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Corporate Mergers and Acquisitions from the Perspective of Competition Law (A Comparative Study Between Indonesia and Japan)

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Abstract
This research focuses on analyzing the implementation of mergers and acquisitions from the perspective of competition law through a comparison between Indonesian and Japanese laws. By conducting legal comparisons, it is hoped that points of improvement can be obtained for competition law in Indonesia in supervising the implementation of mergers and acquisitions. The research method used is doctrinal legal research (dogmatic legal research), with a legis-positivist approach that places the law synonymous with written rules compiled and promulgated by the authorities and sees the law as a normative system that stands alone, closed, and detached from society. Through this research, the author finds that the regulation of mergers and acquisitions in Indonesia from the perspective of competition law, when compared to Japan, is much slower in development. While countries like Japan have long embraced the pre-merger notification regime, Indonesia only adopted it in 2009, and it is regulated through the KPPU Regulation on Pre-Notification of Mergers, Consolidations, and Acquisitions (2009). This certainly creates a misalignment between the Unfair Competition Prohibition Law (1999), which adopts the post-merger notification regime, and the KPPU Regulation on Pre-Notification of Mergers, Consolidations, and Acquisitions (2009). Through this research, the author suggests that harmonization and synchronization between the post-merger notification approach adopted by the Unfair Competition Prohibition Law (1999) and the pre-merger notification approach adopted by the KPPU Regulation on Pre-Notification of Mergers, Consolidations, and Acquisitions (2009) are necessary. This is to avoid confusion among business actors and legal uncertainty that may distort the market.

Keywords: *Acquisition; Business Competition; Merger.*

Introduction

Globalization is the main driver of global economic growth today. Undoubtedly, globalization has been the main factor driving increased economic relations around the world.[1] Globalization has two sides. On the first side, globalization can boost developing countries, allowing for greater investment, both directly and indirectly, which in turn boosts economic growth and employment. On the other hand, globalization can create market imbalances, making markets concentrated,[2] which in turn creates monopolistic practices.

[1] H U Adil Samadani, *Dasar-Dasar Hukum Bisnis* (Jakarta: Mitra Wacana Media, 2013) at 43.
[2] Adi Sulistiyono & Muhammad Rustamaji, *Hukum Ekonomi Sebagai Panglima* (Sidoarjo: Masmedia Buana Pustaka, 2009) at 39.

Business actors always try to maximize profits ("maximizing profit") in carrying out their business activities.[3] This is a natural thing, because business actors are economic subjects who naturally have the instinct to seek profit. Business actors will try to maximize profits by expanding their business.[4] Business expansion is expected to increase efficiency, which in turn will increase the company's economies of scale in the production process.[5] Not only does it increase efficiency, business expansion can also be an alternative for businesses that are experiencing liquidity problems, so it can be a way to protect creditors, owners, and employees from bankruptcy. Business expansion also helps businesses comply with government regulations and remain viable in the market. For example, Bank Indonesia implemented the Indonesian Banking Architecture Program to increase the reserve ratio of commercial banks. This program forces bank business owners to choose between injecting additional funds or expanding their business. On the other hand, business expansion can also be a way for businesses to exit the market as they have no other options.[6]

In theory, business expansion can occur through Mergers and Acquisitions. Business expansion strategies through Mergers and Acquisitions (M&A) are common practices in the business world. However, this does not mean that, because the strategy is commonplace, it does not cause problems. This business expansion can have a negative impact on market conditions, such as market structures dominated by certain business actors, fear of the birth of giant businesses, and foreign control of sensitive industries.[7] Ultimately, this practice results in monopoly and unhealthy business competition. Business actors use this strategy to try to maintain their positions, even to dominate the market. Market domination is achieved through greater market share, cost leadership, and technological leadership. In this case, there is no room for a healthy competition.[8] Considering increasingly fierce and imperfect competition, the value of healthy business competition must receive greater attention in the Indonesian economic system.

Here, the role of law is to eliminate economic distortions as a result of unfair business competition. Law must be able to carry out its function to maintain order and create balance in relations between members of society [9] in order to avoid economic concentration in certain individuals and groups and ultimately create a climate of healthy business competition.[10] For this reason, the state's role is to ensure that healthy business competition can be created.

Based on the Decision of the Business Competition Supervisory Commission (KPPU) Number 09/KPPU-L/2009 dated November 3, 2009, there was an

[3] *Dua Dekade Penegakan Hukum Persaingan: Perdebadan Dan Isu Yang Belum Terselesaikan*, by Komisi Pengawas Persaingan Usaha (Jakarta, 2021) at 134.
[4] Sahat Aditua Fandhitya Silalahi, "Strategi Ekspansi Internasional Badan Usaha Milik Negara Sektor Telekomunikasi" (2016) 21:2 Kajian 125–139 at 125.
[5] Andi Fahmi Lubis et al, *Hukum Persaingan Usaha* (2017) at 266.
[6] Komisi Pengawas Persaingan Usaha, *supra* note 3 at 449.
[7] Syamsul Maarif, *Merger Dalam Perspektif Hukum Persaingan Usaha* (Jakarta: Degraf Publishing, 2010) at 10–11.
[8] Ahmad Yani & Gunawan Widjaja, *Seri Hukum Bisnis: Anti Monopoli* (Jakarta: Raja Grafindo Persada, 1999) at 8.
[9] CST Kansil, *Pengantar Ilmu Hukum dan Tata Hukum Indonesia* (Jakarta: Balai Pustaka, 1989) at 40.
[10] Yani & Widjaja, *supra* note 8 at 8.

acquisition case that caused a stir in the business world and the legal world, namely the acquisition of PT. Carrefour Indonesia against PT. Alfa Retailindo, Tbk. Despite the limitations of the existing legal infrastructure and competence (given the complexity of proving the rule of reason principle), this case is still being carried out. This is the only Merger or Acquisition case that was substantially handled by the KPPU. In this case, the KPPU decided on the acquisition of the PT. Carrefour Indonesia against PT. Alfa Retailindo, Tbk was declared proven to have had an impact on monopolistic practices and unfair business competition. The KPPU's decision was annulled by the Supreme Court through Supreme Court's Cassation Decision Number 502 K/PDT. SUS/2010, on October 21, 2010, this decision became the beginning of a milestone in monitoring business competition in M&A transactions, one of which is the publication Government Regulation on Company Mergers or Consolidations and Acquisition of Company Shares (2010).

Business expansion activities through Mergers and Acquisitions are not only carried out in Indonesia but also in developed countries such as Japan. Japan is one of the developed countries included in the ASEAN +3, along with China and South Korea. Japan itself is one of the countries that passed a law on monopolistic practices for quite some time, namely in 1947, and it was named the Japanese Anti-Monopoly Law (1947). Through this law, Japan regulated the mechanism of M&A carried out by a company.

Company expansion activities through Mergers and Acquisitions can be pro-competitive; however, in practice, it is often misused by business actors to expand their markets and create monopolistic and anti-competitive business practices due to the abuse of a dominant position in the market.[11] For this reason, M&A s need to be controlled and receive serious attention from business competition authorities to combat monopolistic practices and unfair business competition.

Although quite a lot of research has been conducted on the issue of corporate mergers and acquisitions from a business competition law perspective. However, to the best of our knowledge, there is still no research that looks at this issue by conducting a comparative study of M&A regulations in Indonesia and Japan from a business competition law perspective. Most previous research used a case study approach through KPPU decisions to describe M&A from the perspective of business competition law in Indonesia. For this reason, on this occasion, the author will focus this writing on a question regarding how Indonesia and Japan compare the regulation of Mergers and Acquisitions from a Business Competition Law Perspective. By carrying out legal comparisons, it is hoped that points for improvement in business competition law in Indonesia can be obtained by supervising the implementation of M&A.

[11] Ending Sulsitya, "Monopoli Mengintai Akuisisi" *Media Berkala Komisi Pengawas Persaingan Usaha* (15AD) 2009 at 16.

Research Problems

Based on the title of the research and the background that has been described by the author, the author formulates the problem as follows:

1. How are company mergers and acquisitions from the perspective of business competition law in Indonesia?
2. How are corporate mergers and acquisitions from the perspective of business competition law in Japan?

Research Methods

The research was conducted using a normative juridical approach or according to Ronny Hannitjo Soemitro, as doctrinal legal research or dogmatic legal research This method uses a legist-positivist approach that places law as synonymous with written rules prepared and promulgated by the authorities and sees law as a normative system that stands alone, closed, and independent of society. The research sources used were primary and secondary legal materials.[12] The primary legal materials used include Unfair Competition Prohibition Law (1999), Job Creation Law (2023), Company Law (2007), Government Regulation on Merger, Consolidation, and Acquisition of Companies (2010), the KPPU Regulation on Pre-Notification of Mergers, Consolidations, and Acquisitions (2009), the KPPU Guidelines, and other related regulations. The secondary legal materials used included all legal publications on related issues, textbooks, and legal journals.

The research was carried out by comparing the laws related to the implementation of corporate mergers and acquisitions from the perspective of business competition laws in Indonesia and Japan. The analysis process for this research began by comprehensively conveying facts from existing events. The applicable laws are then identified. The final process analyzes the rule structure identified using existing facts.

Discussion

1. Company Mergers and Acquisitions from the Perspective of Business Competition Law in Indonesia

Mergers and Acquisitions can simply be interpreted as "the act or an instance of combining or uniting."[13] Merger comes from the Latin word "mergere," which means (1) to join together and to unite (2) to cause loss of identity due to being absorbed or swallowed by something.[14] In other words, a merger is a form of joining two or more independent business actors[15], or the integration of activities carried

[12] Peter Mahmud Marzuki, *Penelitian Hukum*, 13th ed (Jakarta: Kencana, 2017) at 133.
[13] Bryan A Garner, *Black's Law Dictionary 10th Edition* (2014) at 1002.
[14] Gunawan Widjaja, *Merger Dalam Perspektif Monopoli*, 1st Editio ed (Jakarta: Raja Grafindo Persada, 2002) at 41.
[15] Alison Jones & Brenda Sufrin, *EC Competition Law, Text, Cases, and Materials* (New York: Oxford University Press, 2004) at 847.

out by two business actors in a comprehensive and permanent manner. [16] Acquisition comes from the English word "acquisition" or often called "take over" takeover. The term "acquisition" or "take over" means the takeover of a controlling interest in a company by another company (one company taking over controlling interest in another company), or more simply, an acquisition is the takeover of a company by another company.[17]

According to Article 1 of the Company Law in Indonesia, M&A s have been formally defined as follows:

a. *A merger is a legal act carried out by one or more companies to merge with another existing company which results in the assets and liabilities of the merging company being transferred by law to the company that accepts the merger and subsequently the legal entity status of the merging company ends because law.*
b. *A takeover is a legal action carried out by a legal entity or individual to take over the shares of a Company which results in the transfer of control over the Company.*

Prior to Company Law (1995), the regulation of M&A in Indonesia was subject to the Civil Code, considering that the M&A mechanism was based on a contractual basis. However, long before Law 1/1995, regulations regarding M&A already existed, especially regulations for the banking sector, such as Minister of Finance Decree (KMK) No.Kep.614/MK/II/8/1971 concerning the provision of tax relations to national private banks. Carrying out a Merger and KMK No.278/KMK.01/1989 concerning the Consolidation and Merger of Bank Businesses.

In 2007, the Company Law was amended, and M&A became a business strategy mechanism that has received attention from the government. Through Government Regulation (1998), the government wants to regulate the mechanisms of M&A in more detail. The government is aware of the negative impact of M&A s on the business climate, so M&A mechanisms need to be regulated. This is also one reason for issuing Government Regulations (1998). Even though one of the considerations when Government Regulation (1998) was formed was to create a healthy business climate, there is only one article that regulates this in Article 4, paragraph (1), letter b of Government Regulation (1998), which states that the implementation of Mergers and Acquisitions can only be done by paying attention to the interests of society and healthy competition in conducting business. For this reason, the Unfair Competition Prohibition Law (1999) comprehensively regulates business competition law in Indonesia, one of which regulates the impact of Mergers and Acquisitions. on Indonesia's business climate.

Mergers and acquisitions that lead to anti-competition are mergers that are of concern to business competition law because mergers and acquisitions can have

[16] Ernest Gellhorn & William E Kovacic, *Antitrust Law and Economics in a Nutshell* (St. Paul Minnesota: West Acaemic Publishing, 1994) at 348.
[17] Munir Fuady, *Hukum Tentang Akusisi, Take Over dan LBO* (Bandung: PT. Citra Aditya Bakti, 2001) at 3.

a relatively large influence on competitive conditions in the relevant market. In general, a merger is said to have an anti-competitive effect if the following two conditions are met. [18]

a. The market must be substantially concentrated after the Merger occurs; and

b. Other companies find it difficult to enter the market and become competitors.

In conditions where two or more companies merge, the market shares of the two merging companies will unite and form a larger combined market share so that the market becomes concentrated and it becomes difficult for other companies to enter the market. [19] This is the focus of the business competition law. Mergers and acquisitions can generate or strengthen market power by increasing the concentration of relevant products and geographic markets. This increase in market power can enhance their ability to coordinate both implicitly and explicitly. Thus, a company can monopolize its market.

When viewed in terms of the type of business of the companies involved in the merger transaction, mergers can be classified as follows. [20]

a. Horizontal Mergers
A horizontal merger occurs when two companies with the same business line merge or when companies that compete in the same industry merge. . In this case, the companies being merged are their competitors, either competitors who produce the same product or who have the same marketing territory. It is clear that the aim of this merger is to increase the market share or kill competitors.
b. Vertical Merger
Vertical mergers involve different operational production stages that are interconnected from upstream to downstream. Vertical mergers can also take the form of 2 types, namely Upstream Vertical Mergers and Downstream Vertical Mergers.
c. Conglomerate Merger
A conglomerate merger occurs when two companies that do not have the same business line merge. In other words, conglomerate mergers occur between companies that do not compete and do not have a buyer-seller relationship.

Among the various forms of mergers that generally occur, namely horizontal, vertical, and conglomerate mergers, horizontal mergers are a form of merger that business competition law needs to be wary of. In this type of merger, two or more companies operating in the same line of business combine to become larger

[18] Arie Siswanto, *Hukum Persaingan Usaha,* (Bogor: Ghalia Indonesia, 2022) at 33.
[19] Lubis et al, *supra* note 5 at 283.
[20] Fuady, *supra* note 17 at 88.

business entities.[21] If companies with the same business line merge, the number of competitors in the market automatically decreases. This can damage the competitive climate because the fewer the number of competitors in the market, the smaller the flexibility of competition in the market. Ultimately, this condition will be detrimental to society and the public interest. As a result of the reduction in the number of competitors in the market and the stronger dominant position of the company resulting from the merger, the potential for market entry barriers for new business actors will increase.

The Indonesian Business Competition Law in assessing mergers and acquisitions applies the rule-of-reason principle. Based on this principle, the assessment of M&A is not only based on the fulfillment of the elements or elements of the regulations, but must also look at the consequences and/or reasons for carrying out M&A. It is the right of Merger and Acquisition business actors to argue, accompanied by evidence that Mergers and Acquisitions do not have anti-competitive consequences or will not result in a significant reduction in competition.[22] This is different from the per se principle (illegal per se), where an agreement is considered clear and certain to reduce or eliminate competition. Therefore, in this approach, the reporting business actor does not need to prove the impact of competitors. The proof required is that the agreement in question is valid or that the business activity in question has been carried out by a competing business actor.[23]

Mergers and Acquisitions can be seen from 2 (two) aspects: procedural and substantive. From a procedural perspective, there are two merger notification systems, namely pre-merger notifications, where business actors notify or report Merger and Acquisition plans to the business competition authority, and post-merger notification, where business actors report after the merger is completed.[24] Pre-merger notification is a notification by business actors who will carry out a Merger or Acquisition to the business competition authority regarding the planned Merger or Acquisition that they will carry out. The pre-merger notification system is widely adopted in various countries in the world because it is considered more profitable for business actors, the economy, society, and competition authorities, considering that not much energy, capital, time, or other factors are expended for merger purposes if the authority business competition rejects merger plans.

The second system is post-merger notification. According to this system, notification of a Merger or Acquisition is carried out after the Merger or Acquisition is legally completed or valid, and an opinion is requested by the business competition authority. In contrast to the pre-merger system, because the post-merger has been completed and is legally valid, many resources have been used to carry out mergers or acquisitions. Indonesia adheres to the post-merger notifications. This system was implemented in Indonesia at the time, including the

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[21] Syamsul Maarif, "Komitmen KPPU untuk Kepastian Hukum Persaingan" *Kompetisi: Media Berkala Komisi Pengawas Persaingan Usaha* (2008) at 30.
[22] Komisi Pengawas Persaingan Usaha, *supra* note 3 at 437.
[23] Mustafa Kamal Rokan, *Hukum Persaingan Usaha* (Jakarta: PT Raja Grafindo Persada, 2010) at 78.
[24] Maarif, *supra* note 23 at 33.

Unfair Competition Prohibition Law (1999), because this law was born when Indonesia experienced an economic crisis in 1999; therefore, it required a fast process for carrying out Mergers and Acquisitions.[25] Through the KPPU Regulation on Pre-Notification of Mergers, Consolidations, and Acquisitions (2009), the approach was changed from post-merger notification to pre-merger notification, as has been implemented in various countries in the world in a merger regulatory framework. For the substantive aspect, the merger needs to be analyzed and tested substantially (substantive test) to determine whether a merger transaction can be considered to have a negative impact on competition.[26] With this, there is an incongruity between the Unfair Competition Prohibition Law (1999), which adheres to a post-merger notification regime, and the KPPU Regulation (2009), which adheres to a pre-merger notification regime.

The government has a window to harmonize notification regulations through the Job Creation Law (2023). Unfair Competition Prohibition Law (1999) is one of the contents of the law that was also amended through the Job Creation Law; however, this change is only related to procedures for handling cases, namely Articles 44, 45, 47, and 48, and deletes Article 49 of the Unfair Competition Prohibition Law (1999). In this way, the inconsistency regarding notification provisions continues.

Merger and Acquisition regulations in Unfair Competition Prohibition Law (1999) are regulated in Chapter V, section four concerning mergers, consolidations and takeovers. Article 28 states that business actors are prohibited from conducting mergers and acquisitions of companies, which could result in monopolistic practices and/or unfair business competition. In the event that the impact of the Merger and Acquisition results in an asset value exceeding IDR 2.5 trillion and/or a sales value exceeding IDR 5 trillion, based on Article 29, the Commission must be notified no later than 30 (30) days from the date of the merger, consolidation, or takeover.

Through the Government Regulation on Merger, Consolidation, and Acquisition of Companies (2010), prohibited actions that cause Monopoly Practices and/or Unfair Business Competition as a result of Mergers or Acquisitions occur because business actors are suspected of entering prohibited agreements, prohibited activities, and/or abuse of dominant positions.

Based on Article 5, paragraph (3) of the Government Regulation (2010), for business actors engaged in banking, the obligation to provide notification only arises if the asset value exceeds IDR 20 trillion. The asset value and/or sales value is calculated based on the sum of the asset values and/or sales value of

a. Business Entity resulting from a Merger, or Business Entity that acquires shares of another company and the acquired Business Entity; and

[25] Komisi Pengawas Persaingan Usaha, *supra* note 3 at 432–433.
[26] *Ibid* at 39–40.

b. Business Entities that directly or indirectly control or are controlled by Business Entities resulting from mergers or business entities that acquire shares in other companies and the business entities that are acquired.

Business actors who wish to carry out a Merger or Acquisition that results in the asset value and/or sales value exceeding a certain amount can consult verbally or in writing with KPPU. KPPU can provide advice, guidance, and opinions regarding mergers and acquisition plans for Business Actors. The assessment given by the KPPU does not constitute approval or rejection of the Merger or Acquisition plan to be carried out by the business actor and does not eliminate the KPPU's authority to carry out an assessment after the relevant Merger or Acquisition becomes legally effective. In the event that the Business Actor does not submit a written notification, the Business Actor may be subject to sanctions in the form of an administrative fine of IDR 1 billion for each day of delay, provided that the overall administrative fine is a maximum of IDR 25 billion. The positive aspect of the enactment of the Job Creation Law for business competition law in Indonesia, especially for M&A transactions, is that the KPPU is given the authority to cancel M&A transactions that are proven to create unhealthy business competition. This step needs to be appreciated as an effort to strengthen the KPPU institution to protect the economic climate from monopolistic practices and unhealthy business competition.

2. Corporate Mergers and Acquisitions from the Perspective of Business Competition Law in Japan

Mergers and acquisitions are business practices that apply globally; therefore, the concept of corporate mergers and acquisitions in Japan is relatively the same as in Indonesia. The authorities in Japan use the term merger, which also includes acquisition, unless it explicitly refers to one form of this event. Even though the two strategies differ, both aim to compete in the midst of increasingly competitive business competition. This is because Merger, in a broad sense, includes the meaning of merger itself and acquisition. According to company law in Japan, a merger is defined as the combination of two or more companies into one corporate entity.[27] The shareholders of the absorbed company usually receive shares in the absorbing company according to the merger ratio (which is based on several factors, including the company value of the company being acquired relative to the value of the absorbing company).

In Japan, the Companies Act and Financial Instruments and Exchange Act (FIEA) have provided the basic legal framework for M&A transactions. The Companies Act provides basic rules regarding companies and applies to both public and private companies, while the FIEA makes provisions for, among other things, public offers of securities, tender offers, and insider trading and is an

[27] Takefumi Sato et al, *Public Mergers and Acquisitions in Japan: Overview* (Canada: Thomson Reuters: Practical Law Country, 2020) at 2.

important source of rules governing Mergers and Acquisitions involving corporate transactions. [28]

The Japanese government realizes that mergers and acquisitions can provide benefits to the economy, but can also pose risks to business competition. Therefore, the Japanese government regulates M&A s with the aim of protecting healthy business competition and benefiting consumers. To guarantee this, the Japanese Government issued the Antimopoly Law in 1974, [29] which contained regulations for controlling Mergers and Acquisitions in Japan. [30] The Japanese Anti-Monopoly Law also establishes the competent authority to supervise and take action in the event of monopolistic practices and non-business competition, namely, the Japan Fair Trade Commission (JFTC).[31] JFTC is the same as the Business Competition Supervisory Commission in Indonesia.

Prohibitions under the Japanese Anti-Monopoly Law can be classified into three categories: prohibition of private monopolies, prohibition of unreasonable restraint of trade, and prohibition of unhealthy business practices. Other prohibitions regulate more specific types of activities, such as mergers, acquisitions, ownership of shares and assets, trade association activities, and false advertising. However, these three types of regulations are the most basic. [32]

The definition of "private monopoly" (shitekidokusen) is regulated in Article 2 paragraph (5) of the Japanese Anti-Monopoly Law as "a business activity in which every entrepreneur, either alone or together, through conspiracy, conspiracy, or in other ways together with other entrepreneurs, eliminates or controls the activities of other companies, thereby causing things that are contrary to public interest, creating an obstacle to competition in certain business fields. Based on this provision, a monopoly by one company is carried out by "eliminating" or "controlling" other entrepreneurs'. "Control of other companies" means such as the activity of acquiring businesses, assets or shares from one or more other entrepreneurs, thereby dominating the market and eliminating competition." Article 3 of the Anti-Monopoly Law prohibits this monopoly.

Article 3 of Japan's Anti-Monopoly Law prohibits unreasonable restraint of trade. Unfair trade restraints include horizontal agreements between competitors that suppress competition among themselves (such as price fixing and territorial division), and do not include agreements that establish vertical trade restraints, such as fixing resale price structures to distributors and retailers or granting them exclusive sales territories. This interpretation stems from the fact that Article 2 paragraph (6) of the Japanese Anti-Monopoly Law only prohibits "reciprocal restrictions" (sogo-kosoku) and therefore only agreements are prohibited in which each participant has the same obligations as the other participants." Boycotts were

[28] Mark Zerdin, *The Mergers & Acquisitions Review*, 8th ed (London: Law Business Research, 2014) at 437.
[29] Mitsuo Matsushita, "The Antimopoly Law of Japan" (1974) 4:2 Institute of International Economics at 1.
[30] Dimitri Van Schaik, *M&A in Japan: An Analysis of Merger Waves and Hostile Takeovers* Erasmus University, 2008) [unpublished] at 65.
[31] Kozo Kawai et al, "Merger Control in Japan: Overview", (2019), online: *Thomson Reuters: Practical Law Country Q&A* <https://www.acc.com/sites/default/files/resources/upload/MergerControl InfoPak Japan.pdf> at 2.
[32] Matsushita, *supra* note 31 at 126.

also not included because these activities do not fall into the category of suppressing competition among participants and are considered to fall under the category of unhealthy business practices.

Article 2, paragraph 7 of the Japanese Anti-Monopoly Law defines "unfair business practices" (Fukoseina torihiki-hoho). These include (1) unreasonable discrimination against other entrepreneurs, (2) charging prices that are too high or too low, (3) inducing or forcing customers or competitors to transact with themselves, (4) imposing conditions that limit other parties in a transaction, (5) abuse of a superior bargaining position, and (6) unfair interference in transactions between other entrepreneurs.

In general, in the M&A of Japanese business companies, antimonopoly restrictions aim at the following:[33]

a. Prohibition of holding companies

Pure holding companies are prohibited under Article 9 of the Japanese Anti-Monopoly Law regardless of the size and impact of the proposed holding company. "A pure holding company (mochikabu kaisha) is defined in Article 9 paragraph (3) of the Japanese Anti-Monopoly Law as a company whose main business is to control the business activities of a company or companies in Japan through share ownership (including partnership shares)." Thus, an operating holding company" is not prohibited. If a company that is primarily involved in the production and sale of a commodity or in some other business also holds shares of various other companies, then that company is not considered a holding company under the Japanese Anti-Monopoly Law.

Pure holding companies were banned in 1947 by the Antitrust Law. Only operating parent companies were permitted. The parent company owns shares in its subsidiaries and effectively controls them. Share ownership in subsidiaries of 50% or more, either directly or indirectly. In an effectively controlled company, the parent company is the largest shareholder and shares ownership is between 25% and 50%, including share ownership through other subsidiaries. A pure holding company only shares ownership and control over other companies, and has no business activities. The main objective of a pure holding company is to control the companies within it and obtain profits through dividend payments. The operating holding company has its own profit-making business activities and shares ownership with other companies.

b. Restrictions on share ownership by company

Based on the Japanese Anti-Monopoly Law, the acquisition and ownership of shares in a company by another company is prohibited if the acquisition or ownership could substantially hinder competition in the business field. The

[33] *Ibid* at 146.

relevant provision is Article 10 paragraph (1) of the Japanese Anti-Monopoly Law states the following.

> *"No company shall acquire or own shares of a company or companies in Japan if the impact of such acquisition or ownership of shares could substantially hinder competition in a particular field of commerce, or that the acquisition or ownership of such shares This is done through unfair business practices."*

This article not only regulates acquisitions made by competing companies, but also by other companies. For example, a company operating in the manufacturing sector acquires or owns shares in a company operating in the retail sector, then this takeover or ownership can substantially hamper business competition in certain trade fields. For this reason, it is important to substantially prove whether mergers and acquisitions can hamper business competition. This is because Japan adheres to the rule of the reason model in regulating Mergers and Acquisitions.

c. Restrictions on share ownership by financial companies

Restrictions are imposed on share ownership by financial companies based on Article 11 (1) of the law:

> *"No company operating in the financial sector may acquire or own shares of a company or other companies in Japan if the share ownership of the company or companies exceeds 10% of the total outstanding shares."*

Thus, under economic power regulations, a bank or insurance company may not acquire or hold more than 5% or 10% of voting rights in another company in Japan, respectively, unless one of the exceptions under the Anti-Monopoly Law applies and bank or company insurance obtains prior approval from the JFTC. [34]

d. Restriction of interrelated parts

A company's domination or control can be carried out using interrelated parts. Such interlocking sections are prohibited under Article 13 of the Law if they could "substantially hinder business competition in a particular field of trade" or if they could "force other companies to engage in unfair business practices." This means that an officer or employee of one company cannot simultaneously hold office in another if the effect is to substantially hinder competition in a particular field of commerce. [35] If an official or employee of one company holds an official position in another company in Japan at the same time, this needs to be reported to the JFTC whenever the total assets of the two companies exceed ¥500 million in accordance with Article 13 paragraph (3) of the law. Japanese Anti-Monopoly.

[34] Matsushita, *supra* note 31 at 150.
[35] *Ibid*

e. Restrictions on share ownership by someone other than the company

In relation to share ownership by persons other than companies, under Article 14 of the law, the same restrictions are provided as in the case of share ownership by companies.

f. Restrictions on mergers

In connection with the merger, it is regulated in Article 15 paragraph (1) of the Japanese Anti-Monopoly Law, which reads as follows:

> *"No company in Japan may carry out a merger (1) if there are substantial obstacles to business competition in certain trade fields caused by the merger; (2) if unfair business practices are carried out during the merger."*

Article 15, paragraph (2) of the Japanese Anti-Monopoly Law states that every company wishing to become a party to a merger must first submit its report to the JFTC. The parties involved cannot carry out a merger until 30 days after the proposal, and within that period, the JFTC must take action against the proposed merger if the JFTC considers the merger to be illegal. This waiting period can be extended by another 30 days with the agreement of the parties as regulated in Article 15, paragraph (3).

g. Business transfer restrictions.

Business transfers are prohibited under Japan's Anti-Monopoly Law if their impact could substantially hinder business competition in certain trade fields. Pursuant to Article 16 of the Anti-Monopoly Law, activities such as acquiring all or most of a business or fixed business assets, taking a lease or undertaking management of all or a large part of a business in Japan from another company, or entering into a contract providing a joint profit and loss account for a business in Japan with other companies subject to the JFTC regulations.

As stated above, M&A activities are essentially not permitted if they limit free competition in a particular industry, or if this is achieved through unfair trade practices. To control and prevent this situation, companies carrying out M&A s need to report their proposals (pre-merger) to the JFTC. [36] In 1998, the Japanese Anti-Monopoly Law was amended to reduce the scope of reporting and notification requirements regarding Mergers and Acquisitions and share ownership and to improve inspection procedures. Starting in January 1999, it was no longer necessary to notify every merger of the JFTC. Notification requirements

[36] Matsushita, *supra* note 31 at 150.

are limited to M&A s between companies with total assets of more than ¥10 billion (including parent companies and subsidiaries) and companies with total assets of more than ¥1 billion (including parent companies and subsidiaries). Additionally, notifications are not required for mergers between (i) parent companies and consolidated subsidiaries, and (ii) mergers between similar companies (if the parent company owns more than 50% of the shares of the subsidiary). Notification must be provided before closing the transaction. [37] There are no other legal requirements regarding notification times. [38] The parties can provide notifications before implementation of the definitive agreement.

Guidance from the JFTC can be obtained prior to filing a notification through voluntary consultation with the JFTC. During consultations, the parties can provide a written explanation of the transaction and potential competition issues that may arise and discuss substantive issues, such as market definition or potential competition issues. [39] Parties may also ask the JFTC to review their draft notice to ensure that it accepts it when submitted. Pre-notification consultations usually take approximately two weeks to one month, although the length of pre-notification consultations depends on the case and interests of the parties. strategy. The acquiring company is usually responsible for the notifications. For M&A s, both transacting companies must jointly submit a notification form.

The JFTC is authorized and directed to determine certain actions that fall into the categories of monopolistic practices and tend to hamper fair business competition. The JFTC has issued what it calls a General Determination of Unfair Business Practices that defines 12 types of activities. "This General Determination applies to all industries. In addition, the JFTC can also take other actions against Mergers and Acquisitions that can cause unfair business competition, namely, by requiring business actors to sell some of their assets or requiring business actors not to take certain actions that could be detrimental to business competition.

Conclusions

Based on the results of the discussion of the problems above, it can be concluded that both Indonesia and Japan view Mergers and Acquisitions not only as a business strategy that has a positive role in the development of the business world, but also has risks that can distort the economy, through monopolistic practices and competition. unhealthy business. However, the regulation of Mergers and Acquisitions in Indonesia from a business competition law perspective, compared to Japan, is much slower in development. Japan has regulated this matter comprehensively since 1974, because it has seen and captured the potential negative impacts resulting from unhealthy mergers or acquisitions. Japan has also used a pre-merger notification regime to screen for mergers or acquisitions of companies that have the potential to create unfair business competition. Meanwhile in Indonesia, the same thing was only regulated in 1999, through Unfair

[37] Schaik, *supra* note 32 at 65.
[38] Kozo Kawai et al, *supra* note 33 at 4.
[39] Kozo Kawai et al, *supra* note 33.

Competition Prohibition Law (1999). The Government's attitude in capturing regulatory needs is also very slow. It has been proven that it took almost 11 years to fulfill the requirements of the implementing regulations of Unfair Competition Prohibition Law (1999), through Government Regulation on Merger, Consolidation, and Acquisition of Companies (2010). Apart from that, the government also tends to be slow (not agile) in capturing changes in law enforcement mechanisms that apply globally. While other countries, such as Japan, have long adhered to the pre-merger notification regime, Indonesia only adopted it in 2009, and this is regulated through KPPU Regulation on Pre-Notification of Mergers, Consolidations, and Acquisitions (2009). This of course creates a mismatch between Unfair Competition Prohibition Law (1999) which adheres to a post-merger notification regime, and KPPU Regulation on Pre-Notification of Mergers, Consolidations, and Acquisitions (2009).

Suggestions

It is necessary to harmonize and synchronize the post-merger notification approach adopted by Unfair Competition Prohibition Law (1999) with the pre-merger notification approach adopted by KPPU Regulation on Pre-Notification of Mergers, Consolidations, and Acquisitions (2009). This is to avoid confusion among business actors and legal uncertainty that can distort the market.

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