) <9789794910665>.

Graham C, *EU and UK Competition Law* (Pearson Education 1993).

Jones A and Sufrin B, *EU Competition Law* (Oxford University Press 2011).

Komisi Pengawas Perlindungan Usaha (KPPU), 'Undang-Undang No. 5 Tahun 1999' (2007) <https://www.kppu.go.id/docs/UU/UU_No.5.pdf>.

Marzuki PM, *Penelitian Hukum* (Kencana Prenada Media Group 2013) <http://katalogarpusprovaceh.perpusnas.go.id/detail-opac?id=37384>.

Puisto A and Alavi H, 'Abuse of Dominant Market Position by Predatory Pricing; The Valio Case' (2016) 1 Hasanuddin Law Review 24 <http://pasca.unhas.ac.id/ojs/index.php/halrev/article/view/212> accessed 1 January 2024.

Rifai A, *Penemuan Hukum Oleh Hakim : Dalam Perspektif Hukum Progresif* (Sinar Grafika 2011) <https://simpus.mkri.id/opac/detail-opac?id=240>.

Rusu CS, 'European Internal Market Law.' (Dictatencentrale Radboud Universiteit Nijmegen 2012).

Saputra R and Emovwodo SO, 'Indonesia as Legal Welfare State: The Policy of Indonesian National Economic Law' (2022) 2 Journal of Human Rights, Culture and Legal System 1 <https://www.jhcls.org/index.php/JHCLS/article/view/21> accessed 27 December 2023.

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