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The Sanction of Merger Cancellation Found in Government Regulation No. 57 Year 2010 & its Irrelevance in the Merger Control Context

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THE SANCTION OF MERGER CANCELLATION FOUND IN GOVERNMENT REGULATION NO. 57 YEAR 2010 AND ITS IRRELEVANCE IN THE MERGER CONTROL CONTEXT

AGUSTINUS PRAJAKA WAHYU **BASKARA***

ABSTRACT:

After waiting for more than 10 years, Indonesia finally enacted the Government Regulation No. 57/2010 concerning the *Merger or Consolidation of Business Entities and the Acquisition of Company Shares that could result in Monopolistic Practices and/or Unfair Business Competition* on July 20, 2010. This regulation implements the regulations required by articles 28 and 29 of Law No. 5/1999 concerning the *Prohibition of Monopolistic Practices and Unfair Business Competition*. In paragraph 3 of article 28 of this law, it is stated that "further provisions regarding the prohibition of mergers or consolidations of business entities as referred to in paragraph 1 and provisions concerning the acquisitions of shares in other companies as referred to in paragraph 2 shall be stipulated in a government regulation". And also in paragraph 2 of article 29 of this law, it is clearly stated that "provisions regarding the determination of assets value and or sales value as well as the procedure of notification as referred to in paragraph 1 shall be stipulated in the government regulation".

This paper is based on the hypothesis that mergers are good but must be controlled. This is because those which are not properly controlled will result in market domination that may potentially lead to anti-competitive practices. This paper will discuss the issues related to the relevance of merger cancellation as a sanction aimed at maintaining the spirit of fair business competition. If we look at the title of the government regulation, the approach used is the 'rule of reason'. Referring to the 'rule of reason' approach adopted in article 28, an action can be determined only in terms of the extent it results in unfair competition. The most relevant thing is thus its impact, and not the merger itself. In fact, the overriding issue is the misuse of a merger to introduce monopolistic practices and/or unfair business competition.

I. INTRODUCTION

Mergers, consolidations and/or acquisitions, consciously or unconsciously, affect the competition between business actors in any relevant market, impacting consumers and society. They may result in increased or decreased competition, potentially harming consumers and communities.[1] Business actors as economic subjects strive to maximize profits in their businesses and such maximization can be pursued through various ways.

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[1] Section 1, Appendix of Commission Regulation Number 13 year 2010.

One method is through a merger. Theoretically, maximization of profit is expected to occur through a merger because it can create efficiencies and thus reduce the company's production costs resulting from the merger. The creation of efficiency is expected since the merged company will be able to exploit economies of scale in its production process. Such economies of scale become important in a large market where the total production costs required will be very high; with economies of scale, production costs per unit will drop.[2] Efficiency can also be achieved with the merger scheme through the exploitation of economies of scope, marketing efficiency, or the centralization of research and development.[3] In addition to reasons of efficiency, a merger also represents an avenue for business actors, such as small business owners, to exit from the market if they deem that nothing else can be conducted to continue the business.[4] Thus, a merger may serve as one way out if business actors have difficulty in liquidity since creditors, owners, and employees can be protected from the effects of bankruptcy.[5]

In Indonesia, the laws and regulations governing mergers, consolidations and/or acquisitions are scattered. These laws and regulations include, among others, –

Generally:

1. Law No. 40/2007 concerning *Limited Liability Companies*[6]
2. Government Regulation No. 27/1998 about *Merger, Consolidation, and Acquisition of Limited Liability Companies*

In Capital Market:

1. Regulation No. IX.G.1. concerning *Business Merger or Consolidation of Public Companies or Issuer*
2. Regulation No. IX.E.1 concerning the *Conflict of Interest*
3. Regulation No. IX.F.1 concerning the *Tender Offer*
4. Regulations No. IX.H.1 concerning the *Acquisition of Public Companies*

In Banking:

1. Law No. 10/1998 amending Law Number 7/1992 on *Banking*
2. Government Regulation No. 28/1999 concerning the *Merger, Consolidation, and Acquisition of Banks*
3. Government Regulation No. 29/1999 dated May 7, 1999 concerning the *Purchase of Shares of Commercial Banks*

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[2] Alison Jones & Brenda Sufrin, *EC Competition Law, Text, Cases, and Materials* (New York: Oxford University Press, 2004) at 848 [*EC Competition Law*] reprinted and translated in Andi Fahmi Lubis *et al.*, *Hukum Persaingan Usaha, antara Teks dan Konteks* (Jakarta: KPPU, 2009) [*Lubis*].

[3] *Ibid.* at 848.

[4] *Ibid.* at 849.

[5] *Ibid.* at 848.

[6] A merger is a legal act performed by one company when it merges with one or more existing companies with the result that the assets and liabilities of the merging company are transferred by law to the absorbing company, and the merging company's status as a legal entity is subsequently extinguished by law (article 1(9) of the Law No. 40/2007). It is stated in article 1(10) of the Law No. 40/2007 that a consolidation is a legal act performed by two or more companies when they establish a new company which acquires their assets and liabilities. The statuses of the consolidating companies as legal entities are subsequently extinguished by law. With this establishment of the new company, the consolidating companies' statuses as legal entities are similarly extinguished by law. Then, article 1(111) of the Law No. 40/2007 states that an acquisition is a legal act performed by a legal entity or an individual person when the acquiring of shares by it/him in a company results in the transfer of control in that company.

In Business Competition:

1. Law No. 5/1999 concerning the *Prohibition of Monopolistic Practices and Unfair Business Competition*
2. Government Regulation No. 57/2010 concerning the *Merger or Consolidation of Business Entities and the Acquisition of Company Shares that could result in Monopolistic Practices and/or Unfair Business Competition*
3. Commission Regulation No. 10/2010 concerning the *Merger Notification Form, Corporate Consolidation, and Acquisition of Company Shares*
4. Commission Regulation No. 11/2010 concerning *Consulting Business Entity Merger or Consolidation and Acquisition of Shares*
5. Commission Regulation No. 13/2010 on *Guidelines on Corporate Merger or Consolidation and Acquisition of Shares of the Company which could result in Monopolistic Practices and Unfair Business Competition*

A merger raises concerns of the potential misuse of the post-merger company's market power. This might harm consumers (and other manufacturers). Examples of misuse include setting higher prices, reducing production and lowering product quality. This thus gives rise to the justification for merger control: It is far better to prevent companies from *gathering* the market power rather than trying to *direct* market power that has been formed. Effective merger control policies require a consideration of the impact of mergers on competition before the merger takes place. The merger is disallowed if it substantially harms competition.[7]

Therefore, it can be understood that what must be controlled and managed is the impact of a merger. It is not a problem of whether the merger is on the right track or whether it is pro-competition. The problem only arises when a merger is found to be anti-competitive, *i.e.* the merger is not in accordance with the spirit of fair competition. Government Regulation No. 57/2010 refers to Article 47(e) Law No. 5/1999[8] which sanctions anti-competitive mergers by cancelling them. This paper tries to analyze the relevance of merger cancellation as a sanction in the context of merger control.

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[7] Prof. Ine Minara S. Ruky, "Merger Control Analysis" (KPPU Policy Direction Relating To The Regulation Of Mergers, Consolidations, And Acquisitions Seminar, delivered at Atlet Century, Jakarta, 16 December 2010) [unpublished].

[8] Article 47(e) Law No. 5/1999:

(1) The Commission shall be authorized to impose sanctions in the form of administrative measures against business actors violating the provisions of this Law.

(2) Administrative measures as intended in paragraph (1) may be in the following forms: a. stipulation declaring agreements as intended in article 4 up to and including article 13, article 15 and article 16 as null and void; and/or b. order to business actors to stop vertical integration as referred to in article 14; and/or c. order to business actors to stop activities proven to have been causing monopolistic practices and/or unfair business competition and/or being harmful to society; and/or d. ordering business actors to stop the misuse of their dominant position; and/or ***e. stipulation of the cancellation of mergers or consolidations of business entities and acquisition of shares as intended in article 28***; and/or f. stipulation of compensation payment; and/or g. imposition of a minimum fine of Rp. 1,000,000,000 (one billion rupiahs) and a maximum fine of Rp. 25,000,000,000 (twenty-five billion rupiahs).

II. OVERVIEW ON THE CONTENT OF GOVERNMENT REGULATION NO. 57/2010

The ten-year delay in issuing a government regulation relating to mergers, as required by Law No. 5/1999, has resulted in its articles 28 and 29 becoming *lex imperfecta*. This is because they can only be implemented after the creation of the government regulations stipulated in articles 28(3) and 29(2); articles 28(1), 28(2) and 29(1) are too vague to be implemented if not complemented with additional regulations.[9]

On July 20, 2010, Indonesia enacted the Government Regulation No. 57/2010 concerning the *Merger or Consolidation of Business Entities and the Acquisition of Company Shares that could result in Monopolistic Practices and/or Unfair Business Competition*. This Regulation implements the regulations required by articles 28 and 29 of Law No. 5/1999 concerning the *Prohibition of Monopolistic Practices and Unfair Business Competition*. It consists of four chapters and thirteen articles. Chapter I covers General Provisions, chapter II discusses the Merger and Consolidation of Enterprise and Takeover of Company Shares, chapter III contains provisions on the Notification of Merger and Consolidation of Enterprise and Takeover of Company Shares, and chapter IV contains the Final Provisions. Before discussing the content of Government Regulation No. 57/2010, let us first examine the notifications provided by the relevant business actors to the Indonesian Competition Commission in Tables 1 to 3 below.

1. PRE-NOTIFICATION

No	DATE	PARTIES	OPINION OF COMMISSION	REMARKS
1	22 June 2009	PT Komatsu Indonesia PT Pandu Dayatama Patria	Not to be continued to the pre-notification assessment stage	
2	18 February 2010	Meadown Asia Company Limited PT Matahari Departement Store Tbk.	No Objection Letter (17 March 2010)	Examination of the Document Completeness
				Preliminary Assessment (1 March 2010)
				KPPU has no objection with this acquisition
3	31 March 2010	Prudential Plc		Examination of the Document Completeness

9 Knud Hansen *et al.*, *Law Concerning Prohibition of Monopolistic Practices and Unfair Business Competition* (Jakarta: GTZ, 2001) at 356.

		AIA Group Limited		Preliminary Assessment (20 April 2010) Withdrawal of Pre-notification (4 June 2010)
4	19 May 2010	Unilever Indonesia Holding, B.V. Sara Lee Body Care Tbk	No Objection Letter (7 October 2010)	Examination of the Document Completeness
				Preliminary Assessment (27 May 2010)
				Comprehensive Assessment (9 July 2010)
				KPPU has no objection with this acquisition
5	1 July 2010	PT Tuah Turangga Agung PT Agung Bara Prima	No Objection Letter (23 August 2010)	Examination of the Document Completeness
				Preliminary Assessment (8 July 2010)
				KPPU has no objection with this acquisition

2. CONSULTATION

No.	DATE	No. Reg	PARTIES	OPINION OF COMMISSION	REMARKS
1.	13 October 2010	A20110	PT Bank Rakyat Indonesia (Persero) Tbk PT Bank Agroniaga Tbk	(3 December 2010)	Examination of the Document Completeness
					Preliminary Assessment (22 October 2010)

3. PUBLICATION OF NOTIFICATION

No.	Date	No. Reg	PARTIES	KPPU	REMARKS
1.	25 August 2010	A10110	PT Tuah Turangga Agung PT Agung Bara Prima	Not conducting reassessment (7 September 2010)	

Tables 1 to 3: List of Merger Notifications and Acquisitions[10]

In accordance with the provisions of article 29 of Law No. 5/1999 and article 5(1) of the Government Regulation No. 57/2010, mergers are subjected to post-evaluation after they are implemented. This means that after the business actors conduct a merger, consolidation or acquisition of shares, the company resulting from the merger has to notify the Commission.

The Commission Regulation discussed below stipulates the compliance rules governing the merger notification procedure by business actors to the Commission.

A. Terms of Notice

(i) Limitation Value

The requirement of the notification's service upon the Commission is triggered if, –

1) The value of enterprise's assets resulting from the merger or consolidation or acquisition exceeds Rp. 2,500,000,000,000 (two trillion five hundred billion rupiahs); or
2) The value of sales (turnover) of the business entities resulting from the merger or consolidation or acquisition exceeds Rp. 5,000,000,000,000 (five trillion rupiahs). Specifically in the banking sector, the business actor is required to make a notification to the Commission if the value of enterprise's assets resulting from the merger or consolidation or acquisition exceeds Rp. 20,000,000,000,000 (twenty trillion rupiahs). In the event that the merger is between a bank and a non-bank, the value limits prevailing are the limit values in the banking sector.[11]

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[10] *Komisi Pengawas Persaingan Usaha* (20 December 2010), online: *Komisi Pengawas Persaingan Usaha* <http://www.kppu.go.id/baru/index.php?aid=925&mode=art&mnid=81&encodurl=12%2F22%2F10%2C01%3A12%3A36>.

[11] Commission Regulation No. 13/2010 at chapter 4 section B point 1(a) [Commission Regulation No. 13/2010]. See also Article 5 of Government Regulation No. 57/2010:

(1) The Commission must be notified in writing no later than 30 working days from the date of merger, consolidation, or acquisition of shares of the company becoming judicially effective, where such a merger, consolidation, or acquisition of shares of other companies result in the asset value and/or sales value exceeding a specific amount.

(2) The 'specific amount' referred to in paragraph (1) consists of:

a. asset value of Rp. 2,500,000,000,000 (two trillion five hundred billion rupiahs); and/or
b. sales value amounting to Rp. 5,000,000,000,000 (five trillion rupiahs).

(ii) Mergers between firms that are not affiliated

If one examines the definition of a merger, it is simply the action that results in –

1) The creation of a concentration of control held by one business actor or a group of business actors, where there were previously several independent business actors; or
2) A shift of control from one business actor to another business actor, of which both were previously independent, such that it creates a concentration of control or a concentration of market.

Hence, it is to be noted that mergers among affiliated companies do not meet the criteria for merger as set forth in this Commission Regulation because they do not change the existing market structure and competition conditions.[12]

B. Notification Time

It is stated that business actors shall make the notification no later than 30 days from the date the merger becomes judicially effective. Where the business entity involved is the formation of a limited liability company, the date the merger becomes judicially effective is in accordance with the provisions of article 133 of Law No. 40/2007. This date is decided upon the occurrence of the following –

1) Ministerial approval of the article of association's amendment in the event of a merger is obtained;
2) Notification is received by the Minister of the amendment of the articles of association as referred to in Article 21(3) of Law No. 40/2007, but without the actual amendment accompanying this notification; and
3) Legalization of the minister on the deed of the company in the event of consolidation. In the event that the merged entity does not take the form of a limited liability company, then the notification is to be made no later than 30 days since the date of signing of the merger agreement by the parties. The Commission will conduct an assessment of the merged company to give an opinion on whether or not any alleged monopolistic practice and/or unfair business competition exists.[13]

C. Notification Procedures

1) Business actors shall notify the Commission in writing within a maximum period of 30 days working days.
2) Such notification shall be made in writing by the business actor created by the merger, consolidation of business entities or acquisition of shares, by filling out a form M1 for the merger of business entities, form K1 for the consolidation of

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(3) For business actors belonging to the banking sector, the obligation to submit a written notice referred to in paragraph (1) applies if the value of assets exceeds Rp. 20,000,000,000,000 (twenty trillion rupiahs).
(4) The value of assets and/or value of sales as referred to in paragraph (2) and paragraph (3) is calculated based on the sum of the value of assets and/or value of sales of:
    a. The business entity resulting from the merger, or consolidation, or acquisition of shares; and
    b. The business entity which is directly or indirectly control or controlled by the business entity resulting from the merger, or consolidation, or acquisition of shares.

[12] Commission Regulation No. 13/2010, *ibid.*, point 1(b).
[13] Commission Regulation No. 13/2010, *ibid.*, point 2.

business entities, and form A1 for the takeover of the company's shares respectively.
3) The notification form must be accompanied by the required documents mentioned above as well as other documents deemed necessary by the Commission.
4) The Commission will issue a notification receipt and study the completeness of the required forms and documents.
5) The Commission reserves the right to request additional documents from the business actor in the event it deems it necessary to conduct an assessment.[14]

III. CAN MERGER CANCELLATION BE EQUATED WITH MERGER CONTROL?

If we examine article 28 of Law No. 5/1999, we can conclude that this article is not concerned with the reporting system pertaining to mergers. This article simply states that a business actor intending to conduct a merger has to ensure that the merger does not lead to monopolistic practices and/or unfair business competition. If the merger turns out to have an impact on unfair competition, the merger can be cancelled by the Commission in accordance with its authority. This authority is based on Law No. 5/1999 article 47(2)(e) which provides that the Commission may impose administrative sanctions by revoking the merger or consolidation of business entities, and the acquisition of shares. In addition, the Commission may impose other sanctions like fines and compensatory damages.

This is different from the provisions of article 29 of Law No. 5/1999. Article 29 expressly states that the business actor is required to furnish a report pertaining to the occurrence of a merger no later than 30 days from the date of the merger. This provision clearly shows that Indonesia’s competition law adopts a post-merger notification system. This contrasts against the competition laws in many other countries which avoid the potential cancellation of a merger that has already taken place by requiring the business actor intending to conduct a merger to submit a pre-merger notification to the competition authorities. This allows the authorities to assess whether the merger will result in monopolistic practices and/or unfair business competition, and to determine whether the merger can proceed or not.[15]

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[14] Commission Regulation No. 13/2010, *ibid.*, point 3. Compare this with the provisions on the Submission Procedures for Notification in Article 8 Government Regulation No. 57/2010:
- (1) Notification in writing as referred to in Article 5 paragraph (1) and paragraph (3) is conducted by filling out the form established by the Commission.
- (2) The form referred to in paragraph (1) must at least contain:
  - a. Name, address, name of the leader or manager of the business entities participating in the merger, consolidation, or acquisition of shares of other companies;
  - b. Plan summary of the merger, consolidation, or acquisition of shares of the company; and
  - c. Asset value or the value of the sale of business entities.
- (3) The form referred to in paragraph (1) shall be:
  - a. signed by the leaders or managers who perform the merger, consolidation, or acquisition of shares of other companies; and
  - b. attached with supporting documents relating to the merger, consolidation, or acquisition of shares of the company.

[15] Knud Hansen argues that the prohibition provided for in Law No. 5/1999 should be interpreted as the proposed merger having to be reported in advance to the Commission for examination as to whether the merger is bad for competition or not. This understanding is also supported by the history of the laws on competition in countries that have implemented the merger review. Such history has shown that a merger which has been completed will be difficult to withdraw and the merged company returned to its original state before the merger. This phenomenon is colloquially known in Indonesia as "the rice having become porridge. " Cancellation of mergers are also detrimental for businesses which have issued charges large enough for the preparation and implementation of the merger. Cancellation of the

As mentioned above, mergers may be either pro-competition or anti-competition. The latter consequence is especially possible if there is a lack of control by the competition authorities. The existence of mergers in the business world should be a positive prospect for companies that may otherwise fail from the operational perspective. However, in practice, the mechanism of a merger is often abused by a business actor intending to use it to expand its market. Conflicts between, on the one hand, the efficiencies brought on by the merger and, on the other hand, competition issues also frequently arise. A business actor will always use efficiency reasons as the basis for the merger, while the competition authority will first focus on their business competition issues. The merger may – directly or indirectly – have a relatively large impact on the market conditions which affect competition. Where two or more companies are joined together, their market shares will be united, forming a larger market share. This has been a focus of competition law. Mergers can strengthen market power by increasing the concentration on relevant product and geographic markets. The increase in market power can improve their ability to coordinate either implicitly or explicitly.[16] In the United States, the main concern regarding mergers is the ability of the merger to create or strengthen the companies' market power.[17] In the European Union, some concerns regarding the impact of mergers have been raised. These include, among others,[18] –

1) Adverse effects on market structure;
2) Fear of the rise of big businesses;
3) Rise of foreign-controlled companies within sectors regarded as sensitive;
4) Unemployment.

Market share domination is closely related to the dominance of a company. Considering structure, conduct and performance, the percentage share of a market becomes the benchmark in determining a company's dominance. If two or more companies join, the company resulting from the merger can achieve or strengthen its dominant position in the market. This position of dominance then further increases the chances of abuse.[19]

American Bar Association separates the impact of a horizontal merger into two categories: [20]

A. Unilateral Effect

Such effects arise where the merger creates a single business actor possessing full power of the markets, thereby stabilizing its previously dominant power over the market (dominant position), and blocking new businesses from entering the market (barriers to entry);

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merger also can affect the condition of certainty in the business such that it can inhibit a merger with pro-competition consequences. This is translated from *Lubis*, *supra* note 2 at 196.

[16] Debra J. Pearlstein *et al.*, eds., *ABA Section of Antitrust Law, Antitrust Law Developments*, 5th ed., vol. I (Chicago, ABA Book Publishing, 2002) at 317–319 reprinted and translated in *Lubis*, *supra* note 2 at 198 [*ABA Section of Antitrust Law*].

[17] *Lubis*, *ibid.* at 198 (*ABA Section of Antitrust Law*).

[18] *Lubis*, *ibid.* (*EC Competition Law* at 848–854).

[19] *Lubis*, *ibid.*.

[20] *Lubis*, *ibid.*. See *ABA Section of Antitrust Law*, *supra* note 18 at "FTC and Department of Justice Joint Horizontal Merger Guidelines, 1992" at 342–344, and Gunawan Widjaja, *Merger dalam Prespektif Monopoli* (Jakarta: Raja Grafindo Persada, 2002) at 50.

B. Coordinated Effects

Such effects arise where the merger makes it easier for pre-existing business actors within a market to coordinate their behaviour by reducing price competition, quality, and quantity. Examples of such impact are the creation of explicit or implicit agreements on a set price, the distribution of territory in selling goods and/or services. These coordinated effects are often observed in industries possessing certain characteristics, *i.e.* sale of a homogeneous product, selling in small volumes, as well as similarities in the cost of producing goods or services.

The 'rule of reason' approach, as adopted in article 28 of Law No. 5/1999, allows the court to interpret the statute. The Supreme Court of the United States, for instance, has set a 'rule of reason' standard which allows courts to consider competitive factors and determine whether a trade obstacle is proper or not. This means finding out whether these barriers interfere with, influence, or even block the competition process.[21]

Regardless of whether one applies the 'per se illegal' approach or the 'rule of reason' approach, one is bound to encounter their individual strengths and weaknesses. These strengths and weaknesses will factor when deciding which approach to apply to a business actor which allegedly violates an anti-monopoly statute. The superiority of the 'rule of reason' approach can be observed when one utilises economic analysis to analyse the achievement of efficiency in order to know for certain whether an action of a business actor has any implications for the competition or not. In other words, whether an act is considered to inhibit competition or encourage competition is determined by "economic values, that is, with the maximization of consumer satisfaction through the most efficient allocation and use resources".[22] On the contrary, if you apply the 'per se illegal' approach, then the actions of certain business actors will always be considered to have violated the law.

Nonetheless, the 'rule of reason' approach contains one, arguably fatal, weakness. This is the fact that the rule of reason used by judges and juries requires knowledge of economic theories and a grasp of a number of complex economic data, both of which they may not necessarily possess, in order to produce a rational decision. The limited capacity and experience of a judge to cope with such complex litigation has often caused problems throughout the history of the United States' court system.[23] Moreover, it is not easy to prove the defendant's market power, considering that the plaintiff must rely on an expert witness specialising in the economic field and adduce extensive documentary evidence from other competitors. In fact, the plaintiff's chances of winning are usually so small that the 'rule of reason' approach is often viewed as a rule of 'per se legality'.[24]

It should be understood that the imposition of sanctions against a merger cannot be equated with the imposition of sanctions against the violations of articles found in other competition laws. The lawmaker has analogised erroneously between both issues by

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[21] E. Thomas Sullivan and Jeffrey L., *Understanding Antitrust and Its Economic Implications* (New York: Matthew Bender & Co., 1994) at 85 reprinted and translated in *Lubis*, *ibid.* at 66.

[22] Robert H. Bork, "The Rule of Reason and the Per se Concept: Price Fixing and Market Division" (1965) 74 Yale L. J. 775 at 781 reprinted and translated in *Lubis*, *ibid.* at 66.

[23] "Developments in the Law: The Civil Jury" (1997) 110 Harv. L. Rev. 1489 reprinted and translated in *Lubis*, *ibid.* at 66.

[24] *Lubis*, *ibid.* at 67.

imposing similar sanctions on a merger found to have led to monopolistic practices and/or unfair business competition and an agreement found to have violated another article in competition law, *i.e.* cancellation. In the former, the cancellation of the merger is imposed; in the latter, the cancellation of the agreement is imposed. An example of imposition of such a sanction for the violation of articles in other competition laws is the cancellation of agreements which violate the articles in Law No. 5/1999, chapter 3 concerning Prohibited Agreements. These cover, among others, situations pertaining to the establishment of an oligopoly, division of territory, cartels, trusts, and vertical integration. When a business actor violates any provisions found in the chapter on Prohibited Agreements, the Indonesian Competition Commission is authorized to impose sanctions in the form of cancelling agreements and this can be done easily. However, it is not the same with mergers. A merger has implications that do not simply disappear upon its cancellation.

Merger control pertains to the control of the impact of the merger – which has to be done in accordance with the 'rule of reason' approach – and not the mere cancellation of a merger. When the merger is cancelled, there is nothing left to control. It has to be reiterated that the justification for merger control is that it is far better to prevent companies from *gathering* the market power rather than trying to *direct* market power that has been formed. Nevertheless, Indonesia's competition law adopts a post-merger notification system. If we want to remain consistent to the idea of a post-merger notification, then we should expend effort in making the merger consistent with the principles of fair business competition instead of simply cancelling it when it goes against these principles.

IV. CONCLUSION

Based on the above discussion, I conclude that the sanction of cancelling a merger is irrelevant in the context of merger control for the following reasons:

1) Article 28 Law No. 5/1999 concerning *Prohibition of Monopolistic Practices and Unfair Business Competition* uses the 'rule of reason' approach which focuses on the impact on competition in the context of a merger. This addresses the impact of the misuse of mergers and directs the merger to conform to the spirit of fair competition. Merger cancellation does not solve any problems that crop up but instead creates new problems.

2) The post-merger notification adopted by Indonesia's competition law is incongruent with the sanction of merger cancellation. Although it is linked to notification (post-evaluation) and consultation (pre-evaluation) as stipulated in the Commission Regulation No. 13/2010, it cannot be denied that the imposition of sanctions remains in the post-merger area and cannot be directed to the issues pertaining to the merger itself.

Because the sanctions are still valid, it is suggested that Indonesian Competition Commission be selective in applying the sanctions of cancellation in order to avoid controversy. They should also postpone the imposition of such sanctions because of their complex legal consequences.