Digital Repository Universitas Jember

Lentera Hukum, Volume 6 Issues 2 (2019), pp. 213-222
ISSN: 2355-4673 (Print) 2621-3710 (Online)
doi: 10. 19184/ejlh.v6i2 .9970
© University of Jember, 2019
Published online 30 July 2019

Post-Notification Arrangements in Merging Business Entities (Mergers) as an Effort to Prevent Unfair Business Competition

Ermanto Fahamsyah, Fadhillah Atika Suri
Faculty of Law, University of Jember, Indonesia
ermanto_fahamsyah@yahoo.co.id

Abstract
One way a business actor strengthens their business is through cooperation with other business actors. One form of cooperation is a "merger" or another term, "merging." Mergers carried out by business actors can result in monopolistic practices or unfair business competition. A merger of competition aspects is regulated in Article 28 and 29 of Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition which provides regulation regarding post-notification of mergers. Commission Regulation No. 1 of 2009 on Pre-Notification of Mergers, Consolidations, and Acquisitions gives a different arrangement, namely in the form of pre-notification to business actors. This difference in notification arrangements provides ineffectiveness and inefficiency for business actors.

Keywords: Post-Notification, Mergers, Unfair Business Competition.

I. INTRODUCTION

The Indonesian Government made Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition. The regulation was enacted on March 5, 1999 and entered into force one year after it was ratified. Law No. 5 of 1999 was formed as an enforcement of business competition law as well as protection of equal rights for every business actor in order to create a fair business competition climate. Law No. 5 of 1999 is an essential instrument for spurring economic efficiency and freedom from market distortions. Manifesting the implementation of the 1945 Constitution of the Republic of Indonesia, Law No. 5 of 1999 provides legal certainty, enabling spurred acceleration of economic development as an effort to improve people's welfare.

In the context, Indonesian economic law must be based on Indonesian economic principles contained in Article 33 of the 1945 Constitution. Article 33 implies that the objectives of Indonesia's economic development are rooted in economic democracy. Economic development objectives may be achieved in accordance with the Constitution by paying attention to the interests of business actors and the public, creating a healthy business competition climate, preventing business actors from carrying out monopolistic practices and unfair business competition, and building efficiency and effectiveness of the national economy for the welfare of the people based on Pancasila and 1945 Constitution.

Many business actors, in strengthening their business, collaborate with other business actors. One form of cooperation is "merging." The arrangement of mergers

Digital Repository Universitas Jember

motivated by competition has been regulated explicitly in Article 28 and Article 29 of Act No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, which form the core of the law. These two articles require the analysis of merging transactions through the perspective of competitive business law.[1] As the implementing regulation of the law, the Government Regulation of the Republic of Indonesia No. 57 of 2010 on Merger or Consolidation of Business Entities and Acquisition of Company Shares that can result in Monopolistic Practices and Unfair Business Competition was born.

The motivation for mergers between business actors is to create efficiency in the economy in order to reduce production costs incurred by the company. Apart from being able to create efficiency, business mergers can develop a business or help small business actors to grow and expand their business. A merger can also be used as one way to avoid bankruptcy due to liquidity problems in the company.[2]

Of Law No. 5 of 1999 Article 29, Government Regulation No. 57 of 2010 Article 5, and Regulation of the Business Competition Supervisory Commission No. 1 of 2009, there are differences regarding the nature of a company's notification obligation (notice). In the Regulation of the Business Competition Supervisory Commission No. 1 of 2009 on Pre-Notification of Mergers, Consolidations, and Acquisition, pre-notification is described in Article 1 no. 6 as voluntary for business actors who will carry out mergers. The voluntary nature, when interpreted in the Indonesian language dictionary, has the same meaning as willingness or self-will. In other words, when viewed from the voluntary nature of the notification to the Business Competition Management for business actors seeking to merge, pre-notification can be done or forgone.

In contrast, Law No. 5 of 1999 Article 29 and Government Regulation No. 57 of 2010 Article 5 provide an explanation of notification wherein arrangements for business operators who will conduct mergers must be reported to the Business Competition Supervisory Commission within a period of no later than thirty days from the date at which the merger shall be juridically valid. The voluntary approach to notification embodied in the pre-notification arrangement is clearly inconsistent with the mandatory nature of notification in the post-notification, thus creating confusion and legal uncertainty for business actors seeking to merge. The inconsistency caused by post-notification arrangements is both ineffective and inefficient in its implementation.

II. POST-NOTIFICATION ARRANGEMENTS IN INDONESIA IN MERGING BUSINESS ENTITIES

A merger is one form of expansion strategy used by companies, accomplished by combining two or more companies. "Merger," if interpreted in Latin, means "join

---

1 Susanti Adi Nugroho, *Hukum Persaingan Usaha di Indonesia, dalam Teori dan Praktik serta Penerapan Hukumnya*, cet.2, (Jakarta: Kencana Prenadamedia Group, 2014) at 513.

2 Cita Yustisia, R. Serfianto, dkk, *Restrukturisasi Perusahaan dalam Perspektif Hukum Bisnis pada Berbagai Jenis Badan Usaha*, (Yogyakarta: Andi, 2017) at 13.

Digital Repository Universitas Jember

together, unite, or combine to cause the disappearance of identity because something is absorbed."[3] Merging in business can result in positive consequences for merging companies; however, whether intentionally or not, the merger itself can be misused by business actors as a way to expand their markets. As a result, mergers can influence competition between business actors in the targeted market, as well as consumers and society. As a result of the merger, competition that regularly occurs between the joined companies dissipates. This loss of competition is what can potentially cause losses to consumers and society.[4] Another advantage mergers is that acquisition of another business entity are more straightforward and cheaper compared to other acquisitions. Mergers also have faults for merging parties. When establishing a merger, all conditions must be agreed upon by each company's shareholders, therefore slowing the merge process.[5]

Abdul Moin in Murni Hardiningsih once mentioned the factors or motives related to the legal acts of mergers. On this basis, there are four types, *inter alia*, economic, synergy, diversification, and non-economic motives.[6] *First*, economic motives in which the essence of a company's goals, when viewed from a financial management perspective, is to create value for the itself and shareholders. A merger of business entities has economic motives whose long-term goal is to achieve an increase in that value. Therefore, all activities and decision-making must always be directed towards achieving that goal.[7] *Second*, synergy motives. Synergy is a condition where the primary motivation in merging a business entity is to increase the value of the companies that join. When two companies join, it will provide more power to achieve faster growth. The synergy here is the value of the entire company after a merger that is greater than the sum of the values of each company before joining.[8]

Third, diversification motives. Diversification is a business diversity strategy that can be accomplished through a merger. Diversification is sometimes used as a reason for mergers because it helps stabilize company profits. Diversification is intended to secure positions in market competition. However, if the product of diversification is further away from the initial business, the company will no longer be in a supportive corridor.[9] *Fourth*, non-economic motives. Sometimes business entities merge not only for economic interests but also for non-economic benefits, such as prestige and ambition. Non-economic motives can be the result of "greed" and the personal interests of company executives. Executives want the size of the company to be bigger in order to increase profits and therefore compensation. Besides, company owners' ambition to

---

[3] Iswi Hariyani, *et al*, 2011. *Merger, Kosolidasi, Akuisisi, dan Pemisahan Perusahaan Cara Cerdas Mengembangkan dan Memajukan Perusahaan.* 2011, Jakarta: Visimedia at 15.

[4] Susanti Adi Nugroho *supra* note 1 at 513.

[5] Jurnal Hukum Positum, Vol. 1 No. 1, Fakultas Hukum Universitas Padjadjaran, Bandung, 2016 at 108.

[6] Iswi Hariyani, et al, *supra* note 3 at 13.

[7] *Ibid.*

[8] *Ibid.*

[9] *Ibid.*

Digital Repository Universitas Jember

master various fields of business will make merger activities into a corporate strategy to learn from and acquire different existing companies.[10]

As bearer of the mandate of Law No. 5 of 1999, the Business Competition Supervisory Commission has several authorities. One form of authority is to evaluate mergers that could potentially become monopolistic practices as set out in Articles 28 and 29 of Law No. 5 the of 1999. In addition, as a follow-up to the procedures for Notifying the Implementation of Business Entity Mergers, a Government Regulation was made for mergers.[11]

In contrast to the merger of control found in Competition Supervisory Institutions from other countries which have also provided regulations regarding pre-notification mergers, Government Regulation No. 57 of 2010 regulates post-notifications. The parameters of this regulation are based on the orders contained in Articles 28 and 29 of Act No. 5 of 1999.[12] Regulation No. 57 of 2010 is stipulates that merged businesses should submit a mandatory post-notification, granting the Business Competition Supervisory Commission the authority to receive notifications in writing on Business Entity Mergers that are legally effective.

Business actors must fulfill the definition of a merger in order to conduct a Business Entity Merger, as well as the notification threshold, including the information on the total value of the assets of a business entity from the results of a merger or consolidation exceeds IDR 2,500,000,000,000.00 (two trillion five hundred billion rupiahs) or the total sales value of a business entity from the results of a merger or consolidation has exceeded Rp. 5,000,000,000,000.00 (five trillion rupiahs). Post-notification arrangements submitted by business actors to the Business Competition Supervisory Commission after mergers in Indonesia still have several problems. These problems are indicators that the notification system in Indonesia remains ineffective.

Gustav Radbruch, a legal philosopher and scholar from Germany, gave rise to modern legal thinking by combining three classical views—philosophical, normative, and empirical—into one approach. Each approach is used as an essential constituent of the legal approach and became known as three fundamental legal values: justice (philosophical), legal certainty (juridical), and benefits for society (sociological).[13]

A. *Justice (Philosophical)*

The obligation to notify of a merger in accordance with Article 28 paragraph (2) of Law No. 5 of 1999, in essence, is a process to assist the implementation of Business Competition Supervisory Commission supervision of business mergers so as to avoid monopolistic practices and/or unfair business competition. However, if it turns out that there is a delay in fulfilling the obligation of notification by the business actor, then

---

10 *Ibid.*

11 Jurnal Persaingan Usaha, edisi 5, Komisi Pengawas Persaingan Usaha Republik Indonesia, Jakarta, 2011 at 34.

12 *Ibid.*

13 Legalitas : Jurnal Hukum, Vol. 4 No. 1, Fakultas Hukum Universitas Batanghari, Jambi, 2013 at 143.

Digital Repository Universitas Jember

Article 6 provides a penalty in the form of administrative fines. Yet it is not the delay in fulfilling the obligation to notify the merger of the business entity which results in the practice of monopoly and unfair business competition, but rather the merger itself. Therefore, it can be stated that this fine or sanction is not on target.[14]

B. *Expediency (Sociological)*

The obligation to notify of business mergers in Indonesia takes the form of a post-notification as a repressive measure. One of the formative factors of Government Regulation No. 57 of 2010 is to avoid monopolistic practices or unfair business competition against business entity merger activities as early as possible. However, the purpose of the establishment of laws and regulations is contrary to the procedure of notification, which is not at all preventive.[15]

The next problem is that if the business actor conducts pre-notification, the Business Competition Supervisory Commission will not give a reassessment of the merger if there are no material changes to the data submitted by the business actor. Based on the Commission's response, this paper argues that pre-notifications are a waste of time and document allocation costs. As a result, the merger notification process becomes inefficient, ineffective, and fails to provide the appropriate benefits. In economic activities carried out by business actors, effectiveness and efficiency are highly upheld. On the basis of efficiency and values held by business actors themselves, it should be sufficient to stipulate only one type of merger notification that is the most effective.[16]

C. *Certainty (juridical)*

The main obstacle for Indonesian business merger notification procedures is time. Requirements for notification are applied after the merger is legitimate. If a business entity does not provide pre-notification, yet the Business Competition Supervisory Commission considers that the merger will not lead to monopolistic practices or unfair business competition, the merger will face no procedural issues. However, this will be fatal if the results of the examination by the Business Competition Supervisory Commission show that the merger can result in monopolistic practices or unfair business competition. If the cancellation is carried out, in this case, business actors will suffer losses that are not small in number.[17]

[14] Ditha Wiradiputra, Analisis Hukum terhadap Kewajiban Pemberitahuan Pengambilalihan Saham Perusahaan kepada Komisi Pengawas Persaingan Usaha, (Indonesia : Fakultas Hukum Universitas Indonesia, 2013) at 17.

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid* at 15.

Digital Repository Universitas Jember

III. COMPATIBILITY OF POST-NOTIFICATION ARRANGEMENTS IN MERGING BUSINESS ENTITIES WITH LAW NUMBER 5 OF 1999

The Business Competition Supervisory Commission is an institution given authority by Law No. 5 of1999 to assess competition aspects of business entity merger transactions that have the potential to result in unfair business competition or monopoly. Based on Article 47 letter e of Law No. 5 of 1999, the Business Competition Supervisory Commission is authorised to cancel mergers that will be carried out if they are proven to result in a monopoly or a negative impact on competition. This authority is also in line with the provisions in Article 30 paragraph (1), that the Business Competition Supervisory Commission is an independent institution that oversees the implementation of Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

The presence of Government Regulation No. 57 of 2010 provided relief and was positively welcomed by the Business Competition Supervisory Commission because no prior regulations were governing mergers. However, this regulation still has no certainty in its implementation, so there is a need for application analysis. Hansen's *Law on Prohibition of Monopolistic Practices and Unfair Business Competition* proposes orienting merger regulations to the provisions of the EU. Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (The EC Merger Regulation) and OJ L 24/1, 29 January 2004 are considered the most current legal provisions of their kind. Their arrangement is simple and easy to understand. Furthermore, the articles utilize the years of experience of European Union member countries and the United States.[18]

There are essential things that can be observed from the difference between the applicable Merger Regulations in Indonesia and Government Regulation No. 57 of 2010 as a regulation that is used as a comparison.[19] *First*, in terms of merger supervision, the European Merger Regulation pays more attention to market concentration. Concentration is a basis for considering whether the merger can be included in the category of unfair business competition or not. Other matters, such as relevant markets and efficiency are similarly considered further. Compared with Government Regulation No. 57 of 2010 Article 3 paragraph (1), in assessing potential mergers, the Commission uses the analysis of market concentration, market entry barriers, potential anti-competitive behavior, efficiency and/or bankruptcy. The explanation outlined in Article 3 paragraph (2) a, of Government Regulation No. 57 of 2010, expressly states that the initial indicator to assess whether a Business Entity Merger, Business Entity

[18] Knud Hansen, *Undang-Undang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat*, cet. 2, (Jakarta: GTZ Katalis, 2002) at 357.

[19] Bhaskara Bhaskara, *Tinjauan Yuridis Terhadap Persaingan Usaha Mengenai Merger Bank Terkait Peraturan Pemerintah Nomor 57 Tahun 2010 tentang Penggabungan atau Peleburan Badan Usaha dan Pengambilalihan Saham Perusahaan yang Dapat Mengakibatkan Terjadinya Praktek Monopoli dan Persaingan Usaha Tidak Sehat*. 2011, Skripsi. Universitas Indonesia at 76.

Digital Repository Universitas Jember

Consolidation, or Acquisition of Company Shares can result in monopolistic practices or competition unhealthy business is market concentration. On the other hand, the European Merger Regulation binds the supervision of merger activities to existing market concentrations. Even so, other considerations and analyses are part of further review to assess whether a merger is feasible or not.[20]

Second, European Merger Regulation and Government Regulation No. 57 of 2010 are applied equally to all business sectors without exception. But in determining the limits on the value of market concentration, the two regulations together provide specificity to the banking sector, which has a higher value limit.[21] *Third*, there are some exceptions to market concentration in the Merger Control Regulation in the European Union; however, in Indonesia, there are no exceptions in similar extant regulations. Government Regulation No. 57 of 2010 does not state that there are exceptions to certain conditions, as stated in the European Merger Control Law. Matters such as liquidation, bankruptcy and other issues including exceptions to the European Merger Regulation, are not included in the exemptions set out in Indonesia. Instead, these exceptions are included in the merger assessment.[22]

Fourth, the regulation that discusses pre-notification is not regulated in Government Regulation No. 57 of 2010. Pre-notification is regulated by the Regulation of the Business Competition Supervisory Commission No. 1 of 2009 on Pre-Notification of Mergers, Consolidations and Acquisitions. Pre-notification is a voluntary notification by business people to the Business Competition Supervisory Commission regarding the design of a merger.[23] Indirectly, Regulation of the Commission for the Supervision of Business Competition No. 1 of 2009 on Pre-Notification of Mergers, Consolidations and Acquisitions only covers the post-notification arrangements.[24] *Fifth*, in evaluating merger activities, the European Merger Regulation uses two stages. Whereas in Indonesia, it is enough to use just one phase of assessment to produce a decision. Two-step evalutation certainly has advantages. Attention given to the evaluation is better and more comprehensive than if only using a one-stage assessment.[25] Thus, mergers in Indonesia need a specific regulation to discuss notification, because in this case even though there is Government Regulation No. 57 of 2010, which is considered a form of elaboration upon Articles 28 and 29 of Act No. 5 of 1999, it is still deemed uncertain. Other countries that have provisions regarding mergers are more likely to use the pre-notification system, as is the case in member countries of the European Union and the United States, while Indonesia applies the post-notification system.

---

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid.*

[23] Article 1 The Regulatuon of the Commission for the Supervision of Business Competition No 1 of 2009 on Pre-Notification of Mergers, Consolidations, and Acquisitions.

[24] Bhaskara Pratama, *supra* note 20 at 80.

[25] *Ibid.*

Digital Repository Universitas Jember

IV. CONCLUSION

In conclusion, it is known that the arrangement regarding post-notification is regulated in Articles 28 and 29 of Act No. 5 of 1999, which are then further regulated in Government Regulation No. 57 of 2010. In post- notification arrangements in Indonesia, when compared to countries in the European Union, remain significant disadvantages. Using Rabruch's three fundamental legal values, it is clear that the post-notification system in Indonesia is plagued by obstacles such as inefficiency and ineffectiveness, among others. On the basis of this paper, several key recommendations can be made. *First*, it is necessary to reform the regulations merger notification obligation in Indonesia as soon as possible. Among them, Law No. 5 of 1999 must be addressed concerning issues that result in inefficient and ineffective regulation merger notification obligations for business actors. *Second*, the differences of in pre-notification arrangements stipulated in Commission Regulation No. 1 of 2009 and Government Regulation No. 57 of 2010 create confusion among businesspeople planning to enter into a merger. These two regulations should be compiled into one regulation in order to provide greater certainty for business people. Assessment processes for evaluating potential monoplistic practices or unfair business competition as a result of mergers needs to be further revised into a comprehensive evaluation.

REFERENCES

Cita Yustisia, dkk.2017, *Restrukturisasi Perusahaan dalam Perspektif Hukum Bisnis pada Berbagai Jenis Badan Usaha.*Yogyakarta: Andi.

Iswi Hariyani, dkk. 2011. *Merger, Kosolidasi, Akuisisi, dan Pemisahan Perusahaan Cara Cerdas Mengembangkan dan Memajukan Perusahaan.* Jakarta: Visimedia.

KnudHansen. 2002.*Undang-Undang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat*. Jakarta: GTZ Katalis.

Susanti AdiNugroho. 2014. *Hukum Persaingan Usaha di Indonesia, dalam Teori dan Praktik serta Penerapan Hukumnya*. Jakarta: Kencana Prenadamedia Group.

E-Journal Hukum Positum. 2016.Vol. 1 No. 1.Fakultas Hukum Universitas Padjadjaran. Bandung.

E-Journal Persaingan Usaha. 2011.Edisi 5.Komisi Pengawas Persaingan Usaha Republik Indonesia.Jakarta.

Legalitas : E-Journal Hukum.2013.Vol. 4 No. 1. Fakultas Hukum Universitas Batanghari. Jambi.

E-Journal Ditha Wiradiputra. 2013.*Analisis Hukum terhadap Kewajiban Pemberitahuan Pengambilalihan Saham Perusahaan kepada Komisi Pengawas Persaingan Usaha*.Fakultas Hukum Universitas Indonesia. Jakarta.

Pratama, Bhaskara. 2011. *Tinjauan Yuridis Terhadap Persaingan Usaha Mengenai Merger Bank Terkait Peraturan Pemerintah Nomor 57 Tahun 2010 tentang Penggabungan atau Peleburan*

Digital Repository Universitas Jember

Badan Usaha dan Pengambilalihan Saham Perusahaan yang Dapat Mengakibatkan Terjadinya Praktek Monopoli dan Persaingan Usaha Tidak Sehat. Skripsi. Universitas Indonesia .

Digital Repository Universitas Jember