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Urgency Pre-Merger Notification System in Indonesia Perspective Maqashid Sharia: Comparative Indonesia and South Korea

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Abstract

Merger is an economic activity carried out by business actors with the aim of developing their business. Companies that conduct mergers can become dominant business actors (dominant markets) so that they have the potential to abuse their dominant position. This study examines the mechanism and assessment of merger notifications in Indonesia and South Korea. The research method used is normative research using a comparative approach, a legal and regulatory approach, and a Maqashid Sharia approach. The results of the study show that South Korea uses the Pre-Merger Notification System, while Indonesia uses the Post-Merger Notification System and voluntary notifications. The Pre-Merger Notification System is considered more effective in resolving the adverse impact of the merger implementation, which in this case is an abuse of the dominant position. From the perspective of Maqashid Syariah, the implementation of the Pre-merger Notification provides many benefits for business actors because it can provide certainty and certainty. The theory of maqashid Sharia aims to realize fame and avoid evil. Based on this, changes are needed regarding the merger notification system in Indonesia so that the policies made can provide benefits for business actors and provide a positive impact on consumers.

Keywords: *pre-merger notification, abuse of dominant position, sharia maqashid*

Abstrak

Merger merupakan suatu kegiatan ekonomi yang dilakukan oleh pelaku usaha dengan tujuan untuk mengembangkan usahanya. Perusahaan yang melakukan merger dapat menjadi pelaku usaha yang dominan (*dominant market*) sehingga berpotensi menyalahgunakan posisi dominannya. Penelitian ini mengkaji mekanisme dan penilaian notifikasi merger di Indonesia dan Korea Selatan. Metode penelitian yang digunakan adalah penelitian normatif dengan menggunakan pendekatan komparatif, pendekatan hukum dan peraturan, dan pendekatan *Maqashid* Syariah. Hasil penelitian menunjukkan bahwa Korea Selatan menggunakan sistem *Pre-Merger Notification*, sedangkan Indonesia menggunakan Sistem *Post-Merger Notification* dan pemberitahuan sukarela. Sistem *Pre-Merger Notification* dinilai lebih efektif dalam menyelesaikan dampak buruk dari pelaksanaan merger yang dalam hal ini adalah penyalahgunaan posisi dominan. Dilihat dari sudut pandang *Maqashid* Syariah, pelaksanaan sistem *Pre-Merger Notification* memberikan banyak manfaat bagi pelaku usaha karena dapat memberikan kepastian dan kepastian. Teori *maqashid* syariah bertujuan untuk mewujudkan kemashlahatan dan menjauhi keburukan. Berdasarkan hal tersebut, diperlukan perubahan mengenai sistem pemberitahuan merger di Indonesia agar

kebijakan yang diambil dapat memberikan manfaat bagi pelaku usaha maupun memberikan dampak baik bagi konsumen.

Kata Kunci: *pre-merger notification, penyalahgunaan posisi dominan, maqashid syariah*

INTRODUCTION

Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (Business Competition Law) is a legal rule that must be obeyed by business actors in running their business. These laws and regulations are a legal system used by the government as a tool of social control. In ensuring that the law has been implemented properly and does not cause any harm to society, legal certainty is needed. According to Sudikno Mertukusumo, legal certainty is a guarantee that the law must be implemented in a good manner and for good purposes. The laws that are implemented are in the form of rules or norms that live in society and become boundaries for society, so that the rules that are implemented will create legal certainty (Marzuki, 2008).

In order to realize healthy business competition, the Business Competition Law regulates policies towards companies that carry out corporate actions (mergers, consolidations and acquisitions). Mergers or mergers of companies are corporate actions that are currently often carried out by companies with the aim of developing the company and strengthening the market (Nainggolan & Purnamasari, 2025). Companies that carry out mergers have the potential to become dominant business actors (dominant market), namely business actors who have a large share in the market who can influence market prices by increasing their production.

Dominant business actors more often act as price setters (price setter) compared to price followers (price taker), therefore the dominant business operator has market power (market power) the big one (Mustariyakuma, 2022). Based on the provisions of Article 27 of the Business Competition Law, it is explained that control of a market share of more than 50% by one or one group of business actors, or control of a market share of more than 75% by two or more groups of business actors is illegal in itself. That is, merging (merger) who violate the above regulations are prohibited even if they do not harm competition.

The provisions in the Business Competition Law do not only regulate dominant positions caused by control of market share, but also dominant positions caused by the accumulation of assets that are considered excessive. Article 29 of the Business Competition Law states that a merger which results in the value of assets and/or sales value exceeding a certain

value must be notified to the Commission no later than 30 days from the date of the merger (merger). The merger notification procedure must be carried out by business actors who have fulfilled the provisions. The commission that has the right to receive merger notifications in Indonesia is the Business Competition Supervisory Commission (KPPU).

The KPPU requires every business actor carrying out a merger to make a merger notification report to ensure legal certainty in the merger of two or more companies. Next, KPPU analyzes the impact of the planning for implementing the merger as well as the possible impacts that will arise from implementing the merger (Jasmine, 2024). Business actors are also prohibited from carrying out merger actions against business entities which have the potential to give rise to or result in monopolies or unhealthy business competition as regulated in Article 28 of the Business Competition Law which in essence states that: (1) business actors are prohibited from carrying out mergers or consolidation of business entities which could result in monopolistic practices and/or unfair business competition; and (2) business actors are prohibited from taking over shares of other companies if such action could result in monopolistic practices and/or unfair business competition.

The merger notification system in Indonesia uses a Post-Merger Notification system, namely a merger notification is carried out when a company has carried out a merger and the asset value and/or sales value of the company has exceeded a certain value as regulated in the regulations. The KPPU has the authority to impose administrative sanctions on business entities that violate merger provisions based on the provisions of Article 47 paragraph (2) letter e of the Business Competition Law that the KPPU can cancel the implementation of a merger of a business entity because it is not in accordance with or violates Article 28.

Based on the 2020-2021 KPPU Decision database, KPPU imposed quite large administrative sanctions on companies that violated the merger notification, including: 1) PT Agro Multi Persada with a fine of Rp 1,000,000,000.00; 2) PT Karya Anak Bangsa application with a fine of IDR 3,300,000,000.00; 3) PT Dharma Satya Nusantara, Tbk. with a fine of Rp 1,050,000,000.00; 4) Travel Circle International with a fine of IDR. 1,000,000,000.00; and 5) PT Saratoga Investastama Sedaya, Tbk. with a fine of Rp 1,000,000,000.00. The large fines in this decision can certainly result in losses for business actors and can have an impact on the company's economy. The KPPU applies administrative sanctions to business actors who have merged but do not do so or are late in providing merger notification to the KPPU.

The merger notification policy in South Korea implements a pre-merger notification system. This is different from Indonesia which still implements a post-merger notification system. South Korea through a Presidential Decree established regulations regarding Business Competition, namely Law Number 3320 which is named Monopoly Regulation and Fair-Trade Act (MRFTA), and the commission that has the right to receive merger notices or notifications, namely The Korean Fair-Trade Commission (KFTC) which is an institution under the authority of the Prime Minister with functions as an administrative and quasi-judicial body in South Korea. In its structure, the KFTC has a Mergers and Acquisitions Division whose task is to review transactions for anti-competitive concerns. Use Pre Merger Notification by South Korea aims as a preventive measure to avoid unfair business competition and/or monopolistic practices.

In determining whether there is abuse of a dominant position by a business actor due to a merger, the KPPU can assess whether the business actor has fulfilled the elements of abuse of a dominant position as regulated in the Law. This assessment can be carried out by the KPPU after the business actors carry out a merger. Basically, a dominant position in the relevant market is not prohibited, but what is prohibited is when the business actor abuses his dominant position. In South Korean regulations, Article 5 of the MRFTA regulates that forms of abuse of a dominant position are prohibited because they can result in unfair business competition in the relevant market. KFTC assesses business actors who will carry out a merger, whether the merger will have an impact on unfair business competition or not.

In the context of Islamic law, preventive action is a good thing to do to create benefits and avoid evil (Rohman, 2019). A policy is made with the intention of having a good impact or goal (*maqashid* sharia). The differences in policy between Indonesia and South Korea in implementing the merger notification system above are the basis for researchers being interested in studying how important the implementation of pre-merger notification is in Indonesia, because up to now Indonesia is still implementing post-merger notification which in practice actually makes things difficult for business actors who carry out corporate actions (mergers), as well as causing losses for companies due to administrative sanctions applied for not providing merger notifications or being late in providing merger notifications.

LITERATURE REVIEW

Merger and Dominant Position

The term merger comes from the word merge which in Indonesian means to merge. According to Christian Wibisono, a merger is the merger of two or more business entities that are relatively balanced in strength so that there is a combination that is a common forum with the aim of strengthening each other. In Article 1 number 9 of the Law on Limited Liability Companies jo. Article 109 number 1 of the Job Creation Law defines a merger or merger as a legal act carried out by a company or more to merge with another existing company which results in the assets and assets of the merged company switching due to the law to the company that accepts the merger and then the status of the legal entity of the merged company ends due to the law.

In the context of business competition, a dominant position is often associated with controlling a large market share. This means that a company has a significant share of the market so that it can influence the price or supply of goods and services. This control can hinder competition, because the dominant company can set unfair prices or block the entry of new competitors. In addition to controlling market share, a dominant position can also be caused by the accumulation of assets that are considered excessive. This means that the company not only has great control over the market through the amount of sales or market share, but also through the number and type of assets it owns. These assets can be property, technology, or other resources that provide a significant advantage over competitors.

Maqashid Syariah

According to Article 1 paragraph (3) of the 1945 Constitution, Indonesia is a country based on law. One of the main sources in the formation of law in Indonesia is Islamic law, which has a strong influence because of history and the majority of the Indonesian population who are Muslim. In Islamic law, there is a goal called *Maqashid* Syariah, namely the intention of Allah and His Messenger in compiling the law. This goal can be found in the verses of the Qur'an and Hadith, which are used as a logical basis for formulating laws that focus on human welfare. This law was formulated by Allah to create goodness for mankind in this world and the hereafter. Scholars divide *Maqashid* Syariah into five main goals: 1) maintaining religion; 2) maintaining life; 3) maintaining property; 4) maintaining reason; and 5) maintaining descendants.

In the Business Competition Law in Indonesia, merger regulations are essentially regulated so that business actors carrying out mergers can

develop their business and remain guided by healthy business competition behavior, so that this will have a good impact on consumers. Business actors who carry out a merger will become business actors who have a dominant position in the relevant market. Basically, a dominant position is not prohibited in the Business Competition Law, but what is prohibited is the abuse of a dominant position which causes unfair business competition. In the *maqashid* of Sharia, this prohibition is in line with the aim of preserving assets, because unhealthy business competition will harm other business actors and harm consumers. Then, one of the reasons for the existence of a dominant position is due to a merger by business actors. Therefore, the rules regarding mergers in business competition policy need to be regulated properly in order to achieve beneficial objectives and avoid negative impacts.

METHOD

The type of legal research in this study is normative legal research. Normative legal research is research that examines secondary literature or data that includes primary legal materials, secondary legal materials, and tertiary legal materials (Soekanto, 1986). The normative legal research in this study is a literature research by examining the concept of merger notification in preventing the abuse of dominant position with legal comparisons between Indonesia and South Korea, business competition law books, business competition law journals, and Islamic law in the form of *maqashid* as-sharia.

The data source in this research uses secondary data, which is data that is already available (Sumardjono, 2021). Legal materials for obtaining secondary data consist of primary legal materials, secondary legal materials and tertiary legal materials. The primary legal materials in this research are Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, Government Regulation (PP) Number 57 of 2010 concerning Mergers or Amalgamations of Business Entities and Acquisition of Company Shares that May Result in Monopolistic Practices and Unfair Business Competition, Commission Regulation Number 1 of 2009 concerning Pre-Notification of Mergers, Consolidations and Takeovers, Commission Regulation Number 3 of 2023 concerning Assessment of Mergers, Consolidations or Takeovers of Shares and/or Assets that May Result in Monopoly Practices and Unfair Business Competition, and Monopoly Regulation Fair Trade Act Number 3320 (MRFTA). The secondary legal material in this research is in the form of research results and work from legal circles related to merger notifications and abuse of dominant position.

Data collection in this study was carried out using the documentation method. The documentation method is a method of searching for data on matters or variables in the form of records, transcripts, books, and laws and regulations (Arikunto, 1998). The data obtained in this study were analyzed qualitatively. Qualitative analysis is an analysis that is carried out based on the problems studied and the data collected (Sumardjono, 2021). The steps of qualitative analysis include: first, identifying the data that has been collected; second, the data that has been identified is then classified based on the problem being researched; third, the data that has been identified and classified is then analyzed based on the deductive way of thinking, that is, the way in which the thinking process is carried out by starting from general questions to specific statements in order to obtain conclusion of the problem studied.

RESEARCH RESULTS AND DISCUSSION

Merger Policy and Assessment in Indonesia

Business actors in carrying out their business activities always strive to maximize profits. One way that can be taken by business actors in maximizing profits is by conducting mergers. Because by merging, in theory it can create efficiency so that it can reduce production costs. Merger is a form of economic activity carried out by entrepreneurs that aims to strengthen and develop existing companies (Widhiastuti, 2021). This development is carried out because there are at least two or more companies that have joined. One of the companies remained standing, while the other dissolved because it was merged into an existing company. The term merger is used in Law Number 40 of 2007 concerning Limited Liability Companies (Limited Liability Company Law), while in Law Number 7 of 1992 concerning Banking (Banking Law) the original term in English is used. Therefore, the term merger in Indonesia became a merger.

Merger is a form of absorption by one company to another. If two companies, A and B merge, then there will only be one company, namely A or B. In most cases of merger, the larger company is kept alive and retains its name and legal entity status, while the smaller company or the merged company ceases its activities or legal entity. In contrast to acquisitions that still retain existing companies, mergers actually reduce the number of companies but increase the company's power, finances, and strategy. On this basis, mergers can be carried out both internally and externally.

A company that is still alive or that receives a merger is called a surviving firm or the issuing firm. Meanwhile, companies that cease and dissolve after a merger are called merged firms. Surviving firms by themselves are getting bigger and bigger because all the assets and

liabilities of the merged firm are transferred to the surviving firm. The merged company will strip its legal status as a separate entity and after the merger its status changes to a part under the surviving firm. Thus, legally the merged firm can no longer act on its own behalf.

In the event of a merger, the larger and stronger company will generally become the surviving firm, and vice versa the smaller company will dissolve. However, it is not always a company of great size that survives life. In the event that the opposite happens, that is, if the smaller company is kept alive while the larger company is dissolved, then this situation is called a reverse merger or reverse merger. The reason for mergers is the same as acquisitions, namely that some companies experience difficulties in developing due to lack of capital or because of weak management that makes them unable to compete. Companies that are used as a place to join have strong competitiveness and a monopoly position or as a conglomerate group. Therefore, the company that is positioned as the recipient of the merger becomes bigger and stronger while the company that merges dissolves. The merger is carried out by the company with the aim of: (1) increasing the amount of capital; (2) saving production continuity; (3) securing distribution channels; (4) enlarging the company's synergy; and (5) reducing competition and leading to monopolisticism (Josua Tarigan and Suwenjiadi Yenewan, 2016).

The Business Competition Law in Indonesia also explains about mergers, consolidations and acquisitions, Mergers referred to in the Business Competition Law in simple terms are the actions of business actors that result in the creation of a concentration of control from several business actors who were previously independent to one business actor or one business actor, or the transfer of an obstacle from one business actor to another business actor who was previously independent so as to create a control concentration or market concentration. In Article 28 of the Business Competition Law, which contains: "(1) business actors are prohibited from merging or merging business entities that may result in monopolistic practices and/or unfair business competition; (2) business actors are prohibited from taking over shares of other companies if such actions may result in monopolistic practices and/or unfair business competition; and (3) further provisions regarding the merger or merger of prohibited business entities as intended in paragraph (1) and provisions regarding the acquisition of company shares as intended in paragraph (2) of this article, are regulated in Government Regulations".

The definition of merger juridically can be seen in the provisions of Article 1 number 1 of Government Regulation Number 57 of 2010 concerning Merger or Merger of Business Entities and Takeover of

Company Shares Which Can Result in Monopoly Practices and Unfair Business Competition, which means that merger is a legal act carried out by one or more Business Entities to merge with another existing Business Entity and result in assets and the pasiva of the Business Entity that merges is changed due to the law to the Business Entity that accepts the merger and then the status of the Business Entity that merges ends because of the law.

In business competition, mergers can affect the competition that occurs in a market. In other words, mergers are a legal and legal tool for business actors to get rid of their competitors and/or reduce competition because although mergers are basically legal acts, mergers will become illegal if the transaction causes negative impacts. To anticipate or overcome such competition, a set of legal regulations is needed that includes various prohibitions and business lawsuits based on fraudulent and mis appropriative practices (Gamer, 2014). As an anti-competitive behavior, the Business Competition Law prohibits business actors from entering into agreements with their competitors to set prices for goods and or services that must be paid by consumers or customers in the same market.

In general, the conditions in Article 5 of the Business Competition Law are briefly referred to as price fixing, and the determination of price determination based on the Business Competition Law in Indonesia is regulated on an illegal basis with the exception if this agreement originates in a joint venture or is based on the applicable law. Because of these things, competition authorities around the world consider it necessary to carry out an assessment of the merger transactions that occur. The assessment of the merger transaction is then outlined in a merger review guideline to assess whether the merger transaction that occurs can disrupt competition or not. In this case, the merger review guidelines act as a reference for determining whether or not a merger transaction can be carried out. References to the merger review guidelines consider legal and economic aspects that may arise as a consequence of the transaction. For this reason, merger transactions are procedurally permissible, but the future effects of all this must be considered by the competition authorities (N. N. S. Dkk, 2017).

Based on Perkom No. 3 of 2023, the assessment is divided into 3 (three), namely:

1) Initial assessment

The initial assessment is intended to analyze whether mergers and acquisitions will have an impact on business competition in the industry and/or market. If mergers and acquisitions occur between competing business actors or in the same "relevant market", then the initial assessment is focused on analyzing the market concentration and its changes. In this case, KPPU uses the calculation of market concentration based on the

Herfindahl Hirschman Index (HHI) and/or Concentration Ratio (CR) method.

2) Comprehensive assessment

The comprehensive assessment is a follow-up to the initial assessment after concluding that there are concerns about monopolistic practices and/or unfair competition due to significant changes in market structure, market strength or dominance in the "upstream and/or downstream" market, or the "tying and/or bundling" process. At this stage, the results of the analysis carried out in the previous stage are continued with several other analyses which include: (1) analysis of market entry barriers; (2) analysis of potential anti-competitive behavior; (3) efficiency analysis; (4) bankruptcy analysis; (5) analysis of policies to increase competitiveness and strengthen national industry; (6) analysis of technology development and innovation; (7) analysis of the protection of micro, small, and medium enterprises; (8) analysis of the impact on the workforce; and (9) analysis of the implementation of laws and regulations.

3) Initiative evaluation

An assessment of the initiative is carried out by KPPU if there is an allegation of a merger that has fulfilled the mandatory notification provisions, but the business actor does not submit a notification. KPPU can conduct an assessment of initiatives to business actors sourced from: (1) related previous notifications; (2) information from the public; (3) mass media news; (4) official letter from a government agency; and/or (5) other sources approved at the commission meeting.

The assessment of merger is regulated in Government Regulation No. 57 of 2010 concerning Merger or Merger of Business Entities and Takeover of Company Shares which May Result in Monopolistic Practices and Unfair Business Competition. Based on Article 4 of Government Regulation No. 57 of 2010, the commission will conduct an assessment of the merger of business entities, mergers of business entities, or transfer of shares of companies that have been effective juridically, where the assessment will use the following analysis: (1) market concentration; (2) barriers to market entry; (3) potential for anti-competitive behavior; (4) efficiency; and or (5) bankruptcy. Then it is further affirmed in the Regulation of the Business Competition Supervisory Commission of the Republic of Indonesia Number 3 of 2023 concerning the Assessment of Mergers, Mergers, or Takeovers of Shares and/or Assets That May Result in Monopoly Practices and/or Unfair Business Competition (Perkom No. 3 of 2023). In Article 2 paragraph (1), it reads: "Business Actors are obliged to submit a Notification to the Commission on the Merger, Consolidation, or

Takeover of Shares and/or Assets that meet the mandatory notification provisions". The mandatory notification provisions for Business Actors consist of 4 (four) aspects, namely: 1) meeting the limit of asset value and/or sales value; 2) there is a change in control; 3) not a transaction between affiliated business actors; and 4) transactions between business actors who have assets and/or sales in Indonesia.

The limits on the value of Assets and/or Sales value are regulated in Perkom No. 3 of 2023, including:

1) Limitations on the value of Assets and/or Sales value if they meet:
   a. the value of the Business Actor's Assets resulting from the Merger, Consolidation, or Takeover of Shares and/or Assets exceeds Rp 2,500,000,000,000.00 (two trillion five hundred billion rupiah); or
   b. the value of the Sales of Business Actors resulting from the Merger, Merger, or Takeover of Shares and/or Assets exceeds Rp. 5,000,000,000,000.00 (five trillion rupiah).
2) Limitations on the value of Assets and/or Sales value in the event that transactions are carried out by Business Actors engaged in the banking sector if the value of the Business Actor's Assets resulting from the Merger, Merger, or Takeover of Shares and/or Assets exceeds Rp 20,000,000,000,000.00 (twenty trillion rupiah).
3) In the event that a Merger, Consolidation, or Takeover of Shares and/or Assets is carried out by a Business Actor engaged in the banking sector with a non-banking Business Actor, the limitations on the value of Assets and/or the value of Sales shall apply as intended in paragraph (1).

Business actors who have met the mandatory notification provisions are required to submit a notification through the Notification System through the notifikasi.kppu.go.id. page with the following conditions: 1) register an account using an active email address; 2) 1 (one) account is used for 1 (one) transaction of Merger, Merger, or Takeover of Shares and/or Assets of the company; 3) notifications can be submitted every day through the Notification System during Notification service hours from 09.00 WIB to 14.00 WIB: and 4) all information and documents submitted in the Notification System using Indonesian.

Merger notification in Indonesia consists of Pre-Notification and Post-Notification. Pre-Notification in Indonesia is regulated in Perkom Number 1 of 2009 concerning Pre-Notification of Mergers, Mergers, and Takeovers. Article 1 Number 6 states: "Pre-Notification is a voluntary notification by a business actor who will carry out a merger or merger of a business entity or a share acquisition to obtain the Commission's opinion

on the impact arising from the plan for the merger or merger of a business entity or takeover". KPPU is authorized to supervise mergers to prevent the potential for monopoly or unfair business competition. Furthermore, KPPU will conduct an assessment as the threshold value required for the merger called the Threshold, followed by a thorough assessment until KPPU provides the results of the assessment by announcing KPPU's final opinion on the merger or merger or takeover plan.

Pre-Notification and Post-Notification in Indonesia can be distinguished in two aspects, namely: First, the time of implementation of the notification or notification of the Pre-Notification merger which is given the opportunity for consultation carried out before the merger is carried out by the entrepreneur who will carry out the merger, while Post-Notification is carried out after the merger is legally effective. Second, namely the coercion of the two merger notices where the Pre-Notification is carried out voluntarily by the business actor who will carry out the merger or is consultative, while the Post-Notification is required by KPPU by providing an administrative fine if the business actor is late or does not provide notification to the notification.

In Perkom No. 3 of 2023, notification is a written notification to the Commission that must be carried out by business actors since the merger, merger, or takeover of shares and/or assets that are effective juridically. The definition of a notification system is a notification delivery system provided by the commission electronically. Merger notification in Indonesia consists of Pre-Notification and Post-Notification. Pre-Notification in Indonesia is regulated in Article 1 Number 5 of Perkom No. 1 of 2009, namely: "a voluntary notification by a business actor who will carry out a merger or merger of a business entity or a business takeover to obtain the opinion of the Commission (KPPU) regarding the impact arising from the plan to merge or merge a business entity or takeover". Meanwhile, Post-Notification, which is a business actor who is required to submit a notification to the commission on the merger, merger, or takeover of shares and/or assets that meet the mandatory notification provisions, including: (1) meeting the limits on asset value and/or sales value; (2) there is a change in control; (3) it is not a transaction between affiliated business actors; and (4) transactions between business actors who have assets and/or sales in Indonesia.

Business actors who have fulfilled the mandatory notification provisions are required to notify KPPU no later than 30 (thirty) days after the merger takes effect juridically. Based on this, Indonesia is still using the Post-Merger Notification system. This merger notification is required by KPPU to assess whether business actors violate ongoing merger

transactions or not. The purpose of this assessment is to find out whether there are indications of unfair competition and monopolistic practices in the business. Indications of trade monopoly can also be seen from the ownership of majority shares with companies of the same type or running businesses in similar sectors which results in a handful of business actors having more than 50% power in the market for services and goods. The ban on majority share ownership aims to prevent economic power from being concentrated in one group of business actors (Ida Ayu Chintya Andini and A. A Ketut Sukranatha, 2021).

Merger Policy and Assessment in South Korea

South Korea is currently an economic power that the world is reckoned with, because of its economic management oriented to market mechanisms. On December 31, 1980, by decree of the President of South Korea, he promulgated Law No. 3320 named the "Monopoly Regulation and Fair-Trade Act (MRFTA)". This law consists of 62 (sixty-two) articles that are oriented to the way the market works in South Korea. The purpose of the promulgation of the MRFTA is to encourage fair and free competition, encourage creative business activities, protect consumers and strive for a balance in national economic development by preventing the abuse of market dominance by entrepreneurs. The uniqueness and business competition policy in South Korea also leads to governance in the companies of conglomerates in the country. South Korea also significantly enforces laws and regulations in all major areas of business competition, such as cartel investigations, merger reviews, and market abuse regulations.

South Korea is a country that has a calculated economic power in the world because of the country's management of its market-oriented economy. The Monopoly Regulation and Fair-Trade Act (MRFTA) regulates 8 (eight) main prohibitions, namely:

1) Prohibit abuse of market dominant position. The criteria for measuring a company in a dominant position, as stipulated in Article 4 of the FTA, are if the company controls a market share of more than 50% of the total market, or a combination of the three companies controls a market share of more than 75%. Meanwhile, the real form of abuse of the dominant position is price fixing, excessive control over the sale of goods or services, influencing the business activities of other companies, holding unreasonable transactions to get rid of competitors or actions that can harm the interests of consumers.
2) Restrictions on efforts to integrate a group of companies (business combinations) with an authorized capital of more than 5 billion won or with total assets exceeding 20 billion won, if such actions can hinder

competition. This control can be done through the acquisition of shares (acquisition), the placement of the leadership of one company in another company (interlocking directorate), taking over or leasing a majority of the business, or managing capital management in the establishment of a new company.

3) Prevention of repression of economic power concentration through the prohibition of the establishment of holding companies, the prohibition of direct cross ownership between large groups of companies.
4) Restrictions on undue collaborative activities, such as cartels that can hinder competition. However, rationalization cartels to overcome economic recession and cartels which are industrial restructuring efforts in an effort to increase the competitiveness of small and medium enterprises can be exempted from permits issued by the Korean Fair-Trade Commission (KFTC).
5) Prohibition of unfair trade practices, including refusal to deal, price discrimination, coercion or suppression of competitors' customers, unreasonable use of bargaining position in trade relations with other parties, as well as certain restrictions on trading terms, and misleading types of advertising.
6) Prohibitions on trade associations to create policies and rules that may impede the entry of new members, restrict the business activities of members, or that may lead members to engage in dishonest trading practices and resale pricing.
7) Prohibition on resale price maintenance.
8) Restrictions on international contracts that contain elements of undue collaborative activities, unfair business practices, and resale price maintenance.

South Korea has its own Business Competition Supervisory Commissioner named The Korean Fair-Trade Commission (KFTC) which is a ministerial-level administrative organization that operates under the authority of the Prime Minister and also functions as a quast-judiciary body in South Korea. One of KFTC's responsibilities is to control mergers. KFTC's mergers and acquisitions division is in charge of reviewing mergers. Notice of the merger is forwarded to the Mergers and Acquisitions division. Articles 7 and 12 of the MRFTA discuss the combination of corporate businesses (mergers). Article 12 of the MRFTA states that a company that will carry out a merger of companies is limited to large-scale companies that are required to report the merger.

The Enforcement Decision on the MRFTA contains provisions that complement the MRFTA. In addition, KFTC as the MRFTA enforcement

authority provides the following guidelines and standards for merger control: (1) Guidelines for Notification of Business Combinations; (2) Guidelines for Review of Business Combinations; (3) Guidelines for the imposition of administrative fines for violations of the provisions of the Business Merger Notification; (4) Guidelines for Remedies on Business Combinations; and (5) Standards for Charging Additional Fees to Force Compliance with Business Merger Efforts (Kim, 2019).

South Korea adheres to the Pre-Merger Notification system, which is an effort to establish healthy business competition conditions so that it can be easily assessed, monitored, and evaluated as a result of mergers, mergers, and takeovers. Notification of merger in South Korea is required for certain types of business combinations where one of the parties to the transaction is a large company that has worldwide assets or an annual turnover of KRW 2 trillion or more (including its assets and affiliated turnover), or the transaction value meets a certain threshold and the acquired party has substantial business activities in the domestic market.

If any of these requirements are met, notification may be submitted at any time after the date of signing the agreement but before the completion of the transaction, as long as the transaction has not been completed before it is clarified by KFTC. If none of these requirements are met, only post-merger notification is required. For this merger, notification must be made within 30 days of the completion of the transaction. Interrelated directorates only require post-merger notification, even if one of the parties is a large corporation. KFTC imposes administrative fines for violations of notification deadlines in practice, and any such decisions are disclosed to the public.

MRFTA prohibits business combinations that could reduce competition in South Korea. MRFTA also provides regulations or policies regarding mergers and acquisitions where transactions with a certain amount must be approved by the KFTC. In the MRFTA, there are business actors who are required to submit reports. A transaction that is a combination of businesses must be notified to KFTC if it meets the following Threes hold (Kim, 2019):

1) A party to the transaction has total global assets or total global turnover (including its affiliates) equal to or greater than KRW 300 billion (approximately EUR 234.5 million, USD 280 million) during the previous employment year and the other party to the transaction has total global assets or total global turnover (including its affiliates) equal to or greater than KRW 30 billion (approximately EUR 23.45 million, USD 28 million) during the previous business year.

2) Total assets or total turnover is calculated by summing up the total turnover of companies that maintain affiliate status before and after the transaction. However, in a business transfer when calculating the total assets or total turnover of the company transferring the assets, the total assets or total turnover of the affiliates are not added.
3) In the case of a foreign-to-foreign merger or a Korean-to-foreign merger, the following requirements must also be met (not applicable to the acquisition of a foreign company over a Korean company). The Korean turnover of the two foreign companies in the foreign-to-foreign merger and the Korean turnover of the tarfer asiing companies in the Korean-to-foreign merger (including affiliate turnover) is equal to or greater than KRW 30 billion (about EUR 23.45 million, USD 28 million).

If the Threshold is met, notification is mandatory. Pre-Closing Notice is required if one or more parties to the merger are large-scale companies with total global assets or total global turnover (including its affiliates) equal to or greater than KRW 2 trillion (approximately EUR 1,563 million, USD 1,866.7 million) in the previous employment year. In the pre-merger notification system adopted by South Korea, business actors are prohibited from finalizing and implementing a merger, acquisition, and consolidation transaction without obtaining approval from the business competition supervisory authority (KFTC).

Review of the Sharia *maqashid* on mergers that can result in the abuse of dominant positions

Islamic law teaches human beings in all aspects. Sharia or Islamic law is designed with the aim of achieving human welfare and fame, both in this life and the hereafter. Islam as a perfect source of law has a solid foundation in providing guidance and goodness to all beings. Islam aims to form a good human character and prioritize the principles of justice and welfare in realizing fame (Lathoif, 2021).

Maqashid Sharia in Islamic Law is the goals and secrets that exist and are desired by Allah in establishing all or part of His laws with the aim of maintaining the sake and avoiding *mafsadah*. Therefore, the discussion of the theory of Sharia *maqashid* is always accompanied by the discussion of *maslahah* (M. F. Dkk, 2022). *Maslahah* itself is the direction of the goal to be achieved by the theory of *maqashid* Sharia which means that all activities carried out must bring benefits. Therefore, all policies taken by the government must be based on the basis of fame (utility) and prioritize the public interest.

According to Al Syatibi, the theory of *maqashid* Syariah is a continuation and development of the concept of *maslahah* as it was

proclaimed before the Al Syatibi period. In realizing and preserving the five main elements of *maqashid* sharia (preserving religion, soul, intellect, descent, and property) (Sulaeman, 2018), Al Syatibi divides it into three levels of maqashid. First, *maqashid al-dharuriyat* (primary purpose) which is intended to maintain the five main elements in human life. Second, *maqashid al-hajiyat* (secondary purpose) which has the intention of eliminating difficulties or making the maintenance of the five main elements even better. Third, *maqashid al-tahsiniyat* (tertiary purpose) which has the intention that human beings can do their best for the improvement of the maintenance of the five main elements (Iqbal, 2023).

Based on this, all forms of policies and laws and regulations in Indonesia must be based on benefits, including rules regarding business competition. The purpose of the Business Competition Law is to increase national efficiency in an effort to improve the welfare of the people and create a conducive climate. In business competition law in Indonesia, business actors who will conduct mergers can potentially make the business actor have a dominant position. Based on an economic perspective, a dominant position is defined as a position occupied by a company that has the largest market share where with this large market share the company has market power (Makka, 2021). The definition of the dominant position in Article 1 number 4 of the Business Competition Law is: "a situation where a business actor does not have a significant competitor in the relevant market in relation to the market share controlled, or the business actor has the highest position among its competitors in the relevant market in relation to financial capability, access to supply or sales, as well as the ability to adjust the supply or demand for certain goods or services".

Article 25 paragraph 2 of the Business Competition Law explains that there are three forms of abuse of dominant position, namely: (1) establishing trade conditions with the aim of preventing and/or preventing consumers from obtaining competing goods and or services, both in terms of price and quality; or (2) restricting the market and technological development; or (3) hindering other business actors who have the potential to become competitors to enter the market concerned. Article 25 paragraph (1) is in line with the content of Section 2 of the Sherman Act where the emphasis is on market control which is carried out with a dominant position tends to be monopolistic. This occurs due to the natural selection process that is both the result of certain reasons. Business actors who have a dominant position are not allowed to abuse their dominant position. The spirit carried out in section 2 of the Sherman Act which aims to increase healthy and honest competition in the business world has been violated by business actors who abuse this dominant position (Usman, 2004).

A dominant position in the business world can occur when a business actor has great control in the market. This dominant position can be owned by business actors who have competitive advantages. For example, a wide market share and large brand ownership. To prevent the abuse of the dominant position owned by business actors, the state makes rules to prevent unfair competition and/or monopolistic practices resulting from the existence of this dominant position. Competition law in Indonesia prohibits the abuse of a dominant position because activities carried out by parties who abuse a dominant position can result in monopolistic practices. In addition, dominant business actors can abuse their dominant position by engaging in discriminatory behaviors such as price discrimination, non-price, and predatory pricing (Pradana, 2022). Business actors have great power, in this case business actors who have a dominant position have the potential to commit anti-competitive acts. The existence of these acts can harm other business actors, consumers, and even harm the economy as a whole.

Forms of abuse by business actors who have a dominant position have the potential to commit: (1) price discrimination; (2) exclusive dealing, including tying in sale; (3) discrimination of barriers to entry against certain business actors; (4) vertical restraint; and (5) predatory pricing to kill its competitors. These forms of abuse of dominant positions have the potential to lead to monopolistic practices and unfair business competition. The initial indications that can be used as a reference in detecting the abuse of the dominant position are prices that tend to move up without any fluctuation at all, and the profit margins of companies that control market share are very high (above normal). In addition, production also becomes less because the output produced is less. Thus, human resources (labor), capital, machinery, and other means of production allocated in the industry will be less than they should be.

Merger activities can be pro-competition but can also be anti-competitive if there is no control from the business competition authority. The existence of mergers in the business world should bring a fairly positive influence from companies that fail in terms of operations. However, in practice, merger activities are widely abused by business actors who intend to expand their market. The impact of mergers that often occur in transition countries or developing countries is to create or increase a dominant position so that they can carry out activities that can distort the market (Anisah Balqis Hamizhah Sarwono, 2018). In addition, there is often a conflict between the interests of mergers and reasons for efficiency and business competition problems. Business actors will always use efficiency

reasons as the basis for mergers and business competition authorities will look more at the problems of business competition first.

Business actors who have a dominant position are not prohibited by the Business Competition Law as long as the achievement of the dominant position is carried out through healthy business competition. However, what is prohibited in the Business Competition Law is if the business actor abuses the dominant position. The Business Competition Law is needed to ensure that competition in the economy can take place without obstacles and as a sign to provide a fence so that unhealthy practices do not occur in the business world in Indonesia (Novyan, 2016).

The enforcement of merger notifications in the Sharia *maqashid* theory must be carried out, in order to avoid *mafsadah* or harm. If the business actors who carry out the merger are not controlled, it will have a bad impact on competition with other business actors and consumers. In the perspective of business competition law, merger activities need to be controlled for several reasons, namely: (1) it can directly or indirectly affect the conditions of competition in the market concerned, because the merging companies will form a larger market share and will ultimately affect competition; (2) can create or even strengthen "market power" by increasing concentration on the market concerned. This increase in market power can increase their ability to abuse their power to inhibit competition so that it can harm consumers (Nugroho, 2012).

Until now, Indonesia is still implementing the Post-Merger Notification System where merger notification is carried out when the business actor has made a merger and the business actor meets the mandatory notification category. The notification is made by business actors to KPPU, then KPPU will conduct an initial assessment and analyze the calculation of changes in market concentration. The results of the initial assessment can be in the form of no allegations of monopoly practices and/or unfair business competition, as well as allegations of monopoly practices and/or unfair business competition. In contrast to South Korea, which has implemented the Pre-Merger Notification System, where merger notification is carried out when business actors are going to merge, provided that the business actors meet the mandatory notification category to KFTC. Then KFTC will assess whether or not the merger has an impact on unfair business competition.

The government should change the merger notification system from post-merger notification to pre-merger notification. This is done to optimize the KPPU's performance so that it is able to provide intensive supervision of all forms of merger implementation which have the potential to result in unfair business competition. The pre-merger notification system can also be

a preventive measure carried out by the KPPU in assessing business actors before the merger is carried out.

CONCLUSION

The urgency of the need to change the notification system in Indonesia, where there is an assessment of the Post-Merger Notification System procedure and voluntary notification can cause uncertainty for business actors. The Pre-Merger Notification System policy is considered to provide more effectiveness in resolving the adverse consequences of the merger, namely the abuse of the dominant position. In addition, from the perspective of business actors, it is much better than Post-Merger Notification to avoid cost losses arising from the merger in question. KPPU can cancel the results of the merger that has been carried out, which is detrimental to business actors so that the Pre-Merger Notification policy when viewed from the theory of *maqashid* as-sharia is able to provide benefits for business actors.

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