

Legal Review of the Late Notification of Acquisition of Commission for Supervision of Business Competition (Study of KPPU Case Decision No: 07/KPPU-M/2018)

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ABSTRACT

The form of economic activity carried out by entrepreneurs is the acquisition of shares. Takeover is a way of developing an existing company or saving a company that is experiencing capital shortages or difficulties. One of the companies that made the acquisition was PT Nippon Indosari Corpindo, Tbk. The company that has been acquired is PT. Prima Top Boga on January 24, 2018. The type of legal research used is legal research which is included in the normative legal research typology where this study focuses on positive legal norms in the form of legislation. The purpose of this study is to find out the legal analysis of the delay in notification (acquisition) of PT. Prima Top Boga by PT. Nippon Indosari Corpindo, Tbk., to KPPU and knows the stages of notification and evaluation of MPU for the acquisition of a company. The results of this study show, PT. Nippon Indosari Corpindo, Tbk., Has been proven to be slow in notifying acquisition of KPPU as stipulated in Law No. 5 of 1999 jo. Government Regulation No. 57 of 2010. Business actors wishing to make notifications regarding acquisitions that result in assets and/or sales value exceeding the stipulated provisions are required to carry out consultations as well as notifications according to the stages available.

Keywords: Notification, Acquisition, KPPU

1. INTRODUCTION

The state has a duty to create prosperity for its people. The requirement to be able to fulfill it is through economic growth. Naturally, economic growth determines the level of welfare, security and progress of a country. The higher the level of growth, the higher the level of political, economic and security stability (Maharani & Wulandari, 2016). However, to increase growth is not an easy and simple thing. Precisely various conflicts in a country are born due to mistakes and failures of how the economy is grown. Because the economy grows not in a vacuum and in the interests of importance. Conversely, a country born with an interest and economic growth is another interest which is certainly interrelated with each other. Growth has an impact and is caused by interactions between countries and also has an impact within the country (Hanantijo, 2012).

Participating in the state in regulating the market led to “competition regimes”. At present almost all the world has competition institutions. Each country has the authority to determine the type of industry, trade and services that are allowed to compete freely or be protected. Every country is also allowed to carry out policies that may be contrary to the spirit of the regime itself such as monopoly etc (Silalahi & Edgina, 2017). Ideally economic growth

must be harmonized with the prevailing world economic system. A system that gives the state a role to intervene insofar as the policy aims to improve the level of public welfare. One of the objectives of the establishment of Law Number 5 Year 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition is to safeguard the public interest and uphold national economic efficiency as an effort to improve people's welfare. National economic efficiency in this context is a way for the welfare of the people to be created (Anggraini, 2015). Therefore inefficient business practices in other languages become a counterproductive and meaningful step against the state. Various business practices allegedly against the state such as monopoly, oligopoly, cartels, tender conspiracy and so on are activities that violate Law No. 5 of 1999 (Antoni, 2019).

Efforts to improve competitiveness and to remain competitive in the world of competition, business actors in addition to striving to diversify and extend, also take the path of restructuring the company (Silalahi & Edgina, 2017). Corporate restructuring is simply interpreted as a fundamental improvement to the entire business chain of the company with the aim of creating competitive competitiveness. Improvement of the company does not only concern business aspects, but also concerns aspects of organization, financial management, and legal aspects. To be able to compete with giant companies, both domestically and abroad, companies try to strengthen their capital, reduce production costs, pursue certain tax advantages, increase production capacity, try to produce at the most efficient point with the main goal of increasing profits received, and trying to reduce management inefficiency (Erlina, 2018).

The form of economic activity carried out by entrepreneurs is the acquisition of shares. Takeover is a way of developing an existing company or saving a company that is experiencing capital shortages or difficulties (Santo, 2011). Acquisition is an absorption of the English word acquisition means taking over, mastering or acquiring. Acquisition is a strategy in the face of increasingly fierce business competition.

There are various factors that are the reasons for business actors to make acquisitions, both economic and non-economic. Specifically, the acquisition was chosen by the business actor to get the ease of company licensing, which is thanks to the acquired company having obtained an official permit to conduct a business activity. With this condition, licensing is considered valuable, because the acquirer does not become troubled to deal with licensing issues that consume energy and costs. Furthermore, this transaction has a strategic effect, namely the transfer of company control to the acquirer (Anggraini, 2015).

Business competition in the trading market is getting tighter in the current era of globalization. Companies are required to always develop strategies and create new innovations to maintain their existence in the world of markets. Mastery of economic resources and

concentration of economic power in a particular group or group in a business activity can be through acquisition (Maharani & Wulandari, 2016). Acquisition is more often chosen by business actors because in the acquisition of both or more companies that unite themselves remain, only ownership changes occur, therefore, with the acquisition, no company disappears and no company is formed as a result of the acquisition (Antoni, 2019). In the acquisition must pay attention to the asset value and the combined sales value of the two companies, if the value of the asset and the combined sales value exceeds from the applicable provisions, it must be notified immediately to the KPPU for no more than 30 days.

One of the companies that made the acquisition was PT Nippon Indosari Corpindo, Tbk. The company that was acquired by PT. Nippon Indosari Corpindo, Tbk., Is PT. Prima Top Boga on January 24, 2018. Percentage of shares acquired by PT. Nippon Indosari Corpindo, Tbk., Amounting to 50.99% shares or thirty-one billion shares, four hundred ninety nine million, seven hundred twenty two thousand eight hundred rupiahs (Rp. 31,499,722,800). The acquisition has been legally effective since February 9, 2018. The acquisition of PT Nippon Indosari Corpindo, Tbk., The value of assets has exceeded the provisions stipulated by the Business Competition Supervisory Commission (KPPU) regarding the obligation to notify share acquisition, so that PT Nippon Indosari Corpindo Tbk., Is obliged to notify about the acquisition of KPPU no later than 30 working days from the date of the juridical acquisition. The same thing, regarding the delay in notification also often occurs in several companies that make acquisitions.

Considering that research on acquisitions has been done a lot before, as did Maya Sari, Abdul Rahcmad Budiono & Hanif Nur Widhiyanti in 2017 with the research title "*Minoritas Yang Tidak Dilibatkan dalam Proses Akuisisi*" published in *Yuridika Journal* Volume 32 Number 3, the results of this study show that the Limited Liability Company Law has not provided sufficient legal protection to minority shareholders and research by Rezimia Febrina in 2014 with the research title "*Proses Akuisisi Perusahaan Berdasarkan Undang-Undang No, 40 Tahun 2007 Tentang Perusahaan Terbatas*" published in *Journal Ilmu Hukum* Volume 4 Number 1, the results of these studies show that with the acquisition, 2 or more companies will still exist legally and the largest companies will become the parent company. The acquisition process only changes the status of the shareholders, namely switching from the acquirer's shareholders to the acquiring shareholders. So the changes that arise are not in private status but only in shareholders.

Based on previous research, there are differences in the focus of research that will be carried out by the authors with existing research. Although they both took the theme of acquisition, but the focus of this research was the delay in notification of acquisition to KPPU, based on Case Decision Number: 07 / KPPU-M / 2018. Based on the description stated above,

problems can be formulated that need to be studied, namely first, how late the notification (notification) of the acquisition of PT. Prima Top Boga by PT. Nippon Indosari Corpindo, Tbk., to KPPU according to Business Competition Law? and second, what are the stages of notification and assessment of MPU for the acquisition of a company?.

2. RESEARCH METHOD

The type of legal research used is legal research which is included in the normative legal research typology where this study focuses on positive legal norms in the form of legislation. Analytical descriptive is the nature of the research specifications used by the author, because the specifications of this study describe and describe the problem of the object being studied. The data that has been obtained is then collected and then arranged to be analyzed and explained in order to get the conclusions of the research conducted (Salim & Nurbani, 2014).

Secondary data is used in writing this article. Secondary data is indirect data obtained from the source of the object of research. This data is in the form of legal material that has juridical binding power (primary legal material), legal material that provides further explanation of primary legal materials such as books, articles and internet related to the topic of this research (secondary legal material) and legal material that gives explanation of the two legal materials above (tertiary legal material), because this legal material is able to clarify terms and problems that might be encountered, for example, is a legal dictionary and other language dictionaries (Salim & Nurbani, 2014). The technique used in collecting secondary data is through library research or documentary study, which is a study that examines various documents both related to legislation and other documents that have been available (Salim & Nurbani, 2014). The last thing is compiling data -data that have been obtained so that it becomes a legal writing that is able to answer the problems that have been formulated beforehand so as to help the author make a correct conclusion.

3. RESULTS AND DISCUSSION

3.1 Analysis of Acquisition Notices of PT. Prima Top Boga by PT. Nippon Indosari Corpindo, Tbk. to KPPU

Decision on case Number: 07 / KPPU-M / 2018 is a case of delayed notification of acquisition with the reported party of PT. Nippon Indosari Corpindo, Tbk., Having its address at Cikarang Barat, Bekasi Regency, West Java. Stock takeover or acquisition is a form of acquisition of company ownership by the acquirer, which results in the transfer of control of the expropriated company (Arifin, 2017) A company that has been acquired by PT. Nippon Indosari Corpindo, Tbk., is PT. Prima Top Boga on January 24, 2018. Percentage of shares acquired by

PT. Nippon Indosari Corpindo, Tbk., Amounting to 50.99% shares or thirty-one billion shares, four hundred ninety nine million, seven hundred twenty two thousand eight hundred rupiahs (Rp. 31,499,722,800). The acquisition has been legally effective since 09 February 2018 based on the Letter of the Ministry of Law and Human Rights Number: AHU-0003152.AH.01.02 concerning Approval of Amendments to the Articles of Association of the Limited Liability Company PT. Prima Top Boga.

The object of the *a quo* case from Case Verdict Number: 07 / KPPU-M / 2018 is the delay in notification in the acquisition of PT Prima Top Boga Company by PT. Nippon Indosari Corpindo, Tbk. Delays in notification of acquisitions to KPPU are regulated in Article 29 of Act Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition *jo.* Article 5 Government Regulation Number 57 of 2010 concerning Merger or Consolidation of Business Entities and Takeover of Company Shares That Can Result in the occurrence of Monopolistic Practices and Unfair Business Competition.

Article 29 of Law No. 5 of 1999 states "*paragraph (1). Merger or consolidation of business entities, or takeover of shares as referred to in Article 28 which results in the value of assets and / or sales value exceeding a certain amount, must be notified to the Commission, no later than 30 (thirty) days from the date of merger, consolidation or takeover; and paragraph (2). Provisions concerning the determination of the value of assets and / or the value of sales as well as the procedures for notification as referred to in paragraph (1), are regulated in Government Regulations*".

Article 5 PP No. 57/2010 mentions "*1). Business Entity Merger, Business Entity Smelting, or other company Takeover of Shares resulting in asset value and / or sales value exceeding a certain amount must be notified in writing to the Commission no later than 30 (thirty) working days from the date the juridically effective Business Entity, Consolidation of Business Entity, Takeover of company shares; 2). A certain amount as referred to in paragraph (1) consists of: Value of assets in the amount of Rp 2,500,000,000,000 (two trillion five hundred billion rupiahs); and / or sales value of Rp. 5,000,000,000,000 (five trillion rupiahs); 3). For business actors in the field of banking, the obligation to submit written notice as referred to in paragraph (1) applies if the asset value exceeds 000,000,000,000 (twenty trillion rupiahs); and 4). Asset values and / or sales value as referred to in paragraph (2) and (3) are calculated based on the sum of asset values and / or sales value of: Merged Business Entity, or Smelting Business Entity, or Business Entity that takes over shares of other companies and Foreclosed Business Entities and Business Entities that directly or indirectly control or are controlled by a merged Business Entity, a consolidated Business Entity, or a Business Entity that takes over the shares of another company and a foreclosed Business Entity*".

Related to Case Decision Number: 07 / KPPU-M / 2018, PT Nippon Indosari Corpindo, Tbk., Acquired an acquisition / share acquisition transaction of PT Prima Top Boga on January 24, 2018, amounting to 32,051 shares (issuance of new shares) by means of additional capital worth Rp.499,722,800 (thirty one billion four hundred ninety nine million seven hundred twenty two thousand eight hundred rupiah).

Upon the acquisition, after February 9, 2018, 100% (one hundred percent) of shares owned by PT Prima Top Boga amounting to 851 (sixty two thousand eight hundred fifty one) shares were held by: 1). PT Nippon Indosari Corpindo, Tbk., Amounting to 50.99%; 2). Sylvia for 6.13%; 3). Lin Dao Xian at 12.25%; 4). Asih Lestari Guntur at 4.08%; 5). Kumala Ayu Dewi Guntur at 4.08%; 6). Samiadji Guntur at 4.09%; 7). David Gatot Gunawan for 6.13%; and 8). Lenny Setyawati is 12.25%.

As a result of the acquisition of the shares, KPPU through the Merger Directorate submitted a letter to PT Nippon Indosari Corpindo, Tbk., Related to the obligation to notify KPPU and was received by PT Nippon Indosari Corpindo, Tbk., On March 7, 2018. Then PT Nippon Indosari Corpindo, Tbk., Submitted an official notice of share acquisition to KPPU on March 29, 2018.

Based on the provisions of Article 5 paragraph (1) PP No.57/2010 which regulates the time of notification where the acquisition of another company that results in asset value and / or sales value exceeds a certain amount must be notified in writing to the KPPU at the latest 30 working days from the date it has been valid legally effective. Therefore, PT Nippon Indosari Corpindo, Tbk., Is late in notifying KPPU for 4 (four) working days, which should be based on the calculation of calendar days, notices of taking over shares of PT Prima Top Boga company should be notified to the Commission no later than March 23, 2018.

Article 5 paragraph (2) PP No. 57/2010, regulates asset value and the value of takeover sale of shares in which the amount / limit of certain value as intended consists of asset value of Rp. 2,500,000,000,000 and / or sales value of Rp. 5,000,000,000,000. Then refer to Article 5 paragraph (4) of Government Regulation Number 57 of 2010 letter b, which requires the calculation of asset value and sales value based on the sum of asset values and / or sales value of the acquired acquirer and company, therefore the sum of asset values and / or value Sales are calculated from the assets and / or sales of PT Nippon Indosari Corpindo, Tbk., and PT Prima Top Boga, as follows (Table 1):

Table 1. Combined Assets and Sales Value

Value Limit	PT Nippon Indosari Corpindo, Tbk.	PT Prima Top Boga	Total
Assets	3.395.179.401.721	23.547.662.670	3.418.727.064.391
Sales Value	2.491.100.179.560	20.315.999.415	2.511.416.178.975

(Source: Decision on case Number: 07 / KPPU-M / 2018)

Accordingly, the combined sales value and / or assets are calculated based on the sum of the sales value and / or asset value of PT Nippon Indosari Corpindo, Tbk., And PT Prima Top Boga has violated the provisions of PP No. 57/2010.

For the case above, in general there are problems related to the time of carrying out the notification of acquisition obligations, namely the obligation to be notified after the acquisition is effective legally. If the company does not conduct pre-notification / consultation, then the company conducts acquisition and then notifies the KPPU, then if the KPPU issues an opinion stating that the acquisition conducted by the company does not result in monopoly and does not interfere with fair business competition, then there are no problems. However, of course it will be fatal if the opinion of the KPPU contains a statement that does not agree with the acquisition which shows that the acquisition has resulted in monopolistic practices or unfair business competition. In accordance with Article 47 paragraph (2) letter e of Law No.5 of 1999, then for opinions containing refusal for acquisition with this reason, sanctions will be given in the form of stipulation of the acquisition of the acquisition. If the cancellation is carried out, it is clear that the business actor will incur significant losses. That is the case, which makes cases of late notification occur (Maharani, 2016).

3.2 Stages of KPPU Notification and Assessment of the Acquisition of a Company

The number of legal issues regarding the delay in acquisition notification to KPPU, in this paper will describe the stages of KPPU's notification and assessment of the acquisition. The assessment is conducted to assess whether there are concerns about monopolistic practices and or unfair business competition due to merger or consolidation of business entities or takeovers based on the measurement of the degree of concentration in the relevant market (Sari, Budiono & Widhiyanti, 2017). It is important for businesses to know, how further, the KPPU's assessment process in notification or notification, is related to the acquisition of a company

according to the provisions of business competition law. So that the business plan is not hampered or even gets administrative sanctions from KPPU, in accordance with the authority given by the Act (Erlina, 2018).

The legal reason for implementing the Merger, Consolidation and or Takeover Notification is Article 28 and Article 29 of Law No. 5 of 1999. As in the provisions of Article 28 which states "*paragraph (1). Business actors are prohibited from merging or consolidating a business entity that can lead to monopolistic practices and or unfair business competition; and paragraph (2). Business actors are prohibited from taking over shares of other companies if such actions can result in monopolistic practices and or unfair business competition*". Furthermore, in Government Regulation No.57 / 2010, states that Monopolistic Practices and / or Unfair Business Competition, occur if a Merged Business Entity, Consolidated Business Entity, or Business Actor that takes over shares of another company is suspected of committing: 1). Agreements that are prohibited; 2). Prohibited activities; and / or 3). Abuse of dominant position.

In Law No.5 of 1999 Article 29 paragraph (1) states "*Merger or consolidation of a business entity or takeover of shares as referred to in Article 28 which results in the value of the asset and / or the value of the sale exceeds a certain amount, must be notified to the Commission no later than 30 (thirty) days from the date of the merger, consolidation or takeover*". Based on these provisions, KPPU can impose administrative sanctions in accordance with Law No.5 of 1999 Article 47 paragraph (2) letter e in the form of cancellation of merger or consolidation of business entities and takeover of shares as referred to in Article 28. However, to provide certainty in the world business, KPPU gives an obligation to business actors to make a notification to KPPU after a business actor carries out an acquisition (Fadhilah, 2019). KPPU will then assess the impact of the acquisition plan and provide opinions on the planned acquisition.

For business actors who want to make a notification regarding mergers or acquisitions as regulated in PP No.57 / 2010, that is, business actors in writing notify KPPU by filling out the forms determined by KPPU. This form contains at least information about: 1). Name, address, name of leader or management of a business entity that carries out business entity merger, business entity consolidation, or takeover of shares of another company; 2). Summary of plans for business entity merger, business entity consolidation, or takeover of company shares; and 3). The value of assets or the value of the sale of a business entity. In addition, this form must also be signed by the leader or management of a business entity that combines a business entity, business entity consolidation, or expropriation of shares of another company,

and is accompanied by supporting documents relating to the merger of a business entity, business entity merger or acquisition of company shares.

After a notification or notification is made by a business actor, KPPU will evaluate the notification by giving an opinion on whether or not there are allegations of monopolistic practices and / or unfair business competition resulting from the merger of business entities, business entity consolidation, or takeover of company shares.

This assessment is carried out within a maximum period of 90 (ninety) working days from the date the written notification document is received in full by the Commission. If the opinion of the KPPU states that there are allegations of Monopolistic Practices and / or unfair business competition, the commission will take action in accordance with its authority as stipulated in the Law, one of which can provide administrative sanctions to business actors (Febrina, 2007).

In addition to the notification of the acquisition, it is also known that the consultation to KPPU. In regulating business competition law, especially for business entity acquisition problems, in addition to the obligation of notification or notification, there are also arrangements for consultation with KPPU as a form of plan for a business entity wishing to carry out such merger or consolidation. This can be found in Article 10 PP No.57/2010, which reads "*paragraph (1). Business Actors who will conduct a Business Entity Merger, Business Entity Smelter, or Takeover of other company shares resulting in asset value and / or sales value exceeding a certain amount as referred to in Article 5 paragraph (2) and paragraph (3) may conduct oral consultations or written to the Commission; and Paragraph (2) A written consultation as referred to in paragraph (1) is carried out by filling out the form and submitting the documents required by the Commission*". So, business actors also have the opportunity to conduct consultations on commissions before the intended merger or acquisition. Based on the forms and documents received by the KPPU, an assessment will be carried out.

Then, based on this assessment, the commission provides written advice, guidance, and / or opinions regarding the planned merger of business entities, business entity consolidation, or the takeover of shares of other companies to business actors. In its arrangement, the Commission is limited to providing written advice, guidance and / or opinions at the latest 90 (ninety) working days from the date of receipt of complete forms and documents by the Commission.

Consultation Procedure can be seen in KPPU Regulation Number 02 of 2013 concerning Third Amendment to Regulation of the Business Competition Supervisory Commission Number 13 of 2010 concerning Implementation Guidelines concerning Merger or Consolidation of Business Entities and Takeover of Company Shares That Can Result in the occurrence of Monopolistic Practices and Unfair Business Competition (Perkom No.2 / 2013).

Which clearly states the procedures and stages of consultation are as follows: 1). Business actors who meet the Consultation requirements can conduct Consultations, both in writing and verbally to the KPPU; 2). Written consultation is carried out by all business actors who will conduct merger or consolidation or by takeover business actors, by filling in the M2 form for business entity merger, K2 form for business entity consolidation, and A2 form for taking over company shares; 3). The Consultation Form must be accompanied by the required documents and other documents deemed necessary by the KPPU; 4). KPPU issues a consultation receipt and studies the completeness of the required forms and documents; 5). Forms and documents that have been declared complete by the Commission will be followed up with the Initial Assessment process. Commencement of the Assessment process Initially notified in writing by the KPPU to the Business Actor; 6). KPPU has the right to request additional documents from business actors in the event that it is deemed necessary to conduct an assessment; 7). Business actors must submit documents related to the Business plan required on the Consultation form. The business plan contains documents related to the direction of the policies of the parties for the next 3 years and the industrial conditions of the parties in groups that explain the industry conditions along with the competitive landscape in the industry; 8). Business actors must submit data on all industrial market structures where the parties carry out their business activities. The data includes data on the market share of the parties and the market share data of competing companies. KPPU will assess the completeness of the data to proceed to the Assessment stage or not. KPPU will not conduct an Assessment related to Consultation on Merger, Consolidation, and Takeover of Shares if the parties do not fulfill the market data; and 9). That the Commission will carry out confirmation regarding market data submitted by the business actor in the Document Completion stage before entering the Assessment stage.

In the examination of the completeness of the documents, KPPU can also confirm the correctness of the data to relevant parties, such as competitors, the government as an industry regulator, practitioners / observers in the market, and other parties related to the market (Hanantijo, 2012).

4. CONCLUSION

Stock takeover or acquisition is a form of takeover of company ownership by the acquirer, which results in the transfer of control of the expropriated company. Decision on case Number: 07 / KPPU-M / 2018 is a case of delayed notification (notification) of acquisition with the reported party of PT. Nippon Indosari Corpindo, Tbk. The company that was acquired by PT. Nippon Indosari Corpindo, Tbk., Is PT. Prima Top Boga on January 24, 2018. Percentage of shares acquired by PT. Nippon Indosari Corpindo, Tbk., Amounting to 50.99% shares. The

acquisition has been legally effective since 09 February 2018 based on the Letter of the Ministry of Law and Human Rights Number: AHU-0003152.AH.01.02 concerning Approval of Amendments to the Articles of Association of the Limited Liability Company PT. Prima Top Food. In this case decision PT. Nippon Indosari Corpindo, Tbk., Has been proven to have been slow in notifying acquisition of KPPU as regulated in Article 29 of Act Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition jo. Article 5 Government Regulation Number 57 of 2010 concerning Badab Merger or Merger of Business and Takeover of Company Shares That Can Result in the occurrence of Monopolistic Practices and Unfair Business Competition.

Business people who want to make a notification regarding the acquisition stipulated in PP No.57 / 2010, require businesses in writing to notify the KPPU by filling out the forms determined by KPPU. After the notification is carried out, KPPU will evaluate the notification by giving an opinion on whether or not there are allegations of monopolistic practices and / or unfair business competition resulting from the merger of business entities, business entity consolidation, or takeover of company shares. This assessment is carried out within a maximum period of 90 (ninety) working days from the date the written notification document is received in full by the Commission. In addition to the notification of the acquisition, it is also known that the consultation to KPPU. In regulating business competition law, especially for business entity acquisition problems, in addition to the obligation of notification or notification, there are also arrangements for consultation with KPPU as a form of plan for a business entity wishing to carry out such merger or consolidation.

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