

CHAPTER 1

INTRODUCTION

1.1 Background

The business world today has entered a period of freedom and openness. There are no longer distances or obstacles that have so far limited all business activities, especially activities between regions and between countries. Changes in the business environment such as globalization, deregulation, technological advances and market fragmentation create a very tight competition. Such conditions require companies to always develop strategies in order to survive. Companies responses to this increased competition vary widely. There are those who stick with what they have been doing so far and some have merged into big companies in the industrial world. There are many ways that a company use in optimizing the existing resources such as capital, management technology, and others in order to obtain new synergies in conducting business activities that refer to efficiency and productivity, one of these ways is by way of a merger.¹ Law No. 5 of 1999 explains that the merger of business entities has the potential for monopolization and or unfair business competition, this is regulated in Article 28 and Article 29 of the Anti-Monopoly Law. Merger and acquisition activities are common in the digital economy sector today. This condition is a challenge for the authority of the Business Competition Supervisory Commission (KPPU) because there are broad impacts arising from these business activities. This is because the types of business

¹ Normin S. Pakpahan 1995, Hukum Perusahaan Indonesia, Yayasan Pengembangan Hukum Ekonomi Indonesia, Jakarta, Page 27.

activities of digital companies are not only in one sector, but also in various types of businesses.

An industry is said to have a monopoly structure if there is only one producer or seller without direct or indirect competitors, either real or potential. The resulting output has no substitution. The company has no competitors because there are obstacles for other companies to enter the industry in question.² Merger is a form of company merger or the joining of two or more independent undertaking or the integration of activities carried out by two undertaking in a comprehensive and permanent manner.³ Thus, the merger and consolidation of the company will increase the company's ability to become more competitive by combining the resources owned by the two companies. With this more competitive capability, undertaking can control a larger market share. With a larger market share, the company or undertaking can become a dominant position. This dominant position will have an influence on the competitive conditions in the market. Thus merger control should be taken seriously to avoid unnecessary losses from failure to comply with the merger control regime.⁴ Merger of business entities, consolidation of business entities, or acquisition of shares will give rise to the potential to become a dominant position. Because the purpose of merger, consolidation and acquisition is to achieve synergies and control of resources. Besides, the goal is to achieve a competitive value compared to similar undertaking. The Government issued

² Andi Fahmi Lubis, *Hukum Persaingan Usaha Antara Teks dan Konteks*, Komisi Pengawas Persaingan Usaha (KPPU), Edisi Kedua, Jakarta, 2017, Page. 192.

³ *Ibid.*, Page 19.

⁴ A.M. Tri Anggarini, and Farid F. Nasution, "Pengendalian Merger Berdasarkan Hukum Persaingan (Merger Control Based on Competition Law)", *Legislation Journal*, Vol. 10 No. 2, 2013, Page 191.

Government Regulation No. 57 of 2010 concerning Merger or Consolidation of Business Entities and Acquisition of Company Shares which may result in Monopolistic Practices and Unfair Business Competition. With Government Regulation No. 57 of 2010 is expected to provide legal certainty for undertaking, especially in conducting merger activities.

The potential for unfair business competition in the e-commerce sector is basically very likely to occur. In this case, as an example, it can be illustrated that a large-scale e-commerce company will have market power and even create barriers for other providers to enter the market. In addition, large-scale e-commerce companies also tend to have a higher bargaining position compared to their users, thus potentially creating disproportionate partnership relationships.⁵ The ease and effectiveness of e-commerce has made transactions using e-commerce in Indonesia continue to increase every year. Bank Indonesia (BI) recorded that e-commerce transactions also experienced positive growth in the midst of the Covid-19 pandemic. BI even projects that e-commerce transactions in Indonesia during the pandemic will increase by IDR 429 trillion throughout 2020.⁶ In Indonesia, there is the hot topic of a merger of two digital companies in Indonesia which is being discussed. The name for the merger of Gojek and Tokopedia will use the name GoTo. Gojek and Tokopedia announced the formation of a new company resulting from the merger of the two, GoTo, on Monday, May 17, 2021. The formation of

⁵ Direktorat Ekonomi Kedeputan Kajian dan Advokasi Komisi Pengawas Persaingan Usaha, "Ringkasan Eksekutif Penelitian Perilaku Pelaku Usaha Di Sektor E-Commerce)," KPPU, Page.1, last modified 2019, <https://kppu.go.id/wpcontent/uploads/2020/07/EkSum-e-commercePerilaku1.pdf>.

⁶ <https://money.kompas.com/read/2020/10/22/051200926/bi-prediksi-transaksi-e-commerce-melonjak-sampai-rp-429-triliun-sepanjang-2020>, accessed on 21 September 2021.

the GoTo group is the largest business collaboration in Indonesia, as well as the largest between two internet and media service companies in Asia to date. By combining e-commerce services, delivery of goods and food, transportation, and finance, GoTo will create the largest digital consumer platform in Indonesia.⁷ It is feared that the news of the merger of the two startups will pose a risk to the practice of merging big data to dominate the market.

The understanding of that mergers can lead to monopolistic practices implies that basically mergers are not prohibited, even as described above, this action has a positive side for the development of the company. However, care must be taken not to create market concentration which can cause product prices to increase and threaten small-scale businesses. This means that there is a benchmark to say that the merger creates monopolistic practices and/or unfair business competition.

1.2 Legal Issue

1. Does the merger carried out by *Gojek* and *Tokopedia* already in accordance with the direction of the merger policy in business competition?
2. Can Article 28 of Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition be applied to the merger of *Gojek* and *Tokopedia*?

⁷ <https://www.tribunnews.com/bisnis/2021/05/17/apa-itu-merger-goto-contohnya-perusahaan-gabungan-gojek-dan-tokopedia>, accessed on 21 September 2021.

1.3 Research Objectives

- a. To analyze whether the merger carried out by *Gojek* and *Tokopedia* are in accordance with the direction of the merger policy in business competition law.
- b. To analyze whether Article 28 of Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition can be applied to the merger of *Gojek* and *Tokopedia*.

1.4 Research Benefits

1. Theoretical Benefits

The results of this study are expected to be one of the contributions to the developments in the field of business competition law, especially monopoly practices. In addition, it is hoped that the results of this study can produce benefits for further legal research to add references.

2. Practical Benefits

Through this research, it can add insight to the public regarding monopolistic practices and legal to know the legal consequences of monopoly practices. In addition, it is hoped that it can provide input to legal practitioners in dealing with issues related to business competition, especially monopolization that are prohibited according to Law No. 5 of 1999.

1.5 Research Methods

1. Type of Research

The type of research used in this paper is legal research to find the truth of coherence, namely whether there are legal rules according to legal norms and are there norms in the form of orders or prohibitions in accordance with legal principles, and whether someone's actions are in accordance with legal norms or legal principles.⁸

Legal research is a know-how activity in legal studies, not just know-about. As a know-how activity, legal research is carried out not only to find out something, but to solve existing legal issues. In conducting legal research, it is not just a process of finding the applicable laws in social life activities as stated by Cohen. More than that, legal research is also a process of creating laws to address the problems at hand.⁹

2. Research Approach

The approaches used in legal research are statute approach, case approach, historical approach, comparative approach, and conceptual approach.¹⁰ The approach used in this research is the statute approach, conceptual approach, comparative approach, and case approach. This statute approach is carried out by reviewing all laws and regulations related to the legal issues being handled.¹¹ This research also use conceptual approach, this approach is carried out by studying and understanding the

⁸ Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi*, Cet. 14 Prenadamedia Group (Divisi Kencana), Jakarta, 2019, Page 47.

⁹ *Ibid.*, Page 60-61.

¹⁰ *Ibid.*, Page 133.

¹¹ *Ibid.*, Page 133.

meaning of each related legislation.¹² In using a conceptual approach, it is necessary to refer to legal principles. This principle can be found in the views of scholars or legal doctrines. The concept of law can also be found in the Law itself. This approach is important because understanding the doctrine that develops in legal science can be the basis for building legal arguments when resolving legal issues regarding merger and monopolization. In addition, this research use case approach. The case approach is carried out by reviewing cases related to the issues at hand which have become court decisions that have permanent legal force. The case can be in the form of cases that occur in Indonesia or in other countries. The main study in the case approach is the ratio decidendi or reasoning, namely the court's consideration to arrive at a decision. For both practical and academic purposes, the ratio decidendi or reasoning is a reference for the preparation of arguments in solving legal issues.¹³ This research also use comparative approach. This approach is carried out by comparing the laws of a country with the laws of one or more other countries on the same matter. The purpose of this approach is to obtain similarities and differences between the laws¹⁴

3. Legal Material

¹² *Ibid.*, Page 135-136.

¹³ *Ibid.*, Page 134.

¹⁴ *Ibid.*, Page 135.

The legal materials used in this legal research are primary legal materials and secondary legal materials. Primary legal materials consist of statutory regulations and judges decisions. Secondary legal materials are all publications on law that are not official documents. Publications on law include textbooks, legal dictionaries, legal journals, and commentaries on court decisions.¹⁵

The primary legal materials used for this legal research are as follows:

- a. Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition;
- b. Law No. 40 of 2007 concerning Limited Liability Companies;
- c. Law No. 11 of 2020 concerning Job Creation;
- d. Law No. 19 of 2016 concerning Amendments to Law No. 11 of 2008 concerning Electronic Information and Transactions;
- e. Government Regulation No. 44 of 2021 concerning the Implementation of Prohibition of Monopolistic Practices and Unfair Business Competition;
- f. Government Regulation No. 71 of 2019 concerning the Implementation of Electronic Systems and Transactions;
- g. Government Regulation No. 80 of 2019 concerning Trading Through Electronic Systems;
- h. Government Regulation No. 57 of 2010 concerning Merger or Consolidation of Business Entities and Taking Company Shares

¹⁵ *Ibid.*, Page 181.

which may Result in xwMonopolistic Practices and Unfair Business Competition.

Meanwhile, the secondary legal materials used are books, KPPU guidelines, thesis, scientific journals, articles, related papers and the results of other people's opinions related to the object of research in the field of business competition law, especially monopolization.

4. Legal Material Analysis

Analysis of legal materials is a method to find answers to the subject matter. In conducting legal research, the following steps are taken: (1) identifying legal facts and eliminating irrelevant matters to create legal issues to be resolved; (2) collection of legal materials and if deemed relevant, also non-legal materials; (3) conduct a review of the proposed legal issues based on the materials that have been collected; (4) draw conclusions in the form of arguments that answer legal issues; and (5) giving prescriptions based on the arguments that have been built in the conclusions.¹⁶ Legal analysis in this study, starting from outlining the problem, then explaining, discussing, and solving problems based on the legal material obtained in order to obtain conformity in obtaining conclusions. The truth obtained will be used to answer the legal issues raised.

¹⁶ *Ibid.*, Page 213.

1.6 Systematic Research

CHAPTER I contains introduction which provides a general and comprehensive overview systematically which contains the background, legal issue, research objectives, research benefits, research methods which consists of the type of research, the type of problem approach, sources of legal materials, legal analysis and systematics research.

CHAPTER II contains the first legal issue that is whether the merger carried out by *Gojek* and *Tokopedia* are in accordance with the direction of the merger policy in business competition law. In which there are sub-chapters on the concept of merger in business competition law, the concept of digital platform, the characteristic of merger in digital platform, and the merger of the digital platform of *Gojek* and *Tokopedia*.

CHAPTER III contains the second legal issue that is whether Article 28 of Law No. 5 Year 1999 can be applied to the alleged monopolization of the merger of *Gojek* and *Tokopedia*. In which there are sub-chapters on the principles of fair competition in merger activity, digital platform merger in America, Regulations regarding supervision of mergers in Law No. 5 of 1999, and KPPU and its role in supervising digital business.

CHAPTER IV is the closing which contains the conclusions from the explanations of the previous chapters and also provides suggestions as recommendations from the research results.