

COMPETITION MERGER REVIEW FOR CROSS-BORDER MERGERS AND ACQUISITIONS IN INDONESIA

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Abstract

This article aimed at expressing ideas on a legal construction of competition merger review (CMR) on Cross-border Mergers and Acquisitions (CBM&A) that have Indonesian legal dimension. The problem has been triggered by the lack of CMR guidelines for CBM&A to nurture a fair and sustainable business competition (FSBC). Consequently, the existing guideline is inadequate for reviewing CBM&A proposals which have a multi-jurisdiction dimension character. As a result, merging (gigantic) companies doing business in Indonesia have enormous opportunities to engage in anti-competitive behavior in the domestic market. In its turn, it brings the impact of reducing competition itself whereby national companies become easily marginalized and find themselves in a vulnerable situation. To seek solutions to this problem, this research has been conducted through a normative approach, starting from the formulation of the problem up to an in-depth analysis and drawing conclusions. In order to achieve the said purpose, a literature study was conducted to explore and collect related law information on CBM&A, including CMR methods, namely: Market Dominance Test, Substantial Lessening of Competition/SLC Test, Public Interest Test, and four hybrid Tests: i) Hybrid Test One=SIEC Test; ii) Hybrid Test Two; iii) Hybrid Test Three; and Hybrid Test Four). Out of these seven methods of CMR, I consider to choose the SLC Test as the method for reviewing CBM&A proposal. At the end, this study concludes as follows: 1) there is an urgent need for CMR in the methods of SLC Test for cross-border merger and acquisition proposals in order to fill the absence of a merger review guideline that contains a multi-jurisdiction dimension and to nurture a fair and sustainable business competition in Indonesia; 2) the substantive norms for constructing CMR in the methods of SLC Test for CBM&A transactions in Indonesia should take into account the national law regime: company law, merger law, investment law including the existing public interest. In addition to that, the principles of certainty, efficiency, transparency, and proportionality should also be considered. Thus, I recommend to enact a SLC Test Guideline in order to strengthen the legal review of CBM&A proposals for supporting FSBC, to maintain dynamic, secure, and stable national economy and development.

Keywords: cross-border mergers & acquisitions, competition merger review, substantial lessening of competition test

Abstrak

Artikel ini dimaksudkan untuk mengungkapkan ide tentang pengkonstruksian sebuah pengaturan hukum penilaian merger dari perspektif hukum persaingan (PMPHP) atas proposal Merger dan Akuisisi Lintas Batas (M&ALB) yang berdimensi hukum Indonesia. Permasalahan dipicu oleh ketiadaan pengaturan, setidaknya dalam bentuk panduan guna mengemban persaingan bisnis yang adil dan berkesinambungan (PBAB). Selain itu, panduan penilaian merger yang ada sekarang ini tidak cocok untuk menilai proposal M&ALB yang berdimensi multi-yurisdiksi. Akibatnya, perusahaan pemerger yang melakukan bisnis di Indonesia berpeluang besar melakukan berbagai tindakan anti-kompetitif dalam pasar domestik sebagai bagian dari pasar regional atau global. Pada gilirannya, tindakan tersebut berdampak mengurangi persaingan itu sendiri dalam mana perusahaan nasional dengan termarjinalisasikan dan masuk kedalam situasi kefailitan. Untuk keluar dari permasalahan, penelitian ini menggunakan pendekatan normatif, mulai dari perumusan permasalahan, penganalisan secara mendalam, dan sampai pada penarikan kesimpulan. Untuk itu, kajian literatur telah dilakukan guna mengeksplorasi informasi hukum mengenai M&ALB, termasuk metode-metode PMPHP: Pengujian Dominasi Pasar, Pengujian Pengurangan Persaingan Secara Substansial, Pengujian Kepentingan Publik, dan empat pengujian hybrid (pengujian Hybrid Kesatu=SIEC test; Pengujian Hybrid Kedua; Pengujian Hybrid Ketiga; dan Pengujian Hybrid Keempat). Dari ketujuh metode PMPHP, peneliti memilih metode SLC Test sebagai metode review atas M&ALB. Akhirnya, penelitian ini menyimpulkan: 1) PMPHP dengan metode SLC Test atas proposal M&ALB sangat diperlukan untuk mengisi ketiadaan panduan penilaian merger yang mengdung dimensi multi-jurisdiction dan untuk mengemban PBAB di Indonesia; 2) norma substantif untuk pengkonstruksian CMR dengan metode SLC Test atas transaksi M&ALB di Indonesia harus memperhatikan hukum nasional: hukum perusahaan, hukum merger hukum investasi termasuk kepentingan umum yang ada. Selain itu, prinsip kepastian hukum, prinsip efisiensi, dan proporsionalitas juga harus dipertimbangkan. Peneliti juga merekomendasikan bahwa Komisi Pengawas Persaingan Usaha Indonesia perlu mengundangkan panduan SLC Test yang berdimensi hukum Indonesia untuk menilai proposal M&ALB guna mengemban PBAB, sekaligus mempertahankan perekonomian dan pembangunan nasional yang stabil, aman, dan dinamis.

Keywords: merger & akuisisi lintas batas negara, competition merger review, SLC test

I. INTRODUCTION

The absence of competition merger review (CMR) for cross-border merger and acquisition (CBM&A) proposals in the merger regime of Indonesia has lessened business competition substantially.¹ As a result, most foreign companies find it easy to enter and benefit from the huge scale of market of Indonesia. It has been opening up opportunities for gigantic corporations to engage in anti-competitive behavior, and makes it easy for them to integrate,² to establish, and or to dominate (monopolize) a regional and global market.³ Accordingly, it has been *ipso facto* reducing national corporations' market access for competition. In addition, unilateral and or coordinated effects of CBM&A transactions have caused national corporations being unable to compete, have brought them into a vulnerable situation (bankruptcy), and have brought disadvantageous effects in the area of consumer protection.⁴ All of these have been caused by several influencing factors: i) the existing rules or guidelines for merger review are not appropriate to be applied for reviewing proposals and existing transactions of CBM&A; ii) the lack of multi-jurisdiction dimension in the existing national laws of merger and business competition; iii) the lack of mechanism or legal instrument on CMR that contains and refers to the people based national economic system; and iv) the lack of co-operation among national competition authorities to investigate, to adjudicate, and to execute the decisions of commercial courts or competition authorities.

Empirically, there are some examples of CBM&A proposal having been approved by the Indonesian Commission for Supervising Business Competition (the Commission) in Indonesia. Such approvals have been granted to CBM&A proposals between Bank NISP (Indonesia) and OCBC (Singapore)⁵, Bayan Resources (Indonesia) and KEPCO

¹ See: Nam-Hoon Kang and Sara Johansson, "Cross-Border Mergers and Acquisitions: Their Role in Industrial Globalisation," *OECD Science, Technology and Industry Working Papers*, 2000,01, OECD Publishing, Paris. <http://dx.doi.org/10.1787/137157251088>; and The US Foreign Trade Commission (FTC) at <http://www.ftc.gov/sites>.

² Jrisy Motis, "Mergers and Acquisitions Motives," *Toulouse School of Economics* <http://economics.soc.uoc.gr/wpa/docs/0730.pdf>; John G. Matsusaka, "Takeover Motives during the Conglomerate Merger Wave," *RAND Journal of Economics* 24, no. 3 (1993).

³ In fact, the companies from the United States of America and the United Kingdom were globally dominating CBM&A transactions through mega merger. They have 87% of transactions mainly in the field of banking, financing, post, telecommunication, information technology, and cement, see: Stephen Paul Mahinka and Michael C. Griffen, "Implication of the DOJ/FTC Revised Merger guidelines on FERC's Merger Analysis", (presentation, Morgan Lewis, October 14, 2010) at https://www.morganlewis.com/pubs/webcast_dojftc_merger_guidelines_14oct10.pdf; and Beena Saraswathy, "Cross-border mergers and acquisition in India: extent, nature and structure" *Centre for Development Studies Working Paper No. 434*, July, 2010, <http://www.cds.edu/outreach/publications/working-papers/>

⁴ See: Duncan Angwin, *Mergers and Acquisitions*, (Chichester: Wiley Publishing, 2007), and the WTO, "Information Note on the Impact of Cross-Border Mergers and Acquisitions on Domestic Companies, particularly Small and Medium-Sized Enterprises", note by Secretariat, Working Group on the Interaction between Trade and Competition Policy, doc. Number (01-4653), September 28, 2001, <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/WGTCP/W180.doc>

⁵ This merger was approved on February 7, 2011, see: <https://www.ocbcnisp.com/Groups/Tentang-OCBC-NISP/Brief-History.aspx?viewmode=0&devicename=&langobjectlifetime=request&loaddevice=1&lang=en-US>, accessed 8 July 2016.

(South Korea)⁶, Gold Capital (Indonesia) and First REIT (Singapore).⁷ According to the 2011 report of the Commission to the Organization of Economic Cooperation and Development (OECD), there were 11 mergers between foreign and domestic companies in the total value of IDR26.3 trillion (25% of total merger transactions), and 9 mergers between foreign companies in Indonesia in the total value of IDR 70.9 trillion (66% of total transactions).⁸ In addition, there were some rather significant acquisition transactions approved by the Commission: the acquisition of PT. Indosat by Tower Bersama Infrastructure, the acquisition of PT. Indomobil Sukses Internasional Tbk by Gallant Venture Pte.Ltd, the acquisition of PT. Carrefour Indonesia by Chairul Tanjung (CT) Corp., and the acquisition of PT. Matahari Pacific and PT Putra Nadya Investama by Multipolar Indonesia Tbk.⁹

In addition to the foregoing, the Commission reported that specifically in the period of July 2012 and June 2013, the total number of approvals on the CBM&A proposals did not significantly increase in comparison to the preceding year. However, most approvals had been granted in the business sector of natural resources and financial services. Statistically, the approvals granted by the Commission had shown a slight increase which proves that Indonesia was becoming increasingly attractive investment destination for foreign investors. It was due to several factors: the Indonesian economy had successfully recovered from the national monetary crisis in 1997, it remained relatively unaffected by the global financial crisis in 2007, the high of lending rate of the Central Bank of Indonesia compared to other central banks, as well as the huge market shares (consumers) supported by robust political and economic stability.¹⁰

However, the core of this problem can be found at the legal perspective that could also be understood from the national, regional, and international legal perspectives. At the national legal perspective, the lack of CMR for CBM&A transactions in Indonesia was triggered by the absence of the relevant legal framework. In addition, the existing law does not adequately respond to or anticipate the emerging problem of CBM&A transactions. In fact, there are no unified and integrated rules of mergers and acquisitions including the controlling of CBM&A transactions and the impacts thereof to business competition. In fact, the rule on merger transactions has been set forth in different and separate schemes of laws, namely as follows: Article 122 to 137 Chapter VIII on mergers, acquisitions, takeover, and splitting in the 2007 Company Law No. 40,¹¹ Article 28 and 29 of the 1999 Law on Prohibition of Monopolistic Practices and

⁶ The transaction in materials had value USD. 523 million; see: Pickering Pacific, "ASEAN 6 - M&A Deals: A Pickering Pacific study of trends in M&A deals in six major ASEAN countries for 2010," <http://www.pickeringpacific.com/wp-content/uploads/2016/12/ASEAN-6-Report-2010.pdf>, accessed 8 July 2016.

⁷ The transaction in the health sector had value for USD. 132 million, *Ibid*.

⁸ KPPU, "Annual Report on Competition Policy Development in Indonesia in the year of 2011", this report was submitted to the Competition Committee - OECD on October 8, 2012, p.5.

⁹ Tumbuan & Partners, "Indonesia", *Merger & Acquisitions Law Guide 2013/14, LexisNexis the 1st Annual Guide to Practicing M&A Law in Asia*, <http://www.lexisnexis.jp/pdf/MALawGuide2013.pdf>

¹⁰ For example, bank rate at the Central Bank of Indonesia was 5%, whereas the bank rate in the Central Bank of Singapore was 3%. There was a significant difference to get huge benefits of running business in Indonesia.

¹¹ Previously, these were regulated in article 102-109 - Chapter VII on mergers, acquisitions, and consolidations of the 1995 Company Law, see Indonesia, *Undang-undang tentang Perseroan Terbatas (Law on the Limited Liability Company)*, UU No. 5 tahun 1995, LN No. 13 tahun 1995, TLN No. 3587 (Law No. 5 of 1995, SG. No. 13 of 1995).

Unfair Business Competition (the 1999 Competition Law),¹² the 2010 Government Regulation No. 57 on Merger and Business Consolidation¹³, and the 2012 Rules of the Commission for Controlling Business Competition (Commission Rules) No. 03 on the second changes of the 2010 Rules of Commission Rules No. 13 concerning guidance for enforcement on mergers and acquisitions of corporations and taking over corporate shares that can potentially result in monopolistic practices and unfair business competition.¹⁴ Thus, the said existing rules on mergers are not appropriate to be applied to CBM&A transactions, due to the fact that such transactions between foreign to foreign companies, foreign to national companies have certain international dimension characteristics. Subsequently, due to the absence of CMR for CBM&A, the Commission has had to apply the merger review guideline which has a national dimension character to review CBM&A proposals and existing CBM&A transactions, even though it was an inappropriate step for the purpose of maintaining fair and sustainable business competition (FSBC) in Indonesia.¹⁵ Therefore, to fulfill such vacuum of law, the Commission needs to introduce a new legal mechanism, specifically in the form of CMR which is urgently required for the review of CBM&A proposals. However, subject to the application of jurisdiction including national laws and the principle of legal certainty, it is necessary to note that any merger,¹⁶ of either national or international dimension character, must establish a new corporation and must be registered at the Ministry of Justice and Human Rights.¹⁷

Furthermore, the absence of CMR for CBM&A in the ASEAN regional legal regime has caused difficulties in maintaining FSBC under Indonesia's jurisdiction. Consequently, the absence of specific CBM&A rules has also opened up opportunities to gigantic corporations to engage in anti-competitive conduct with the effect of lessening business competition and creating bias regionally to its member states including Indonesia. It is due to the fact that ASEAN still lacks specific rules on cross-

¹² Indonesia, *Undang-undang tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat (Law on the Prohibition of the Monopolistic and Unfair Business Practice)*, UU No. 5 tahun 1999 LN No. 33 tahun 1999, TLN No. 3817 (Law No. 5 of 1999, SG No. 33 of 1999).

¹³ Indonesia, *Peraturan Pemerintah tentang Penggabungan atau Peleburan Badan Usaha dan Pengambilalihan Saham Perusahaan yang dapat mengakibatkan terjadinya Praktik Monopoli dan Persaingan Usaha Tidak Sehat (Government Regulation on the Mergers and Business Consolidations)*, PP No. 57 tahun 2010, LN No. 89 tahun 2010 TLN No. 5144 (Government Regulation No. 57 of 2010, SG No. 89 of 2010).

¹⁴ In the matter of corporate shares, it is necessary to be considered that composition of corporate share ownership is still dominated by foreign investors at 57.80%. Such domination had been held by foreign corporations rather than financial institutions. Therefore, the Indonesian Capital Market remains uncompetitive and small. See: Apri Sya'bani, "Minority Shareholder Protection in the Indonesian Capital Market", *Indonesia Law Review* 4 no. 1 (2014), doi: <http://dx.doi.org/10.15742/ilrev.v4n1.96>.

¹⁵ This compulsion is based on the article 27 of the 1999 Competition Law stated that any proposed merger could be banned without having a competition law assessment. See: Perdana A. Saputro, "Article 27 of Competition Law and What Lies Beneath", *Indonesian Law Review* 1, no. 3, (2011), doi: <http://dx.doi.org/10.15742/ilrev.v1n3.59>.

¹⁶ In case of a company intending to undertake a merger, consolidation, or acquisition, article 89 of the 2007 Law No.40 on Limited Company provides that such company should reach a quorum and decision making in the general meeting of shareholders/GMS. See: Ari Wahyudi Hertanto, "Determining Quorum of Attendance and Decision making in the General Meeting of Shareholders based on Court Stipulation due to the Neglectful Absence of the Majority Foreign Shareholder in a Joint Venture Company (A Foreign Capital Investment Analysis)", *Indonesian Law Review* Year 2 Vol.3 December 2012. doi: <http://dx.doi.org/10.15742/ilrev.v2n3.21>.

¹⁷ Registration of a company is required under the 1982 Law No. 3 on Mandatory Company Registration. See: Ari Wahyudi, "Implementation of Mandatory Enterprise Registration Following the Effectiveness of Law No.40 Year 2007 Concerning Limited Liabilities Companies in the Era of Regional Autonomy", *Indonesian Law Review* 2 (2014), pp. 215-255, doi: <http://dx.doi.org/10.15742/ilrev.v4n2.109>.

border mergers and acquisitions to manage such multi-jurisdiction transactions for regional application.¹⁸ ASEAN's business competition law and policy are still in the process of being developed, particularly in managing CBM&A transactions within the free market zone under the ASEAN Economic Community (AEC) introduced in 2015. However, ASEAN had launched the 2010 ASEAN Regional Guideline on Competition Policy to achieve a highly competitive region as envisaged in the AEC Blueprint. Ideally, ASEAN should have a legal framework for managing CBM&A transactions similar to the Directive 2005/56/EC (the Cross-border Merger Directive/CBMD)¹⁹ implemented by the European Communities (Cross-Border Merger) Regulation 2008²⁰ to review multi-jurisdiction transactions²¹. It could be a driving force in the acceleration of ASEAN market integration while enforcing a convergence effort in corporate and merger & acquisition law of ASEAN state members. Then, by referring to EC practices, ASEAN member states should transpose such ASEAN Cross-border Directive into national law before scrutinizing CBM&A proposals.²² For the successful implementation of this kind of Directive, it is necessary to recognize that there will of course be certain major obstacles which need to be considered such as: harmonization of mergers and acquisitions rules, a clear standard on inter - National Competition Authorities/NCAs communications, safeguard for various stakeholders (shareholders, creditors, employees), certain fast track procedures, and potential inconsistencies.²³ Accordingly, such obstacles should be overcome and provided for in such an ASEAN Cross-border Directive as a solution, beside structuring and providing for some other main points: definition of market in the regional context and multi-jurisdiction anti-competitive conduct of corporations in a regional dimension, co-operation between national competition authorities in the exchange of information, in joint investigation, in litigation, and so forth. In order to achieve the foregoing, it is important to conduct competition and merger policy research, comparative (the ASEAN state members) regulatory research concerning companies, competition and mergers & acquisitions, as well as multi-market analysis at the regional level.

In the context of the international legal regime, the absence of CMR for CBM&A is also a handicap for Indonesia in realizing FSBC. This is triggered by the lack of Global

¹⁸ ASEAN, "Overview of Competition Policy," at: www.asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/competition-policy, accessed on 8 July 2016.

¹⁹ This Directive entered into force on December 15, 2005 and should be incorporated into national law by December 15, 2007. See at: European Union, "Cross-border mergers of limited liability companies", Directive 2005/56/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A126041>.

²⁰ This ECMR had also been completed with the Guidelines on the 2007 Assessment of non-horizontal mergers, See: <http://gcl.coleuop.be>, accessed 8 July 2016.

²¹ According to the research conducted by Bech-Bruun and Lexidale in September 2013, it is mentioned that to apply this Directive, the European Union's Directorate General on Internal Market and Services (DG) had commissioned a review based on Article 18 CBMD that called for a review of the Directive five years after the final date of transposition "in the light of the experience acquired in applying it". See: Bech-Bruun & Lexidale, "Study on the application of the Cross-border Merger Directive," September 2013, available at http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf, accessed 8 July 2016.

²² By the deadline of 2007, there were only 16 member states which had transposed the CBMD into national law. In the following year, there were ten member states which had transposed and 4 member states completed the process of transposition as late as 2009. See also: Article 11 and Article 16 of The Directive 2005/56/EC on Cross-border Merger in EU. Bech-Bruun & Lexidale, *Ibid*.

²³ Bech-Bruun; Lexidale, *Ibid*.

Competition Rules (GCR)²⁴, Global Competition Authority (GCA)²⁵, and its convergence efforts²⁶. Subsequently, it also has business implications for companies in the matter of multi-jurisdiction merger review undertaken by several national competition authorities (NCAs)²⁷ and increasing conflicts of NCA's jurisdiction in merger review, as the following examples indicate mainly between: MCIWorldCom v. Sprint,²⁸ Boeing v. McDonnell,²⁹ Rio Tinto Inc. v. Billiton Plc,³⁰ and GE v. Honeywell.³¹ Thus, CBM&A as one of multi-jurisdiction transactions require both GCR and GCA, as a formal legal scheme and institution, to control anti-competitive conducts of gigantic corporations in the globalized or integrated market. It has occurred as these transactions have shown significant increase triggered by the 1994 WTO Agreement Trade Related of

²⁴ Andrew T. Guzman, "International Competition Law," in *Research Handbook in International Economic Law*, eds. Andrew T. Guzman & Alan O. Sykes (Cheltenham: Edward Elgar, 2007), p. 418.

²⁵ Regarding a global (international) institution to manage competition (antitrust) matters, four terms have been promoted by different competition experts. The term of International Antitrust Authority (IAA) was advanced by Fikentscher, Immega, Monti and Drexel through the Draft International Antitrust Code (the DIAC) in Munich on July 27, 1993; and G. Bruce Doern, "Toward an International Antitrust Authority? Key Factor in the Internationalization of Competition Policy", *Governance* 9, issue 3 (July, 1996), pp.265-286; International Competition Authority (ICA) was promoted by Ajit Singh, "Competition and Competition Policy in Emerging Market: International and Developmental Dimensions," *G-24 Discussion Paper series, no. 18*, UN Publication, Geneva, September 2003, pp.18-22, at http://unctad.org/en/docs/gdsmdpbg2418_en.pdf; The same term were also promoted by Paul Crampton and Milos Barutckiski in "Trade Distorsion Private Restrain; A practical Agenda for the future Action," *Southwestern Journal of Law and Trade in the America* 6, (1999); and Claus-Dieter Ehlermann, "The International Dimension of Competition Policy", *Fordham International Law Journal* 17, no.833 (1994); The term of Global Antitrust Authority (GAA) was promoted by Holscher, and Stephen in "Merger Control and Competition Policy in Central East Europe in view of EU Accession", *ACE Project* no. 97-8020, 2001, p. 14; This term was also promoted by Mariana Bode and Oliver Budzinski, "Competition Ways towards International Antitrust: The World Trade Organization versus International Competition Networks," *Marburg Economic Working paper No. 03-2005*, <https://papers.ssrn.com/sol3/papers.cfm?abstract-id=888682>. This term was also advanced by Hahn, Ferrar, and Kroes. Then, the term of Global Competition Authority (GCA) was promoted by Hanlon, Tay, and Willmann, and the EU, see: Pat Hanlon, *Global Airline: Competition in Transnational Industry*, 2nd ed. (Burlington, MA: Butterworth-Heinemann 1999); Abigail Tay & Gerard Willmann, "Why (no) Global Competition Policy is a tough choice," *The Quarterly Review of Economic and Finance* 45, Issue 2-3, (May 2005), pp. 312-324. However, it is necessary to remind that there were some opponents to encounter the establishment of an international (global) competition authority. Therefore, the debate on this topic is still developing and will take time to end it up.

²⁶ See: Done Holbrook, "International Merger Control Convergence: Resolving Multi-Jurisdictional Review Problems," *UCLA Journal of International Law and Foreign Affairs* 7 (2002).

²⁷ See: W. Adam Hunt, "Business Implication of Divergences in Multi-Jurisdictional Merger Review by International Competition Enforcement Agencies," *Northwestern Journal of International Law and Business* 28, no. 147, 2007-2008.

²⁸ See: Elena Solis, et al., "Re The Concentration between MCI WorldCom and Sprint Corporation (case COMP/M.1741 before the Commission of the European Communities (2003/790/EC)," in *Antitrust Report*, Part IV, Elena Solis, Eds. (London: Sweet & Maxwell, 2004), p. 1134.

²⁹ See: See: Eleanor Fox, "Merger in Global Market: GE/Honeywell and the Future of Merger Control", *University of Pennsylvania Journal of International Economic Law* 23, no.3 (2002), pp. 457-467; Barbara Crutchfield George, Lynn Vivian Dymally, and Kathleen A Lacey, "Increasing Extraterritorial Intrusion of European Union Authority in US merger business and competition practice: US Multinational business underestimate the strength of the European Commission from G.E.-Honeywell to Microsoft," *Connecticut Journal of International Law* 19, issue 3 (2004), pp.4-6.

³⁰ See: Tempo Interaktif, "EU widens Billiton-Rio Tinto antitrust probe into acquisition deal", July 5, 2008.

³¹ See: European Commissions, "Case no. COMP/M 2220 - between General Electric and Honeywell," http://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf, accessed 8 July 2016.

Investment Measures (TRIMs)³² to ensure the free flow of investment from developed to developing or to the least-developed countries and other influencing factors such as bilateral agreements on trade and investment, and the ASEAN Free Market. In addition to the foregoing, such increase of investment was also triggered by the highest growth of national economy of China and other emerging economies. Specifically, China has, by employing the paradigm of state capitalism, expanded its investment aggressively to African countries, the United States of America, Europe, as well as to Asian countries to support their domestic economic potentials and growth.³³

Secondly, the root cause of this problem can be looked at from the legal philosophical perspective. From such perspective, the scientific gap is related to the absence of CMR for CBM&A transactions in Indonesia which has significantly lessened business competition. It means that the lack of CMR for reviewing CBM&A proposals and transactions has created inefficiencies, ineffectiveness, and imbalance in business competition, especially between gigantic corporations and small and medium enterprises. As a consequence, it is hard to realize FSBC as an ideal situation in which stakeholders run business by sustaining a balanced mode of competition between companies that is not only benefiting them, but also damaging consumer interests.

In order to find a solution to such problem as mentioned in the root cause above, this study offers at least five solutions: 1) defining CMR under the national legal regime of Indonesia; 2) introducing a new law dealing with cross-border mergers and acquisitions; 3) introducing a governmental regulation regarding CMR; 4) revising any related laws to deal with the implementation of CMR; and 5) establishing a work unit to perform CMR in view of CBM&A proposals including to improve capacity building of the National Commission for the Supervision of Business Competition/KPPU experts and staffs. However, this article will limit its analysis to the offered solution number one, which can be broken down into five sections: i) research question; ii) the concept of Competition Merger Review; iii) seeking appropriate test methods for Indonesia's CMR: a) market dominance test; b) substantial lessening competition test/SLC test; c) public interest test; d) the hybrid test (one to four tests); iv) substantiating SLC Test as a CMR method in Indonesia; v) employing SLC Test guidelines to CBM&A proposals.

Dealing with the CMR, there is a scientific gap in literatures about the function of CMR for CBM&A proposals and existing transactions. However, there are at least four literatures related to this topic written by Pati,³⁴ Chantara-Opakorn,³⁵ Bake,³⁶ and Trossman³⁷ respectively. However, none of them discusses CMR in Indonesia. To

³² See: William I. Robinson, "The Crisis of Global Capitalism: Cyclical, Structural or Systemic?" *Falea Center for Global and International Studies*, 2010. <http://www.soc.ucsb.edu/faculty/robinson/Assets/pdf/theCrisis.pdf>, accessed 8 July 2016.

³³ See: Xi Li and Yong Wang, "A Model of China's State Capitalism." Working Paper, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2061521; and Yea-Mow Chen; Chun-Tien Lin, "Performance of Cross Border Mergers and Acquisitions by Chinese Firms", San Francisco State University, May 2009, at: www.rcie-cnorg/conference/2010/papers/chen-ym.pdf, accessed 8 July 2016.

³⁴ See: Suchismita Pati, "Merger Control under Competition Act," <http://lex-warrior.in/2013/09/merger-control-competition-act/>, accessed 8 July 2016.

³⁵ See: Anan Chantara-Opakorn. "Thailand's Competition Law and Its Implications on International Mergers and Acquisitions." *Wisconsin International Law Journal* 18, no. 3 (2000), pp. 591

³⁶ See: Donald Bake, "Antitrust merger review in an era of escalating cross-border transactions and effects", *Wisconsin International Law Journal* 18, no. 3 (2000), pp.577-589.

³⁷ See: Jeffrey Trossman, "Merger Review under the Competition Act: The Meaning of 'Substantial Lessening of Competition,'" *University of Toronto Faculty of Law Review*, 48 (1990), pp.117-150.

fill such gap, it is necessary to construct CMR guidelines with the SLC Test method for CBM&A in the dimension of Indonesia's national legal regime. For the above purpose, it is necessary to formulate it into a central research question which can be stated as follows: *How to formulate an CMR regulation for CBM&A transactions in an effort to maintain a fair and sustainable business competition in Indonesia ?* More specifically, the above question can be broken down into two questions as follows: 1) Why is CMR required to assess the CBM&A for maintaining a fair and sustainable business competition in Indonesia?; and 2) What are the substantive norms for formulating SLC Test guidelines for reviewing CBM&A proposals?

II. THE CONCEPT OF COMPETITION MERGER REVIEW

Competition Merger Review is a relatively new concept that has been necessarily introduced for obtaining an in-depth understanding on the assessment of CBM&A proposals or reassessing existing CBM&A transactions. The main purpose of this section is to conceptualize merger review specifically from the perspective of the competition law regime. For such purpose, this section will discuss the terms, definitions, dimensions, causal models, the future development, and the necessity of CMR as follows.

A. The Term Competition Merger Review

The term Competition Merger Review (CMR) has been drawn from merger review in general. It is relatively new in literatures. Recently, however, merger review can be conducted from the perspective of at least five dimensions of analysis, starting from national defense and security³⁸, culture, politics, business competition, and other various analyses applying certain disciplines of science such as sociology, or anthropology.³⁹ However, this study will focus only on CMR as defined in the legal perspective below.

B. Defining Competition Merger Review

The paradigm of CMR was first introduced by Goldstein in 2011. However, while it is in the early stage of development, it may potentially become the subject of a heated legal debate in the near future. For the purpose of this study, CMR can be defined as a process of assessment to consider, examine, and evaluate CBM&A proposals mainly under competition law and other additional supporting parameters for ensuring that a fair and sustainable business competition is maintained.

Such assessment may vary from one country to another, due to the different philosophy of their respective competition or anti-trust law regimes. It means that the parameters used for reviewing CBM&A transactions may be the same to some extent, while the rest could be different depending on the country concerned. Basically, any competition (anti-trust) law in the world prohibits anti-competitive behavior by corporations such as monopoly or cartel, as well as the abuse of dominant position in the market which are not only lessening competition itself but are also harmful to consumer interests. Therefore, assessment using competition law as the main parameter is an important factor to measure whether or not there is an indication of contradiction with a fair and sustainable business competition.

³⁸ See: Xioqiong Wang, "National Security Review of Foreign Mergers and Acquisitions in China: Progress and Reform," Indiana University Research Center for Chinese Politics & Business Working Paper No. 20, 1 February 2012.

³⁹ Kevin B. Goldstein, "Reviewing Cross-border Mergers and Acquisitions for Competition and National Security: A Comparative Look at how the United State, Europe, and China separate security concern from competition concerns in reviewing acquisitions by foreign entities", *Tsinghua China Law Review* 3 (Summer, 2011), p.6.

Other than these, there are also additional parameters that could be considered to maintain a welfare and prosperous state. Especially in Indonesia, they can be found in the Preamble of the 1945 Constitution dealing with the principle of social justice, welfare and prosperity for the people of Indonesia and in article 33 of 1945 Constitution concerning the People's Interest-based National Economic System. However, in order to complement the above parameters for CMR, the competition policy of countries which have had experience in successful CBM&A management could also be considered and built upon.

C. Dimensions of Competition Merger Review

Under the competition law regime, the dimension of CMR should include substantial parameters for preventing anti-competitive conduct such as monopoly, cartel, abuse of dominant position, and or fixed pricing. The potential occurrence of such anti-competitive conducts should be initially predicted or indicated before the CBM&A proposal concerned is decided upon by the competition authority. It means that many questions should be addressed in view of the CBM&A proposal in order to assess any future potential anti-competitive conduct after the proposal is approved. In other words, the national competition authority is to review the CBM&A proposal to ascertain whether anti-competitive conduct by a gigantic corporation would lessen competition substantially or close market access to other companies. For instance, if it lessens competition proven by empirical evidence, the authority should take into account the option of deciding to reject the proposal concerned.

Then, based on the territorial application, CMR could be distinguished based on single jurisdiction and multi-jurisdictions. In a single jurisdiction, CMR is conducted by a national competition authority based on its national laws. However, CMR could also involve two or more jurisdictions referred to as multi-jurisdiction CMR. It may have jurisdictions within a certain region, such as ASEAN or EU countries, referred to as regional CMR. However, if it involves two or more jurisdictions located on two different continents, for instance between the American and the European continent, it is referred to as a multiple Merger Review or a global CMR. The latter is now still debated among anti-trust or competition scholars, especially in view of the establishment of a global competition authority (GCA) to function for such Multiple Merger Review under hypothetical global competition rules (GCR).

D. Causal Model of Competition Merger Review

The existence of CMR in a jurisdiction is bound to bring certain consequences to corporations, consumers, and to the national competition authority concerned. CMR would be a guideline or entrance of a green corridor for business competition; however, beyond the determined lines or parameters, the proposed CBM&A should be prohibited due to violating national law orders, such as competition law and related laws. In the event that the merger of two companies is approved, the merging company is in a safe position to compete and comply with the ultimate value of competition its self as well as the state's objectives.

However, if the CMR is ignored by the NCA, there would be consequences on competition at the national level. For instance, when the CBM&A proposal is approved by the NCA without complying with the determined parameters, gigantic corporations can easily engage in anti-competitive behavior. Therefore, CMR should be a screening tool or model to look for indications of corporate motivations for conducting mergers

and any anti-competitive behavior.

E. The future of Competition Merger Review

Based on an understanding of the latest situation of competition in Indonesia, CMR for CBM&A should be developed by adding some additional parameters. It should be complemented with parameters which exist in the Preamble of the 1945 Constitution dealing with the principle of social justice, welfare and prosperity for the people of Indonesia and in the article 33 of the 1945 Constitution on the People's interest-based National Economic System.

At the same time, due to the risk of multi-jurisdictional CBM&A impacts on national economic stability, CMR should be enriched with international dimensions. For such purpose, cooperation between competition authorities in reviewing CBM&A proposals is required in order to measure regional impacts on business competition, such as EU under Cross-border Merger Directive 2005/56/EC which has been implemented by the EU Cross-border Merger Regulation issued on May 27, 2008. In a broad sense, cooperation between competition authorities involving different regions or continents would also be promoted to maintain a fair and sustainable global business competition (global justice in competition) by a hypothetical global competition authority (GCA) based on global competition rules (GCR). However, such proposed multi-jurisdiction competition review institution and rules are still being debated by competition scholars, commissioners, and decision makers on the manner of encountering anti-competitive behaviors by gigantic corporations resulting from CBM&A transactions at the global level.⁴⁰

III. SEARCHING FOR APPROPRIATE TEST METHODS FOR INDONESIA'S CMR

After having reviewed related literatures, there is apparently not one single fixed test method for CMR. However, all of the existing CMR methods are still in debated by competition experts and an international convergence effort is required in the future in order to minimize the differences and to reduce the emergence of merger conflicts. However, to identify an ideal CMR test method for CBM&A, it is necessary to research and possibly choose one of the following seven tests: a) the market dominance test; b) the substantial lessening competition test; c) the public interest test; d) the hybrid tests: 1) the Hybrid One Test; 2) the Hybrid Two Test; 3) the Hybrid Three Test, and 4) the Hybrid Four Test. Each of these seven test methods are described below.

A. The Market Dominance Test

In general, the market dominance standard (MD) test is aimed to prevent or prohibit mergers that strengthen a leading company to reach a dominant position. This approach has been developed in Europe based on the Rome Treaty,⁴¹ more specifically in Directive 2005/56/EC (the Cross Border Merger Directive) and the 2008 Cross-border Merger Regulation.⁴² According to the conclusion of OECD research, a

⁴⁰ See: Zulheri, "Regulating the Global Competition Regime to Promoting a Sustainable Global Justice in Competition", unpublished paper, Post Graduate Degree Program, Andalas University, Padang, December 2011; See also: Guzman & Sykes, "International Competition Law"; Tay & Willmann, "Global Competition Policy"

⁴¹ See Articles 81, 82, and 87 of the *Treaty establishing the European Economic Community*, Rome, 25 March 1957.

⁴² For more detailed about the Directive 2005/56/EC (the Cross-border Merger Directive and the

merger can potentially have anti-competitive effects if the merged company seems to be strengthening a dominant position in the market. If such a company has a dominant position through merger it is possible that such merger will be prohibited.⁴³ However, this test has been obsolete, due to the lack of interpretation and ambiguity of the meaning 'dominant' that could be individually and or collectively which has caused difficulties in implementation.⁴⁴ In practice, this method has been left by Australia (1992), Canada (1999), New Zealand (2001), UK (2002), and the European Community (2004).⁴⁵

B. Substantial Lessening Competition Test

Substantial Lessening Competition Test (SLC) Test is aimed at creating an effective business competition environment which is applied to all companies in undertaking merger or in establishing their business operations in the European common market.⁴⁶ Typically, the SLC test involves certain measures to prevent a merger that tends to tighten control over a small group of companies in the market or to determine a company individually that has domination of a certain market.⁴⁷ Basically, the SLC test is focuses on whether a proposed merger would: 1) narrow the area of competition to a small amount of firms; and or 2) allow companies to have a more complete market power. Otherwise, if a proposed merger is likely to be dominating a market, competition in the business sector concerned is assessed substantially to ascertain whether it is lessened and a merger could be prohibited, unless such lessening changes the situation for the better.⁴⁸ Subsequently, it is also assessed whether such substantial lessening of competition resulted from an anti-competitive conduct of the company concerned as an impact of the merger. However, the SLC Test is less focused on the structural issue of market or dominance; it concentrates on the impact of merger against the existing impediments of competition and the assessment of market power after merger. In other words, investigation under the SLC Test pays greater attention as to whether the prices of goods would increase after merger.⁴⁹

2008 Cross-border Merger Regulation have a look at: eur-lex.europa.eu/legal.content/EN/TXT?uri=CELEX.

⁴³ See: J. William Rowley and A. Neil Campbell, "Multi-jurisdiction Merger Review: Is it time for a common form filing treaty?," *Policy Direction for Global Merger Review* 9, no. 12 (1998).

⁴⁴ These two kinds of test for dominant position had been stated in the Assessment of Concentration Test/ACT as provided by article 2 of the EC Merger regulation, and Substantial Lessening of Competition Test (SLC) Test. Snelders and Dolmans advised EU to replace the first test to the second one by the reason that the second has significant advantages. See: R. Snelders; M. Dolmans, "Cross-border merger in Company Law and Competition Law: Removing the Final Barriers," in *Tasjschrift voor Europees en economische rech* 49, no.9 (September 2002), p.311.

⁴⁵ Other than these states, Belgium, French, Spain, and Poland were also changing their MDS to SLC Test. See: OECD. "Roundtable on the Standard for Merger Review, with a Particular Emphasis on Country Experience with the Change of Merger Review Standard from the Dominance Test to the SLC/SIEC Test." *OECD Working Party No. 3 on Co-operation and Enforcement*, 29 May 2009, p.16.

⁴⁶ Boris Babic, "SIEC vs. Dominance test: SIEC: Croatian and EU Perspective", presentation, 2nd Conference on Merger Control: Recent Trend in EU and Croatian Competition Law, University of Zagreb Faculty of Economics and Business, December 14, 2010

⁴⁷ See: J. W. Rowley and D. I. Baker, eds., *International Merger: The Antitrust Process*, 2nd ed. (London: Sweet & Maxwell, 1996), p. 4 in Rowley & Campbell, "Multi-jurisdiction merger review," in J. William Rowley and A. Neil Campbell, "Multi-Jurisdictional Merger Review-Is it Time for a Common Form Filing Treaty?" *McMillan Binch LLP*, April 1999, http://www.mcmillan.ca/Files/Multi-Jurisdictional%20Merger%20Review_with%20attach_April%201999.pdf, accessed 8 July 2016.

⁴⁸ *Ibid*, p.10.

⁴⁹ See: OECD, "Roundtable," p.16.

Practically, this SLC test has been applied by the U.S.A., the U.K., Australia, Canada, New Zealand, Malaysia, Singapore and others in reviewing CBM&A transactions.⁵⁰ Theoretically, the SLC Test has been discussed by competition law experts with a view to applying and developing it into a supranational merger review. If such proposal gains support from experts and commissioners and becomes regulated in an international legal instrument (convention), the SLC Test would become a general phenomenon and applied in all jurisdictions in the world, and would become a valid and binding method of merger review for all negotiating or member states.⁵¹

C. Public Interest Test

The Public Interest (PI) Test is one of review methods for a proposed merger, in addition to the competition test⁵² in African Countries. These two tests have been provided for in Section 12A of the Competition Act (the Act) granting mandate to the Commission or the Supreme Court of Competition to evaluate mergers by considering the competition aspect on the one hand, and make an assessment purely based on economic standard and public interest on the other.⁵³ The PI is regulated in Section 12A (3) of the Act. The subsection states that “when establishing whether such a merger can or can not be legitimated on the basis of public interest, the Commission or Supreme Court should recommend merger effects that would take place at: a) specific industrial sector or region; b) labors; c) ability of black or small business that could be competitive; d) the ability of national industry to compete internationally”. The PI test is usually made separately and independently by considering the four effects mentioned above. Even though a merger does not result in a contradictory effect to competition, it should be reviewed on the basis of PI because it may potentially be prohibited based on the PI assessment. The PI test is mandatory and ultimately the approval of merger can be granted or banned.⁵⁴ In addition, the PI test has been implemented in South Africa in the industrial and labor sectors. In addition to the above, there have also been some cases of violation of PI, especially related to the ability of national industry to compete internationally, namely in the following cases: 1) Nampak Ltd. vs. Malbak Ltd, and 2) Tongaat-Hullet Group Ltd. vs. Trasvaal Suiker.⁵⁵

D. The Hybrid Test

⁵⁰ See: Thomas W. Ross, Andy Baziliauskas, “Lessening of Competition in Merger under the Competition Act: Unilateral and interdependence effects,” *The Canadian Business Law Journal* 33, no. 3 (2000), p. 373.

⁵¹ See: Douglas H. Gisburg and Scott H. Angstreich, “A Multinational Merger Review :Lesson From Our Federalism,” *Antitrust Law Journal* 68, no. 1 (2000), p. 222.

⁵² Competition Test would be conducted on the basis of Section 12A of the Act which provides that: “the Commission should determine whether or not such a merger would prevent or lessen competition substantially by assessing factors as provided in subsection 2, namely: 1) actual import level and potential in the market; 2) accessibility into the market, including tariff impediments and regulations; 3) the level and trend of concentration and history of collusion in the market; 4) the degree of countervailing powers in the market; 5) characteristic and large of vertical integration; 6) whether a partly or wholly of business of a party that would merger or the proposed merger had been fail or seem to be failure; and 7) what a merger would have consequences to ... competitor effectively”. See: Simbarashe Tayuyanago, “Public Interest Consideration and Their Impact on Merger Regulation in South Africa,” *Global Journal of Human Social Science: E Economic* 15, no. 7 (2015)

⁵³ Tavuyanago, *ibid.*, pp.25-26.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, pp.28-34.

After having analyzed the hybrid test, and as it was mentioned above, there are four possible formations of hybrid test construction. However, it is necessary to remind that all of them should be addressed to maintain a fair and sustainable business competition as an ultimate value. A brief explanation on each is provided in the following sub-sections.

1. The Hybrid One Test

The hybrid One test is a combination of the market dominance standard test and the SLC Test. This hybrid has been employed by the EU by the name of the Significant Impediment to Effective Competition (SIEC) Test. It has been used for a legal term that was first mentioned in article 2 (3) of Council Regulation 4064/89 of 1989. It was subsequently provided for in the EU Merger Regulation. However, these regulations were revised to become the new SIEC Test as stated in article 2 (3) of ECMR 139/2004 which states as follows: 'a significant business concentration which would have impediment of an effective competition, both in common market or in its substantial part, specifically as consequence of creation or the use of dominant position, should be declared incompatible with common market'.⁵⁶ Subsequently, the SIEC Test was constructed by the European Community to prevent any form of market domination by foreign companies when they are investing in Europe. It has been specifically applied for European region characters to maintain the principle of justice to its members.⁵⁷ However, this Hybrid One test has also been applied in the jurisdiction of Brazil, France, and South Korea to review CBM&A proposals.

2. The Hybrid Two Test

The hybrid test is constructed by combining the concept of the market dominance test and public interest test. It means that the substance of the test should be addressed to assess a market structure of products and put stressing on consumer interest protection. At the present time there are no countries applying this Hybrid Two Test. However, African countries may have the opportunity to develop and enrich their CMR by using market structure analysis as a new component in their CMR for CBM&A proposals. It would be certainly determined by the conditions and advancement of their domestic economy and political stability. For such purpose, African countries could conduct a comparative study and take into account the EU experience in applying the market structure test, while adapting it to their respective national legal systems.

3. The Hybrid Three Test

The concept of this hybrid test is composed by employing the SLC test plus the public interest test. This hybrid had been applied previously by the United Kingdom. The U.K. experience could be a reference for Indonesia, due to Article 33 (2) of the Constitution which provides that: 'the branches of production that are vital for state and which dominate the livelihood of the people at large shall be governed by the

⁵⁶ See: Lars-Hendrik Roller and Miguel de la Mano, "The Impact of the New Substantive Test in European Merger Control", Brussels, January 2006, p.3, and Farid Bektashi, Structural Link for the Detection of Collective Dominance: Analysis of Case Law under the EC Merger Regulation, Master Thesis, Lund University, May 2007, pp.24-25; see also Kokkoris, I., "Do Merger Simulation and Critical Loss Analysis Differ Under the SLC and Dominance Test?", *European Competition Law Review*, 2006, vol.27, no. 5, pp.249-260.

⁵⁷ See: Boris Babic, "SIEC vs. Dominance test."

state' can serve as a legal basis to insert the component of public interest into this Hybrid Three Test. Such formulation could be the second choice for Indonesia's CMR. However, it requires a more comprehensive and in-depth analysis and research in order to determine which one is an appropriate and workable model of CMR complying with the current legal and economic conditions in Indonesia. At the same time, the insertion of public interest could also be considered or employed after the Commission's approval is implemented and thereafter.

4. The Hybrid Four Test

The concept of this hybrid four test is substantiated by the following components of assessment: market structure plus the result of competition and also placing emphasis on consumer interest protection. This is the most complete component of assessment in merger review. As a consequence, the Competition Authority concerned needs to prepare for and complete three different kinds of work of test to reach final decision in merger review. It may require more time and substantial funds for operational cost (budget). Thus, conducting this Hybrid Four Test involves more complicated work which needs to be undertaken by the Competition Authority requiring a greater number of staff and experts. However, it is rather difficult to be applied and is not the preferred choice of many countries at the present time. It may be required when there are indications of potential complicated anti-competitive effects of CBM&A transactions in order to maintain the main objective of business competition itself. In other words, it could require extra-ordinary effort by the Competition Authority which could lead to uncertainty, inefficient costs and delays, while the merger review process is supposed to be conducted under the principles of cost effectiveness, expediency, and predictability. Therefore, the Competition Authority should reconsider before taking this option for competition merger review.

Out of the above described seven tests, in my view the Substantial Lessening Competition (SLC) Test would be the most suitable CMR method for Indonesia. There are certain reasons why the SLC test could be considered: 1) there is an increasing trend and amount of using SLC Test as a method of merger review in the world, and in time it would be the most favorable test that helps to converge the CMR; 2) Indonesia has been one of destinations of investment for foreign firms and got involved in business operation through CBM&A;⁵⁸ 3) there is an increasing volume and frequency of CBM&A transactions creating the risk of lessening competition as an impact of anti-competitive conduct; 4) Article 33 (4) of the Indonesian Constitution can serve as the legal basis for employing the SLC test within the jurisdiction of Indonesia; and 5) both state owned companies (BUMN) and non-state owned companies are in the same position of competition purely running their business professionally for seeking financial benefit.

IV. SUBSTANTIAL LESSENING COMPETITION TEST AS A METHOD OF CMR IN INDONESIA

This part would discuss three main points, namely as follows: legal construction, applicability of SLC Test Guidelines, and employing SLC Test Guidelines to the CBM&A Proposal. The above mentioned three main points are elaborated upon in the following section.

⁵⁸ See: Pickering Pacific, "ASEAN 6 - M&A Deals."

A. Legal Construction of the SLC Test

To obtain a legitimate SLC Test which can be applied, it is necessary to construct SLC Test complying with Indonesia's competition and merger law system. Based on article 3 (3) of the 2010 Government Regulation Number 57 on Mergers and Acquisitions, there is a slot of possibility for KPPU to determine and employ the SLC Test as an option. For such purpose, the proposed SLC Test could be optionally regulated in a guideline or in a government regulation. Therefore, it should be formulated in the following several main points: terminology, definition of SLC Test, legal principles for review, criteria, form and characteristics of assessment, related factors to be considered, mergers (horizontal, vertical, and conglomerate merger) affecting or reducing competition or other potential adverse competitive effects,⁵⁹ market definition of goods or services, entry analysis, legal principles for merger review (transparency, certainty, efficiency, procedural fairness), assessment of corporate motives for undertaking CBM&A transactions, the forms of anti-competitive conduct of corporation that is lessening business competition, criteria for substantial or less substantial lessening competition, evidencing of lessening competition, timing for reviewing, co-operation between national competition authorities (NCAs) for investigation related to such a reviewing process of proposed merger, exchanged information between NCAs, formulating a decision, result of assessment, enforcement of such decision of SLC Test, evaluation and amendment of KPPU's decision on SLC Test, and closing. Also, in order to realize such proposed SLC Test, it is necessary to establish a kind of working committee to formulate it provision by provision by having discussions and research. To that end, KPPU should provide and allocate some related experts who have experience in merger review and competition matters supported by the appropriate budget.

B. Applicability of the SLC Test Guidelines

Due to the fact that the concept of SLC Test originated from the U.S.A.⁶⁰, it is necessary to make certain adjustments or modifications in order to ensure its applicability in practice within the jurisdiction of Indonesia. Such adjustments should be made based on the existing norms applied in Indonesia. In another word, such SLC Test should reflect and possess the dimension of Indonesian legal norms.

Accordingly, it is necessary to consider and check whether the SLC Test Guideline has been constructed in compliance with the ultimate value as the highest objective: a modern, prosperity and welfare state of Indonesia, and specifically with the People's Interest based National Economic System as stipulated in the Preamble and in Article 33 of the 1945 Constitution of the State of the Republic of Indonesia. More specifically, it should also comply with national laws (norms) regarding existing competition, merger, and company law regimes. And finally, such SLC Test guideline should also take into account existing and well-recognized international law norms and principles regarding merger review.

⁵⁹ See: The 2002 Enterprise Act of the United Kingdom; Dave Poddar and Gemma Stook, "Consideration of Public Interest Factors in Antitrust Merger Control," <https://www.competitionpolicyinternational.com/consideration-of-public-interest-factors-in-antitrust-merger-control/>, p. 3., accessed 8 July 2016.

⁶⁰ The SLC Test was firstly introduced by the Supreme Court in the case of 'International Shoe Company vs. the Federal Trade Commission' in 1930, see: James R. Williamson, *Federal Antitrust Policy during the Kennedy-Johnson Years* (Westport: Greenwood Press, 1995), p. 14.

In order to ensure the applicability of such guideline, KPPU should seek acceptance from merging companies and consumers promptly after its launching to the public. Accordingly, the said guideline should consider 'obedience or disobedience' of merging companies of such LSCT Test Guideline. In sum, it should be in the form of adopted norms which can be easily applied in practice and without being contradictory to other national and international laws. For such purpose, it should also become highly fact-intensive investigation norms with coherence among those norms implemented in a formal and working institution.

V. EMPLOYING SLC TEST GUIDELINES TO THE CBM&A PROPOSAL

By understanding the current situation of multi-jurisdiction merger transactions and to have a workable SLC Test guideline, it is urgently required to employ such guideline to fulfill the lack of a multi-jurisdiction dimension merger review and to stop or at least minimize any potential anti-competitive conduct by merging companies in Indonesia. There are certain reasons why such a guideline should be employed in the near future in Indonesia, namely: 1) to prevent anti-competitive effects; 2) to prevent the formation of business concentration by gigantic companies harming competition; 3) to anticipate the lack of multi-merger review based on global competition rules/GCR under a global competition authority/GCA or to anticipate the lack of a global competition policy; 4) to anticipate the lack of co-operation between national competition authorities (NCAs); 5) to protect consumer interest from any multi-jurisdiction anti-competitive impacts; 6) to realize a fair and sustainable business competition; and 7) to anticipate the lack of national law regulating cross-border merger and acquisition transactions.

After having considered the enactment of SLC Test Guidelines, it is necessary to employ the same in order to overcome the above described problems. It raises the issue of its workability in practice. For achieving a workable SLC Test Guideline, it is necessary to keep in mind that the SLC Test Guideline is intended for the assessment of norms for merger control in order to achieve a fair and sustainable business competition in Indonesia. Consequently, the concern is how certain legal principles, transparency, certainty, efficiency, and procedural fairness,⁶¹ can be employed during the merger review process of CBM&A proposal. In other words, can those principles be employed during registration (filing), the merger proposal assessment process, and in making a decision by the KPPU in the appropriate manner.

First, the principle of efficiency⁶² should be applied to process registration, the

⁶¹ See: Poddar & Gemma, "Consideration of Public Interest", p. 3

⁶² There are three types of efficiencies: allocative and productive efficiency (together static efficiency), and dynamic efficiency. Kolasky and Dick mentioned that 'allocative efficiency refers to the allocation of resources in a market. It is achieved when the market process leads to all available final and intermediate resources being allocated to their highest value use among all market participants. Whereas productive efficiency describes cost effects within the production process of a particular goods'. Further, Brodley states that 'dynamic or innovative efficiency refers to the extent to which a firm innovates by introducing new as well as improving existing products or process of production. It defers from static efficiency in that it possesses a temporal dimension'. See: W. J. Kolasky and A. R. Dick, "The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers," *Antitrust Law Journal* 71 (2003); Miguel de la Mano, "For the Customer's Sake: The Competitive Effects of Efficiencies in European Merger Control," *EU Commission (DG Enterprise) Paper* No 11/2002 8; J. F. Brodley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress," *New York University Law Review* 62 (1987), p. 1033 in Christian R. Fackelmann, "Dynamic Efficiency Consideration in EC Merger Controls: An Intractable subject or a Promising Change for Innovation," *Center for Competition Law and Policy, Working Paper* (L) 90/06,

process of SLC Test, and at the time of KPPU making a decision on CBM&A transaction proposal. In view of timeliness, KPPU should state a limited time frame required to complete these three phases of process. KPPU would also give some kind of a tolerable time frame to limit the merger process efficiently. For such purpose, KPPU would announce the parties for clarifying information on such merger process before starting registration. Thus, KPPU would ensure that the parties intending to conduct merger acknowledge the efficient process for merger.

Secondly, the principle of certainty should be applied by KPPU and it should be specifically demonstrated in the form of legal certainty of documents required, time limit for the process of merger review, criteria or factors of merger assessment, and in issuing the decision for the proposed CBM&A. In order to make it clear, KPPU should issue a standard of procedures (SOP) for these three phases of merger review process. However, all of these points have become a larger problem in several East Asian countries in the merger review process.⁶³

Thirdly, during the process of merger review, the principle of transparency⁶⁴ should be implemented or demonstrated by KPPU to the parties involved in the CBM&A proposal. KPPU needs to inform about such SOP for merger review, filing, assessment, and decision making. In this case, Coate and Ulrik state that:⁶⁵

"The U.S. Federal Trade Commission promoted transparency through a number of formal and informal programs. Examples include detailed notice, to aid public comment, press releases that clarify reasons for specific decision, policy statement in speeches, and several research projects. The Commission recently initiated the Merger Transparency Project".

Fourthly, the most important one during the process of SLCT Test is to apply procedural fairness.⁶⁶ In this respect, there are several measures to be undertaken by KPPU. It means that KPPU should pay attention to a fair process of registration for mergers and acquisitions to both merging as well as merged firms. KPPU should treat both parties equally with other parties proposing the same kind of multi-jurisdiction mergers. KPPU shall apply the same standard of procedures (SOP) of

the University of Oxford; See also: Andrew Tepperman; Margaret Sanderson, "Innovation and Dynamic Efficiencies in Merger Review," *Final Report, CRA International*, April 9, 2009; and UK's Office of Fair Trading, "Merger: Substantive Assessment Guidance," paragraph 4. 29-435 on Efficiencies, London, May 2003.

⁶³ See: Global Competition Review, "Certainty a Greater Issue than Industrial Policy for merger in Asia," [http:// globalcompetitionreview.com/shop/article/38145/certainty-greater-issue-industrial-policy-mergers-asia](http://globalcompetitionreview.com/shop/article/38145/certainty-greater-issue-industrial-policy-mergers-asia), accessed 8 July 2016.

⁶⁴ In this case, the meaning of transparency is mostly found in the Constitution. In the EU Constitution for example, transparency has four elements: openness, legal clarity, right of access to documents, and duty to give a reason. However, in the Indonesian Constitution (UUD 1945), the meaning of transparency can be found in Article 28 F which provides that 'Every person shall have the right to communicate and to obtain information for the purpose of the development of him/her and social environment, and shall have the right to seek, obtain, possess, store, process, and convey information by employing all available types of channels'. See: S. Precal and M. E. de Leeuw, "Transparency: A General Principle of EU Law," in *General Principles of EC Law in a Process of Development*, Ulf Bernitz, Joakim Nergelius, Cecilia Cardner, Xavier Groussot, eds. (Netherlands: Kluwer Law International, 2008); pp.201-42; and Indonesia, the 1945 Constitution of the Republic of Indonesia

⁶⁵ See: Malcolm B. Coate and Shawn W. Ulrik, "Transparency at the Federal Trade Commission: The Horizontal Merger Review Process 1996-2003," *Antitrust Law Journal* 73, no. 2 (2006), p. 531.

⁶⁶ For understanding about procedural fairness, see; Christine A. Varney, "Procedural Fairness", September 12, 2009, <https://www.justice.gov/atr/speech/procedural-fairness>, accessed 8 July 2016.; and OECD, "Procedural Fairness and Transparency," Paris, OECD, 2003.

SLC Test for merger proposals. KPPU should also prohibit any proposal of merger if such a proposal indicates an implied motive or a bad intention related to the merger, or other similar or implied reasons. For this, KPPU would not pass such a proposal if it contradicts Indonesia's merger, company, and competition law regimes, or the existing public interest.

With a view to the employment of the enacted SLC Test guideline, it is also necessary to underline an interesting point, namely co-operation between national competition authorities (NCAs) in investigation related to such reviewing process of proposed merger. The objective of such co-operation is to complete information relating to the trace of conducts of merging company and to discuss the multi-jurisdictional impacts of such anti-competitive conduct resulting from the CBM&A transaction concerned. Such exchange of information between NCAs would have to be implemented reciprocally between related NCAs.

Furthermore, one of the most important things is how to employ such a SLC Test Guidelines in an empirical way. Accordingly, KPPU should take certain steps necessary for the successful implementation of the said guideline. Firstly, KPPU should enact it in the form of a KPPU Regulation and publish it in order to obtain formal validity and as such to become enforceable with a binding character and to be integrated as part of the national legal system. Secondly, KPPU should establish the SLC Test Department as an integral part of KPPU. It should be supported by capable and credible staff who have expertise and experience in CMR and code of conduct (ethics) for KPPU's SLC Test Staff in implementing their functions, including a Standard of Procedures for undertaking the CMR process. For all of the foregoing, the SLC Test Department should also be provided with related documents, the required facilities and technologies for investigation. However, in of the employment of such SLC Test Guidelines, there are at least two challenges in the successful implementation of CMR process, namely as follows: 1) ensuring a clear or zero corruption during the CMR process derived from the merging companies; 2) improving the mentality of KPPU's staff to be free from corruption. In order to achieve the above, it is necessary to involve the investigating team of the Anti-Corruption Commission (KPK) as a strategic partner during the process of CMR for CBM&A transaction.

VI. CONCLUSION

By referring to the two main research questions mentioned above, I herewith conclude as follows: 1) CMR in the methods of SLC Test for cross-border merger and acquisition proposal is urgently required to fill the absence of a merger review which contains a multi-jurisdiction dimension and to maintain a fair and sustainable business competition in Indonesia; 2) the substantive norms (factors) for constructing CMR in the method of SLC Test for CBM&A transactions in Indonesia should take into account the national law regime: company law, merger law, investment law including the existing public interest. In addition to that, the international law regime, particularly the principles of certainty, efficiency, transparency, and proportionality recognized in business transactions should also be treated as some major points to be considered. Based on the above conclusions, I recommend that KPPU issue KPPU regulation for CMR in the methods of SLC Test for CBM&A, followed by establishing the CMR Department, preparing its experts and staff in merger review, and entering into some agreements between national competition authorities to enhance joint investigation and other activities related to merger review and the enforcement of its decisions.

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