

Juridical Review of the Merger of Gojek and Tokopedia in the Aspect of Unfair Business Competition

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Abstract

Mergers in digital companies are things that have recently become a topic of discussion, concerns about indications of monopolistic practices in them are one of them. As in the merger activity of the digital companies Gojek and Tokopedia which attracted a lot of attention. KPPU is considered to have an indispensable role in supervising and assessing merger activities that have the potential to create a monopoly, especially in digital company mergers. The purpose of this paper is to find out the regulation, supervision, and evaluation by KPPU of monopoly practices in digital company mergers. This writing uses the approach of legislation. The result of this writing is that KPPU has not found any monopolistic practices in the merger of Gojek and Tokopedia companies, by prioritizing analysis of assessment aspects such as aspects of market concentration using the HHI method, barriers to market entry, and potential anti-competitive behavior. With the merger of the GoTo group, access to market share for new digital companies engaged in the same field has not experienced any obstacles at all, nor has there been any discriminatory policy imposed by the GoTo group in carrying out its business against competitors.

Keywords: Digital, Merger, Monopoly, Supervision, Company



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INTRODUCTION

One of the manifestations of national economic development is in the form of the presence of a limited liability company legal entity. The company itself in terminology is a business activity or business activity that aims to gain profit. To increase the development of the national economy, it is necessary to create a healthy business climate, which can be achieved if there is a conducive business competition policy and pro-competition behavior of business actors. The complexity of the people's needs which are increasingly limitless also contributes to the influence of the economy in Indonesia. The dynamics of the global economic specs have an impact on the growth of various types of businesses so as to create competition to attract consumers. This business competition has become a separate consequence due to the large number of requests for community needs. Therefore, competition not only has a positive impact but also has a negative impact. There are two types of business competition, namely fair competition activities and unfair competition activities. The existence of healthy and unhealthy business competition practices encourages policy makers to establish statutory regulations as an effort to enforce the law by taking into account legal values and aspects (Fauzi: 2021).

The enactment of the law aimed at protecting against unfair business competition between companies is contained in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. This regulation contains provisions prohibiting monopolistic behavior and unfair competition. The prohibition provides protection for economic actors to create conditions for fair commercial competition. The prevention of economic distortions caused by the abuse of government mergers and acquisitions became the background for the formation of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. Fair business competition can act as a means to create democracy and coefficients in the economy whose progress or development

must be achieved so that it can be arranged according to plan and is relevant. preventing and prosecuting entrepreneurs who are involved in unfair competition business activities. It also aims to create more effective effectiveness and efficiency in business activities. When these goals are achieved, conditions of economic stability and legal certainty will be guaranteed. The guarantee of legal protection in the form of Law Number 5 of 1999 has implementing regulations, namely contained in Government Regulation Number 57 of 2010 concerning Mergers or Consolidations of Business Entities and Acquisition of Company Shares That Can Lead to Monopolistic Practices and Unfair Business Competition.

This government regulation discusses the procedure for notifying business actors regarding merger and acquisition activities related to efforts to prevent monopolistic practices and unfair business competition as mandated by Law Number 5 of 1999. Merger and acquisition activities themselves are carried out by business actors in Indonesia as a forum for business actors to save companies that are experiencing problems and to be able to expand the company's network, which was initially too short. As a result, these business actors can become more and more large entities. In addition, merger and acquisition activities are sometimes used by actors to get rid of business competitors, resulting in unfair business competition (Zenal: 2012). If there are mergers and acquisitions with bad aims, such as getting rid of business competitors, then this will lead to unfair business competition and monopolistic activities as prohibited in Articles 28 and 29 of Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Competition Unhealthy Business. These two articles are further explained in Government Regulation no. 57 of 2010 concerning Mergers or Consolidations of Business Entities and Acquisition of Company Shares Which Can Result in Monopolistic Practices and Unfair Business Competition (Kalangi: 2017). These two regulations are used to ensure that later mergers and acquisitions do not lead to monopolistic behavior and unfair business competition. Therefore, it is explained in article 29 (1) of Law No. 5 of 1999 that business actors in carrying out merger and acquisition activities must pay attention to the main condition, namely if the value of assets or sales if it exceeds a certain amount must be notified in writing to the commission within 30 (thirty) days from the commencement of the merger and acquisition date.

The rest explained in article 29 (1) of Law No. 5 of 1999 has been strengthened in Article 5 of Government Regulation No. 57 of 2010 that notification procedures carried out by business actors who will carry out merger and acquisition activities are mandatory to be reported within 30 (thirty) days from the date the merger and acquisition activities are carried out if the business actors do not exceed this period in making notifications to KPPU, then based on Article 47 paragraph (2) letter g of Law no. 5 of 1999, the KPPU can impose sanctions in the form of paying a fine of 1 (one) billion Rupiah within one day of late notification. Therefore, in carrying out merger and acquisition activities, business actors must be careful and alert, such as being timely in giving notifications to KPPU. Because the General Law Administration (AHU) Directorate General of the Ministry of Law and Human Rights shows that KPPU can cancel merger and acquisition activities which can cause legal uncertainty and have enormous consequences for the business world (Achulia: 2018).

A digital company is a company whose business relationships are carried out digitally, be it in terms of customers, suppliers, or workforce. In Indonesia itself, digital companies have mushroomed and become something that is no longer foreign. For example, companies engaged in the transportation sector have now used online as their means and infrastructure, such as Gojek and Grab companies, as well as companies engaged in online buying and selling, such as e-commerce, such as Tokopedia. (Mustofa: 2016) Companies engaged in the field of transportation and in the field of online trading are significant embodiments of technological

advances and are often the choice for the community because of all the conveniences offered by these companies. In running their business, online transportation companies such as Gojek and Grab prioritize the use of devices and the internet for both service users and drivers. Gojek provides an application which makes it easier for consumers to travel using two-wheeled or four-wheeled vehicles without having to find a driver, with just one click, consumers can get a driver who can take them to their destination. Meanwhile in the case of e-commerce companies such as Tokopedia, the company offers convenience for consumers in finding and buying goods without having to do face-to-face meetings like conventional markets (Putri, et al: 2021).

By offering many choices with various price ranges and shops, this makes consumers prefer to shop through e-commerce. Recently, quite a number of digital companies have carried out company mergers in order to increase the value of these companies. An example is the merger of the Gojek and Tokopedia companies to form the GoTo group which was officially announced on May 17 2021. The formation of the GoTo group aims to form a combination of e-commerce, on-demand services, as well as payment and financial services. With the merger between these two digital companies in Indonesia, GoTo is predicted to be able to provide conveniences for consumers and provide far greater benefits to Gojek driver partners and store sellers or merchants at Tokopedia by providing services, one of which is by offering e-mail delivery services. -commerce same day which can make consumers receive goods purchased at Tokopedia faster and cheaper, besides that there is also a payment feature via Gopay which gives consumers wider options to choose a payment method. Merger itself is a business combination between one or several business entities with one entity without merging the business entities (Sapitri: 2015).

However, this actually raises concerns about the potential for unfair business competition practices from digital company mergers, in this case monopoly practices. In Article 1 Number 1 of Law no. 5 of 1999 concerning Unfair Business Competition (UUPU), in essence, explains that monopoly is control over production, coercion of goods, or use of certain services by business actors. Monopoly itself is a practice that is prohibited because it can produce a market distortion. Merger practices are also regulated in this UUPU, more precisely in article 28 paragraph (1) which prohibits the merger of companies that have the result of unfair business competition or monopoly. Even though monopolistic practices have been strictly prohibited from being carried out in company merger activities, in reality the assessment aspects in these laws and regulations still do not significantly explain what things can be used as benchmarks for a company carrying out merger activities that have or will cause monopoly potential. On this matter, it is necessary to carry out supervision of the mergers of digital companies to find out whether or not there are indications of monopolistic practices regarding these business mergers.

Therefore, this supervision must be carried out by the Business Competition Supervisory Commission (KPPU) specifically because the merger of digital companies is a big challenge because it utilizes cross-data business network technology. By looking at the values under KPPU's supervision of merger activities that have the potential to give rise to monopolistic practices, it can be seen and ascertained whether the merger of digital companies has indications of monopoly or not. Based on the background described above, a problem arises, namely about how to further regulate monopoly in digital company merger activities when viewed from the perspective of business competition law and how the KPPU evaluates in supervising and overcoming if there are indications of monopolistic practices in company merger activities digital mergers. The purpose of this writing is to analyze the regulations and KPPU's assessment in supervising and overcoming digital company merger activities where there are indications of monopoly practices.

RESEARCH METHODS

The normative juridical research method is the method used in this research. Normative legal research is a procedure or research by finding the truth of a matter to be studied based on the normative aspect of legal scientific thinking. With a focus on research on legal rules, this research uses a statute approach or a statutory regulation approach with the technique of collecting legal materials. The legal materials used in this research are primary legal materials, namely laws and regulations, as well as secondary legal materials collected from books, articles, journals, and the internet. Regarding the purpose of this research is to analyze the sources of literature in this case are the laws and regulations related to mergers and unfair business competition, as well as regulations governing the KPPU's authority in assessing whether or not there are indications of monopolistic practices in digital company merger activities. The legal material collected is then reviewed and analyzed where the results of the analysis will be drawn into a conclusion using deductive logic, namely logic that departs from a general possibility to a conclusion with special certainty.

RESEARCH RESULTS AND DISCUSSION

Of course, business competition is very closely related to the company. The concentration of market power can be hindered by competition between one company and another. Thus the spread of market power and the opportunity to open a business provides opportunities for development and development in entrepreneurship. In addition to achieving efficiency, competition is needed, therefore in carrying out a market economy competition is a *conditio sine qua non* (Sudjana: 2016). Article 33 of the 1945 Constitution of the Republic of Indonesia is the basis for the strategy and regulation of business competition law, in which it mandates a monopoly that can harm society and cause unfair business competition which is not justified in Indonesia. Even though the source of business competition law, namely Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter the Antimonopoly Law) does not include the definition of business competition. However, in the synonyms it is found that "competition" means "...a struggle or contest between two or more persons for the same objects". So that this reflects efforts to beat each other and the will of business actors to achieve the same ambitions. On the basis of business competition, entrepreneurs compete to obtain more profits than other companies by merging or consolidating. Business actors in order to gain profits can carry out merger actions as a means to raise capital. So in other words, business actors who want to expand their business network and improve their company's performance can merge with other companies.

However, it is not uncommon to find business actors using methods that are not justified in the process of competition in the business world which cause violations of business competition. In terms of keeping the company from loss or failure due to a merger transaction, therefore merger control is needed. If a merger transaction creates an unfair business competition climate, then the said merger transaction is prohibited for business actors. By carrying out mergers and acquisitions, it is possible that market concentration will occur which tends to create unfair business competition. That is why the law on mergers and the law on anti-monopoly is very warning that a merger or acquisition does not violate anti-monopoly provisions or fair competition. It is only natural that the law related to mergers mandates that a merger transaction does not violate the provisions of the law on fair business competition. This is because market concentration that creates unfair business competition can be presented through merger transactions.

Control over a production, distribution, even the use of certain services carried out by one/a group of business actors can lead to potential mergers resulting in monopolies and the

company's ability to be competitive in the market will increase. The company's ability to be competitive can make business actors have a dominant position, because this will have an impact on the market share it controls to become larger. Competition conditions in a market are strongly influenced by the dominant position held by a company. Although the dominant position of 50% or more owned by the company is not prohibited. In its implementation, a dominant position that is prohibited is used to exploit consumers and other competitors in order to get rid of or hinder other business actors from entering the market. The problem of abuse of dominant position in corporate mergers is not a new thing in the world of research. However, on the other hand, the authors did not find research discussing company mergers in the digital industry which combine various services at once in the digital economy sector.

The joining of the two digital companies that form the GoTo Group entity will fill each other's deficiencies. In addition, the merger will significantly increase the company's market share. This research is based on the argument that the development of information and communication technology is a trend that cannot be stopped and stopped again. The era of globalization has ushered in developments in various aspects of human life. The presence of Gojek and Tokopedia through their applications fulfills various activities of the Indonesian people. As of April 2021, Gojek has a valuation of US\$ 10 billion (Rp. 142.5 trillion, an exchange rate of Rp. 14,250/US\$) and Tokopedia US\$ 7 billion (Rp. 99.7 trillion).

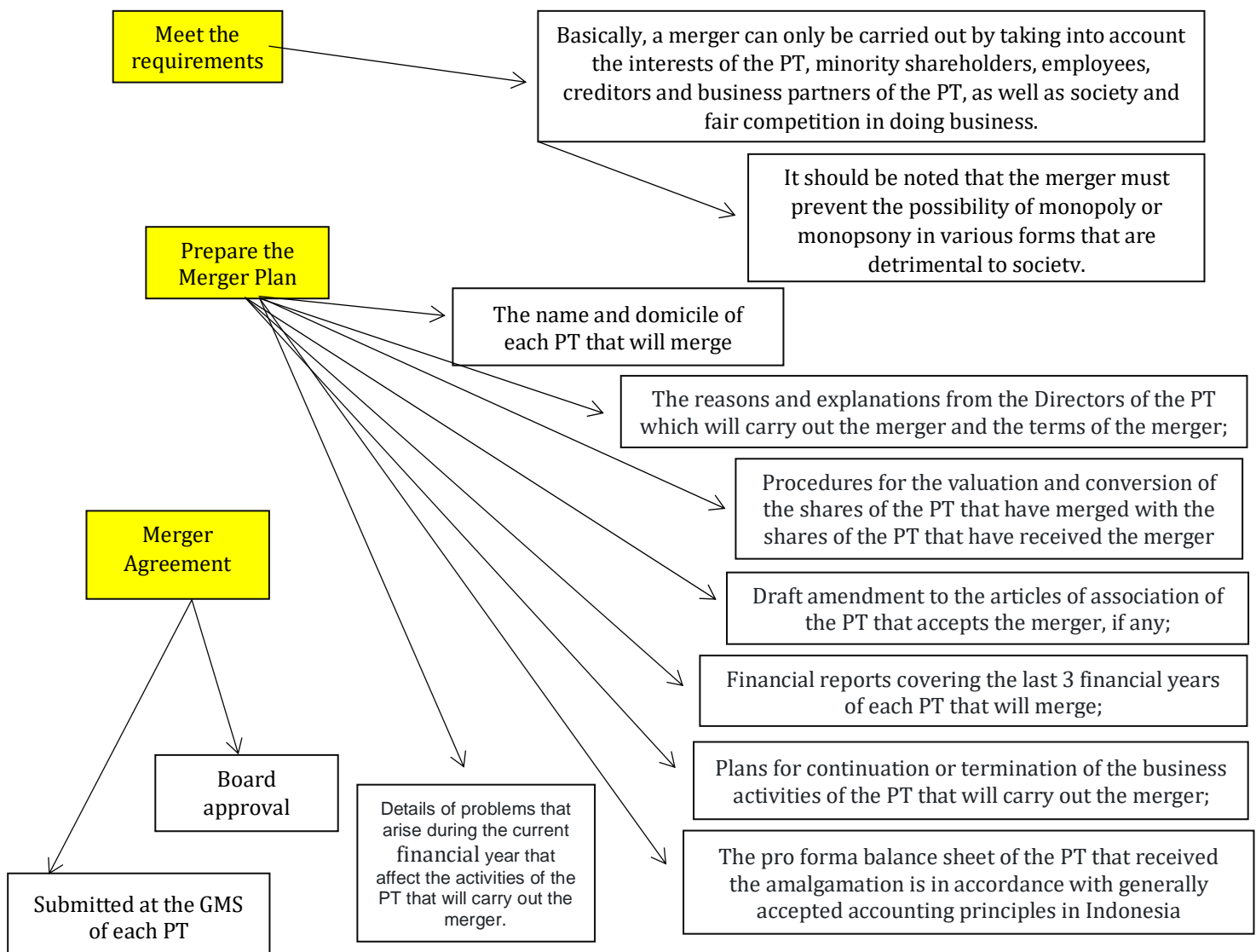
So it is estimated that GoTo's valuation is US\$17 billion, or around Rp.242.2 trillion and has the potential to reach around US\$40 billion. Gojek and Tokopedia conducted a merger transaction with the aim of enabling the company to increase its valuation prior to going to an IPO (Initial Public Offering). The company's valuation will increase as a result of the merger transaction, resulting in progress in the form of a digital industry which will become an infrastructure for the wider community. Therefore, there is a need for an alignment of regulations from the government to neutralize the negative impacts that will arise later. It is feared that the collaboration between Gojek and Tokopedia will become a vertical integration that has the potential to discriminate against other business actors outside the two companies. Economists at the Institute for Development of Economics and Finance (Indef) argue that if the digital industry has already been controlled by large companies, it will be difficult for small companies in that market to develop. Even if they dare to enter the market and have good innovations, the market doesn't necessarily pay attention because they depend on the wider ecosystem of big players.

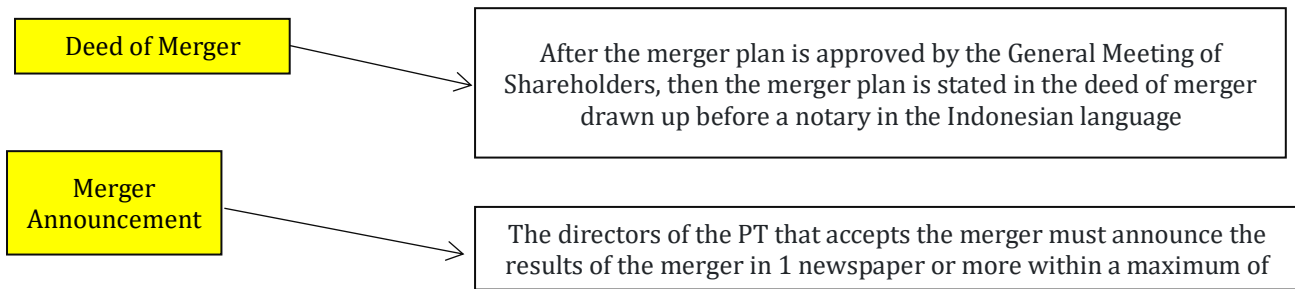
The market structure of the digital industry generally leads to a contestable market which has characteristics such as low barriers to entry in entering the market, setting up similar companies does not require too high initial and sunk costs, as well as strong substitutes for the goods and services sold. So if GoTo is proven to have abused its dominant position, opportunities for other business actors to enter the digital market industry will be even more difficult, and welfare losses will be created because there are no other market options. Basically, merger transactions result in market power in the company so that it can produce welfare loss. On the other hand, mergers have a positive impact on businesses and the national economy. Therefore, it is necessary to review the background of the merger transaction itself in advance to determine whether the merger is prohibited or not. This review can use market power indicators. It should be noted that market power is an ability to influence prices in the market as well as efforts to beat competitors owned by a company. Then in determining the impact that will arise on a merger transaction based on the industry structure. In creating merger transactions that do not create market power, mergers are applied to industries with a competitive structure. If the merger has an impact on increasing monopoly and market power, it is certain that the merger industry is basically an oligopolistic structure. The market share

standard used as a threshold in determining evidence in accordance with Article 25 of the Antimonopoly Law makes aspects of market structure important. In an industry that has a contestable market, it does not create welfare losses, but impacts such as the creation of efficiency and the goal of consumer welfare, opportunities to gain market share and compete for MSMEs, the ability to develop innovation.

However, considering the market power owned by the GoTo Group and the increasingly large valuation, further research is needed regarding the impact of the merger of the two companies on the business competition climate in Indonesia. If the structure of the digital industry in Indonesia is known, then a study will be carried out regarding indications of abuse of a dominant position using contestable market theory and Government Regulation Number 57 of 2010 jo. Perkom for Supervision of Business Competition Number 2 of 2013 but only covers market structure, market concentration, barriers to market entry posed by GoTo to be able to determine the impact of a merger on the business competition climate in Indonesia. By knowing that there are indications of abuse of a dominant position, a responsive implementation of appropriate regulations for the digital industry is needed in order to realize broad benefits.

Goto Merger/Merger Stages





Norm conflicts over the impact of the merger of the two companies on the unfair business competition climate, as well as the role and authority of the KPPU which are still unclear, causing legal uncertainty due to the non-implementation of Article 49 of the Antimonopoly Law, and the effectiveness of the implementation of the post notification system in Indonesia at this time. It should be remembered that with the prevention of an unfair business competition climate, the Antimonopoly Law was formed as a legal umbrella and provides protection for internal parties. Although in PP No. 44 of 2021 concerning the Implementation of the Prohibition of Unfair Business Competition Practices in Article 12 states that sanctions for business actors who do not report their merger and acquisition activities to KPPU are in the form of a minimum sanction in the form of a fine of 50% of total profits or 10 percent of total sales. However, this is in the nature of a violation, then there are sanctions for the violation. So that legal acts of violation have been carried out, not the prevention of these violations. Therefore, KPPU which is an agency that has the authority to prevent various actions that lead to digital monopoly such as discriminatory behavior, predatory pricing, abuse of dominant position, to market exploitation that can arise as a result of merger transactions carried out by Gojek and Tokopedia which form GoTo entity. Evaluation to determine indications of abuse of dominant position as regulated in Articles 25 – 28 of the Antimonopoly Law is part of the duties and powers of the KPPU itself, which is part of writing this thesis.

So that in terms of determining the role and authority of the business competition supervisory authority the author uses the theory of legal purposes as a means of social control as put forward by legal expert Roscoe Pound "law as a tool of social engineering" the concept is in line with the current business competition law and KPPU's role as a supervisory institution to control the behavior of business actors in running a business while continuing to create a climate of fair business competition. Based on what the authors stated above, the authors are interested in conducting research on the role of KPPU in merger transactions in Indonesia and the impact that will arise as a result of the Gojek and Tokopedia merger transactions in business competition in Indonesia, whether it will lead to an abuse of dominant position or create an efficiency. in the digital industry in Indonesia.

After the merger, the steps that need to be taken by Gojek and Tokopedia are to provide notifications/reports to the Business Competition Referee believing the Business Competition Supervisory Commission (KPPU) for these activities, no later than 30 (thirty) days after the activity was legally established legally. Based on the applicable regulations, Law No. 5/1999, concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. What's more, Gojek, in this case, was fined IDR 3.3 billion by the KPPU for being late in giving notification about the acquisition of PT Global Locket Sejahtera (Locket.com), in 2017. This merger information was established even though the KPPU reported that it had not received notification regarding the merger of Gojek with Tokopedia. Thus, KPPU has not been able to provide an assessment of whether the merger process has an impact on monopoly practices or not. GoTo's next step must act to integrate services at Gojek and Tokopedia so that they can be

made into one service, such as financial services which will be integrated into GoTo Financial. "And no less important, then GoTo must also seek funding to immediately compete with competitors in each line of business (Grab and Shopee)," However, the presence of GoTo certainly apart from being an added value for the digital ecosystem, consumers in this competitive stretch will also greatly benefit in the short term, because giving bonuses and discounts will still be the ultimate way to attract the attention of many consumers. "However, what needs to be considered again is that in the long run, market domination will have an impact on increasingly uncompetitive business competition for competitors outside the three major groups.

Those things are aspects of assessment that are used by KPPU in assessing whether or not monopolistic practices exist in company mergers, if there are indications of monopolistic practices in company mergers, KPPU can impose sanctions. In Article 4 PP 57/2010 it is also explained that administrative action sanctions can be imposed on business actors who carry out monopolistic practices in their merger activities, this is included in the authority of the KPPU. In the case of imposing sanctions on companies that have merged and indicated that they are carrying out monopolistic practices, these include sanctions for cancellation of the merger and payment of fines. In addition, business actors carrying out a merger are required to provide written notification of said business merger to KPPU no later than 30 days after the merger becomes legally effective. After receiving the notification, KPPU can assess the said merger of companies and provide an opinion regarding whether or not there is a monopoly practice in the merger of companies no later than 90 working days after receipt of the notification. If there are indications of monopolistic practices in said merger activity, KPPU can exercise its authority as described in the UUPU. Regarding this matter, regulated in Article 5 to Article 9 PP 57/2010.

Regarding digital company mergers such as the merger between Gojek and Tokopedia which resulted in the GoTo group being widely discussed, as reported from the Suara.com news page, KPPU Chairman Kodrat Wibowo said that there had been no indication of the merger of the two digital companies, especially in the e-commerce sector and not yet. there are reports regarding monopolistic practices involved in the merger of Gojek and Tokopedia. In addition, if the evaluation aspect uses the HHI method, until this writing is written, the KPPU is still analyzing this because the transaction value and market share are so wide and large. However, when viewed from other assessment aspects such as barriers to market entry and anti-competitive behavior, it can be seen that this GoTo group merger cannot be said to be carrying out monopoly practices. In terms of barriers to market entry, for example, until now there are still many new digital companies engaged in online transportation and e-commerce that can enter the market share, for example the Maxim online motorcycle taxi service, which recently entered the market share and its development has not been disturbed at all.

Then in the assessment of anti-competitive behavior, in the GoTo group merger which is engaged in transportation and online buying and selling, it is known that it has not completely closed market access for its competitors, this can be seen from the many digital companies engaged in the same field that still exist today. this does not even lose its consumers due to discriminatory policies that could have been issued by the GoTo group, but in fact GoTo did not issue these discriminatory policies to close market access for its business competitors, for example, Tokopedia still provides the Grab Express service as a choice of freight forwarding services. consumers can choose. According to this paper, when viewed from the aspect of assessing the presence or absence of monopolistic practices in the merger, the merger of Gojek and Tokopedia has very little indication of monopolistic practices because the two companies operate in different markets, Gojek in the scope of online transportation and Tokopedia in the scope of e-commerce, so controlling market share as described above cannot be carried out.

In addition, business competition that cannot be entered by other competitors in the aspect of barriers to market entry and aspects of potential anti-competitive behavior that prioritizes the consumer's bargaining position cannot occur because in the case of delivery of goods ordered at Tokopedia, Consumers can still choose services between other goods. Even so, it is KPPU's duty to continue to monitor digital company mergers both now and in the future to ensure that indications of monopolistic practices will not occur in the merger of these companies.

CONCLUSION

Arrangements regarding the prohibition of merger activities which can result in a monopoly practice itself are explicitly regulated in Article 28 UUPU. A business actor that can be said to have entered into a merger that has the potential to give rise to monopolistic practices if: there is no substitute for goods or services; business competition for goods or services that cannot be entered by business actors with the same goods or services business; market control over certain types of goods and services of more than 50% by business actors. This also applies to digital company merger activities. On this matter, it is the authority of KPPU to supervise and assess whether or not there are indications of merger activities being carried out by companies, one of which is a digital company. Regarding the merger of digital companies carried out by Gojek and Tokopedia, KPPU considers that there has not been any monopolistic practice in the merger of the two companies, by prioritizing an analysis of assessment aspects such as aspects of market concentration using the IHL method, barriers to market entry, and potential for anti-competitive behavior. . With the merger of the GoTo group, access to market share for new digital companies engaged in the same field has not experienced any obstacles at all, nor has there been any discriminatory policy imposed by the GoTo group in carrying out its business against competitors. So according to this paper, the Gojek-Tokopedia merger does not give rise to indications of monopolistic practices, because the two companies operate in different markets and consumers can still choose other options, namely services between other goods when ordering goods at Tokopedia, and other business actors. can enter the market because the GoTo group merger activity does not result in a control over market share. Even though there has not been any indication of monopolistic practices in the GoTo group merger, KPPU must continue to monitor and assess and tighten supervision of digital company mergers without waiting for reports regarding this matter.

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