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Technology Company Merger and Acquisition: a Study of Indonesian and European Union Competition Law

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ABSTRACT

Technology has become an essential part of human activities, and people's needs and demands are significantly increasing. People have become dependent on technology because they use it to travel, communicate, learn, do business, and simplify human life. Currently, technology-based companies are growing rapidly worldwide, as we can see how Google, Facebook, Twitter, Microsoft, Apple, and various other companies dominate the market. Likewise, in Indonesia, people's activities cannot be separated from various products from technology-based companies, such as Gojek, Tokopedia, Shopee, Grab, Traveloka, etc. Recently, Gojek and Tokopedia officially merged to become the GoTo Group and claimed to be Indonesia's largest technology group. This merger is usually carried out by business actors to seek more profit and to become a company that wins the market both on a national and international scale and, in fact, has a significant impact on changes in structure and control over the market so that there is a potential for abuse of dominant position to occur by limiting the choice of both products, quality, and price. Based on this case, this normative research using the case approach and statute approach aims to analyze how Indonesian competition law regulates technology company mergers by comparing it with European Union competition law. Accordingly, a lesson learned from European Union is that Indonesian Competition Law needs to adapt to the Data Protection Law in reviewing technology company mergers in Indonesia.

1. INTRODUCTION

Technological developments make society must accept the presence of technology penetrating all aspects of life. Information technology is the fastest-growing and directly influences the level of civilization.[1] This fact makes the rapid growth of

[1] Dendy Suseno Adhiarso, Prahastiwi Utari, and Sri Hastjarjo, "The Impact of Digital Technology to Change People's Behavior in Using the Media," *Social Sciences and Humanities* 2 (2018): 35–40; Wei Qian, Lee Parker, and Jingyu Zhu, "Corporate Environmental Reporting in the China Context: The Interplay of Stakeholder Salience, Socialist Ideology and State Power," *The British Accounting Review*, 2023, 101198, https://doi.org/10.1016/J.BAR.2023.101198., p.35.

technology-based companies a necessity, as it is Amazon, Apple, Google, and Microsoft, the four American companies now worth more than a trillion dollars each (Microsoft is above $2 trillion, and Apple nearly $3 trillion) reported enviable growth in 2021,[2] and this number experienced stagnant growth during the pandemic. Apple has its "services" business, a division that includes, among other things, its App Store, Apple Pay, iCloud, and its music and TV subscription plans, and Amazon is not just an indomitable retailer but also the largest cloud services provider with its Amazon Web Services cloud.[3]

In Indonesia, Gojek and Grab provide not only online transportation services but also online shopping services, online restaurants, e-money, and entertainment services. Tokopedia and Shopee are online marketplaces that provide various payment services. These technology companies' business networks have dominated consumer activities and various services.[4]

As digital platforms grow in size and importance, their impact on our market and societies has to be considered. Companies such as Google, Facebook, Apple, and Amazon are at the forefront of competition law, and in recent years, competition regulators from around the world have written expert reports to understand the dynamics of competition of these digital companies.[5] Technology markets can present some unique issues and challenges for policymakers, manufacturers, distributors, and consumers, and the fundamental principles of antitrust law and economics have to be equally applicable to even the newest industries.[6]

On May 17, 2021, PT Aplikasi Karya Anak Bangsa (Gojek) and PT Tokopedia officially merged to become the GoTo group. GoTo Group companies combine various services at once, such as online commerce or e-commerce, delivery of goods and food, transportation, and finance. The GoTo merger already has more than 11 million business partners.[7] Based on the Statista report, the number of Gojek company monthly active

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[2] Farhad Manjoo, "The Rise of Big Tech May Just Be Starting," https://www.nytimes.com/2022/02/16/opinion/big-tech-stock-market.html, 2022.

[3] Manjoo.

[4] Didit Darmawan and John Gatheru, "Understanding Impulsive Buying Behavior in Marketplace," *Journal of Social Science Studies (JOS3)* 1, no. 1 (2021): 11–18, https://doi.org/10.56348/jos3.v1i1.2.

[5] Filipo Lancieri and Patricia Morita Sakowski, "Competition in Digital Markets: A Review of Expert Reports," *Stanford Journal of Law, Business and Finance* 26, no. 1 (2021); José van Dijck, "Governing Trust in European Platform Societies: Introduction to the Special Issue," *European Journal of Communication* 36, no. 4 (2021): 323–33, https://doi.org/10.1177/02673231211028378.

[6] Federal Trade Commission, "Competition in the Technology Marketplace," Federal Trade Commission, 2022.

[7] Mochamad Januar Rizki, "Melihat Potensi Pelanggaran Persaingan Usaha Dalam Merger Perusahaan Digital," https://hukumonline.com/berita/baca/lt60af3df3138ce/melihat-potensi-pelanggaran-persaingan-usaha-dalam-merger-perusahaan-digital/?page=all, 2021; Anisya Humaira and Kukuh Tejomurti, "Analysis of Consumer Personal Data Protection for Data Integration: The Gojek-Tokopedia Case," *Indonesian Journal of Law and Policy Studies* 3, no. 1 (2022): 20–30.

users as of November 2019 was 29 million.[8] Meanwhile, Tokopedia's active users were 100 million monthly, and the number of sellers was 11 million.[9] This business combination is rated as Asia's largest combined digital company and media services. The potential for monopolistic practices or unfair competition that could arise after the merger of the GoTo group was being debated, considering that these two companies have different markets.[10] Gojek provides transportation services and a digital payment service called Gopay. Meanwhile, Tokopedia is engaged in the e-commerce business. In European Union, technology company mergers were proposed, including the merger of Google and DoubleClick, and Microsoft and Skype.[11]

Based on the facts described above, in the 5.0 era, there are mergers and acquisitions of technology-based companies worldwide that will affect markets and competition. Therefore, this study aims to examine and compare how the Government of Indonesia and European Union regulate the Technology Company Merger and Acquisition in their Competition Law.

2. RESEARCH METHOD

This normative juridical research focused on examining positive law[12] and it was carried out using a statutory approach by examining all laws and regulations related to legal issues and case-based approach by examining the cases that occurred in Indonesia and European Union. This normative research used secondary data, namely data obtained from the results of a literature review of various library materials related to research problems or materials, including scientific journals[13] and was described the technology company mergers regulation in Indonesian and European Union Competition Law.

3. RESULTS AND DISCUSSION

3.1. Merger and Acquisition Overview in Indonesian and European Union Law

In business, the terms merger and acquisition are generally used interchangeably. This is because mergers and acquisitions lead to essentially the same outcome when the two entities become one. A merger is legal when two or more organizations merge, and

[8] S. Ganbold, "SEA: Number of Gojek Monthly Active Users by Country 2019," https://www.statista.com/statistics/1168407/sea-number-of-gojek-monthly-active-users/., 2019.

[9] Tokopedia, "Tentang Tokopedia," https://www.tokopedia.com/about/our-story, 2021.

[10] Sukarmi Sukarmi et al., "Assesing the Merger of Online Platform Companies: Does It Lead to Monopoly or Just Business Expansion? (Analysis of The Merged Company of GoTo)," *Jurnal Cita Hukum* 9, no. 3 (December 2021): 551–66, https://doi.org/10.15408/jch.v9i3.21667.

[11] Jasper van den Boom and Peerawat Samranchit, "Assessing The Long Run Competitive Effects of Digital Ecosystem Mergers," *TILEC Discussion Paper*, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3766282.

[12] Johny Ibrahim, *Teori Dan Metodologi Penelitian Hukum Normatif* (Malang: Bayumedia Publishing, 2006).p.295.

[13] Mukti Fajar and Yulianto Achmad, *Dualisme Penelitian Hukum-Normatif Dan Empiris* (Yogyakarta: Pustaka Pelajar, 2015). p.156.

only one company survives as a legal entity.[14] Two or more companies approach together and become one company, while in the acquisition, a large and financially sound company buys a small company,[15] two or more adjacent companies, and forms one or more companies.[16] Hampton claims that "a merger is a combination of two or more businesses when only one company survives".[17]

In Indonesian law, "merger" is regulated in Law Number 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as the Limited Liability Company Law), where a merger is defined as a legal action carried out by one or more companies to merge with another company that has existed, resulting in the assets and liabilities of the merging companies being transferred to the company that received the merger and subsequently the legal entity status of the merging companies ended by law.[18] Mergers can benefit business actors because they can be a tool for raising capital and expanding business scale.

In anti-competitive analysis, mergers are called horizontal when they occur between companies competing in the same market, vertical if they integrate different segments of the supply chain within a company, and conglomerates if the combining companies operate in adjacent markets, and produce goods, both to complement or differ from the demand point of view.[19] The act of merging, consolidating and/or acquisition will affect competition in the relevant market and will have an impact on increased or reduced competition that has the potential to harm consumers and society.[20] Combining independent companies into a single unit can increase the power of the resulting entity and influence markets in many parts of the world. For example, if two of the world's largest and most successful computer chip manufacturers merge, the impact would affect worldwide.[21]

Indonesian Competition Law regulates mergers in Article 28 and Article 29 of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter referred to as Indonesian Antimonopoly Law), where

[14] Horne in Muhammad Faizan Malik, "Mergers and Acquisitions: A Conceptual Review," *International Journal of Accounting and Financial Reporting* , 2014, 520–33. p.521.

[15] Giorgius in Malik.

[16] Khan in Malik.

[17] Hamption in Jenifer Piese, "Merger and Acquisition: Definitions, Motives, and Market Responses," *Lee Alice: Encyclopedia of Finance* , 2015. p.542.

[18] Article 1 (9) Act Number 40 of 2007 concerning the Limited Liability Company.

[19] Aldo Gonzalez and Daniel Benitez, "Pre-Merger Notification Mechanisms: Incentives and Efficiency of Mandatory and Voluntary Schemes ," https://lawprofessors.typepad.com/antitrustprof_blog/files/merger_notification_oct22.pdf, 2018.

[20] Komisi Pengawas Persaingan Usaha, "Pedoman Merger," https://www.kppu.go.id/id/wp-content/uploads/2012/12/Lampiran-Pedoman-Perkom-3.pdf, 2012; Thomas Stuart, "Too Little Too Late?: An Exploration and Analysis of the Inadequacies of Antitrust Law When Regulating GAFAM Data-Driven Mergers and the Potential Legal Remedies Available in the Age of Big Data," *European Competition Journal* 17, no. 2 (2021): 407–36, https://doi.org/10.1080/17441056.2021.1909234.

[21] David Gerber J, *Competition Law and Antitrust* (Oxford: Oxford University Press, 2020). p.75.

business actors are prohibited from merging or consolidating business entities, or taking over shares of other companies if these actions result in monopolistic practices and unfair business competition. Further provisions relating to the provisions of Article 28 and Article 29 are regulated in Government Regulation No. 57 of 2010 concerning Mergers or Consolidations of Business Entities and Acquisition of Company Shares That Can Result in Monopolistic Practices and Unfair Business Competition.[22] Regarding the process of handling cases for delays in Merger and Acquisition Notifications, it is regulated in KPPU Regulation No. 4 of 2012 concerning Guidelines for Imposing Fines for Late Notification of Mergers or Consolidations of Business Entities and Acquisition of Company Shares.

Indonesian competition law adheres to a post-merger notification system. In post-notification, all the requirements for mergers and acquisitions have been fulfilled from a legal aspect. However, the notification to the Indonesian Competition Authority, Komisi Pengawas Persaingan Usaha (hereinafter referred to as KPPU), has resulted in an assessment that the results of the merger or acquisition cannot be continued because it is reasonably suspected that they may violate the provisions of Law No. 5 of 1999 even though the merger or acquisition has been completed done. To avoid these problems, business actors can carry out oral and written consultations (pre-merger notification) with the Commission as regulated in PP Number 57 and KPPU Regulation Number 3 of 2019.[23] Mergers and Acquisitions in Indonesia are carried out by business actors with an asset value resulting from Mergers and Acquisitions exceeding IDR 2.5 trillion or sales values resulting from Mergers and Acquisitions exceeding IDR 5 trillion must be notified in writing to KPPU no later than 30 working days from the legally effective date of the mergers and acquisitions. Business actors in the banking sector who carry out Mergers and Acquisitions are required to submit a written notification to KPPU if the asset value of the Mergers and Acquisitions exceeds IDR 20 trillion.

The criteria that must be fulfilled by business actors includes the following:

a. Do not have the same business activities.
b. Do not have vertically integrated business activities.
c. Having the same business activities with a combined market share.
d. Spectrum I with an HHI value of less than 1,500 ($HHI<1,500$);
e. Spectrum II with an HHI value of 1,500 to 500 ($1,500 \leq HHI \leq 2,500$) and the change (delta) of HHI is less than/equal to 250 ($\Delta HHI \leq 250$);

[22] Preeti Kartika Putri and Paramita Prananingtyas, "Supervision of Kppu on the Action of Mergers Done By Mining Companies," *Diponegoro Law Review* 5, no. 1 (2020): 108–23, https://doi.org/10.14710/dilrev.5.1.2020.108-123.

[23] Rilda Murniati, "Ketidaktahuan Pelaku Usaha Sebagai Alasan Keterlambatan Notifikasi Merger Dan Akuisisi (Implementasi Peran KPPU Dalam Penanganan Merger Dan Akuisisi Di Masa Pandemi Covid-19)," *Jurnal Persaingan Usaha* 2 (2021): 43–52. p.51.

f. Spectrum III with an HHI value of more than 2,500 (HHI>2,500) and a change (delta) of HHI less than/equal to 150 (ΔHHI≤150).
g. Having vertically integrated business activities with an HHI value of each of these business activities fulfilling the Spectrum I criteria with an HHI value of less than 1,500.
h. Not potentially able to do tying and/or bundling or behavior that causes network externalities (network effect).
i. Notification is submitted no later than 30 days from the date of Juridical Effectiveness.
j. Takeover resulting in a Business Entity with sole control by one of the controllers who previously had joint control with another party in the Business Entity.
k. The notification period with a simple assessment is shorter than a comprehensive assessment, which is carried out within 14 working days after the approval of the simple appraisal notification procedure by the KPPU.

Certain business actors are excluded from the "non-notification mandatory" category. Business actors who are not required to make notifications must fulfill conditions including (1) Do not meet the value limit, (2) Is a transaction between affiliated companies, (3) There is no change in control, (4) Formation of a joint venture that does not go through the process of merging, consolidating, or takeover, (5) Transfer of exempted assets, and (6) Implement laws and regulations.[24]

a. Furthermore, regarding acquisitions through transfers of productive assets, transfers of assets that are not subject to notification obligations to KPPU are those that meet the following criteria:[25]
b. The value of the Asset Transfer transaction for Non-Banking Business Actors is less than IDR 250,000,000,000 (two hundred and fifty billion rupiah).
c. The value of the Asset Transfer transaction for Banking Business Actors is less than IDR 2,500,000,000,000.00 (two trillion five hundred billion rupiahs).
d. Transfer of assets acquired in the course of routine transactions (ordinary course of transactions).
e. Transfer of assets specifically for the property industry that meets one of the criteria, such as assets in the form of a building designated by the buyer as an office, or assets designated as social facilities and/or public facilities.
f. Transfer of Assets that have nothing to do with the business activities of the Acquisition Business Actor.

[24] KPPU Regulation No. 3 of 2019 concerning Assessment of Mergers or Consolidations of Business Entities and Acquisitions of Company Shares That Can Lead to Monopolistic Practices and Unfair Business Competition

[25] KPPU.

In the European Union, there are two levels of merger control. The first level is EU consolidation controls for transactions having EU dimensions, which are under the jurisdiction of the Commission under Regulation (EC) 139/2004 on the control of concentrations between undertakings (EU Merger Regulation), which provides the regulatory framework for the assessment of mergers, acquisitions and certain joint ventures (collectively concentrations) that meet prescribed turnover thresholds and therefore have an "EU dimension." The second level is national merger controls for transactions that do not meet the criteria of the EU Merger Regulations but qualify for investigation under Member States' national laws.[26]

European Union competition law uses the “concentration” term, defined as a lasting change in the control of an undertaking. "Control" is defined as the ability to exercise decisive influence over an undertaking. A change of control, and so a concentration, can arise in the following situations:

a. The merger of two or more previously independent undertakings (or parts of them).
b. The acquisition by one or more undertakings, directly or indirectly, of the whole or parts of another undertaking.
c. The creation of a full-function joint venture.

Article 1 EC 139/2004 regulation shall apply to all concentrations with an EU dimension as defined below:

a. The combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5.000 million, and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 25 million (unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State);
b. The combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2.500 million; in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million; in each of at least three Member States included, the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million (unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State)

[26] Iiris Tuohimaa, “Merger Control in the EU When Is an Impediment to Effective Competition Significant?.” (Lund University, 2022).

The procedural provisions in the merger process in the European Union regulated in the EUMR are as follows:[27]

a. Notice. The Commission must be notified of any merger with EU dimensions prior to its implementation. Companies can contact the Commission in advance to find out how best to prepare their notifications. The Commission has provided a pre-prepared format used for merger notifications.
b. Phase I investigation. Upon notification, the Commission has 25 working days to analyze agreements in this phase. More than 90% of all cases are resolved in this phase, and generally without a remedy. Phase I review involves a request for information from the combining company or a third party; and questionnaires for competitors or customers seeking their views on mergers, as well as other contacts with market participants, aimed at clarifying the competitive conditions in a particular market or the role of the combining company in that market. There are two main conclusions from the phase I investigation, namely:

    1) The Merger is finalized, either unconditionally or subject to agreed amendments; or
    2) The merger still raises competition issues, and the Commission opens a phase II investigation.

c. Remedy; If the Commission has concerns that a merger could significantly affect competition, the merging companies may offer a solution ("commitment"), namely proposing certain modifications to the project that will ensure continued competition in the marketplace. Companies can offer remedies in phase I or II.
d. Phase II investigation. In phase II, the Commission carries out an in-depth analysis of the impact of mergers on competition and requires more time, namely when the Commission has concerns that the transaction may limit competition in the internal market. Phase II investigations usually involve gathering more extensive information, including internal company documents, extensive economic data, more detailed questionnaires to market participants, and/or site visits. In phase II, the Commission also analyzed the claimed efficiencies that could be achieved by these companies if combined. If the positive effects of these efficiencies on consumers will outweigh the negative effects of the merger, the merger can be approved.
e. Final decision. After a phase II investigation, the Commission may:

    1) Unconditionally agree to the merger; or

[27] European Commission, "Merger Control Procedures," https://ec.europa.eu/competition-policy/system/files/2021-02/merger_control_procedures_en.pdf, 2021.

2) Approving the merger with remedial measures; or
3) Prohibit a merger if the combining party has proposed no adequate solution to the competition problem.

f. Review. All decisions and procedural actions of the Commission are subject to review by the General Courts and ultimately by the Courts. Companies or other interested parties can appeal within 2 months after the decision. This review process guarantees independent oversight and ensures that all rights of defend available to companies are fully respected

In assessing the suitability of a concentration for the internal market, the Commission relies on the substantive test contained in Article 2 of the EUMR, which is called the Significant Barriers to Effective Competition ('SIEC') test. According to the test, concentration is permissible only if it does not significantly impede effective competition in the internal market or a significant part of it, in particular as a result of creating or strengthening a dominant position.[28] According to the dominance test, the assessment of the suitability of concentration with the internal market depends on whether the concentration will lead to the creation or strengthening of a single or collective dominant position.[29]

3.2. Technology Companies Merger and Acquisition in Indonesian and European Union Competition Law Perspective

Merger activity can be anti-competitive. On the other hand, it can also increase efficiency. Today, technology companies have launched platforms that are becoming increasingly dominant in the global economy and, as a result, require significant regulatory scrutiny.[30] The phenomenon of mergers and acquisitions of technology companies began when in the 2000s, several big tech companies acquired small companies. Big Tech, commonly associated with Google, Apple, Facebook, Amazon, and Microsoft (GAFAM), in the ten years leading up to 2020, these five companies alone acquired more than 400 firms, predominantly in the technological sector.[31] Facebook acquired WhatsApp for $19bn in 2014, Google took control of Motorola Mobility in the same year for $12.5bn, and Microsoft bought LinkedIn for $26bn in 2016.[32]

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[28] Tuohimaa, "Merger Control in the EU When Is an Impediment to Effective Competition Significant?." p.5.

[29] Tuohimaa.

[30] Geoffrey Parker, Georgios Petropoulos, and Marshall Van Alstyne, "Platform Mergers and Antitrust," *Industrial and Corporate Change* 30, no. 5 (December 2021): 1307–36, https://doi.org/10.1093/icc/dtab048.

[31] Pauline Affeldt and Reinhold Kesler, "Big Tech Acquisitions Towards Empirical Evidence," *Journal of European Competition Law & Practice* 12, no. 6 (2021): 471–78. p.471.

[32] Marc Bourreau and Alexandre de Steel, "Big Tech Acquisitions Competition & Innovation Effects and EU Merger Control," *Centre on Regulation in Europe (CERRE)*, 2020.

In Indonesia, two large technology companies, Gojek and Tokopedia, officially merged into a holding company called the GoTo Group and are expected to combine the three services including Gojek (Ride hailing-on demand), Tokopedia (Marketplace/E-Commerce), and GoTo Financial (financial technology service platform). The company has become increasingly competitive in the non-Indonesian market, as evidenced in the report of Bloomberg.[33] KPPU conducted a thorough evaluation process on the notification of the acquisition transaction of Gojek and Tokopedia[34] and in Deputy Chairman of KPPU Guntur Syahputra Saragih written statement, KPPU declared that the merger of Gojek and Tokopedia contained no indication of monopoly or unfair competition.[35]

According to Abdul Moin, two motives encourage a company to conduct mergers and acquisitions: economic and non-economic. Economic motives are related to the essence of the company's goals of increasing the company's value or maximizing shareholders' prosperity. On the other hand, non-economic motives are based on the owner's subjective desires or personal ambitions.[36]

Considering the research of scholars, technological mergers and acquisitions are characterized by technology as the main motive of mergers and acquisitions. Technology mergers and acquisitions are defined as small businesses with technology as the main driving factor to increase or acquire technical capabilities for small and medium enterprises to carry out technology mergers and acquisitions.[37] Hao Qingmin and Ren Huanhuan pointed out that the main reason for merger and acquisition activities is often due to the ability to reduce competitors through mergers and acquisitions to improve control of the business environment, increase market share, enable companies to obtain some form of monopoly or oligopoly, and increase opportunities for long-term profits.[38]

There are two ways in which mergers between competitors can reduce competition and harm consumers, first, by creating or enhancing the ability of the remaining firms to act in a coordinated manner on several competitive dimensions (coordinated interaction), or second, by allowing mergers to drive up prices for self-advantage (unilateral effect). In either case, consumers may face higher prices, lower

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[33] Lee in Sukarmi et al., "Assesing the Merger of Online Platform Companies: Does It Lead to Monopoly or Just Business Expansion? (Analysis of The Merged Company of GoTo)." p.557.

[34] "KPPU Lakukan Penilaian Menyeluruh Atas Notifikasi Akuisisi Tokopedia Oleh Gojek," Komisi Pengawas Persaingan Usaha, 2022.

[35] Nidia Zuraya, "KPPU Putuskan Merger Gojek-Tokopedia Tidak Langgar Persaingan Usaha, Gojek Melakukan Notifikasi Merger Terhadap Tokopedia Kepada KPPU Pada 9 Agustus 2021," 2022.

[36] Abdul Moin in Muhammad Aji Nugroho, "Analisis Perbandingan Kinerja Keuangan Perusahaan Sebelum Dan Sesudah Merger Dan Akuisisi (Pada Perusahaan Pengakuisisi, Periode 2002-2003)" (Universitas Diponegoro, 2010). p.28.

[37] Yunhe Jin, "The Impact of Technology M&A on Corporate Innovation Performance Literature Review and Future Prospects," *Advances in Economics, Business and Management Research* 91 (2019). p.656.

[38] Jin.

quality, reduced service, or fewer choices due to the merger.[39] In addition to its effect on competition, start-up acquisitions by incumbents can also affect innovation. First, acquisitions can stimulate the influx of innovations. Second, they can influence, positively or negatively, the development of innovation by start-ups. Third, new ventures can have incentives to direct their research and development in a direction that maximizes the value of their acquisition over the value of their product.[40] That is why policymakers have started heavily scrutinizing large technology firms' merger and acquisition activity.

In Indonesian Competition Law, merger transactions are conventionally regulated in Article 28 and Article 29 of Indonesian Antimonopoly Law as well as Government Regulation Number 57 of 2010. Furthermore, the Business Competition Supervisory Commission (KPPU) issued KPPU Regulation Number 3 of 2019 concerning the Assessment of Mergers or Consolidation of Business Entities, or Acquisition of Company Shares which Can Result in Monopolistic Practices and/or Unfair Business Competition. Article 29 of the Competition Law 5/1999 and Article 5 in conjunction with Article 10 PP Number 57/2010.

KPPU has the authority to supervise merger transactions in 2 (two) methods, First, Post-evaluation (Notification), or called Ex-post; Second, Pre-evaluation (Consultation), referred to as Ex-ante. In principle, KPPU in supervising merger transactions in Indonesia is guided by the "Theory of Harm," which is closely correlated with economic and legal analysis. In this context, KPPU will conduct an analysis of a number of aspects of merger transactions. First, an analysis of vertical and conglomerate mergers shows the extent to which negative impacts on welfare and effective competition in the relevant market occur. Second, an analysis of horizontal and vertical mergers, the extent to which collective dominance has resulted from competition in the market. Will the merger transaction increase the chances of a "collusive agreement" between business actors? Third, an analysis of the unilateral impact of the merger transaction. KPPU will see whether the incentives for business actors to compete in the market will decrease in intensity or effectiveness if the merger transaction is approved. KPPU also observes if the merger transaction could harm the competitive structure in the market.[41] KPPU will take precautionary measures and/or prohibit merger transactions only if the merger will result in the emergence of market power resulting from the merger transaction and weakening of effective competition in the relevant market (Substantial Lessening of Competition or

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[39] Federal Trade Commission, "Competitive Effects," https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/competitive-effects#:~:text=There%20are%20two%20ways%20that,prices%20profitably%20on%20its%20own, 2022.

[40] Bourreau and de Steel, "Big Tech Acquisitions Competition & Innovation Effects and EU Merger Control."

[41] Summarize from Dian Parluhutan, "Analisis Hukum Kompetisi Terhadap 'Big Data' Dan Doktrin 'Essential Facility' Dalam Transaksi Merger Di Indonesia," *Jurnal Persaingan Usaha* 1, no. 1 (2021): 84–97.

"SLC").[42] In the case of GoJek Tokopedia, the merger did not violate Indonesian Antimonopoly Law for several reasons. First, GoJek's services are not a substitute for Tokopedia. Second, Gojek and Tokopedia are not in the same relevant market. Third, GoJek Tokopedia merger transactions are multi-sided, so the controlled market is quite diverse and requires a complex network effect analysis.[43]

Previous research held by Sukarmi found that, as can be seen from the Gojek Tokopedia merger, KPPU does not analyze consumer behavior analysis in markets other than Tokopedia and assesses the sharing of data that may be carried out as part of a risk assessment. It is only analyzed from the perspective of conventional merger assessment using five competition parameters, as follows: First, Market Concentration (as described in the Herman Herfindahl Index/HHI or CR4 Index); Second, market entry barriers; Third, the potential for anti-competitive behavior; Fourth, Efficiency; Fifth, Company Bankruptcy. It can be concluded Indonesia has regulated mergers and acquisitions traditionally but has not specifically regulated mergers and acquisitions for technology companies. It also has not analyzed the role and impact of Big Data in the effectiveness of competition in digital platform-based markets as a result of the technology companies' merger. KPPU must enact regulations regarding digital economy mergers in Indonesia, Big Data ownership, and their impact on effective competition in the digital market.

In European Union, merger control is traditionally regulated in Regulation (EC) 139/2004. In the last few decades, several merger cases related to digital ecosystems have been submitted to the European Commission (hereinafter referred to as Commission) for approval, including Google/DoubleClick, Microsoft/Skype, Facebook/WhatsApp, Microsoft/ LinkedIn, and Apple/ Shazam mergers.[44] The Commission approved all transactions with few (if any) restrictions. One of the main reasons the transactions were approved without many obstacles was because they fall under conglomerate mergers.[45] At the EU level, the current merger notification threshold is based on the monetary turnover of the companies involved in the concentration. However, big technology companies mostly acquire companies with low cash turnover because acquisitions occur early in company development, whereas digital companies focus more on growing their subscribers than on growing turnover and profits.[46]

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[42] Parluhutan.

[43] Summarize from Sukarmi et al., “Assesing the Merger of Online Platform Companies: Does It Lead to Monopoly or Just Business Expansion? (Analysis of The Merged Company of GoTo).”, (December 23, 2021).

[44] Jasper van den Boom and Peerawat Samranchit, “Digital Ecosystem Mergers in Big Tech—A Theory of Long-Run Harm with Applications,” *Journal of European Competition Law & Practice* 13, no. 5 (August 2022): 365–71, https://doi.org/10.1093/jeclap/lpab085. p.365.

[45] van den Boom and Samranchit.

[46] Bourreau and de Steel, “Big Tech Acquisitions Competition & Innovation Effects and EU Merger Control.”

The Commission may review acquisitions of big technology companies that could have a negative impact on welfare by supplementing the monetary turnover threshold with additional notification thresholds. Which can be based on the following:[47]

1. Acquisition value does not mean all concentrations with a relatively high transaction value above the turnover value must be considered anti-competitive acquisitions. It simply means that the transaction must be reviewed by the Commission to determine whether the high transaction price reflects expected future earnings or more a guarantee of market stability in the event of a potential competitor being eliminated;
2. The market share of the companies involved in concentration is based on the market informed by the company, as happened in Portugal, Spain, and the UK.
3. Acquirer characteristics, designated digital companies as having 'Strategic Market Status' (i.e., maintaining market power over strategic bottleneck markets) must notify all their acquisitions to the relevant competition authorities.

In summary, based largely on monetary turnover concentrating parties, the current EU merger notification threshold fails to capture high potential corporate acquisitions with no or low monetary turnover. Additional notification limits based on transaction value, market share, or characteristics of the acquirer may be required to screen these acquisitions. The choice between these options should ensure that only those acquisitions that present the highest risks to competition and innovation are notified to competition authorities.[48]

In reviewing a merger, the Commission assesses its impacts on several competition parameters, such as prices, output, choice, quality, and innovation. In the EU 2004 Horizontal Merger Guidelines, the Commission notes that:

> "In markets where innovation is an important competitive force, a merger may increase the firm's ability and incentive to bring new innovations to the market and, thereby, the competitive pressure on rivals to innovate in that market. Alternatively, effective competition may be significantly impeded by a merger between two important innovators, for instance, two companies with 'pipeline' products related to a specific product market. Similarly, a firm with a relatively small market share may nevertheless be an important competitive force if it has promising pipeline products."

In 2016, the Commission launched an evaluation of the procedural and jurisdictional aspects of EU merger control. The evaluation results showed that a small number of transactions that could impact competition in the internal market had passed merger control reviews at the EU and national levels. These findings raise concerns about acquisitions in the digital space involving companies that play a significant competitive role in the market at stake despite generating little or no turnover at the time of the merger. In 2021, the Commission fully enforced Article 22 EUMR by allowing Member States to

[47] "Public Consultations," Directorate General for Competition, 2020.

[48] Bourreau and de Steel, "Big Tech Acquisitions Competition & Innovation Effects and EU Merger Control."

review transactions under the appropriate national thresholds that include acquisitions of nascent or highly innovative competitors, including inter alia digital and technology markets that, despite falling below the threshold, still meet the provisions of Article 22 EUMR.[49]

The General Court recently confirmed the legality of the approach in its decision in Illumina v European Commission by adopting Article 14 of the Digital Markets Act ("DMA"), which requires gatekeepers to notify the Commission of intended concentrations where the merging entity or target provides any core platform or other service in the digital sector or enables data collection.[50] In the Google vs. Commission decision, the Commission stated the need to "Identify the conditions of competition relevant to the assessment of the position of economic power enjoyed by the business concerned therefore requires a multi-level or multi-directional examination to determine the facts and the extent of the various possible competitive constraints imposed on that business."[51]

In assessing Digital and Technology Mergers, the Commission conducted a Substantive Assessment in the following three aspects:[52]

1. Conglomeration Relationship: Degradation of Interoperability. The Commission analyzed that mergers involving companies supplying different system components may create certain interoperability problems. They may lead the merged entity to focus its efforts on integration and block or degrade a competitor's interoperability with its own, thereby closing competitor access from the relevant market.
2. Vertical Relationships: Access Degradation. The commission assessed access degradation with theories of harm, that is, products or services provided by one player rely strongly on access to other products or services as inputs. As a starting point, usually one of the merging parties will have market power in relation to such an input, and access to this input is often already provided to third parties at the time of the transaction;
3. Data Related Effects. With the emergence of data as an important tool in online services, the ability to access and use data has become an important element in merger control.

Under Commission policy, divestment commitments are the best way to eliminate competition concerns resulting from horizontal overlaps. As Robertson's Report points

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[49] Youenn Beaudouin et al., "Merger Enforcement in Digital and Tech Markets: An Overview of the European Commission's Practice," *Digital and Tech Mergers Competition Policy Brief No 02/2022*, n.d.

[50] InfoCuria, "General Court Judgement of 13 July 2022," Illumina v European Commission (ECLI:EU:T:2022:447), 2022.

[51] InfoCuria, "General Court Judgement of 14 September 2022," Google v Commission, n.d. paragraphs 116 and 117.

[52] Summarize from Bourreau and de Steel, "Big Tech Acquisitions Competition & Innovation Effects and EU Merger Control."

out, horizontal effects in digital and technology mergers at the national level require intervention because they can also be relevant for future cases at the EU level. On non-horizontal effects, divestment is not always the most appropriate method, so the Commission is allowed to intervene proportionally to address the issue. However, prohibition is the most appropriate measure when such targeted remedies are unavailable or ineffective.[53]

The statement above describe that European Union in reviewing merger transactions related to innovation and technology, have been using various approaches, including analyzing the impact of multi-sided market mergers and considering data control by these technology companies. Meanwhile, Indonesia is still implementing and regulating the merger of technology companies with the conventional merger regime. This research find that as is the rapid growth and mergers of technology companies, Indonesia should take lessons from the European Union by adding merger parameters for technology companies, among others, by analyzing the ownership and utilization of big data as a benchmark for assessing the market power of business actors in the digital market.

4. CONCLUSION

Technology companies' mergers have disrupted markets and business practices so that they affect merger control regimes in several ways which the competition authority has to renew and evaluate their merger regulation and procedure to adapt with the development of business transactions, especially in the digital and technology sector. The significant increase in technology company mergers will significantly impact competition, innovation, and data utility, so it requires careful regulatory scrutiny. Currently, Indonesia has a merger regulation, but there is no specific regulation and analysis for the technology companies' merger, so when the GoJek and Tokopedia merger occurred, KPPU only analyzed it from the perspective of product substitution and relevant markets and has not analyzed the impact of the merger from the point of view of consumer data ownership. This is different from the European Union, where several new things have been implemented in the European Union in terms of reviewing mergers of technology companies, including the European Union has adopted the provisions of the Digital Markets Act in reviewing the Illumina merger; The EU has added several parameters in addition to the EUMR provisions for technology company mergers, namely the value of the acquisition, market share control, characteristics of the acquiring company and the impact of the merger on innovation and data utilization, in addition, the Commission also authorizes National Authorities to review technology company mergers even if the value of the merger does not meet the threshold. From the description above,

[53] Bourreau and de Steel.

there is an urgency in Indonesia to evaluate the merger provisions, especially for merger transactions carried out by technology companies, so that the merger not only continues to have a positive impact on competition but also does not kill innovation and abuse the use of consumer data. KPPU can consider the provisions of the Personal Data Protection Law in reviewing mergers of technology companies.

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