

# The Determination of Relevant Market on Islamic Financial Services Sector: Perspective of Indonesian Business Competition Law

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**Abstract:** After promulgation of Act Number 4 of 2023 concerning the Development and Strengthening of Financial Sector, sharia financing service businesses consisting of Sharia Banking, Sharia Public Economic Banks and Sharia Microfinance Institutions (LKMS) have financing products that tend to be the same. This is related to the definition of the relevant market in Act Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. This study aims to analyze the relevant market and to find potential of anti-competitive behavior in the financial services business. It is a normative juridical research using qualitative analysis. The method is summarized by examining regulations and doctrines related to Indonesian Business Competition Law. The results of this study explain that Sharia Banking, Sharia Public Economic Banks, and LKMS have same relevant market because the only difference is the financing scale. The Sharia Banking as dominant sector can influence the climate of business competition. Based on CR4 theory, the market concentration ratio in the Islamic financial services sector is a market that leads to loose oligopoly. There needs to be a limitation on the scale of financing regarding the maximum value of financing in Sharia Banking area and how much is in the area of LKMS to reduce the potential for abuse of dominance. But, rule of reason approach is still needed to find out the occurrence of violations caused by corporate action. The rule of reason approach used to assess corporate actions is in accordance with the *maslahah mursalah* concept.

**Keywords:** Relevant Market, Islamic Financial Services, Business Competition Law.

**Abstrak:** Pasca diundangkannya Undang-Undang Nomor 4 Tahun 2023 tentang Pengembangan dan Penguatan Sektor Keuangan, pelaku usaha jasa pembiayaan syariah yang terdiri dari Perbankan Syariah, Bank Perekonomian Rakyat Syariah, dan LKMS mempunyai produk pembiayaan yang cenderung sama. Mereka masih merupakan satu kesatuan dari iklim persaingan atau pasar yang bersangkutan. Hal ini terkait dengan pengertian pasar bersangkutan dalam Undang-Undang Nomor 5

Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat. Penelitian ini bertujuan untuk menganalisis pasar bersangkutan dan mengetahui potensi perilaku anti persaingan pada bisnis jasa keuangan. Penelitian ini merupakan penelitian yuridis normatif dengan menggunakan analisis kualitatif. Metode tersebut dirangkum dengan mengkaji peraturan dan doktrin terkait Hukum Persaingan Usaha Indonesia. Hasil penelitian ini menjelaskan bahwa Perbankan Syariah, Bank Perekonomian Rakyat Syariah, dan LKMS mempunyai pasar bersangkutan yang sama karena yang membedakan hanyalah skala pembiayaannya. Perbankan Syariah sebagai sektor dominan dapat mempengaruhi iklim persaingan usaha di sektor jasa keuangan syariah. Berdasarkan teori CR4, rasio konsentrasi pasar pada sektor jasa keuangan syariah adalah pasar yang mengarah pada oligopoli longgar. Perlu adanya pembatasan skala pembiayaan terkait nilai maksimal pembiayaan yang menjadi wilayah Bank Syariah dan berapa yang menjadi wilayahnya LKMS untuk mengurangi potensi penyalahgunaan posisi dominan. Namun demikian, pendekatan *rule of reason* tetap diperlukan untuk mengetahui terjadinya pelanggaran yang diakibatkan oleh suatu aksi korporasi. Adapun pendekatan *rule of reason* yang digunakan untuk menilai aksi korporasi telah sesuai dengan konsep masalah mursalalah dalam Hukum Islam.

**Kata Kunci:** Pasar Bersangkutan, Jasa Keuangan Syariah, Hukum Persaingan Usaha

## Introduction

Economic growth in Indonesia continues to increase every year. This maintenance is supported by various sectors including the infrastructure sector, the manufacturing sector, the financial sector, and other sectors. The financial sector is a sector consisting of companies in the form of banks and non-bank financial institutions managed by business actors who provide financial services to customers. The financial sector is often dubbed as the most fundamental sector in advancing a country's economy.<sup>1</sup>

Sharia Banking is one of the financial institutions of the Islamic financial services sector in Indonesia, which has grown significantly every year. Statistical data from the Financial Services Authority (OJK) show developments in the number of business actors engaged in the islamic financial services sector (sharia banking). As of December 2022, the total distribution of office networks for Sharia Commercial Banks (BUS) and Sharia Business Units (UUS) reached 572 (five hundred seventy two) Head Offices, 1803 (one thousand eight hundred and three) Sub-Branch Offices and 70 (seventy) Offices Cash.<sup>2</sup>

The development of the financial services sector is motivated by the presence of regulations that are able to create a strong and stable financial services sector. On

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<sup>1</sup><https://ojk.go.id/id/berita-dan-kegiatan/siaran-pers/Pages/Sektor-Jasa-Kuangan-Terjaga-Stabil-dalam-Menghadapi-Peningkatan-Ketidakpastian-Global.aspx>

<sup>2</sup> Otoritas Jasa Keuangan, *Sharia Banking Statistics December 2022*, p. 7.

December 15, 2022, the House of Representative (DPR) as the legislator passed Act Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector (hereinafter referred to as the P2SK Law).<sup>3</sup> According to the Minister of Finance Sri Mulyani, the P2SK Law is a law made using the omnibus law method which changes around seventeen regulations related to the financial sector that have been in effect for quite a long time in Indonesia.<sup>4</sup> Therefore, the House of Representative (DPR) passed regulations that are expected to be able to adapt to the dynamics of changing times.

One of the major changes in the P2SK Law is the financial services business, especially in the sharia sector. Whereas the Islamic financial sector is not only Sharia Banking, but also Sharia public economic bank (BPRS), Sharia Microfinance Institutions (LKMS), and Sharia Cooperatives. If the business sector for sharia financing services is considered the same or generalized while the form of business is different, then this could create the potential for unfair business competition. In order to realize a healthy and conducive competition climate in Indonesia, Act Number 5 of 1999 was enacted concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (the Business Competition Law) with the aim of ensuring certainty of equal business opportunities for large business actors, business actors medium and small businesses.<sup>5</sup>

In the P2SK Law, sharia financing service businesses, namely Sharia Banking, Sharia public economic banks (BPRS), and Sharia Microfinance Institutions (LKMS) have financing products that tend to be the same, so that they are still one unit of the competitive climate or market in question. This is as the Business Competition Law defines Relevant Markets, namely *"markets related to a certain marketing area or area by business actors for the same or similar goods and services or the substance of said goods and or services"*.

Afterwards, with the amendment to Article 68 of Act Number 21 Concerning Sharia Banking in the P2SK Law, namely in the case of a Conventional Commercial Bank having a Sharia Business Units (UUS) after fulfilling the conditions set by the Financial Services Authority (OJK), the Sharia Business Units (UUS) must be separated from the main bank to to be BUS. Therefore, this article will potentially increase the existence of Sharia Commercial Banks (BUS) as a new competitor but does not consider the existence of Sharia Microfinance Institutions (LKMS) as another business sector engaged in the same financing services.

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<sup>3</sup><https://www.dpr.go.id/berita/detail/id/42437/t/Omnibus+Law+Sektor+Keuangan%2C+DPR+dan+Pemerintah+Sahkan+RUU+P2SK+Jadi+UU>

<sup>4</sup><https://www.kemenkeu.go.id/informasi-publik/publikasi/siaran-pers/Presiden-Sahkan-RUU-P2SK>

<sup>5</sup> Article Act Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition

The Implementation of changes to Article 68 of Act Number 21 of 2008 concerning Sharia Banking will have legal consequences related to corporate actions that have the potential to lead to market dominance in Islamic financial sector services. Corporate action is an action taken by a company that has implications for the interests of the company, such as mergers, consolidations, acquisitions, spin offs, IPOs, and reverse stock splits.<sup>6</sup>

Basically, Microfinance Institution (MFIs) are financial institutions established specifically to provide business development services and community empowerment, either through loans or financing in micro-scale businesses.<sup>7</sup> So that what distinguishes between banks and MFIs is the financing limitations. MFIs are more targeting financing in the small business sector such as Micro, Small and Medium Enterprises. The Sharia Microfinance Institutions business activities are<sup>8</sup>: *first*, business development services and community empowerment through loans or financing in micro-scale businesses to members and the community, managing savings or providing business development consulting services; *second*, other business activities determined by the Financial Services Authority.

If we take a look closely, there is potential for inconsistencies between the provisions on the financing scale of Sharia Microfinance Institutions and Sharia Banking, especially regarding the obligations of Sharia Banking, namely one of them is channeling financing to the Micro, Small and Medium Enterprises sector, where this target basically also becomes the territory of Sharia Microfinance Institutions. In addition, there is an imbalance in norms related to the implementation of activities between Islamic Commercial Banks and Islamic Financial Institutions. The visible inequality is the potential for market domination by the Sharia banking industry which can cause the Sharia Microfinance Institutions business to the dim.

Huta Disyon has conducted research on business competition law enforcement lawsuits in the Sharia banking industry. The conclusion from this research is that there are many corporate actions in the Sharia banking sector involving the Business Competition Supervisory Commission (KPPU) together with Bank Indonesia and the Financial Services Authority (OJK) to supervise activities carried out in the Sharia banking industry with the aim of creating a competitive climate that is healthy in the sharia banking sector.<sup>9</sup> In addition, referring to another study conducted by Muhammad Arifin et al regarding the analysis of development strategies in competing Islamic microfinance institutions in Aceh with the conclusion that there

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<sup>6</sup> Dhaniswara K. Harjono. *Aksi-Aksi Korporasi dalam Aspek Hukum Perusahaan*, (Jakarta: UKI Press, 2020), p. 18-19.

<sup>7</sup> Article 1 Point 1 of Act Number 1 of 2013 concerning Microfinance Institutions

<sup>8</sup> Article 204 Paragraph (4) Act Number 4 of 2023 concerning Development and Strengthening of the Financial Sector.

<sup>9</sup> Huta Disyon, "Tantangan Penegakan Hukum Persaingan Usaha pada Industri Perbankan Syariah", *Jurnal Persaingan Usaha*, Vol. 2 No. 2 Tahun 2022.

are several factors both internal and external that influence the development of Islamic Microfinance Institutions. This development strategy aims to increase the resilience of MFIs so they can compete with other sharia financial services.<sup>10</sup>

Based on the above references, there are things that interest the author to examine by conducting research related to business competition law enforcement in the Islamic financial services sector and the potential for violations of Act Number 5 of 1999 after the issuance of Act Number 4 of 2023 concerning Development and Strengthening of the Financial Services Sector. This research uses a positive legal perspective and *maslahah mursalah*. To find out whether LKMS in Indonesia are still included in the same relevant market as Sharia Banking or not, the positive law used is related to the relevant market theory and the implications of corporate actions carried out by Sharia Banking reviewed with the Anti-Monopoly Law. The *maslahah mursalah* theory is used to determine whether the rule of reason approach is in accordance with the objectives of Islamic law itself or not.

This research is a type of juridical-normative research or also can be called normative legal research. This research examines legal materials that contain normative rules. Apart from that, it also examines materials related to literature and secondary materials that have been collected.<sup>11</sup> The following is the formulation of the problems from this research based on the background described above: 1) What is the Relevant Market Analysis in Business Competition in the Islamic Financial Services Business Sector Based on Act Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition; 2) What are the Challenges of Business Competition in the Islamic Financial Services Sector After the Issuance of Act Number 4 of 2023 Concerning the Development and Strengthening of the Financial Sector?

## Result and Discussion

### Relevant Market Analysis in the Islamic Financial Services Business Sector Based on Act Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition

Business competition law is a regulation that aims to regulate the actions of business actors in carrying out their business activities correctly and properly to create a healthy business climate.<sup>12</sup> As Adam Smith argued in *The Wealth of Nations* (1776), competition will encourage the allocation of production factors towards uses

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<sup>10</sup> Muhammad Arifin, Riza Aulia dan Nurul Azizah, "Analisis Strategi Pengembangan Dalam Persaingan Lembaga Keuangan Mikro Syariah Di Aceh", *Scientific Journal of Students Islamic Economics and Business*, Vol. 3 No. 2, 2022.

<sup>11</sup> Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana, 2008), p. 29.

<sup>12</sup> Kodrat Wibowo and Chandra Setiawan Ed., *Two Decades of Business Competition Law Enforcement: Debates and Unresolved Issues*, (Jakarta: KPPU RI, 2021), p. 93.

that have high efficiency and value.<sup>13</sup> The existence of competition will indirectly make commercial companies use certain strategies to develop products, technological innovations and services, so that they can produce more diverse product choices, better products and stable prices in certain relevant markets. Richard Posner's thoughts regarding the principle of efficiency put forward in his book *Economic Analysis of Law* are in line with the aim of establishing the Business Competition Law.<sup>14</sup> Posner's efficiency principle was influenced by Jeremy Bentham's Utilitarian Theory which prioritizes the principle of utility or expediency. In economics, the principle of efficiency is an important principle. Apart from that, Posner believes that the role of law must be seen in terms of the resulting efficiency, value and usefulness.<sup>15</sup>

Determining the relevant market for certain goods or services is usually used to describe the size of a market with the reach or marketing area of the same, similar or substitute for goods and/or services.<sup>16</sup> The definition of the relevant market is a very important part for the Business Competition Supervisory Commission (KPPU) in proving the potential for misuse of market control by certain business actors. Appropriate determination of the relevant market can measure market structure as well as limitations and anti-competitive behavior. By knowing the relevant market in a particular sector, it can be determined which is the dominant business actor which can limit other competing business actors.<sup>17</sup> Apart from that, determination of the relevant market can also be used as a guideline to examine a case whether it is deemed to have violated the provisions of business competition law or not.

In proving whether there is a violation or not, the approach taken can be through a per se illegal and rule of reason approach. Per se illegal in the context of business competition law is a situation or action in the form of anti-competitive behavior such as through certain agreements and other actions that harm other business actors or consumers without having to prove that the action damages the business competition climate, so this is absolutely prohibited.<sup>18</sup> The doctrine of Per

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<sup>13</sup> Oti Handayani, et al., "Relevant Market Analysis in Business Competition Law in the 4.0 Disruption Era (Online Business Versus Conventional Business)", *Soumatra Law Review*, Vol. 3 No. 2, 2020, p. 162.

<sup>14</sup> Richard A. Posner, *Economic Analysis Of Law*, (Boston, Toronto, London: Little Brown and Company, 1992), p. 25-26.

<sup>15</sup> *Ibid*, p. 162-163.

<sup>16</sup> Article 1 Point 10 of Act Number 5 Year 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

<sup>17</sup> Andi Fahmi Lubis, et. al., *Business Competition Law Between Text and Context*, Jakarta: GTZ, 2009, p. 50.

<sup>18</sup> Susanti Adi Nugroho, *Business Competition Law in Indonesia in Theory and Practice and Application of Law*, Jakarta: Kencana, 2012, 693.

se illegal was first used by the American Supreme Court.<sup>19</sup> Meanwhile, the rule of reason is that an act that is prohibited needs to be proven beforehand to what extent the anti-competitive act or behavior has an impact on competition in the market. For this reason, the rule of reason approach is usually aimed at markets where the phrase "*can lead to unfair business competition*" is found. Basically this doctrine is used to understand a behavior that is suspected of causing unfair business competition, but anti-competitive behavior is not automatically prohibited. However, what is seen is the impact of his behavior based on the available evidence.<sup>20</sup>

Basically, Sharia Commercial Banks, Sharia Business Units, and Sharia Public Economic Banks are still one unified type, namely Sharia Banking cluster. Meanwhile, Sharia Microfinance Institutions is a non-bank financial institution. However, in its development, all of these Islamic financial institutions have financing products that tend to be the same. One of these similarities is found in the explanation of the third part regarding Sharia Banking Article 21C Paragraph (1) of Law Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector which explains the obligations of Sharia Commercial Banks and Sharia Business Units to distribute financing to certain sectors, Business Micro, Small and Medium, inclusive financing and/or sustainable financing. This is the same as Sharia Microfinance Institutions (LKMS), namely financial institutions specifically established to provide business development and community empowerment services such as microbusiness financing in the form of loans, savings, or providing business development consulting services. So that LKMS itself has goals that lead to micro-scale funding and community economic empowerment.<sup>21</sup>

After the issuance of Act Number 4 of 2023 (P2SK Law), there have been several significant changes related to Islamic financial service institutions. In this law, Islamic financial service institutions including Sharia Commercial Banks (BUS), Sharia Public Economic Banks (BPRS), Sharia Business Units (UUS), and Sharia Microfinance Institutions (LKMS), which these institutions also is a derivative of the conventional financial services sector. The P2SK Law also changed the term Sharia Rural Banks to become Sharia Public Economic Banks. This refers to Article 13 of the P2SK Law that "*Sharia People's Economic Bank, hereinafter referred to as Sharia Rural Bank, is a type of Islamic Bank which in its activities does not provide services in direct traffic jams*".

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<sup>19</sup> A.M. Tri Anggraini, *Prohibition of Monopolistic Practices and Unfair Competition Per Se Illegal or Rule of Reason*, Jakarta: Postgraduate Faculty of Law University of Indonesia, 2003, 80.

<sup>20</sup> Susanti, *Business Competition Law in Indonesia in Theory and Practice and Application of Law*, 712.

<sup>21</sup> Article 1 Point 1 and Article 3 of Act Number 1 Concerning Microfinance Institutions.

When examining the explanation regarding the relevant market in Article 1 Point 10 of Act Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition<sup>22</sup>, the relevant market has two dimensions, namely the product dimension as stated in the sentence “*for goods and/or services of the same or similar or substitution of the said goods and/or services.*”, and regional or geographical dimensions as in the sentence “*related to certain marketing areas or areas*”.<sup>23</sup> In the event that Sharia Banking have the same financing products as LKMS, then these institutions enter the same relevant market. The relevant market is a very significant concept for interpreting the market size of a product. This market size is important because it can identify how much control over certain products in that market by a business actor.<sup>24</sup>

Application or definition of the relevant market in the Islamic financial services sector is important, because it can explain and identify how much domination of Islamic financial services products in a market by certain business actors. Because the existence of anti-competitive behavior that occurs can be seen through the relevant market that has been determined. In addition, one approach that can be used is the elasticity of demand approach. Through this approach, it can be seen how far the sensitivity of a product to price changes is expressed by the percentage change in demand or the percentage change in price. Many factors must be considered in order to determine what is meant by the relevant market for a product or service. An outline for determining the relevant market can be done by taking into account the specific characteristics of each product, the specific product procurement facilities and each product, the price and each product prevailing in society, the sensitivity of each product to changes in prices in the community, the existence of specific vendors or suppliers for each product, and the recognition of each of these products by the general public who use or use the product.

Based on the description above, there are several potentials that can affect business competition and become an obstacle to business competition in the Islamic financial services sector. Namely because existing financing products at Sharia Banking have similarities to financing at LKMS, this has the potential to cause unfair business competition, because Sharia Banking institutionally have greater capital to channel funds in the form of certain financing than LKMS. This is because there are no limitations regarding the amount of capital disbursed by Sharia Banking and

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<sup>22</sup> Article 1 Point 10 of the Business Competition Law, "markets related to certain marketing areas or by business actors for the same or similar goods and services or the substance of said goods and or services".

<sup>23</sup> Andi Fahmi Lubis, et. al., *Business Competition Law Between Text and Context*, Jakarta: GTZ, 2009, 23.

<sup>24</sup> Princessa Deanera and Siti Anisah, “Relevant Market Analysis in KPPU Decisions (Study of Case Decisions Number 10/KPPU/-1/2016 and Number 13/KPPU-I/2019)”, *Al-Adl Law Journal*, Vol. 14 No. 1, 2022, 25.



LKMS. Both of them can provide financing to small businesses. So the target market is the same. Referring to article 21C Paragraph (1) of Act Number 4 of 2023 Concerning the Development and Strengthening of the Financial Sector, this actually indicates the potential for anti-competitive behavior to lead to unfair business competition. This article actually has the potential to kill the business of Islamic Microfinance Institutions because basically LKMS is formed to distribute and collect funds, especially for Micro small and Medium Enterprises.<sup>25</sup>

In addition, in the third part concerning Sharia Banking, Article 21C Paragraph (1) of Act Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector, explains that *"Sharia Commercial Banks and Islamic Business Units are required to distribute financing for certain sectors, Micro Enterprises, Small and Medium Enterprises, inclusive financing, and/or sustainable financing"*. This indicates that Sharia Banking will have a dominant position or standing over LKMS, because both have the same target market for financing products based on sharia principles.

## **The Challenge of Business Competition as an Implication of the Relevant Market in the Islamic Financial Services Sector After the Issuance of the P2SK Law**

### **Digital Financial Services Institution**

Dynamically, current economic activity shows a change in behavior from conventional to digital which also influences law enforcement against business competition.<sup>26</sup> Digital platforms aside from offering many benefits to society, on the other hand, they also have significant control over consumer data which has the potential to cause various problems. Not only related to the protection of personal data, but also challenges related to unfair commercial competition that may arise, such as determining the relevant market and abusing the dominant position in the digital economy.<sup>27</sup>

Advances in communication and data processing enable the emergence of the production of new products and services that can affect global economic value and disrupt the sustainability of traditional economic systems. On the one hand, this progress can provide benefits and stimulate economic growth, but on the other hand it can also cause business competition problems and create the need for new regulations.

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<sup>25</sup> Act Number 1 of 2013 concerning Microfinance Institutions.

<sup>26</sup> Rohmat, "The Urgency of Establishing a Digital Market Law as an Instrument for Supervision of Business Competition in the Digital Age," *Journal of Business Competition* 2, no. 2 (2022), 121.

<sup>27</sup> Ahmad Sabirin and Raafid Haidar Herfian, "The Impact of Digital Ecosystems on Business Competition Laws in Indonesia and Optimizing the Role of the Business Competition Supervisory Commission (KPPU) in the Digital Economy Era," *Journal of Business Competition* 1, no. 2 (2021), 77.

The rapid development of technology and information has an impact on human life, one of which is the development of digitalization in financial services. There are many benefits to be gained from digitizing financial services. Currently, a person can open an account and make various transactions using only a smartphone, without having to come directly to a financial institution.<sup>28</sup> Digital financial services are all financial service activities carried out via the internet. Digital financial services are broader than mobile banking. With digital financial services, customers can access data via desktop, mobile and ATM (Automatic Teller Machine).

According to POJK No.12/POJK.03/2021, the definition of a Digital Bank is an Indonesian Legal Entity Bank (Bank BHH) that carries out business activities and provides services via electronic platforms without using a physical office other than the head office or limited physical office.<sup>29</sup> Until now, people in general have used digital banking services. Digital banking services by digital banks are aimed at maximizing the utilization of customer data as an effort to provide services faster, easier, as needed. Electronic banking services can also be carried out by customers independently while still paying attention to the security element.

The development of digitalization in financial services has not only had an impact on conventional banks, but also on Islamic banks. In accordance with customer needs and the demands of the times, Sharia Banking are currently innovating in providing services to customers digitally. Customers do not need to come directly to the bank to carry out various financial transactions such as cash deposits and cash withdrawals. Customers can go directly to an ATM machine that is placed in a public place by conventional banks and Sharia banking.<sup>30</sup> To make transactions at ATM machines, customers only need to bring an ATM card or use the mobile banking application on their smartphone.

Technological innovation in financial services is currently known as Financial Sector Technology Innovation (ITSK), is one of the supporting factors in the development of digital banks. The presence of Act Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector (P2SK Law) provides an understanding of ITSK, namely technology-based innovations that have an impact on products, activities, services, and business capital in the digital financial ecosystem.<sup>31</sup> The payment system, collection and distribution of funds, raising capital, investment management, settlement of securities transactions, risk management, market support, activities related to digital financial assets such as crypto currency assets, and other financial service activities are the scope of ITSK.

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<sup>28</sup> Accessed on the page <https://www.-digital-and-bank-digital-lt647683af1cb07/> on September 15, 2023.

<sup>29</sup> POJK No.12/POJK.03/2021 Concerning Commercial Banks.

<sup>30</sup> Andrew Shandy Utama, "Digitalization of Conventional Bank Products and Islamic Banks in Indonesia", *Journal of Law, Legislation and Social Institutions*, Vol.6 No. 2 years 2021.

<sup>31</sup> Article 1 number 34 of the Act Number 4 of 2023 concerning Development and Strengthening of the Financial Sector.

Parties that may organize ITSK are Financial Services Institutions (FSI), and other parties conducting business activities in the financial sector in the form of limited liability company legal entities or other legal entities in accordance with statutory provisions. Sharia Banks and Sharia Micro Finance Institutions (LKMS) are FSI whose business activities are carried out using sharia principles. The Islamic Financial Services Institution can organize ITSK to develop its business.

In practice, ITSK at The Islamic Financial Services Institution is in the form of an application feature that can be operated on a smartphone with its function to facilitate the payment system. The easier this feature is to understand and use, the more people are interested in using digital The Islamic Financial Services Institution. Another advantage of digital Islamic Financial Services Institution is that there are many cashback promos where the digital bank works with merchants selling goods and services. This promo can be used by customers from digital Islamic Financial Services Institution when making transactions.

The presence of ITSK, which in this case is a digital Islamic Financial Services Institution, provides various kinds of benefits and conveniences. However, there are also challenges in developing digital Islamic Financial Services Institution. The presence of the P2SK Law legitimizes Islamic Banks to add services in the digital financing sector. Sharia Banking have large capital. Therefore, Sharia Banking are able to develop their business by innovating using technology to become Digital Sharia Banks. This is different from LKMS, whose scope of financing is not as large as Islamic Banks, so that LKMS have not fully switched to digital. The large amount of socialization and marketing of Digital Sharia Banks in various media, both electronic and print, has made people more trust and choose Digital Sharia Banking compared to LKMS. People will tend to choose financial service institutions that have easier access, such as digital banks.

In addition, Digital Sharia Banking are superior to LKMS in developing ITSK. Moreover, there are requirements that are considered difficult for LKMS to develop their business into digital LJKS. The requirements that must be met to become a digital bank (LJKS digital) are contained in Article 24 POJK Number 12/POJK.03/2021<sup>32</sup>, first, serving the needs of the community using a business model with safe, innovative and secure technology; second, have the ability to manage the banking business with a prudent and sustainable digital model; third, have adequate risk management; fourth, fulfilling governance aspects, including meeting the Board of Directors who have other competencies in accordance with OJK provisions regarding fit and proper tests for key parties in financial services institutions; fifth, protect and be responsible for the security of customer data; and sixth, providing efforts that contribute to the development of the digital financial ecosystem and financial inclusion. The existence of these requirements makes it

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<sup>32</sup> Article 24 POJK No.12/POJK.03/2021 Concerning Commercial Banks.

increasingly difficult for Sharia Financial Services Institutions in the form of LKMS to compete with Sharia Financial Services Institutions in the form of Sharia Banking.

Therefore, it would be better if these rules were made to make it easier for LKMS to digitize the services offered. As well as the need for alignment of the capabilities of LKMS in order to get the same opportunities as other Islamic financial sector service institutions.

### **Corporate Action**

Corporate actions are known in general in the form of mergers, fusion/consolidation, acquisitions and spin-offs whose initial conception was a form of business development. The regulation of corporate actions in company law in Indonesia is contained in Chapter VIII (eight) of Act Number 40 of 2007 concerning Limited Liability Companies (Limited Liability Companies Law). Basically, the implementation of corporate actions is a personal matter of each company. Even so, the Company Law provides limitations for companies that will carry out corporate actions. The Company Law states that legal actions for merging, consolidating and taking over companies must pay attention to two aspects, namely: first, the interests of the company, priority shareholders and company employees; and secondly, public interest and healthy competition in doing business.

Corporate actions are also regulated in banking to be precise in Article 28 of Act Number 10 of 1998 concerning Amendments to Act Number 7 of 1992 concerning Banking (Banking Law) which reads: *“Mergers, consolidations and acquisitions must first obtain permission from the Bank's Management Indonesia”*. Banks in conducting mergers, consolidations and acquisitions must avoid the emergence of a concentration of economic power in a group in the form of a monopoly which is detrimental to society and detrimental to the interests of customers.

Merger activities can be pro-competitive, but can also be anti-competitive if there is no control from the business competition authority. The existence of mergers in the business world should have a positive impact on companies that fail from an operational perspective. However, in practice, many merger activities are misused by business actors who intend to expand their market. In addition, conflicts often arise between merger interests for reasons of efficiency and business competition issues. Business actors will always use efficiency reasons as a basis for mergers and business competition authorities will pay more attention to business competition issues first. Mergers that lead to anti-competition are mergers that are feared by competition law. Because directly or indirectly, a merger can have a relatively large influence on the competitive conditions in the relevant market. In

conditions where there are two or more companies merging, then the market shares of the two companies joining will unite and form a larger combined market share.<sup>33</sup>

In order to develop its business, Sharia Banking, which are a form of company, can carry out corporate actions such as mergers. Meanwhile, LKMS in the form of cooperatives cannot carry out corporate actions. LKMS with the form of a company can merge with a Sharia Public Economic Banks. However, the merged entity must become a Sharia Public Economic Banks. The limited movement of LKMS in carrying out corporate actions will have an impact on the difficulty of LKMS in developing their business. If this continues, LKMS cannot compete with banks.

Whether we realize it or not, corporate actions including mergers, consolidations and/or acquisitions will affect competition between business actors in the same relevant market and have an impact on consumers and society. Sharia Banking and Sharia Microfinance Institutions are business entities that are still included in the same relevant market regarding the products offered. Merger, consolidation or takeover by Sharia Banking may result in reduced competition. This has the potential to harm other business actors, consumers and society. Therefore, the Business Competition Law prohibits corporate actions that could result in monopolistic practices and/or unfair business competition. This means that not all corporate actions carried out by companies have the potential to lead to monopolistic practices and unfair business competition. What is prohibited are corporate actions that violate regulatory provisions or do not meet the reasonable limit of material value based on an assessment carried out by the KPPU or another assessment team.

According to the Business Competition Law, companies that carry out corporate actions (merger, consolidation, or acquisition of shares) which result in the value of their assets and/or sales value exceeding a certain amount, are required to submit notifications to KPPU. In addition, provisions for companies that are required to submit notifications are also listed in the Regulation of the Commission for the Supervision of Business Competition Number 3 of 2023, namely: first, comply with the asset value and sales value limits; second, there is a change in control; third, not transactions between affiliated Business Actors; and fourth, transactions between Business Actors who own Assets and Sales in Indonesia.<sup>34</sup>

Submission of notification by the company to KPPU no later than 30 (thirty) days from the date of merger, consolidation or acquisition of shares or assets legally valid. The notification (notification) is intended so that the corporate actions carried out by the company do not adversely affect the business competition climate. In

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<sup>33</sup> Muhammad Surya Mustariyakuma, "Juridical Review of Merger Notification in Business Competition Law: A Case Study of PT FKS Multi Agro TBK", *Journal of the Law Masters Program, Faculty of Law, University of Indonesia*, Volume 2 Number 1, 2022, 170.

<sup>34</sup> Regulation of the Business Competition Supervisory Commission Number 3 of 2023 concerning Assessment of Mergers, Consolidations, or Acquisitions of Shares and/or Assets That May Lead to Monopolistic Practices and/or Unhealthy Business Competition.

order to find out whether corporate actions carried out by the company can result in monopolistic practices and/or unfair business competition, an assessment is required by the Business Competition Supervisory Commission (KPPU). Analysis of the practice of mergers and acquisitions is only possible in a textual normative way that refers to the impact of these mergers and acquisitions.<sup>35</sup>

The prohibition on corporate actions that could lead to monopolistic practices and/or unfair business competition is regulated in Article 28 and Article 29 of the Business Competition Law. Apart from that, Government Regulation Number 57 of 2010 on Mergers and Consolidations of Business Entities and Takeovers of Company Shares which May Result in Unfair Business Competition also regulates procedures for submitting notifications, assessments by the Business Competition Supervisory Commission (KPPU), and consultations on corporate actions carried out by the company. To be able to determine whether a corporate action (merger, consolidation and/or takeover) of Sharia Banking can lead to monopolistic practices and unfair business competition. There are two basic parameters as a reference for evaluation that can be used, namely the determination of the relevant market and an assessment of the existing level of competition in the relevant market. The relevant market is very important in determining whether there is a monopoly practice that can be caused by corporate actions.

Determination of the relevant market is very relevant and requires attention in assessing whether there are corporate actions that violate the provisions of the company resulting in unfair business competition. Sharia Banks and LKMS are Sharia FSI whose financing products are based on Sharia principles. Therefore, Sharia Banking and LKMS are relevant markets. In the second part of the Banking chapter, Article 28A of the P2SK Law also explains that Public Economic Banks can merge with microfinance institutions. Then if the merger occurs, the legal entity that is formed must become a Public Economic Banks. So that Microfinance Institutions as smaller entities will merge into one with Public Economic Banks, both conventional and sharia.

However, when it is determined that there is a potential or alleged violation that could lead to unfair business competition, a rule of reason approach is still needed through several aspects in an interdisciplinary manner. This is because, basically, corporate actions are not prohibited according to both Company Law and Business Competition Law in Indonesia.

### **Analysis of Changes in Market Concentration Based on the Concentration Ratio for Biggest Four (CR4) Index**

The CR4 index, or often known as the concentration ratio for the top 4 companies, has been the most relevant index for measuring concentration before the

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<sup>35</sup> Ida Nadirah, "Perspective of Business Competition Law on Mergers and Acquisitions of Companies in the New Normal Era", *SiNTESa Journal*, Vol. 1 No. 1, 2021, 970

emergence of the Herfindahl-Hirschman Index. The index calculation is carried out by adding up the market shares of the 4 largest companies in the same relevant market.

However, the main weakness of this index is that differences in market structure may not be visible. A market where each of the four largest companies controls 20% of the market has the same CR4 value as another market whose shares are owned by the top four companies, at 55%, 20%, 4%, and 1% respectively, i.e. 80% overall, even though the level of competition is very different for four companies of the same size versus four companies of different sizes. A further aspect of the problem is that monopoly or oligopoly risks arising from mergers may not be highlighted if the merger occurs between the top four firms, and ignored altogether if the market consists of only four firms. Additionally, CR4 does not consider the market as a whole, but only a select number of companies.

**Formula:**

$$CR_4 = \sum_{i=1}^4 s_i.$$

According to Gwin, the CR4 value criteria are as follows:<sup>36</sup>

- 1)  $CR_4 = 0$ , then it includes the minimum category and perfect competition market structure.
- 2)  $0 < CR_4 < 40$ , then it is included in the low category and the market structure is effective or monopolistic competition.
- 3)  $40 < CR_4 < 60$ , then it belongs to the lower middle category and the market structure is monopolistic competition or loose oligopoly.
- 4)  $60 < CR_4 < 90$ , then it belongs to the upper middle category and the market structure is tight oligopoly competition or a dominant company with a competitive fringe.
- 5)  $CR_4 > 90$ , then it is included in the high category and the market structure is effective monopoly competition (near monopoly).

Based on Sharia Banking Statistical data released by the Financial Services Authority, in 2022 the total assets of Sharia banking which includes Sharia Commercial Banks (BUS) and Sharia Business Units (UUS) in Indonesia are 802.2 trillion rupiahs. Meanwhile, the assets of Islamic Microfinance Institutions in the non-bank financial industry sector are 580.64 billion rupiahs. Then to calculate market concentration based on the CR4 formula, it is necessary to determine the 4 institutions with the largest market share in the same relevant market. In the Islamic

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<sup>36</sup> Lincoln Arsyad and Stephanus Eri Kusuma, *Industrial Economics: Structure, Behavior and Performance Approach*, (Yogyakarta: UPP STIM YKPN, 2014), 109.

finance sector, there are 4 banks that have the largest market share, namely Bank Syariah Indonesia (BSI), Bank Muamalat Indonesia, Bank Panin Dubai Syariah and BCA Syariah. Based on the annual financial reports released by each bank in 2022, the following data is obtained:

Total Sharia Banking Assets (BUS + UUS) for Islamic Banks in Indonesia is Rp. 802.2 trillion rupiahs. Then:

1. BSI<sup>37</sup> = 38.11% (305 trillion rupiahs)
2. Bank Muamalat Indonesia = 7.66% (61.4 trillion rupiahs)
3. Bank Panin Dubai Sharia = 1.84% (14.8 trillion rupiahs)
4. Bank BCA Syariah = 1.59% (12.7 trillion rupiahs)

In the case of the relevant market in the Islamic finance sector which includes Sharia Commercial Banks, Sharia Business Units, and Sharia Microfinance Institutions, the total Islamic Financial Assets include BUS + UUS + LKMS = Rp. 802.2 trillion + Rp. 580.64 billion = Rp. 802,781 trillion. Then:

1. BSI = 38.09%
2. Bank Muamalat Indonesia<sup>38</sup> = 7.65%
3. Bank Panin Dubai Syariah<sup>39</sup> = 1.83%
4. Bank BCA Syariah<sup>40</sup> = 1.58%

$$CR4 = 38.09\% + 7.65\% + 1.83\% + 1.58\% = 49.15\%$$

CR4 Index on Market Competition Level

No.	Scale	Market Competition Level
1	0	Perfect Competition
2	0 - 40	Monopolistic Competition (Effective Competition)
3	40 - 60	Loose Oligopoly
4	> 60	Tight Oligopoly - Dominant Firm with a Competitive Fringe

Based on the above calculations, the Islamic Financial Services Sector which includes BUS, UUS, and LKMS has a market concentration towards a loose oligopoly market. This means that this market can still be said to be a competitive market at the middle level, but you still need to watch out so that the structure does not lead to a tight oligopoly.

<sup>37</sup> [https://ir.bankbsi.co.id/annual\\_reports.html](https://ir.bankbsi.co.id/annual_reports.html)

<sup>38</sup> <https://www.bankmuamalat.co.id/index.php/hubungan-investor/laporan-tahunan>

<sup>39</sup> [https://paninbanksyariah.co.id/document/anual\\_report/Laporan%20Tahunan%20Panin%20Dubai%20Syariah%20Tahun%202022.pdf](https://paninbanksyariah.co.id/document/anual_report/Laporan%20Tahunan%20Panin%20Dubai%20Syariah%20Tahun%202022.pdf)

<sup>40</sup> <https://www.bcasyariah.co.id/laporan-tahunan>



## The Rule of Reason Approach in Maslahah Mursalah's Perspective

The rule of reason is an approach commonly used by the KPPU in assessing whether a particular legal act is proven to result in unfair business competition or not. Basically, not all actions contained in the Anti-Monopoly Law are prohibited. However, there are certain actions that are permitted by law as long as they do not give rise to unfair business competition in the relevant market. One of them is mergers and acquisitions. In this case, mergers and acquisitions are corporate actions that are permitted under the Limited Liability Company Law. However, within the scope of business competition, mergers and acquisitions can also have an impact on the competitive climate. Therefore, a rule of reason approach is needed to assess whether one or several business actors carrying out corporate actions are carrying out monopolistic practices that are prohibited by law or not.

If a corporate action carried out by a company has an impact on changing market concentration, namely becoming a concentrated market, then the KPPU can provide sanctions and/or adjustments to the company so that it does not have the potential to kill other business actors in the same relevant market. As regulated in KPPU Regulation Number 3 of 2023, this principle is known as pre-notification of mergers where companies that will carry out mergers, consolidations and acquisitions must report to the KPPU for a material assessment. This will certainly provide benefits to business actors who will carry out corporate actions to minimize potential losses. The loss in question is that if the material assessment is carried out after a corporate action occurs, the KPPU can impose administrative sanctions on business actors if the results have the potential to give rise to unfair business competition.

The doctrine of the rule of reason approach related to material assessment of corporate actions is that we cannot justify that a company carrying out corporate actions can immediately cause unfair business competition. So to prove this, a rule of reason approach must be taken. This principle certainly provides benefits and is in line with the concept of maslahah in Islamic law. In general, we can understand that maslahah is anything that can provide direct benefits, both from taking and deciding on an action by rejecting something to avoiding everything that can bring difficulties and harm.<sup>41</sup> Basically, Islam prioritizes benefit and avoids harm. One type of maslahah that is in accordance with the discussion above is maslahah mursalah. Because maslahah mursalah is maslahah muamalah which is not confirmed in legal provisions and there is no comparative analogy in the Al-Qur'an or Sunnah, but can provide convenience for humans.<sup>42</sup>

Based on Islamic economics, monopoly is defined as the act of hoarding goods. This act contained elements of abuse and arbitrariness. In ancient times, hoarding food was an act of unjust people because it aimed to defraud Muslims, namely by

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<sup>41</sup> Amir Syarifudin, *Ushul Fiqh*, (Jakarta: Kencana, 2008), p. 345.

<sup>42</sup> *Ibid*, 353.

charging the price of goods above the fair market price.<sup>43</sup> However, as times progress, monopolistic actions also come in various types. It's not just about stockpiling food. One of them is corporate action. So that to obtain benefits itself, monopolistic actions must be eliminated. According to Yusuf Qardhawi, quoted by Kusno Aji, he believes that the source of monopolistic practices is caused by human egoism which aims to enrich themselves and their group and does not open up the same opportunities to others.<sup>44</sup>

So based on the description above, there are points of similarity between the concept of monopoly in conventional law and Islamic law. Both can harm other people because there is a goal to enrich oneself with large profits. In this case, corporate action is a legal act which, if not monitored, could potentially lead to unhealthy business competition. Therefore, to prove whether a corporate action can give rise to unfair business competition or not, a certain assessment is needed to eliminate existing harm. The method is the rule of reason approach. The rule of reason approach certainly provides benefits (*maslahah*) for the KPPU and business actors in carrying out mergers. Because if the results of the assessment turn out to have an impact on the business competition climate in a particular relevant market, the KPPU can provide recommendations to business actors to make adjustments to material assets so as not to give rise to unhealthy business competition. So, this approach is in accordance with the concept of *maslahah mursalah*.

## Conclusion

The definition of the relevant market is a very important part for the Business Competition Supervisory Commission (KPPU) in proving the potential for misuse of market control by certain business actors. Appropriate determination of the relevant market can measure market structure as well as limitations and anti-competitive behavior. By knowing the relevant market in a particular sector, it can be determined which business actor is dominant and can limit other competing business actors. The Islamic financial services sector which includes Sharia Banking and Islamic Microfinance Services Institutions (LKMS) are included in the same relevant market in terms of product dimensions. In the event that there are similarities in the products offered, it is necessary to limit the scale of financing between Sharia Banking and LKMS. This is intended so that the marketing of financing products can be distributed evenly regarding which is the domain of each institution. When talking about banking institutions, Sharia Banking are also allowed to carry out corporate actions. Therefore, corporate actions must be based on an

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<sup>43</sup> Dede Abdul Fatah, *Monopoly in Islamic Economics Perspective*, Al-iqtisad, Vol.4 No. 2 (July, 2012), p. 160.

<sup>44</sup> Didik Kusno Aji, "The Concept of Monopoly in a Review of Islamic Economics", *Journal of Sharia Law and Economics*, Vol. 13 No.2 (2013), p. 51.

assessment conducted by KPPU. Before carrying out a corporate action, a company must notify the KPPU for an assessment (merger pre-notification).

As the challenges of Business Competition in the Islamic Financial Services Sector After the Issuance of P2SK Law, one of the implications of the relevant market is the formation of market share. Then, to find out changes in market concentration in the Islamic financial services sector, it can be calculated based on the formula from the Concentration Ratio for Biggest Four (CR4) Index. That is by calculating the 4 companies with the largest market share in a relevant market after BSI carried out the merger, the CR4 result in the Islamic financial services sector is 49.15%. It means that the market concentration is towards a loose oligopoly market. This market can still be said to be a competitive market at the middle level, however, vigilance is still needed so that the structure does not lead to a tight oligopoly. So, there needs to be a limitation on the scale of financing regarding the maximum value of financing in Sharia Banking area and how much is in the area of LKMS to reduce the potential for abuse of dominance.

Based on Islamic economics, monopoly is defined as the act of hoarding goods. But, as times progress, monopolistic actions also come in various types. It's not just about stockpiling food. One of them is corporate action. So that to obtain benefits itself, monopolistic actions must be eliminated. We can understand that *maslahah* is anything that can provide direct benefits, both from taking and deciding on an action by rejecting something to avoiding everything that can bring difficulties and harm. The rule of reason approach certainly provides benefits (*maslahah*) for the KPPU and business actors to prevent monopolistic actions that caused by corporate action. So, The rule of reason approach used to assess corporate actions is in accordance with the *maslahah mursalah* concept.

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