

## **Analyzing the Company Merger Between Tokopedia and Gojek from the Perspective of Business Competition Law: Does it Lead to Anti-Competitive Behavior?**

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### **Abstract**

This study analyses how the merger between Tokopedia Ltd and AKAB Ltd is viewed from business competition law. The problem in this article is whether monopolistic actions and unfair business competition indicate the merger between these two largest digital companies? As normative legal research, the study uses an analysis of the statute approach and uses research sources for primary legal materials, secondary legal materials, and tertiary legal materials. The study results concluded that although they are a large company in the same market group, both are not indicated by monopolistic actions and unfair business competition. This is because the post-merger company does not control production/distribution/consumption in the community, and consumer behaviour is not centred on the post-merger company. When faced with the current development of the digital era, the relevant market theory is no longer relevant. Therefore, this study suggests that in addition to looking at the appropriate market conditions, merger assessments can also use consumer behaviour theory to determine whether a merger engages in monopolistic action and unfair business competition or not.

### **Keywords**

Keywords; business competition law; company merger; monopoly

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## Introduction

The business development rate chart is getting more and more increasingly day by day. Moreover, the strong influence of globalization on the economic sector makes the trade mechanism between countries has no boundaries. Economic globalization forces a country to open its economy freely and allow market forces to rule. Such circumstances lead to global economic integration. The occurrence of global economic integration reduces trade transaction costs and encourages companies to invest or develop strategies to develop their business ventures (Navaretti & Venables, 2004). Several companies build their business by conducting mergers and acquisitions across countries and within one government.

Mergers are one of the processes towards optimizing profitability in Indonesia. According to Article 1 point 9 of Act Number 40 of 2007 respecting Limited Liability Businesses (Limited Liability Companies Act), a merger is a legal action taken by one to two corps combine to another, ensuring the merging firm's capitals and liability. By law, merging legal entity status is transferred to the company that approves the merger. The joining legal entity position is terminated. In simpler words, a union is the combination of two or more firms by protecting one and dissolving the other. Companies retained are generally companies with more significant assets and market share.

The company's merger activity which has recently attracted public attention is the merger between Ride-hailing and Payment Companies, namely Aplikasi Karya Anak Bangsa Limited (AKAB Ltd) or known as "Gojek" with an e-commerce company, namely Tokopedia Ltd, on May 17, 2021. These two companies merged under the auspices of a Holding Company called "GoTo". The merger of these two companies has attracted the attention of the Indonesian people, both those whose status is as consumers and business actors in other companies. Bothh Gojek and Tokopedia are unicorns that dominate the Indonesian market. Even in December 2020, Gojek managed to become the only next-level unicorn company, namely Decacorn, in Indonesia, whose valuation reached US\$10 billion (Paramadita et al., 2020).

After the merger of Gojek and Tokopedia, GoTo is now ranked first as the most sophisticated and complete business company in Indonesia, where Gojek has digital financial transaction features and transportation with high numbers and intensity then combined with online shopping transaction features with high public reach from Tokopedia. This creates conditions for solid business solicitation for other businesses in Indonesia. GoTo can become a company with a dominant position to attract consumers surfing cyberspace to fulfil their daily needs.

Article 12 of Act Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition (Anti-Monopoly Act) has stated that business actors cannot draw up agreements through mergers but still maintain their respective companies. In the end, unfair business competition as an alternative to monopolistic practices is the impact of controlling the community's production, distribution, and marketing system.

These provisions are signed for GoTo in running its business to keep an eye on the position of the market dominance.

The significant valuation value between Tokopedia -Gojek, and the GoTo group, which is recorded to have a list of blue-chip investors (Alibaba Group, Astra International, BlackRock, Capital Group, Telkomsel, Temasek, Tencent, and Warburg Pincus,) makes many parties think that the merger of the two major platforms leads to a market monopoly position. According to Sudjana (Sudjana, 2016), a union has the potential to develop a monopoly, such as an economic player dominating the production of either or both marketing of commodities or the implementation of particular services.

An example of a case related to monopoly in a merger is the case of United Shoe Machinery Corp (USMC) (Yani & Widjaja, 1999). USMC is a company formed from the merger of small companies. As a result of this merger, USMC controls more than 75% of the shoe-making machine needs. USMC is the only manufacturer to offer a range of shoe-making machines with extensive research and development (R&D). The United States government sued USMC on charges of having a monopoly on the shoe-making machine market, which in the end, the court ruled that there had been a monopoly by USMC. Although mergers are equal to producing monopolistic behaviours and inequitable commercial competition, the Anti-Monopoly Law does not inherently ban these acts based on a rule of reason approach. Several indicators are defined as benchmarks for analyzing the intention of dominant behaviours with inequitable business competition in the merger. The main factor is a general standard, while additional factors are more specific: a measure adjusted to the merger's form (Hamner, 2001).

Based on the above research background, this research will focus on the transfer of company assets that need to be considered in conducting company mergers and proving the allegations of monopolistic practices and unfair business competition.

### Research Methods

This research is a doctrinal (normative) legal research because what is studied is the interpretation of the act and legal theory (Christiani, 2016). The focus of the study is on the presence or absence of elements of monopoly and unfair business competition from merger activities, as well as the use of relevant theories to determine a merger is free from unfair business competition. Primary legal sources are Anti-Monopoly Act (UU No. 5 / 1999) and the Limited Liability Companies Act ( UU No. 40 / 2007), while secondary legal sources include books, journals, and research on corporate law and competition law. The legal sources were then analyzed qualitatively through the syllogism method of deductive thinking patterns. The drawing conclusion from the use of the central premise (the rule of law), then submitted to the minor premise (legal facts) (Evans et al., 2001).

## Discussion

### 1. Transfer of Company Assets Post Merger Company

Companies conducting mergers must pay attention to certain legal aspects, such as merger agreements, minority shareholder rights, employee status, and transfer of company assets. Company assets can be classified into two types, namely fixed assets and non-fixed assets. Fixed assets are assets that have an extended period and tend to be stable. Fixed assets are tangible assets because they have a visible physical form (Reeve, 2010). The company's daily operations are almost based on these tangible assets. Examples of fixed assets are land, buildings, vehicles, computer equipment, machinery, furniture, etc. Meanwhile, non-fixed assets are included in intangible assets because their use is based on non-physical assets (Supriyati, 2016), such as patents, copyrights, trademarks, franchises, etc.

The development of an increasingly advanced era makes the company's space move into cyberspace and requires personal consumer data as an absolute requirement to access products from a company. Consumer personal data is included in the intangible company's intangible assets. These assets are generated through contracts between companies and consumers. As with other company assets, personal consumer data must also be protected and considered to maintain consumer trust.

The assets of the merging company are passed to the company that approves the merger under the Limited Liability Company Act. According to this clause, the consumer's data is treated as an intangible asset of the merging company. Its control status is legally transferred to the company that approves the merger. This transfer of personal consumer violates Article 58 paragraph (2) of Government Regulation Number 80 of 2019 concerning Trading Through Electronic Systems (PP PMSE), which states that every business actor must keep personal consumer data confidential to avoid data leakage. The conflict between personal consumer data that needs to be protected and the transfer as a company asset due to a merger is quite tricky to determine by companies with the majority of business actors based on information technology whether there is a merger that causes the assets of the company to be transferred illegitimate the company that accepts the merger to participate and has whether the merging firm has the right to keep and utilize personal data personal consumers.

Customer Data that is instantly transferred during the merger due to corporate assets may result in a monopoly on the personal consumer as the primary personal data provided by consumers to technology companies such as full names, active mobile phone numbers, Its dresses, home addresses, and several other personal information will fall into the ownership and personally consumer that accepts the merger. This means that the company that agrees with the merger will be richer in owning consumer personal consumer is feared to be a threat to the company in cases of fraud, hacking, wiretapping other people's data, spamming emails, buying and selling personal data, manipulating data with computer programs to access other people's data and misuse of personal information, and so on.

Provisions regarding other personal data that need to be considered are Article 26 of Act Number 19 of 2016 Concerning Amendments to Law Number 11 of 2008 Concerning Information and Electronic Transactions (Information and Electronic Transaction Act), which states that all activities involving personal data someone in the electronic media must be done with the consent of the person concerned. Article 24 paragraph (1) of the Minister of Communication and Information Technology's Regulation No. 20 of 2016 Concerning the Protection of Personal Data in Electronic Systems also emphasizes that the use of Personal Data displayed, announced, received, and disseminated by Electronic System Operators must be based on Approval. For firms that will collect customer data, the importance of consent is highlighted.

In Indonesia, companies, especially companies engaged in technology and requiring a lot of personal consumer data, ignore the consumer confirmation agreement's provisions when conducting a merger. An example is a merger between Tokopedia Ltd and AKAB Ltd. When Tokopedia Ltd merged with AKAB Ltd is still a question regarding the fate of the control or ownership of consumers' data, especially the personal data of Tokopedia consumers. Are consumers rather than Tokopedia needs to include their consent for the transfer of control or ownership of its data to AKAB or not.

Consumers whose data is stored by the company are named as data subjects. If a merger results in a direct transfer of personal consumer data, then when the consumer suffers a loss, such as loss, destruction without permission, dissemination, and/or disclosure of data without permission, they are entitled to seek compensation through the courts. Data subjects should also be able to seek compensation through the courts for losses caused by the use of inaccurate data. With a written request to data users, all data subjects are entitled to receive one copy of personal data and notification of the transfer of control or ownership of their data; this right is referred to as "subject access right" (Bufalieri et al., 2020). Suppose the data subject thinks there has been a violation of one of the data protection principles. In that case, the subject has the right to complain about the matter to the company concerned, and it will be resolved through the company's internal mechanism, or the data subject has the right to file a lawsuit in court.

This regulation regarding the control and/or ownership of personal consumer data is still a legal vacuum in the Indonesian laws and regulations. The status of consumers' data seems to be ignored even though personal data include constitutional rights guaranteed in Article 28G paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Regulations related to individual data control are necessary to realize the principle of legal certainty for consumers. Without a clear legal status of responsibility about the holder of personal consumer data after the merger, it will lead to abuse and cybercrime attacks. The Job Creation Act, which is an update of the Limited Liability Company Act, is still not sufficient to explain consumers' data protection and legal status for the occurrence of company merger activities.

## **2. Analysis of the Merger of Tokopedia Ltd and AKAB Ltd from The Perspective of Business Competition Law**

To carry out economic operations, Indonesia, which has a mixed financial system, combines the roles of the government and the society. The government must enact rules and oversee market performance. Competition between business actors is one of the relevant legislation's regulatory and supervisory duties. According to the Organization for Economic Cooperation and Development (OECD), business competition encompasses price, quality, and service competition, as well as a mix of other elements that might draw customers' purchasing power (OECD, 1993). The existence of this business competition requires business actors to continue to raise the worth of the goods or services produced. Of course, the implementation of business competition must be carried out healthily. Indications of fair business competition can be seen from the following conditions (Sianipar, 2008):

1. Suppliers compete for market demand, while demand parties compete for auction opportunities;
2. Exchange factors, especially prices, can be formed and developed freely as long as they can maintain their function as an indicator of the limited quantity of goods and as a means of controlling demand and supply.
3. Access is not restricted so that new suppliers or business actors can join at any time while their supply can enrich the variety of separate goods in terms of quantity, quality, and price.

Observing the indicators above, it can be concluded that fair business competition can be measured based on the freedom of buyers to choose suppliers of goods, freedom of suppliers of goods to select their buyers, freedom of markets that allow business actors to move, and freedom of needs to be entered by new entrants. Thus, the existence of a sense of competition will enable business actors to compete through their business strategies. However, sometimes business actors implement the process by offering strategy products or closing access to market entry from other business actors. This causes an unfair business competition in the market since most business players to carry out dishonest or illegal production and/or marketing activities of goods to maximize earnings from the maximize

One of the practices of companies that can trigger unfair business competition is the practice of company mergers. Although the method of mergers has many benefits for companies on the one side, on the other side, the approach of mergers can lead to monopolistic practices and unfair business competition (Baker et al., 2008). Merger activities can be a powerful tool in reducing market competition and building a stronger company in the market.

The government enacted the Anti-Monopoly Act to avoid and remedy these issues. The purpose of this act is to prevent the establishment of a concentration of economic power in a single corporation, which might lead to a dominant position in the market. In the



framework of unfair business competition oversight and law enforcement, the government has also formed the Business Competition Supervisory Commission (KPPU). Thus, to prevent signs of monopolistic impact and unfair business competition, every corporate merger plan and execution in Indonesia, including the merger between Tokopedia Ltd and AKAB Ltd, must conform to the Anti-Monopoly Act's rules and the KPPU Regulations.

The merger of starts up between Tokopedia Ltd and AKAB Ltd is one of the largest mergers in Southeast Asia. GoTo offers daily necessities on one hand. The complete range of products and services offered makes the merger of the two companies often seen as an indication of unfair business competition because they can control the market.

Market control is explained in Article 19 of the Anti-Monopoly Act, in which several activities are prohibited for business actors or a combination of business actors. There are 2 (two) main points that must be the company's attention, namely holding a dominant position and being in the same relevant market.

#### **1. Analysis of the Dominant Position of the Merger of Tokopedia Ltd and AKAB Ltd**

According to Article 1, number 4 of the Anti-Monopoly Act, a dominating position is defined as a situation in which a business actor has no competitors in the relevant market. Within the scope of this market, business actors have the most unique position among their rivals in the relevant market, either in terms of financial capacity, access to sales suppliers, and the ability to alter the demand for specific goods or services. The merger of Tokopedia Ltd and AKAB Ltd does not meet the Anti-Monopoly Act's definition of a dominating position. This is because the two firms' mergers do not remove rivals in the relevant market. Tokopedia Ltd and AKAB Ltd is also involved.

According to Article 25 paragraph (2) of the Anti-Monopoly Act, a corporation is considered to possess a dominating position when one business actor or a group of business actors controls 50% (fifty per cent) or more of the market share of a particular category of products and or services. When two or three business actors control 75 per cent (seventy-five per cent) or more of the market share for a specific category of products and or services, they are considered to possess a dominating position. The merging of Tokopedia Ltd and AKAB Ltd also fails to meet the criterion for successfully controlling 50% or 75% or more of the market share of a particular category of goods or services. For example, one of the payment services from AKAB Ltd is GoPay. After the merger occurred, the digital payment platform in Indonesia was controlled by GoPay. There are still many digital payment services in Indonesia that people can use according to their preferences, such as Ovo, DANA, Linkaja, ShopeePay, Jenius, Sakuku, etc. Based on data from Databoks Katadata Indonesia 2021 ([www.databoks.metadata.co.id](http://www.databoks.metadata.co.id)), the digital payment wallet that the Indonesian

most widely accesses is not GoPay which is one of the services in the merged company, but Ovo. This also happened to the company that merged with Tokopedia Ltd and AKAB Ltd. The types of goods offered on the Tokopedia online shopping platform are still widely sold in the market, both online and offline, online for example, there are still marketplaces called Shopee, Bukalapak, Lazada, Blibli, JD.ID, Zalora, Sociolla, and etc. So, it can be concluded that the merger of Gojek and Tokopedia does not make the company become a dominant position in the market. Fears of a merger causing a trendsetter, both prices and models of goods cannot be proven because there are still many other competitors in the community.

## **2. Determination of the relevant market**

Determination of indications of unfair business competition due to company mergers, apart from being a dominant position in the market, can also be seen from the perspective of the relevant market. According to Article 1 number 10 of the Anti-Monopoly Act, the relevant market is markets related to specific marketing ranges or areas by business actors for the same or similar goods and services or substitutions of said goods and or services. The relevant market described by Anti-Monopoly Act focuses on companies with a horizontal context, between one company and another, and the intended consumer. The relevant market can be divided into two perspectives: a market based on geography and a market based on the products produced. Markets with geographic coverage relate to the reach of the marketing area. Meanwhile, the market with product coverage relates to the similarity of the types of products produced.

This grouping of relevant markets is essential because it can identify how a particular company controls the need for marketing its products. In the relevant market, which is too narrow in scope, business actors can control a specific product type. In addition, the relevant market helps identify competitors in one market (Robertson, 2019). This explains why companies in the same market are prohibited from doing merger activities between companies that are members of the relevant market will eliminate one or more competitors in the relevant market itself. The loss of competitors in the relevant market results in less competition and the merged company has more power to attract consumers to the merged company.

In fact, along with the times, the determination of unfair business competition only seen based on the relevant market becomes less precise. For example, the Indonesian E-Commerce Association (Idea), a community of Indonesian E-Commerce industry players, released the relevant market groupings on the community website ([www.idea.or.id](http://www.idea.or.id)).



## MARKETPLACE



Figure 1. The relevant market group based on Idea Indonesia

Referring to the picture above, Tokopedia and Gojek are in the same market, namely the "marketplace" category. However, although they are in one room, Tokopedia and Gojek do not indicate that the merger includes a monopoly and unfair business competition. This is because the parameters or boundaries of the classifier in question are increasingly blurred and vague along with the times. Each association or community has the right to classify a company as belonging to the relevant market or not. For example, Idea has the right to release the appropriate market groupings, but the Indonesian Chamber of Commerce (KADIN) has also been and has the right to terminate the relevant market groupings for businesses in Indonesia. Between the formers of the relevant market one, another can have different grouping results, according to the subjectivity of each forming authority. The inconsistent market groupings make it challenging to find a standard reference for assessing whether one business is in another market. The relevant market theory is now less appropriate if used as a reference to determine whether a company can cause unfair business competition or not.

Apart from the inconsistency in the classification of the relevant market, if we look at the meaning of the relevant market from the Anti-Monopoly Act, it can be based on geographical coverage with a marketing area coverage. This also becomes difficult along with the times because the geographical aspect of determining the relevant market cannot be determined by traditional methods. After all, currently, the business sector, especially e-commerce platforms, is not limited by space and time. Therefore, the use of

relevant market theory is now less relevant to determine a merger, including unfair business competition or not.

Technological developments to determine whether a merged company result in unfair business competition is more relevant when based on consumer behaviour. As an illustration, e-commerce platforms in Indonesia, not only from Tokopedia, several e-commerce platforms, such as Shopee, Blibli, Lazada, Bukalapak, etc., offer the types of goods and prices similar to those provided by Tokopedia. The availability of many e-commerce platforms forms a consumer behaviour to be free to choose based on the credibility of the e-commerce platform, price, and delivery time from merchants, likewise with Gojek. Consumers are still free to choose and determine what services they will use other than Gojek based on platform accessibility, price, and delivery time of goods or services offered by several different companies such as Grab, Maxim, etc.

The enormous opportunity for consumers to choose the various service platforms they want to use indicates that the merger of Tokopedia Ltd and AKAB Ltd does not mean monopolistic actions and unfair business competition in Indonesia's business climate. Consumer behaviour is the basis for determining whether a business has a monopoly on a trade in the market or not (Davies & Cline, 2005). When consumer behaviour tends to be centred on post-merger companies and consumers do not have many choices to switch to other types of business, then it is said that merger activities have an impact on indications of monopoly and unfair business competition. The merger between Tokopedia Ltd and AKAB Ltd, which is based on consumer behavior, tends not to make consumers focus on the two companies. This proves that the merger of Tokopedia Ltd and AKAB Ltd does not indicate monopoly and unfair business competition in Indonesia.

## Conclusion

Based on the results of research and discussion, the authors can conclude that there is still a legal vacuum regarding the control of consumers' data due to company mergers. On the one hand, personal consumer data can become company assets and be transferred automatically to the merger recipient company without consumer consent. However, on the other hand, personal data remains the right of consumers whose use requires approval from consumers. This regulation on the transfer of personal consumer data during the merger is still not accommodated in the Limited Liability Companies Act and the Job Creation Act.

This research also concludes that the merger of Tokopedia Ltd and AKAB Ltd is suspected of violating legal aspects in the form of a company that will conduct a merger, it must not bring losses to other business actors. The claim is that monopolistic behaviors and unfair commercial competition occur in the community. Based on the Anti-Monopoly Act, both Tokopedia Ltd and AKAB Ltd do not fulfil the requirements for a company to conduct a monopoly or become a company with a dominant position. In addition, to prove the merger of Tokopedia Ltd and AKAB Ltd does not cause unfair

business competition through the theory of the consumer behaviour approach, which replaces the relevant market theory. By basing on the consumer behaviour approach in choosing a product, it can be seen whether a merged company monopolizes the purchasing power of consumers in the community or not.

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