BALTIC JOURNAL OF LAW & POLITICS
A Journal of Vytautas Magnus University
VOLUME 15, NUMBER 1 (2022)
ISSN 2029-0454

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Cite: *Baltic Journal of Law & Politics* 15:1 (2022): 2064-2080
DOI: 10.2478/bjlp-2022-00133

Regulating Compliance of Companies on the Merger on Digital Platform in Indonesia

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Received: August 12, 2022; reviews: 2; accepted: November 21, 2022.

Abstract

With the rise of transaction volumes in Indonesian digital market has make the digital market to become one of the largest contributors of the economy sector. However, from the perspective of competition law, the rise of the digital sector has brought concerns over anti-competitive threats along with its capacity to enforce, especially within mergers. This research aims to detect and recommend plausible solutions towards those threats. In doing so, this research will use a comparative legal research method in order to achieve its aims. Our findings have shown that the Indonesian competition law have the need for adjustments to effectively enforce competition law within digital markets in Indonesia, especially within mergers.

Keywords

Merger on Digital Economy, Digital Economy, Competition compliance

1. Introduction

The advent of digitalization has ultimately created and reshaped the landscape of competition through the creation or transformation of markets. In accordance to a 2020 OECD report for the for the G20 Digital Economy Task Force, Roadmap toward a Common Framework for Measuring the Digital Economy, proposes a common definition and a tiered framework to help establish clear, comparable measures for policy making:[1]

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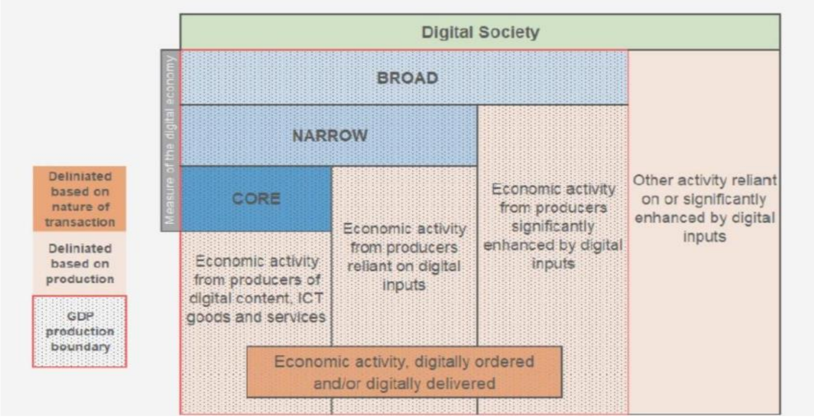
[1] OECD, "A Roadmap Toward A Common Framework For Measuring the Digital Economy: Report for the G20 Digital Economy Task Force," *OECD Report*, 2020

"The Digital Economy incorporates all economic activity reliant on, or significantly enhanced by the use of digital inputs, including daigital technologies, digital infrastructure, digital services and data. It refers to all producers and consumers, including government, that are utilizing these digital inputs in their economic activities."

Through its disruption, the digital market has shaped new competitive dynamics that includes multi-sided markets, strong network effects, a rapid potential for economies of scale and scope, reliance on large amount of user data that is difficult and costly to analyze, the rise of switching costs between digital platforms, low or zero pricing models, disruptive innovations, and vertically integrated and conglomerate business models.[2]The digital market has also created several different tiers in its operation, namely:

1. The Core measure of the Digital Economy only includes economic activity from producers of ICT goods and ICT and information services.
2. The Narrow measure includes the core sector as well as economic activity derived from firms that are reliant on digital inputs.
3. The Broad measure includes the first two measures as well as economic activity from firms significantly enhanced by the use of inputs.
4. The Digital society extends further than the Digital Economy and incorporates digitalized interactions and activities not included in the GDP production boundary, such as the use of free digital platforms (including public digital platforms). While not considered part of the Digital economy per se, this activity is important for effective digital policy by government.
5. The additional measure economic activity, digitally ordered and/or digitally delivered can be considered as an alternative perspective of the Digital Economy as it is delineated based on the nature of the transaction, rather than split based on firms' output or production methods. This measure focuses on the method of ordering or delivery, regardless of the final product or how it is produced.[3]

Figure 2: Tiered definition of the Digital Economy



[2] OECD, OECD Handbook on Competition Policy in the Digital Age (OECD, 2022) <https://www.oecd.org/daf/competition-policy-in-the-digital-age> [accessed 5 November 2022]
[3] Ibid.

Accordingly, the tiered definitions of digital economy are portrayed, as follows:

Tiered definition of the Digital Economy by OECD (2020) © OECD 2020

From these points, it is apparent that the digital market has bring subsequent changes to the competitive landscape by raising new competitive dynamics and changes in operating markets. While these innovations have generate substantial consumer benefits, a competition law perspective over these innovations raises concerns over the possibility of a declining competition intensity. This paper aims to search possible anti-competitive threats which exists in a digital market especially within the practice of mergers. Additionally, this paper will also analyze the readiness of Indonesian competition law to enforce anti-competitive violations by comparing to the other jurisdictions such as Germany, Singapore, and the European Union along with other jurisdictions.

2. Research Method

This research is qualitative juridical normative research. Normative legal research is a type of legal research, which is conducted by examining library materials or secondary data consisting of sources derived from primary, secondary, and tertiary legal materials resource through a comparative legal study between Indonesian Competition law and of other countries, likes German Competition Law, European Competition law, French Competition law and Singapore Competition law. Furthermore, literary studies will mostly be used in answering the aims of this research. Those materials are collected by using the method of literature review and analyzed using qualitative analysis.

3. Results and Discussion

3.1 Competition Law Concern

On the one hand, the increasing activities of digital economy have brought many benefits to society and to our economy. Nevertheless, from a competition point of view, these developments have posed new challenges and regulatory concerns. In this emerging environment, some larger entities such as platforms have become what are known as gatekeepers for many digital and non- digital products and services. Such a dominant position can be underpinned by additional factors which can include extreme economies of scale and scope, strong network effects, zero pricing and data dependency. In other examples, structural competition problems may be arising where concentrated markets can allow companies to monitor the behavior of competitors and create incentives to compete less vigorously without any direct coordination.[4]

Several Competition Authorities (CA) have issued a contemporary approach to assess the procompetitive and anticompetitive effects of digital economy

[4] Argentesi, Elena, Emilio Calvano, Tomaso Duso, Alessia Marrazzo, and Salvatore Nava, "Merger Policy in Digital Markets: An Ex-Post Assessment," SSRN Electronic Journal, 2019 <http://dx.doi.org/10.2139/ssrn.3507256>

activities. For example, theGerman Federal Cartel Office (Bundeskartellamt) and the French Autorité de la concurrence has presented the joint study on algorithms and competition policy and digital economy.[5] Subsequently, the European Union (EU) DG Competition have released the New Competition Tool. This policy instrument aims to identify and remedy structural competition problems at an early stage. Further, this will enhance the EU Commission's power to intervene the market, in order to keep up with the rapid developments on the digital markets and react appropriately to problems arising under competition law.[6]

Equally important, the Competition and Consumer Commission of Singapore (CCCS) hasinitiated investigations because of merger control's violation against digital companies. Based upon the Section 54 of the Singapore Competition Act,

"Mergers that have resulted, or may be expected to result, in a substantial lessening of competitionwithin any market in Singapore for goods and services are prohibited. Section 54(4) of the Competition Act also provides that the creation of a joint venture to perform, on a lasting basis, allthe functions of an autonomous economic entity shall constitute a merger."

CCCS investigated into Grab and Uber concerning the sale of Uber's Southeast Asian business to Grab in consideration for Uber holding a 27.5 per cent stake in Grab. On 26 March 2018, Grab and Uber announced and completed the transaction, and began the transfer of the acquired assets immediately.[7] This included the transfer of information and data, such as contractswith riders, drivers, eateries and delivery partners in Singapore. However, the CCCS had found that the transaction resulted in a substantial lessening of competition in the provision of ride-hailing platform services in Singapore. This market is a two-sided market connecting drivers on one side and riders on the other. The interdependence of drivers and riders gives rise to indirect network effects (namely, drivers are attracted to a platform with more riders and vice versa). However, a substantial percentage of the drivers in the private hire car and taxi fleet were exclusiveto Grab. These exclusivity clauses would effectively prevent drivers from multi-homing and reinforce the network effect. Finally, the CCCS issued directions to Grab and Uber with the aim to lessen the impact of the transaction on drivers and riders, and to open up the market and level the playing field for new players. The CCCS released instructions to require Grab to remove the exclusivity obligations on drivers and ensure that drivers and riders are free to choose their preferred platform.[8]

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[5] Bundeskartellamt, Bundeskartellamt <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Diskussions_Hintergrundpapier/AK_Kartellrecht_20>

[6] European Comission, "Impact Asssessment for a Possible New Competition Tool," Competition Policy <https://ec.europa.eu/competition-policy/public-consultations/2020-new-comp-tool_en> [accessed 5 April 2023]

[7] Jeffs, Claire, E-Commerce Competition Enforcement Guide (London, UK: GCR, 2020)

[8] "Competition Appeal Board Upholds CCCS's Infringement Decision against Uber for Anti-Competitive Merger with Grab," CCCS, 2023 <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/cab-upholds-cccs-id-against-uber-for-anticompetitive-merger-with-grab> [accessed 5 April 2023]

3.2 Digital Economy in Indonesia

According to Competition Authorities (CA) experiences, there are certain features of the digital market which are new and often connected and interlinked, which constitute a profound challenge for Competition Authorities in many jurisdictions, especially in enforcing the merger control. These are: 1. Network effects (direct and indirect); 2. multi-sidedness of market; 3. 'Big data'; 4. Rapid innovation.[9]

Principally, the network effects exist merely in multi-sided markets.

Shelanski, Knox and Dhilla argues:

"Network effects are the cross-platform externalities that result when the actions of participants on any side of the platform, or of the platform itself, affect participants on other sides of the platform (or the functioning of the platform itself). The externality can be direct, as when an increase in content providers makes the platform more valuable to content consumers, or indirect, as when a platform's provision of better terms for users makes the platform more attractive to content or service providers and to advertisers. For ease of exposition, this paper will refer to all cross-platform externalities simply as "network effects."[10]

Subsequently, as regards the multi-sidedness of digital market, Filistrucchi, Geradin, van Damme and Armstrong explain, as follows:

"A market is two-sided if the platform can affect the volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount; in other words, the price structure matters, and the platforms must design it so as to bring both sides on board."[11]

"Two-sided markets or platforms exist when a company or platform serves at least two groups (or networks) of consumers or suppliers and there is at least an indirect network effect between these groups. For example, a media platform exists when a daily newspaper sells content to readers and advertising to advertisers. The advertisers benefit from a higher circulation and the readers of the newspaper also experience at least a partial benefit from the consumption of the advertisements. However, the latter relationship is not necessary for the existence of a two-sided platform. The newspaper as a platform internalizes the network effects between the groups, takes them into account in its pricing, and thus lowers the transaction costs between readers and advertisers."[12]

Furthermore, regarding 'Big data" and its competition impact, the Bundeskartellamt and the French Competition Authority (FCA) published a joint report, which postulating:

"Aspects of "big data" that are often mentioned in the debate are large amounts of different types of data, produced at high speed from multiple sources,

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[9] Ibid.

[10] OECD Secretariat, rep., *Network Effects and Efficiencies in Multisided Markets - Note by H. Shelanski, S. Knox and A. Dhilla Hearing on Re-Thinking the Use of Traditional Antitrust Enforcement Tools in Multi-Sided Markets*, 15 November 2017

[11] Filistrucchi, Lapo, Damien Geradin, and Eric E.C. van Damme, "Identifying Two-Sided Markets," SSRN Electronic Journal, 2012 <http://dx.doi.org/10.2139/ssrn.2008661>

[12] Ibid.

whose handling and analysis require new algorithms, new and more powerful processors, storage and data transport technology.

In a shorter form "big data" is often characterized by the three "V"s – Velocity, Variety and Volume – or the four of them adding "Value". As regards data collection by companies, there are different ways to gather data. Personal data are often provided voluntarily by consumers, e.g. in social networks or online shops. Customers provide information in exchange for – often zero-priced and advertising financed – products and services. Thereby the companies get information not only about address, email-contact, date of birth or payment details, but also about shopping preferences or in some cases even photos or videos. Another possibility to learn about the consumers' interests and preferences is to observe their behavior on the internet and assess which web pages they visit. Companies can also infer new information about consumers using already existing data, e.g. drawing conclusions about gender or age by analyzing the consumers' shopping activities. All these possibilities to collect data are usually referred to as "first party data", because the company itself deals with the data collection and is related to their own customers. Besides there is the possibility to use "third party data". This means that another entity collected the data and shares or sells these data.[13]

Both German (Bundeskartellamt) and French Competition Authorities (FCA) postulate that 'Big data' has not only pro-competitive impact, but also anti-competitive impact to the competition in three ways: 1) Data can be a factor contributing to market power. 2) Data can increase market transparency among suppliers and thereby facilitate collusion. 3) Data can be an instrument for certain anti-competitive conducts.[14]

With regard to the merger control in digital market, according to the German Federal Cartel Office (Bundeskartellamt), 3 aspects are of utmost importance for the Competition Authority's enforcement, notably:

First, assessment of an intermediation market. This assessment aims to analyse the relationships between companies in digital or digitized markets, which could not be clearly identified as the typical vertical relationships between supplier and customer. This antitrust principle prerequisities that a position of intermediary companies/firms must be taken into consideration in the assessment of a digital company's market position, notably in the context of abuse of dominant position.[15]

Second, access to big data and 'essential facility'. The access to specific data of consumers and business partners also affiliated undertakings (governmental affiliations) constitute an essential facility. The refusal of a digital company to accord access to big data is regarded as the violence against the Competition law by taking into account the following rule:

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[13] Bundeskartellamt, "The French Autorité De La Concurrence and the German Bundeskartellamt Publish Joint Paper on Data and Its Implications for Competition Law," Bundeskartellamt, 2016 <https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/10_05_2016_Big%20Data%20Papier.html> [accessed 5 November 2022]

[14] Lasserre, Bruno, and Andreas Mundt, "Competition Law and Big Data: The Enforcer's View," Italian Antitrust Review, 1 (2017) <http://dx.doi.org/10.12870/iar-12607 >

[15] See Section Section 18 (3b) Gesetz gegen Wettbewerbsbeschraenkung (GWB)

ISSN 2029-0454
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"refuses to supply another undertaking with such a good or commercial service for adequate consideration, in particular to grant it access to data, networks or other infrastructure facilities, and if the supply or the granting of access is objectively necessary in order to operate on an upstream or downstream market and the refusal threatens to eliminate effective competition on that market, unless there is an objective justification for the refusal"[16]

Furthermore, the access to big data can constitute a prohibited dependence between digital companies. For example, in the German Competition Law this type of dependence is prohibited:[17]

"Section 19(1) in conjunction with subsection (2) no 1 shall also apply to undertakings and associations of undertakings to the extent that other undertakings as suppliers or purchasers of a certain type of goods or commercial services are dependent on them in such a way that sufficientand reasonable possibilities for switching to third parties do not exist and there is a significant imbalance between the power of such undertakings or associations of undertakings and the countervailing power of other undertakings (relative market power). Section 19(1) in conjunctionwith subsection (2) no 1 shall also apply to undertakings acting as intermediaries on multi-sided markets to the extent that other undertakings are dependent on their intermediary services for accessing supply and sales markets in such a way that sufficient and reasonable alternatives do notexist. A supplier of a certain type of goods or commercial services is presumed to depend on a purchaser within the meaning of sentence 1 if this supplier regularly grants to this purchaser, in addition to discounts customary in the trade or other compensation, special benefits which are notgranted to similar purchasers.

(1a) Dependence within the meaning of subsection (1) may also arise from the fact that an undertaking is dependent on accessing data controlled by another undertaking in order to carryout its own activities. Refusing to grant access to such data in return for adequate compensationmay constitute an unfair impediment pursuant to subsection (1) in conjunction with Section 19(2) no 1..."

Third, existence of "tipping" of market and network effects

Tipping of market is defined as to topple over of a certain market in favor of a company that can gain a very large share of the market due to strong positive network effects. Such a market development will lead to term "winner-takes-it-all market". For example, the German Cartel Office (Bundeskartellamt) found the practice of market "tipping" in Facebook concerning its increasing dominance in the market for social networks. Closely related to the market "tipping" is the network effects of a digital company, both of indirect and direct network effects. The German Cartel Office (Bundeskartellamt) elucidates in its recent report that network effects can constitute anticompetitive effects both due to abuse of market dominance and a merger of digital companies. Specifically, Bundeskartellamt explains:

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[16] See Section 19 para (2) number 4 of the Act against Restraints of Competition (Competition Act – GWB)

[17] See Section 20 on Prohibited Conduct of Undertakings with Relative or Superior Market Power of the GWB

Indirect network effects exist when the value of a service or product for a specific group of users increases (positive network effects) or decreases (negative network effects) with the number of users of another group. This wide definition covers both platforms with bilateral positive indirect network effects and platforms with unilateral indirect network effects.[18]

Furthermore, the direct network effects arise if the users of one product directly benefit if more (positive network effects) or less (negative network effects) people use the same product as well. In other words, the effects occur between the individual members of one group rather than between two distinct groups. The connection between the users that leads to the network effects can be direct or indirect. Typical examples of networks whose main characteristic is the presence of direct network effects are telecommunication networks or social networks. Social media networks like Facebook operates mainly based upon the direct network effects.[19]

In the multilateral practices of Competition Authoritiy (CA) concerning the analysis of merger in digital economy, CA applies the Theory of Harm (ToH) to assess both of unilateral and coordinated effects of merger transactions.[20]In the merger control theory, Theory of Harm assists CA in assessing the procompetitive and anticompetitive effects of a merger proposal at hand. Theory of Harm assesses both of unilateral and coordinated effects. Merger proposal will result in unilateral and/or coordinated effects when they weaken or remove the competitive pressure on firms in a market. In cases where unilateral and/or coordinated effects amount to a significant and sustainable increase in the market power of the merged firm and/or other firms in a market, the merger would lead to Substantial Lessening of Competition ("SLC").[19] On the other hand, the European and German Merger Control approaches impose the Significantly Impede Effective Competition ("SIEC")

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[18] In the case of bilateral positive indirect network effects the members of one group benefit indirectly from the growth of their group because it provides an incentive for the other group to grow as well, which in turn has a positive effect on the first group. The growth of one user group thus creates a "ping pong effect". Bilateral positive network effects occur in particular where the platform serves to connect two or more user groups for the purpose of direct interaction. Such platforms can be referred to as matching platforms. If a matching platform connects distinct user groups for a specific transaction it is called a transaction platform. The transaction can be conducted either via the platform or outside the platform. Examples are real estate platforms , where the transaction (the purchase or rental of a property) is carried out outside the platform or hotel booking platforms where the transaction (the reservation of a hotel room) is carried out via the platform. Typical non-transaction matching platforms are online dating platforms whose objective is not to facilitate a specific transaction but to enable direct private contacts between their users.6 In the case of unilateral indirect network effects only one side benefits from the growing number of users on the other side, while there is no benefit to the users whose number has increased (in fact they might even experience adverse effects). This concerns in particular platforms were the actual platform business is financed by providing access to potential customers for advertising purposes. Such platforms enable one group of users to get the attention of another user group (as a whole and not filtered according to individual preferences). They could be referred to as 'audience providing' platforms or advertising platforms. See Bundeskartellamt, Working Paper: The Market Power of Platforms and Networks Executive Summary, Bundeskartellamt (Bundeskartellamt, 2016) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Zusammenfassung.pdf?__blob=publicationFile&v=4> [accessed November 2022]

[19] Ibid.

[20] European Comission, "Intervention Triggers and Underlying Theories of Harm - European Commission" <https://ec.europa.eu/competition/consultations/2020_new_comp_tool/kd0420575enn.pdf> [accessed 5 April 2023]

in the market. Respectively, Article 2 §2 of the European Merger Regulation (EC) No 139/2004 of January 20, 2004 reads:

"A concentration which would not significantly impede effective competition (SIEC) in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.."[21]

3.3 Competition Law Compliance in Merger on Digital Economy

In its most basic form, a compliance programme is a way for a company to public-ally announce that it intends to follow all of these rules, and they have to be taken into account in day-to-day business. Often, but not always, compliance programmes are coupled with the company's corporate governance code or another code of conduct. Compliance programmes are examples of 'voluntary governance', whereby companies or organizations express their commitment to certain rules and to the values or objectives on which they are based. Such programmes generally also include a set of actions intended to assist companies in building a genuine culture of compliance with those rules, but also in detecting likely acts of misconduct, in remedying them and in preventing any repetition. Because compliance programmes are often publicly available, they serve an important external signaling function by stating that a company is aware of the law, and intends to comply with it. However, compliance programmes also create an educational responsibility in the internal structure of the company. By having a compliance programme in place, companies basically state that their employees are aware of the applicable rules and regulations, and that they take care to abide by them. This creates an obligation for companies, at least in theory, to educate all personnel about the laws to which they have committed themselves. For that reason, compliance programmes often contain an approach to the training and education of current employees, and they are usually provided to new employees at the outset.

In the perspective of the Indonesian Competition Law Number 5/1999 is a form of commitment, active attitude and awareness business actors in behaving in the market when interacting with suppliers, competitors, and consumers so as not to violate the provisions of Law No. 5 Year 1999 year 1999.

From the Indonesian Supervisory Commission for Business Competition (KPPU), the antitrust compliance in Indonesia provides several benefits to the companies. A compliance programme can be used as a control to protect the company from the risk of violating Law Number 5 Year 1999 as early as possible. The benefits of a company's participation in a compliance programme include:[22]

Maintain the good name and reputation of the Company

Companies that have been proven to have committed violations of competition law and have been sentenced by KPPU will by KPPU will result in the

[21] European Merger Regulation (EC) No 139/2004 of January 20, 2004
[22] Article 4 of KPPU Regulation No. 1 of 2022 on Competition Compliance Program.

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2022

loss of the company's good name the company's good name, and this automatically lowering the company's reputation.

Companies that are found to have violated Law No. 5 Year 1999 also become unattractive to business partners, investors and consumers who are willing to invest in the company. to business partners, investors and consumers who business partners, investors and consumers who have special attention to ethical issues and good image of the company.

The company is considered to be able to maintain and have high moral ethics

This perception will be created if the company does not violate the law and actively actively encourages the implementation of fair business competition values in every business activity.

Creating and maintaining internal standardized procedures related to compliance with Law Number 5 Year 1999.

After participating in the compliance program of Law No. 5 of 1999 compliance program, it is expected that every activity of business actors, such as such as: making agreements with other parties, pricing, promotion and sale of goods, as well as relationships with consumers, suppliers, and competitors no one has the potential to violate the provisions of Law Number 5 Year 1999.

Minimizing the cost consequences arising from non-compliance with Law Number 5 Year 1999. Cost consequences that arise include; i. Costs during the law enforcement process at KPPU, objection process at the District Court up to to the cassation process at the Supreme Court; ii. Administrative sanctions that may be imposed on business actors found to have violated Law Number 5 Year 1999.

KPPU currently is focusing on the advertisement of the competition compliance to prevent the violation of Law Number 5 of 1999 what is called preventive approach rather than repressive approach namely to enforce the Indonesian competition law if the business actors violated the provisions of Law Number 5 of 1999. Business actors who follow the competition compliance program will be encouraged to maintain the competitive values of healthy business and so that the company becomes more competitive and innovative in the relevant market.

3.4 Regulating Competition Compliance in the Digital Market

In the Law Number 5 year of 1999 concerning The Prohibition of Monopolistic Practices and Unfair Business Competition (“Indonesian Competition Law Number 5/1999”), mergers, consolidations and acquisitions refer to the actions of business actors, which:

1. create a concentration of control of several Business Actors that were previously independent tobecome 1 (one) Business Actor or 1 (one) group of Business Actors; and/or
2. result in a change in control from one Business Actor to other Business Actor that was each previously independent so as to create a control concentration or market concentration.[23]

[23] Article 1 of the Law Number 5 year of 1999 concering Prohibtion of Monopolistic Practices and Unfair Business Competition

Subsequently, Article 28 of the Law No. 5/1999 stipulates the prohibition of Mergers, Consolidations, and/or Acquisitions of Company Shares if such actions may result in the occurrence of monopolistic practices and/or unfair business competition. Law No. 5/1999 orders that further provisions regarding Mergers or Consolidations or Acquisitions of Company Shares be provided for in a government regulation. Furthermore, Article 29 of Law No. 5/1999 regulates that mergers or consolidations, or Acquisitions of Shares as intended in Article 28 of Law No. 5/1999 which results in the assets value and/or sales value exceeds a certain amount, must be notified to the Indonesian Supervisory Commission for Business Competition ("KPPU") by no later than 30 (thirty) days as from the date of Mergers, Consolidations, or Acquisitions. Further provisions regarding the setting of the assets value and/or sales value as well as notification procedures are provided for in a government regulation.

In order to provide accurate implementing rules for mergers, the Government of Indonesia and KPPU promulgated the Government Regulation Number 57 Year 2010 regarding Mergers or Consolidations and Acquisitions of Company Shares that May Result in the Occurrence of Monopolistic Practices and Unfair Business Competition ("Government Regulation Number 57/2010"). Furthermore, KPPU enacted Regulation Number 3 Year 2023 regarding the Assessment of Mergers or Consolidations or Acquisitions of Company Shares and/or Assets that may Cause a Monopolistic Practices and/or Unfair Business Competition (KPPU Regulation Number 3/2023).

In the practice, KPPU classifies mergers into 3 (three) categories: First, the Horizontal Merger, Consolidation, or Acquisition, namely transactions that engage Business Entities being in one market. Second, the Vertical Merger, Consolidation, or Acquisition, namely transactions engaging Business Entities being in one supply chain. Third, the Conglomerate Merger, Consolidation, or Acquisition, namely transactions not including horizontal or vertical category.[24]

KPPU, in terms of merger control measures, requires the business actors (acquiring companies and merged companies) to notify KPPU regarding the merger transaction. Pursuant to Article 5 of the GR Number 57/2010, stipulates:

1. Merger of Business Entities, Consolidation of Business Entities or Acquisition of shares of other companies causing the asset value and/or sale value exceeding a certain amount must be notified in writing to the Commission by no later than 30 (thirty) business days as from the date on which the Merger of Business Entities, the Consolidation of Business Entities or the Acquisition of shares of other companies is legally in effect.
2. A certain amount as intended in paragraph (1) shall consist of:
1. asset value in the amount of Rp2,500,000,000,000.00 (two trillion and five

[24] Article 1 paragraphs (1)-(3) of the Government Regulation Number 57/2010 on Assessment of Merger, Consolidation or Acquisition of Shares and/or Assets That May Cause Monopolistic Practices and/or Unfair Business Competition

hundred billion rupiah); and/or

2. sale value in the amount of Rp5,000,000,000,000.00 (five trillion rupiah).
3. As for Business Actors engaging in the banking sector, the obligation to provide written notice as intended in paragraph (1) shall be applicable in the event that the asset value exceeds Rp20,000,000,000,000.00 (twenty trillion rupiah).
4. The asset value and/or sale value as intended in paragraphs (2) and
5. shall be calculated based on the total of asset value and/or sale value of:

1. Business Entity resulting from the Merger, Business Entity resulting from the Consolidation orBusiness Entity acquiring the shares of other company and the Business Entity acquired; and
2. Business Entity which directly or indirectly controls or is controlled by Business Entity resulting from the Merger, Business Entity resulting from the Consolidation or Business Entity acquiring shares of other companies and the Business Entity acquired.

The merged company must be notified to the KPPU if it meets the threshold concerned as stipulated in Article 5 paragraph (2) or paragraph (3) of GR No. 57 of 2010 by no later than 30 (thirty) business days as from the date on which the Merger of Business Entities, the Consolidation of Business Entities or the Acquisition of shares of other companies is legally in effect.[25] It shows that the merger control system is a mandatory post-notification system. Then, the legal consequence of failing to notify a merger is that the KPPU imposes sanctions in the form administrative action on business actors for committing against the applicable laws which cause monopolistic practices and/or unfair business competition. In the event that the business actor does not submit the written notification as referred in Article 5 paragraph (1) and (3), the business actor is subject to a sanction in the form of an administrative fine of Rp. 1,000,000,000.00 (one billion rupiah) for each day of the delay, provided that the maximum administrative fine is Rp. 25,000,000,000.00 (twenty-five billion rupiah). Meanwhile the KPPU will examine whether the merged company would have a dominant position which may cause a monopolistic practices and/or unfair business competition in the relevant market. If the result of the assessment may cause a monopolistic practices and/or unfair business competition then the KPPU will cancel the merged company. This is one of the weaknesses of a mandatory post-notification system. Then the GR No. 57 of 2010 regulates a voluntary consultation system in which the companies may consult to the KPPU to ask an assessment of merger companies plan before the merged company is legally in effect. Both merged company that notify late or those merged company that notify within the allotted time, then KPPU will conduct its assessment in two stages[26] if the merged company meets the threshold as stipulated by the GR No. 57 of 2010 and KPPU Regulation No. 3 of 2023 and suspected of monopolistic practices and/or unfair business competition in the

[25] See Article 2 paragraph (2) KPPU Regulation No. 3 of 2023.
[26] Guidelines for Assessment for Mergers, Consolidations, Or Acquisitions (2020), p. 34

relevant market. The two stages of assessment are the initial assessment and the comprehensive assessment[27]. The initial assessment will be conducted to review the market concentration of the merged company whether the merged company has exceeded of market concentration index as stipulate in KPPU guidelines. If the result of initial assessment achieved high concentration index and will be followed by the comprehensive assessment. The comprehensive assessment will be reviewed in using of analysis of

1. barriers to the market entry (barrier to entry).
2. Potential anti competitive behavior (unilateral conduct, coordinated effect and closing of market access (market foreclosure).
3. Efficiency; and
4. Bankruptcy.

These two stages of assessment shall be applied to the merged company either to the conventional merger or digital merger. But for digital merger shall be added another factor to fix whether digital merger may lead to substantial lessening competition or not in using of the Theory of Harm (ToH) to assess both of unilateral and coordinated effects of merger transactions. The KPPU didn't apply such theory and didn't consider that the digital economy shall be treated difference by assessing its relevant market and its market concentration and as well as networking effect. Meanwhile there is no digital economy regulations or guidelines in which merger on digital market could comply.

Currently KPPU received the notification of PT Aplikasi Karya Anak Bangsa (Gojek) acquisition over Tokopedia shares on 8 August 2022. The notification was conducted based on the applicable law threshold regulations, namely;

1. The combined asset value resulting from the Acquisition of PT Tokopedia shares by PT Aplikasi Karya Anak Bangsa Rp. 2,500,000,000,000.- (two trillion five hundred billion rupiah);
2. The combined sales value of the results of the Acquisition of shares of PT Tokopedia by PT Aplikasi Karya Anak Bangsa exceeds Rp. 5,000,000,000,000.- (five trillion rupiahs).

PT Aplikasi Karya Anak Bangsa notified the acquisition concern to the KPPU within 30 days after the acquisitions legally effective date was. Then KPPU conducted the assessment and the result of the transaction impact analysis are:

1. Based on market concentration analysis, the level of market concentration for 12 (twelve) services in one relevant market is in spectrum III with an HHI value of more than 2,500 (HHI>2,500) and an HHI delta of more than 150 (ΔHHI>150)). However, there is no serious indication of significantly lessening competition;
2. Based on the analysis of market entry barriers, it was concluded that 12 (twelve) services in the relevant market have low barriers to entry;
3. Based on the coordinated impact analysis, it is found that the elasticity of consumer demand is > 1 (greater than 1) for 12 (twelve) services in one

[27] Ibid.

relevant market, thus the coordinated impact resulting from the acquisition of PT Tokopedia shares by PT Aplikasi Karya Anak Bangsa is low;

4. Based on the analysis of data submitted by Business Actors, the transaction of the Acquisition of PT Tokopedia Shares by PT Aplikasi Karya Anak Bangsa had an impact on increasing efficiency for Business Actors;
5. Based on the bankruptcy analysis, bankruptcy is not the background to the PT Tokopedia Share Acquisition transaction by PT Aplikasi Karya Anak Bangsa;
6. Based on the analysis of other aspects, the following conclusions are obtained;

1. Transactions carried out are not related to government policies to increase competitiveness and/or strengthen national industries;
2. The takeover is carried out in connection with the development of technology and innovations;
3. Transactions have a positive impact on Micro, Small and Medium Enterprises;
4. Transactions have an impact on protection and employment;
5. Transactions are not carried out by order of laws and regulations.

Based on the above review KPPU came to the conclusion that there is no allegation that could cause a monopolistic practices and/or unfair business competition in the acquisition of PT Tokopedia Shares by PT Aplikasi Karya Anak Bangsa. Meaning that GoTo as a holding company could not cause a monopolistic practices and/or unfair business competition.

The review process of acquisition of share's Tokopedia by Gojek and its result was not open for public and no one knows how the KPPU conducted the review and determination of the relevant market and market concentration and what kind of theory was applied. The result of review was just informed by KPPU to the PT Aplikasi Karya Anak Bangsa.

It is certain to review the relevant market in the digital market has to consider the characteristics of digital market such as network effects (direct and indirect); multi-sided of market; 'big data'; and rapid innovation. In the case of acquisition of share's Tokopedia by PT Aplikasi Karya Anak Bangsa, both of them is a multi-sided market and their respective characteristic, Gojek is platform ride-hailing services and Tokopedia is a platform goods services. Every platform serves at least two groups (or networks) of consumers or suppliers and there is at least an indirect network effect between these groups. And now both of them is under controlled by GoTo.

Consumer data that collected by the GoTo shall be also considered in the review of merger on digital market, because the big data has not only pro competitive impact but also anticompetitive impact. As German Bundeskartellamt and French Competition Authorities conducted that the impact of big data to the competition could be in three ways, namely: 1) Data can be a factor contributing to market power. 2) Data can increase market transparency among suppliers and thereby facilitate collusion. 3) Data can be an instrument for certain anticompetitive conducts. And according to the Bundeskartellamt, 3 aspects are of utmost importance for the Competition Authority's enforcement of merger controll in the digital market, first assessment of an intermediation market. Second, access to big data and 'essential facility'. Third, existence of "tipping" of market and network effects. Further more the Bundeskartellamt emphasis that network effects can constitute anticompetitive effects both due to abuse of market dominance and a merger of digital companies. The Competition Authority applies the Theory of Harm (ToH) to assess both of unilateral and coordinated effects of merger transactions in the digital market. All these factors can be applied by the competition authority because there is regulations of digital market as a legal basis to review its to proof whether the merger on digital market would lead to substantial lessening competition or not.

So if the KPPU reviewed the acquisition of the share's Tokopedia by PT Aplikasi Karya Anak Bangsa using the conventional approach and without considering the merger is in digital market and certainty that the acquisition would not lead to the substantial lessening competition because PT Aplikasi Karya Anak Bangsa and PT Tokopedia are in different relevant market as KPPU had already decided. The lack of digital economy regulations in Indonesia limits the KPPU to analysis the merger digital properly and the business actor could not comply, because the absence of the digital economy regulations.

4. Conclusion

Embarking upon the analysis and exposition abovementioned, this paper finds that there has been lack of regulatory provisions or even an absence of substantial provisions concerning ensuring effective compliance of digital companies in the digital market in Indonesia. For example, in the case of merger transaction between PT Aplikasi Kkarya Anak Bangsa (Go Jek) and Tokopedia, both Law Number 5/1999 and KPPU did not impose specific requirements for these digital undertakings to seize specific measures in order to secure full compliance with the Indonesian Competition Law Number 5/1999. The Government of Republic of Indonesia shall enact the digital economy regulations in which KPPU may apply it to review merger on digital market and the business actor could comply with it as well.

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