

**RELEVANT MARKET ON ONLINE TRAFFIC TRANSPORTATION**

**A BACHELOR DEGREE THESIS**



**By:**

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**INTERNATIONAL PROGRAM**

**FACULTY OF LAW**

**UNIVERSITAS ISLAM INDONESIA**

**YOGYAKARTA**

**2017**

**RELEVANT MARKET ON ONLINE TRAFFIC TRANSPORTATION**

**A BACHELOR DEGREE THESIS**

Presented as the Partial Fulfillment of the Requirements  
To Obtain the Bachelor Degree at the Faculty of Law  
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Yogyakarta



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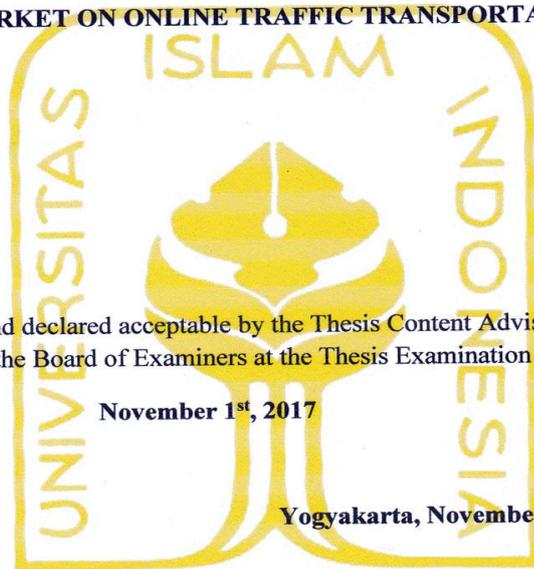
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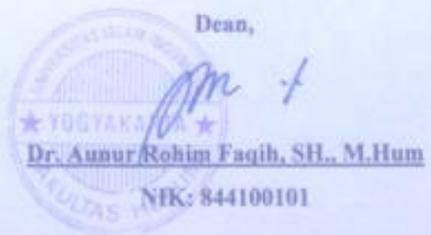
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*Bismillahir rahmaanir rahiim*

Yang bertandatangan di bawah ini, saya:

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Adalah benar-benar mahasiswa Program Internasional Fakultas Hukum Universitas Islam Indonesia Yogyakarta yang telah melakukan penulisan karya tulis ilmiah (tugas akhir) berupa skripsi atau legal memorandum atau studi kasus hukum dengan judul:

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Demikian, Surat Pernyataan ini saya buat dengan sebenar-benarnya dalam kondisi sehat jasmani dan rohani, dengan sadar serta tidak ada tekanan dalam bentuk apapun oleh siapapun.

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*Courage, dear heart. (C.S. Lewis)*

*Whatever you are, be a good one. (Abraham Lincoln)*

*Peace be upon you for what you patiently endured. And excellent is the final home. (QS. Ar-Ra'd: 24)*

*Be gentle with yourself. You are a child of the universe, no less than the trees and the stars. In the noisy confusion of life, keep peace in your soul. (Max Ehrmann)*

## DEDICATION

*This thesis is wholeheartedly dedicated to:  
My beloved parents, Sudaryanti and Muklas  
My little brother, Shandy Bagus Bagaskara  
Myself and my precious friends*

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Finally, the writer recognizes that this thesis is still far from being perfect, so the writer expects the readers to give some criticism and suggestions. However, the thesis will hopefully be useful for anyone who reads this.

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## ABSTRACT

*In sharing economy era, online traffic transportation such as Uber, Go-Car, GrabCar has disrupted taxi industries as an incumbent in conventional traffic transportation. Taxi industries has been accusing online traffic transportation for conducting unfair business due to their existence cannot be subjected in any existing law. The existence of online traffic transportation remains unclear because they are new comers which bring new modes of transportation and new business model in traffic transportation industry. Therefore, it has direct impact to a market once dominated by conventional taxis. The objectives of this research are the following: a) to analysis online traffic transportation and conventional traffic transportation in the same market or not; b) to know comprehensively implementation on competition law towards online traffic transportation as a disruptor. The research will be used juridical normative approach by using statutory approach to determine the relevant market between Uber, Go-Car, GrabCar and Taxi remains important as the first step to know whether there is any violation of competition law and whether Competition Law can be imposed in online traffic transportation as a disruptor in conventional traffic transportation industry by the form of qualitative and descriptive. Identifying relevant market and violation of competition is using juridical normative approach to know legal norms and legal views regarding these matters. Online traffic transportation operates under Transportation Network Companies (TNCs). Meanwhile, conventional traffic transportation operates under transportation companies. In the future scenario, online traffic transportation might harm competition because their existence might drive out incumbents which lead to serve the entire transportation market and become monopoly that the winner-takes-all nature. Therefore, between online and conventional traffic transportation is complement each other others. They both have different products and characteristic. They don't exist in the same relevant market. Also, imposing Competition Law might be happening due to sake of consumers which might be harmed if monopoly practices by disruptors happen.*

*Keywords: relevant market, online traffic transportation, traffic transportation*

# CHAPTER I

## INTRODUCTION

### A. Context of Study

Economic is not stagnant, it has always been dynamic and moving forwards. It changes from time to time from the behaviour of market or simply just economy in general. We can see how dynamic the economic system can be by comparing traditional and modern economy system, from traditional market place changed into a virtual market. From a modern economy, there is a digital economy which also can be called as the Internet economy, new economy, or the web economy. Digital economy has brought different atmosphere for our environment because the existence of Internet-based society and also has created digital evolution.<sup>1</sup>

Digital economy is related to digital communication networks such as internet, and computer, software, and other information technologies.<sup>2</sup> The digital economy is defined by many products and services that has digitized and by the utility of internet and any other networks to support and help economic activities.<sup>3</sup> As we can see that digital economy is inevitable in this era, at the same time, the market in digital economy era has certain issue to be maintained such as the entrants are easier and faster to enter to the digital economy market more than in a traditional one.<sup>4</sup> In this era of digital economy, all of things seem to develop extremely fast,

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<sup>1</sup> Jacek Unold, *Basic Aspects of the Digital Economy*, Acta Universitatis Lodziensis, 2003, p.2.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> Nicolai Van Gorp, and Olga Batubara, *Challenges for Competition Policy in a Digitalised Economy*, Policy Department A: Economic and Scientific Policy, July 2015, p.7.

in consequence, it also challenges our existing policies such as competition policy, consumer protection, taxation and intellectual property right. Competition problems seem inevitable as a result of fast development supported by advanced technology.<sup>5</sup>

High rates of investment and innovation are as the symbols of digital market that often lead to the progress of advanced technologies and increasing of disruptive innovation.<sup>6</sup> The term of disruptive innovation itself was found by Harvard professor, Clayton M. *Christensen*. He stated that new technologies tend to make great firms to fail. He also stated that technology was the important component to drive disruption innovation, hence, there would not be disruptive innovation if there was not because of technology. However, the disruptive innovation is not solely all about the technology itself but it is about how to take as many as possible the advantages of the usefulness of the advanced technology.<sup>7</sup> Christensen was stated technology as the “processes by which an organization transforms labour, capital, materials, and information into products and services of greater value.”<sup>8</sup>

In the disruptive innovation, it is not only for products and manufacturing process, but also the creation of new business models also.<sup>9</sup> They also bring radical changes that are unexpected and uncommon by incumbents, in addition, they might decrease or destroy incumbent firms or create new market.<sup>10</sup>

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<sup>5</sup> *Ibid.*

<sup>6</sup> OECD, *Digital Economy, Innovation, and Competition*, <http://www.oecd.org/competition/digital-economy-innovation-and-competition.htm>, accessed on 18<sup>th</sup> September 2017.

<sup>7</sup> Shannon Spangler, *Disruptive Innovation in the Legal Services Market*, ABA Annual Meeting, August 2014, p.8.

<sup>8</sup> *Ibid.*

<sup>9</sup> OECD, *Hearing On Disruptive Innovation*, DAF/COMP(2015)3, May 2015, p.3.

<sup>10</sup> *Ibid.*

Traffic transportation has been disrupted by the existence of online traffic transportation. As we know that transportation is a vital necessity for people to move from one place to another place especially for Indonesian people, in which, Indonesia is known as a large country that has thousands islands.<sup>11</sup> Transportation encourages the state development because it holds important roles namely economic development and non-economic development. The aim of economic development is to increase national income, to develop national industry and to create as well as to maintain employment opportunity for society. While for non-economic development is to enhance nation's integrity, as well as national defence and security.<sup>12</sup> The existence of convenience traffic will affect a whole living aspect, in other words, the existence of convenience traffic has its function and role which is compatible with national development which is forming a just and prosperous society be in harmony with Pancasila and the 1945 Constitution

Moving faster, conveniently and safely from one place to another place will likely to be fulfilled if it is supported with the availability of decent transportation. But then again, society's mobility is often clogged up, which means it potentially causes the decreasing of transportation performance, and the public rights doesn't fully fulfil, in which will be affecting further effects on economy, politic, cultural and others.

New innovations which happened to traffic transportation have been giving rise to pro and contra within society. Taxi online such as Uber, Grab and, GO-JEK is the most controversial case about disruptive innovation. They actually are ridesharing services as example of a phenomenon called sharing economy. This

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<sup>11</sup> Abdulkadir Muhammad, *Hukum Pengangkutan Niaga*, Citra Aditya Bakti, Bandung, 1998, p.7

<sup>12</sup> Abbas Salim, *Manajemen Transportasi*, Raja Grafindo, Jakarta, 2006, p.2

ridesharing service is controversial because they have disrupted taxi companies' market as incumbent in transportation market. Taxi companies have been fighting against taxi online to ban them and kick them out from the market.<sup>13</sup> Uber has gained some anti around the world, the anti-Uber has been protested for Uber to get out from the industry or simply just force them to apply an appropriate and existing regulation<sup>14</sup> because they have taken over the taxi services which caused the increasing competition between conventional taxi and online taxi, like Uber. The controversy started by the fact that Uber does not own any cars, like conventional taxi business does, but instead they only provide a matching online platforms for drivers whom using their own cars with passengers whom in need for a fast, easy and low-cost ride.<sup>15</sup> By this controversy, in Europe, taxi drivers have protested against Uber and it caused court banning or restricting Uber's services. In the meantime, in United States, in January 2013 there were fewer than 1.000 drivers joined the Uber platform, while in December 2014, the number of drivers has been increasing up to be 40.000 new drivers.<sup>16</sup> Consequently, the average number of traditional taxi rides was decreased by 65 percent start from 2012 and 2014.

The existence of online traffic transportation, Uber, in Europe also faces some resistance whether it is from government or conventional taxi drivers. In Europe, the European court of justice's advocate general believes that Uber is a transport service rather than a digital service as what has been argued. Uber platform

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<sup>13</sup> Eugene Merkert, *Antitrust vs. Monopoly: An Uber Disruption*, Undergraduate Law Journal, Summer 2015, p.50.

<sup>14</sup> Sean Farrel, *Uber expansion meets global revolt and crackdown*, <https://www.theguardian.com/technology/2015/jun/26/uber-expansion-meets-global-revolt-and-crackdown>, accessed on 18<sup>th</sup> September 2017.

<sup>15</sup> Thor Berger, Chinchih Chen, and Carl Benedikt Frey, *Drivers of Disruption? Estimating the Uber Effect*, January 23, 2017, p.2.

<sup>16</sup> *Ibid.*

concludes in the field of transport consequently Uber is required to obtain license and authorisation under national law like what conventional taxi does.<sup>17</sup> Several countries have banned Uber on remaining to stay in their country because of numerous considerations. In Bulgaria, they suspended Uber due to being accused of unfair trade practices, they want Uber to be regulated in the same way as conventional taxi. Several countries have banned Uber from operating their online platform like Denmark, Italy, Hungary, Canada, while in Asia there are Taiwan and China, in Australia there is Northern Territory, also London because they believe that Uber is illegal under their national law and Uber doesn't pass fit and proper test.<sup>18</sup>

While in Indonesia, as one of the largest population in the world, Indonesia has been targeted by many enterprises since most people in Indonesia is an internet user on their daily basis. Therefore, it is such a perfect combination between innovation, high accessibility of technology and huge amount of consumers for enterprise. We can see GO-JEK application as one of the most controversial and successful disruptive innovation because GO-JEK offers Indonesia consumers outstanding on-demand service which makes costumers' life easier and improve their welfare with quick respond and low-priced services.<sup>19</sup> Besides that, GO-JEK does not only offer ride-sharing service but also other services to facilitate consumers such as food delivery, daily need delivery, instant courier, on-call beauty treatment service, on-call massage service, on-call vehicle

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<sup>17</sup> Julia Kollewe, *New Uber blow as European legal adviser says service should be licensed like taxis*, <https://www.theguardian.com/technology/2017/may/11/uber-cabs-taxis-us-app-ecj>, accessed on 30<sup>th</sup> September 2017.

<sup>18</sup> Anna Rhodes, *Uber: Which Countries Have Banned The Controversial Taxi App*, <http://www.independent.co.uk/travel/news-and-advice/uber-ban-countries-where-world-taxi-app-europe-taxi-us-states-china-asia-legal-a7707436.html>, accessed 1<sup>st</sup> October 2017

<sup>19</sup> OECD, *The Impact of Disruptive Innovation on Competition Law Enforcement*, DAF/COMP/GF/WD(2015)40, 15<sup>th</sup> October 2015, p.3.

services, mobile-ticketing services, shopping service, logistic service.<sup>20</sup> Yet despite of the successfulness of GO-JEK's breakthrough, competition becomes the issue which would be affected by this application since GO-JEK has triggered particular controversies in Indonesia as its home country.

Considering the existence of GO-JEK makes demands on conventional ride services such as taxi and motorcycle taxi or *ojek*, was decreased and was no longer needed by consumers. However GO-JEK is still operate in under-regulated market or in grey area, thus, government authorities such as competition authority in particular needs to put its hand regarding this issue because they should be updated and keep monitoring the rapid movement of business development in the era of digital economy.

As GO-JEK and other ride-sharing services such as Grab and Uber has caused controversy especially between conventional car taxi and motorcycle taxi due to they have disrupted conventional transportation industry and taxi drivers felt like have been rigged by online traffic transportation because they do not go through the same cost and regulation as taxi drivers do.<sup>21</sup> For that issue, Indonesian Ministry of Transportation has set Transportation Government Regulation No. 26 Year of 2017 on 1<sup>st</sup> April 2017 as the revision of Law No. 32 Year of 2016 on Taxi Online with new eleven points.<sup>22</sup> But it has been revoked by Supreme Court because Supreme Court considered Government Regulation No. 26 of 2017 violated the higher laws which are Law. No. 20 of 2008 on Micro, Small, and Medium Enterprises, besides that, eleven articles of that Government Regulation

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<sup>20</sup> <https://www.go-jek.com/>, accessed on 18<sup>th</sup> September 2017.

<sup>21</sup> BBC News, *Jakarta taxi drivers protest against Uber and Grab*, <http://www.bbc.com/news/world-asia-35868396>, accessed on 18<sup>th</sup> September 2017.

<sup>22</sup> Law No 26 of 2017

was contradicted to Law No. 22 of 2009 on Road Traffic and Transportation.<sup>23</sup> Therefore it is not legally binding to traffic online transportation.

Besides those controversies above, defining relevant market on sharing economy especially in the phenomenon of disruptive innovation can be hard to do. In the conventional market is counted as one-sided market such as taxies while it is a completely different case in the online search engine to define the market because it can be two-sided market.<sup>24</sup> The definition of relevant market is important for competition law because it will affects the market definition and the identification of market power. An online platform is possible to turn a conventional one-sided market into a two-sided market which can lead to the entrant of new players in conventional market to be competitors to the historical incumbent.<sup>25</sup>

The Business Competition Supervisory Commission or in Indonesian language namely is *Komisi Pengawas Persaingan Usaha* (KPPU) as the competition enforcer also has important role to maintain and solve this issue regarding online traffic transportation in the field of competition, KPPU also need to held an appropriate fair business competition which can be applied for traffic online transportation case and to establish regulations which can guarantee the opportunity and equality for all business actors. Since disruptive innovation can harm competition, therefore competition law has to take its rule to prevent the barrier to market entry, facilitate entry into markets without any unnecessary

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<sup>23</sup> Andi Saputra, 4 *Alasan MA Cabut Aturan Transportasi Online*, <https://news.detik.com/berita/3609348/4-alasan-ma-cabut-aturan-transportasi-online>, accessed on 04 October 2017

<sup>24</sup> Francesco Russo, and Maria Luisa Stasi, *Defining the relevant market in the sharing economy*, INTERNET POLICY REVIEW Journal on internet regulation, 30 June 2016, p. 4

<sup>25</sup> *Ibid*

restrictions and to take part in fostering innovation instead of withdrawing from innovation. The government faces difficulties in putting where online ride-hailing stand in Indonesian regulation. It causes several issues regarding relevant market whether online ride-sharing is a competitor of conventional taxi or not, is online ride-hailing can be counted as a substitution of conventional taxi or not, to what extent of market boundaries between conventional taxi and online ride-hailing to know whether they are running in the same market or not. This is why defining relevant market in the case of disruptive innovation between conventional taxi and online ride-hailing transportation is important.

With that being said, to properly address on defining relevant market in online platforms remains important because it is as a first necessary step to immediately identify the actual or potential competitors of relevant companies, to delimit the latter's market position and to be able to engage their position with competition law and to subject them within their obligation.<sup>26</sup> Aside from that, to know the roles of competition law on enhancing economic and promoting competition, especially in disruptive innovation can be useful in prevent anti-competitive conduct by the disruptors of the market. This thesis will be focused on GrabCar, Go-Car and UberX as the example of online traffic transportation. Meanwhile, for conventional traffic transportation will be using Taxi as the example.

## **B. Problem Formulation**

This research would like to seek answers of:

1. Does online traffic transportation and conventional transportation exist in the same relevant market?

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<sup>26</sup> Francesco Russo, Maria Luisa Stasi, *Defining the Relevant Market in the Sharing Economy*, Internet Policy Review – Journal on internet regulations, Volume 5 – Issue 2, p.5.

2. Whether competition law can be imposed on online traffic transportation as disruptors?

### **C. Research of Objectives**

The problem formulation would like to achieve the purposes of:

1. To analyse online traffic transportation and conventional transportation exist in the same relevant market or not.
2. To know comprehensively implementation on competition law towards online traffic transportation as a disruptor.

### **D. Theoretical Framework**

Law has interdependent relationship with numerous fields such as economy in particular. Consequently, development of law can't be seen by only one particular side but it has multi-sided which must be considered in law. For that reason, sources of theoretical framework do not only come from legal aspect but also from economy aspect as well such as theory of harm, ex-ante vs ex-post regulation, as well as rule of reason and per se illegal.

Before talking about those theories, to have the understanding for each definition is very crucial and important. From here, there are two types of technological innovation according to Christensen:<sup>27</sup>

1. Sustaining innovation: this innovation takes place inside the value network by the established firms or incumbent to give consumers better services, products or other attributes that consumers has been valued ever since.

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<sup>27</sup> OECD, *Disruptive Innovation and Competition Policy Enforcement*, DAF/COMP/GF(2015)7, 20<sup>th</sup> October 2015, p.2.

2. Disruptive innovation: this innovation takes place outside the value network by the established firms or incumbent and come along with a whole different deal or package of services, product or other attributes from package which has been existed in the market

It means that in sustaining innovation, the incumbents is aware of their own product to satisfies loyal consumers and they constantly try make improvement to result better products within their value network. Whereas, disruptive innovation takes its opportunity from unexpected side, they make product which meets the basic requirement of the value network and add additional value which can be obtained by end-user.<sup>28</sup>

Disruption innovation is more needed the existence and role of competition policy than sustaining innovation because disruptive innovation brings radical changes in the market and so often that incumbent firms do not seem to be able to see it through so they can't solve it. Besides that, the effects of disruptive innovation are more very pronounced.<sup>29</sup> In doing so, it can disrupt the incumbents' market by taking over its significant role in the market because the incumbent has market power.

Innovative theory of harm can be used as the relationship between competition policy and disruptive innovation because it can indicate whether the business actors in the disrupted market are anti-competitive or not by seeing the effect in the market.

1. Incumbent must have a market power in its value network to have significant incentives and interest to protect its power from disruptive

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<sup>28</sup> *Ibid*, p.3.

<sup>29</sup> *Ibid*, p.6.

innovation. If incumbent does not have such power, or does not have dominant position in the market, so they would not have huge incentive to protect their power from disruption because they have nothing to lose or at least less to lose. A dominant incumbent is considered has a huge role in the market, therefore they try to prevent any disruption in their market to stay where they are in order to protect their position.

2. If the target does not happen in the same relevant market as the incumbent, then the target could be a potential disruption. In the theories of harm related with innovation, the target is on the different market with the incumbent because the purpose of the target is not for taking market position, raising price but it's because of preventing the redefinition of the relevant market by shifting the value network of incumbent.
3. Incumbent firms try to make to entry barriers for disruptive innovation is hard to enter, incumbent firms try to make it difficult for small firms to develop. The disruptor itself is between traditional product and its innovation product as the disruptor stand at the centre, therefore it brings customers to the new value network where the disruptor exists. The strategic ways used by incumbent to prevent the disruptor to enter the relevant market is by make the disruptor raising their cost of product so they won't have lower-products than the incumbents, and the incumbent can use acquisition of the firms that incumbents assume as potential disruption in the near future and mothballing.

Acquisition of potential disruptor in order to avoid disruptive innovation entering to the incumbent' market and replace them can be a conduct of anti-

competitive. Therefore, this should be prohibited by competition for the sake of public welfare. However, it is not an easy task to know and determine that the result of such acquisition would be danger public welfare in the future. Along with that, potential disruptor is usually a small firm which might not recognized by the competition enforcer.<sup>30</sup>

To avoid anti-competitive on competition between business actors whether it's from potential disruptor or incumbent firms, the application of ex post is required with less ex ante regulation.<sup>31</sup> As an incumbent who holds a dominant position, they have particular responsibility by not abusing its position and make barrier to entry the market since being dominance is not illegal by nature. Besides, there is a risk to apply wrong rule to a novel situation, thus, regulation must remain specific to manage the risk because not only incumbent who may have the ability to abuse of power but potential disruptor as small firms can perform anti-competitive conduct.<sup>32</sup>

The application of ex post as the evidence based approach is needed and important because conduction intervention without having any evidence to prove anti-competitive would be suitable and inappropriate to be applied. There are three kinds of risk which caused by intervention:<sup>33</sup>

- 1) Acting prematurely.
- 2) Inadvertently ossifying evolving market structures.
- 3) Acting too late.

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<sup>30</sup> *Ibid*, p.9.

<sup>31</sup> Alex Chisholm, and Nelson Jung, *Platform regulation — ex-ante versus ex-post intervention: evolving our antitrust tools and practices to meet the challenges*, Competition Policy International, Spring/Autumn 2015, p.3.

<sup>32</sup> *Ibid*.

<sup>33</sup> *Ibid*, p. 5.

However, the alteration from ex-ante into ex-post can't be done only by one elements but it requires a strong commitment and cooperation between competition authorities, policymakers, businesses and consumers are needed to avoid anti-competitive and to maintain market remains fair to all business actors.<sup>34</sup>

The judicial review on Competition Law towards the conflict between conventional taxi and online taxi can use Law No. 5 Year of 1999 concerning the Ban on Monopolistic Practices and Unfair Business Competition. To avoid and to prevent anti-competitive conduct, there are two approaches to know whether or not business actors violate Competition law. First approach is by rule of reason, a performance is valid and legit by law and there is an objective reason to justify the performance, hence, there will not be any violation.<sup>35</sup> The point is to know whether or not the performance is anti-competitive conduct is to know the material element of the performance itself. Thus, the application of rule of reason must be considering the reasons behind the performance which is done by business actor.

The rule of reason is used to make an evaluation towards the result or effect by the agreement or business activities to know whether it is obstruct or support the competition.<sup>36</sup> Articles which contain rule of reason can be seen by the sentence of “which can caused” and/ “reasonably suspected” like article on carter (11) and monopoly practice (17). So in this theory, there must be an in-depth study and comprehensive research to prove the reason behind business activities.

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<sup>34</sup> *Ibid*, p. 7.

<sup>35</sup> Susanti Adi Nugroho, *Hukum Persaingan Usaha Di Indonesia – Dalam Teori dan Praktek serta Penerapan Hukumnya*, Fajar Interpratama Offset, 2012, p. 711.

<sup>36</sup> Melisa Safitri, *Tinjauan Hukum Persaingan Usaha Terhadap Konflik Antara Taksi Konvensional dan Taksi Online*, Jurnal Keadialan Progresif, September 2010, p.140.

Second approach is per se illegal, to know whether or not there is a violation done by business actor, business activity itself must be prohibited by law without any justification and to see the effect of business activity itself. So it is obviously stated in the law that the conduct is strictly prohibited without any further study to know the effect of conduct. This approach is actually the opposite of rule of reason.<sup>37</sup> Per se illegal approach can be applied if fulfil one of the requirements, which are:

1. The condemned practice is always harmful, no matter the circumstances are. It always does to lessen competition but there would be no further justification.
2. The practice is sometimes harmful for competition and sometimes remains neutral but it never contributes in the positive way towards the competition and market. Hence, it is harmful if the practice is successfully achieves its intended effect but it remains neutral if fail to achieve.
3. The practice is sometimes harmful, or neutral, or sometimes beneficial, but the aggregate of harm in situations in which it makes a beneficial contribution to the working of the market. Or can be both harmful and beneficial.<sup>38</sup>

## **E. Research Method**

1. Object Study
  - a. The relevant market between online traffic transportation and conventional transportation.
  - b. Applying competition law towards traffic online transportation as disruptors.

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<sup>37</sup> Susanti Adi Nugroho, *op.cit.* p, 701.

<sup>38</sup> *Ibid.*, p. 707.

## 2. Research Source

This research will be using secondary data which are taken from journal, document, conventions or other archives that are related to the problem which is discussed in this research. The purpose of this data is to answer the problems formulation. Secondary data are divided into:

### a. Primary Legal Materials.

- 1) Law No. 5 of 1999 concerning on the Ban on Monopolistic Practices and Unfair Business Competition
- 2) Law No. 22 of 2009 concerning on Road Traffic and Transportation
- 3) Indonesian Civil Code
- 4) Indonesian Commercial Code
- 5) Ministry Regulation No. 108 of 2017 concerning on the Implementation of People Transportation With Public Vehicles Not in Particular Routes

### b. Secondary Legal Materials.

- 1) European Competition Law
- 2) American Antitrust Law

c. Literatures related to disruptive innovation, relevant market, court decision in several countries regarding online traffic transportation, Indonesian Competition Law system and Indonesian Transportation Law. It can be books, paper works of experts.

d. Journals related to Literatures related to disruptive innovation, relevant market, court decision in several countries regarding online

traffic transportation, Indonesian Competition Law system and Indonesian Transportation Law. It can be journal published by OECD, Westlaw, or experts journal from libraries.

e. Article related to disruptive innovation, relevant market, court decision in several countries regarding online traffic transportation, Indonesian Competition Law system and Indonesian Transportation Law. It can be taken from newspaper, magazine.

f. Internet sources to disruptive innovation, relevant market, court decision in several countries regarding online traffic transportation, Indonesian Competition Law system and Indonesian Transportation Law.

### 3. Approach of Study

Approach of study for this research is a juridical normative approach which identifies legal norms and legal views regarding the issues of this research. The objective is to understand comprehensively and to answer the object of study by using approach of statutory and comparative approach. Statutory means the writer will be using an approach into statutes to analyse related to research objects. Comparative approach means the writer will use comparison across different legal systems related to research objects.

### 4. Analyse Legal Materials

The data collection is by selecting the data related to the discussed problem in this research by descriptive analysis. The data are collected and used to answer and to find out the problems. The method of analysis

data is by using qualitative method in which will be in form of qualitative and descriptive. It also portrays facts, legal enforcement, and bears with the applicable legal aspects. The steps are defined as follows:

- a. Classification of the data collection based on the problems of the research
- b. Systematic of data collection
- c. Systematic data is analyzed to achieve solution and conclusion

#### **F. Thesis Outline**

Chapter I contain an Introduction which consist of these following parts: Context of Study, Problem Formulation, Research Objectives, Theoretical Framework, Research Method, and Structure of Writing.

Chapter II contains Theoretical Review discussing the study Transportation Law and Competition Law.

Chapter III contains two discussions as follows: The relevant market in online traffic transportation based on KPPU Guidelines and the application of competition law towards traffic online transportation as disruptors.

Chapter IV contains the Conclusion and Recommendation which is obtained by previous analysis in the prior chapters.

## CHAPTER II

### TRANSPORTATION AND COMPETITION LAW

#### A. Transportation Law

##### 1. General Overview of Transportation Law

Regulations regarding traffic transportation in Indonesia can be found in Law No. 22 of 2009 as the main source of law and Government Regulation No. 74 of 2014. Traffic is a movement of vehicles and people in the inland traffic according to article 1 point 2 of Law No. 22 of 2009. While transportation is the transfer of people and/or goods from one place to another place by using vehicle on the road according to article 1 point 3 of Law No. 22 of 2009. The scope of traffic and road transportation is a state. The implementation to conduct traffic and road transportation in direct service to the society is done by government, local government, legal entities, and/or public is stated in the article. In land transportation is divided into two kinds, which are:<sup>39</sup>

##### a. Road Transportation

Vehicles that are allowed to be used in inland transportation are:

- 1) Motorcycle: two or three wheeled motor vehicle without a roof or rail on its side.
- 2) Passenger car: motor vehicles which are equipped with a maximum of eight seats, excluding driver's seat, with or without the baggage.

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<sup>39</sup> MDC Melli Darsa & Co, *Transportation Regulation In Indonesia*, April 2015, p.7.

3) Bus: motor vehicles with more than eight seats, excluding driver's seat, with or without the baggage.

4) Goods car: motor vehicles other than motorcycle, passenger, and bus.

Besides those explain above, there are other inland transportation such as bicycle, *delman*, rickshaw, *bajaj*, and others.

b. Railway

Railways consist of public and special railways. Public railway is used to provide the transportation for people and/ goods. While special railways is used only to support the principal activities of certain business entities and not for the public, such as coal mining enterprises.

Transportation is to move persons and/or goods in one place to another place using a vehicle. According to Minister of Transportation Decision No. 35 of 2003 on the Implementation of Public Transportation for People by Public Vehicle, road transportation can be classified as follows:

a. Bus

Bus is every motor vehicle equipped with more than eight seats excluding four seats for drivers, and it is either with or without baggage storage.

b. Taxi

Taxi is public transportation which used a car to transport its passenger. Generally taxi likely uses sedan type cars, but in certain countries there is van taxi in which transport a lot more of people.

c. Medium-size bus

Medium-size bus is a term which refers to a public transportation with a predetermined route. Unlike bus which has bus stops, medium-size bus can

stop from places to places in order to pick up or to drop off passenger anywhere.

d. Bemo

Bemo is a three-wheeled small motorized vehicle for public transport. At the beginning, bemo was expected to replace trishaw which considered as inhuman to utilize a human as driving force.

e. Trishaw

Trishaw is a three-wheeled mode of transportation. It is environmentally friendly because it does not cause air pollution or loud noises. However, the existence of trishaw in city can disrupt traffic road because trishaw moves very slow compared to other transportation such as car or motorcycle.

f. Delman

Delman is a two until four-wheeled traditional transportation which does not use machine as driving force but it uses horses as the replacement.

There are several definitions concerning road traffic transportation according to legal dictionaries, experts, statutes and regulations, as follows:

- a. Law No. 22 of 2009 on Road Traffic and Transportation defines road traffic and transportation, Traffic, Transportation as:<sup>40</sup>

*“Road Traffic and Transportation shall mean the integrated system consisting of Traffic, Road Transportation networks, Road Traffic and Transportation infrastructure, vehicles, drivers, road users as well as their management”*

*“Traffic shall mean the motion of vehicles and people at road traffic spaces”*

*“Transportation shall mean the movement of people and/or goods from one place to another by vehicles at road traffic spaces”*

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<sup>40</sup> Article 1 (1)(2)(3) on Law No. 22 of 2009 on Traffic Road and Transportation.

The process of performance in transportation are involved from load of persons or goods by carrier, then the persons or goods are brought in destination which has been determined, the last is to drop off the persons or goods in destination.

- b. According to *Kitab Undang-Undang Hukum Dagang* (KUHD) in Book II, Chapter VA on Transportation of goods, article 466:

*“The forwarder in this chapter refers to a person who has bound themselves both through time charter or journey charter, as well as other agreements, to provide services for fully or partially transporting by sea”<sup>41</sup>*

While in Book II, Chapter VA on Transportation of people, article 521:

*“Transportation in the understanding of this chapter is people who bind themselves in charteragreements according to time or according to voyage as well as other agreements forarranging the transportation of people (travelers, passengers) entirely or in part by sea”<sup>42</sup>*

- c. Transportation according to Muchtaruddin Siregar is all activities to perform the movement of goods or persons from one place to another places, if the formulation is studied, then, the transport produces transportation services as its production, in which as a service in the performance of moving goods or persons.
- d. Transportation according to Purwosutjipto is a person who has bound themselves to undertaken a transport of goods or persons from one place to a certain destination safely.<sup>43</sup>
- e. Transportation law is a mutual agreement, in which the carriers have bound themselves to undertaken transportation of goods and/persons to a

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<sup>41</sup> Article 466 on Commercial Code

<sup>42</sup> Article 521 on Commercial Code

<sup>43</sup> Purwosutjipto, *Pengertian Pokok Hukum Dagang Indonesia*, Penerbit Djambatan, Jakarta , 2000, p.10

certain destination, whereas the other parties (sender-receiver, sender or receiver, passenger) shall fulfill the payment for the transportation service.<sup>44</sup>

## 2. Principles of Transportation Law

The basic principles on Transportation stipulates in article 2, Law No. 22 of 2009 on Road Traffic and Transportation, as follows:<sup>45</sup>

- a. *Transparency principle shall mean the openness in organizing the Road Traffic and Transportation to the public in obtaining the correct, clear and honest information in order that the community has the opportunity to participate in the Road Traffic and Transportation development.*
- b. *Accountable principle shall mean the organizing of Road Traffic and Transportation that is accountable.*
- c. *Sustainability principle shall mean the ensuring of quality of environment of vehicle worthiness technical requirements and general plan of Road Traffic and Transportation Network building and development.*
- d. *Participative principle shall mean the arrangement of the community participation in the progress of policy and supervision preparation on the implementation of policy, accident handling and reporting of the occurrence related to the Traffic and Road Transportation.*
- e. *Benefit principle shall mean all activities of Road Traffic and Transportation organizing that may give the largest added value in the frame of realizing the community welfare.*
- f. *Efficient and effective principle shall mean the service in Road Traffic and Transportation organizing made by each administrator in governmental phase on efficient and effective basis.*
- g. *Equality principle shall mean the organizing of Road Traffic and Transportation that must be implemented based on the equality between the facilities and infrastructure as well as the fulfillment of the rights and obligations of the Service Users and organizers.*
- h. *Integrated principle shall mean the organizing of Road Traffic and Transportation service made by giving the priority to the harmony and interdependence of authority and responsibility of the administrator authority.*
- i. *Independence principle shall mean the effort to organize the Road Traffic and Transportation through the national resources development and empowerment.*

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p.5 <sup>44</sup> Sution Usman Adji, *Hukum Pengangkutan Di Indonesia*, Rineka Cipta, Jakarta, 1990,

<sup>45</sup> Elucidation on Article 2 of Law No. 22 of 2009

Those principles are made in order to implement Road Traffic and Transportation as to the realization of the secure, safe, orderly, smooth Road Transportation service and integrated to the other transportation mode to enhance the national economy, improve the public welfare, strengthen the national unity and integrity as well as being able to uphold the nation dignity, the realization of the ethics of traffic and national culture and the realization of the law enforcement and legal certainty for the public.<sup>46</sup>

Meanwhile the principles of transportation which are philosophical background are divided into two. Those are public law and private law. Public law principle is applicable legal basis and beneficial for all parties including carriers, the third party who has an interest in transportation and state. On the other hand, private law principle is an applicable legal basis and beneficial both parties in transportation which are carrier and passenger or the goods' owner.<sup>47</sup>

a. Public law principle

There are three laws that stipulates about transportation which can be included as a public law, those are Law No. 23 of 2007 on Railway, Law No. 22 of 2009 on Traffic and Road Transportation and Law No. 1 of 2009 on Aviation. The principles of public law are as the basic regulation which is prioritized for public interest and common welfare. Public law also has several principles, as follows:<sup>48</sup>

- 1) Benefit principle: transportation shall contain benefit and give value as much as possible for the human existence to increase the public welfare, and to develop the public living.

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<sup>46</sup> Article 3 of Law No. 22 of 2009

<sup>47</sup> Abdulkadir Muhammad, *Hukum Pengangkutan Niaga*, PT Citra Aditya Bakti, Bandung, 2013, p. 12

<sup>48</sup> *Ibid.*

- 2) Fairness principle: the implementation of transportation shall give the fair services and equality for all whole society without any exception, with the decent and affordable cost.
- 3) Equilibrium principle: the implementation of transportation shall be balanced and harmonized between the facilities and infrastructures, the interest between transportation organizer, passengers, public, and the national and international interest.
- 4) Public interest principle: the transportation organizers shall focus and prioritize the interest of public service for wider community.
- 5) Integrated principle: the transportation shall be integrated.
- 6) Law enforcement principle: the government is obligated to enforce and to guarantee the legal certainty and command the public of Republic Indonesia to be always mindful and obey all regulation that has been stipulated by transportation organizer.
- 7) Confidence principle: transportation shall be based on belief in ability and strength of their own and rooted in nation's identity.
- 8) Safety of passenger principle: the transportation to transport passenger shall be attached to accident insurance and other loss insurance. The accident insurance is included as social insurance which is compulsory security insurance. Besides that, the transportation organizer shall provide and maintain the facilities and infrastructures to fulfill the safety standard which is compatible with the positive laws and international conventions.
- 9) Sustainable environmental principle: the performance of transportation shall be based on sustainable environment. Sustainable environment is defined

as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.<sup>49</sup>

10) State's sovereignty principle: transportation's organizer shall be maintaining the territorial integrity of the Republic of Indonesia.

11) Nationality principle: transportation's organizer shall reflect the nature and character of diversities and pluralistic in Indonesia while keep maintaining the principle of Republic of Indonesia

b. Private law principle

Private law principle is legal basis, in which more focus on the interested parties who has interest in transportation. The relationship between carrier/transportation's organizer and passenger/goods' owner shall be based on legal basis. Those principles are:<sup>50</sup>

1) Agreement principle means that every transportation is undertaken with an agreement between transportation companies and passenger or goods' owner. The agreement does not need to be a complicated ones, the ticket and transportation's document can be used as a evident of agreement between both parties. In addition, the agreement does not need to be in written but consent between both parties. However, it is needed a supported document to prove that the agreement exists and to bound them.

2) Coordinate principle means the parties who has interest in transportation have an equal position, therefore, none of them are superior compared to each them in despite of the fact that the transportation organizer will likely to carry

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<sup>49</sup> Abdurrahman, *Pembangunan Berkelanjutan Dalam Pengelolaan Sumber Daya Alam Indonesia*, accessed in <http://www.lfip.org/english/pdf/bali-seminar/pembangunan%20berkelanjutan%20-%20Abdurrahman.pdf>, on 21 October 2017.

<sup>50</sup> Abdulkadir Muhammad, *Op.cit*

out a command from passenger or goods' owner. This shows that transportation is an agency agreement.<sup>51</sup>

3) Hybrid principle means that transportation is mixed between three kinds of agreements, namely authorization, storages of goods, and doing the work from the passenger or the goods' owner towards transportation organizer. This third principle is applicable to transportation, unless if it is stated otherwise in the transportation agreement.

4) Retention principle means transportation organizer does not exercise retention rights (right to hold goods) since the use of retention right is contradict with the purpose and transport function. Transportation organizer only has obligation to storage/keep the goods by the cost paying by passenger or goods' owner.<sup>52</sup>

5) Evidence of document principle means every transport is always evidenced by transport document. The absence of transport document will

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<sup>51</sup>Agency is a consensual relationship created by contract or by law where one party, the principal, grants authority for party, the agent, to act on behalf of and under the control of the principle to deal with a third party. An agency relationship is fiduciary innature, the actions and words of an agent exchanged with a third party bind the principal. An agreement creating an agency relationship may be express or implied, and both the agent and principal may be either an individual or an entity, such as a corporation or partnership according to <https://legaldictionary.thefreedictionary.com/agency>, accessed on 21<sup>st</sup> October 2017.

<sup>52</sup> Retention in the Scots law of contract, the right for A not to pay money due to B under a contract until damages due by A to A under the same are ascertained. Thus, a claim for freight may be opposed by a claim for damage done to the good in transit. In bankruptcy or liquidation, a party who is facing an illiquid claim may retain in respect of an illiquid sum owed to him by the bankrupt and it is not necessary that the debts should arise out of the same contract. In the law of Sale of Goods 1979, where the property in goods has not passed to the buyer, the unpaid seller has a right to withhold deliver similar to and co-extensive with his right of lien or retention and stoppage in transit where the property has passed to the buyer. According to <https://legaldictionary.thefreedictionary.com/retention>, accessed on 21<sup>st</sup> October 2017.

mean no transport, unless it is common and generally accepted, such as transport by carrier urban (*angkot*) without ticket.

### 3. Legal Subject of Transportation

A legal subject of transportation law is a part of determining the relationship of rights and obligations in transportation law, which is the parties who involves in transportation agreement. Legal subjects of transportation law can be included as two types. First, party who are directly bound, in which they directly fulfill their obligation and obtain their right from the transportation agreement. They are transportation organizer, passengers, goods' owner, and sometimes the goods' receiver. Second, parties who are not directly bound because they are not included in transportation agreement but they act under the name of others' interest. The parties who are involved in transportation namely:<sup>53</sup>

#### a. Transportation organizer / carrier

Transportation's organizer is a party who is bound themselves to organize transportation of persons or goods. It can be in form of stated-owned enterprises, private enterprises, or individual owned enterprises who are in a business of transportation. Characteristic of a carrier are being a party in transportation agreement, being a company who organize transportation, using mechanic transportation tool and issuing transportation document.

#### b. Consigner / Shipper

Consigner or shipper is a party who is bound themselves in transportation agreement to pay over transportation cost. If the shipper does not take the goods from a certain place which has been decided in a particular amount of

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<sup>53</sup> Lestari Ningrum, *Usaha Perjalanan Wisata Dalam Perspektif Hukum Bisnis*, Citra Aditya Bakti, Bandung, 2004, p.140

time, the shipper will be fined. If there is a postponement in transporting by carrier, consequently shipper is obligated to pay certain amount of money the goods' owner has paid as compensation. Characteristic of shipper are being a party in transportation agreement owner of goods, paying transportation cost, and holding transportation document.

c. Passenger

A passenger is a person who is bound themselves to pay transportation cost toward themselves that is being transported, whether inland, air or sea. Characteristic of passenger are being a party in transportation agreement, paying transportation cost, and holding transportation document.

d. Expeditor

A expeditor is an individual or legal entity to look for transportation organizer or carrier in inland or sea for the interest of shipper. Expediter runs a business in the field of cargo expedition in railway, ship, or airplane. Expediter handles various documents and formalities which is applicable for submitting and/or picking up the goods from conveyance, or warehouse in station/port/airport. Characteristic of expediter are being an intermediary company in search for transportation organizer, acting for and under the name of shipper, and accepting provision from shipper.

e. Travel agent

A travel agent is likely a party who looks for passengers for transportation organizer. They act in the name of transportation organizer and provide transport facilities for passenger by selling ticket to them. As a consequence, passengers pay the transportation cost which by then travel agent gives the

transportation cost paid by passenger to transportation organizer, in return travel agent will get provision from transportation organizer. Legal relationship is in form of contract of representative agency. Characteristic travel agent is as an intermediary companies looking for passenger, acts to and under the name of transportation organizer, and accepts provision from transportation organizer.

f. Stevedoring

Stevedoring companies is a company who runs in business of loading and unloading services. This company can stand independent or can be part of transportation organizer. If it is a part of transportation organizer, all activities including all acts against the law conducting by stevedoring will be the responsibility of transportation organizer.

g. Warehousing

Warehouse company runs in a business which engages in goods storage services in a port warehouse for certain amount of time while waiting for the ship to come. It is under the supervision of customs authority.

h. Consignee

Consignee is a shipper which can be known from transportation document. Consignee can be an importer/buyers or a party who is given an authority from shipper. Characteristic of consignee are a company or individual who obtains the right from shipper, proven by transportation document, and to pay or not to pay transportation cost.

#### 4. Traffic Transportation Enforcement

In terms of ownership of business entities, transportation organizer can be grouped into three types, namely:<sup>54</sup>

##### a. State-Owned Enterprises (SOEs)

It is a business or industry that is wholly or only partially owned and operated by official government.<sup>55</sup> SOEs presents in almost all sectors or industries such as banking (finance), travel (tourism), agriculture, forestry, mining, construction, fishing, energy, and telecommunications (information and communication).<sup>56</sup> State-owned enterprises can be in form of *perusahaan perseoran* which is limited liability company, in which, independent and its main purpose is to gain profits such as PT Kereta Api Indonesia, PT Garuda Indonesia Airlines. There is also *perusahaan umum (perum)* or public service company which is wholly owned by Indonesian government, its main purpose is to provide goods and/or services to public but still allowed to gain profits.

##### b. Private Enterprises

It is a business or industry which is owned by individual people or commercial companies for profits, so it is not owned by government or any official organization.<sup>57</sup> Private enterprise is generally in the form of limited liability companies, such as PT Lintas Sumatra, PT Sriwijaya Airlines, PT Lion Airlines. Other forms of private enterprise are cooperation and CV which

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<sup>54</sup> Abdulkadir Muhammad, *op.cit*, p. 62.

<sup>55</sup> <http://www.businessdictionary.com/definition/state-owned-enterprise-SOE.html>, accessed on 22<sup>nd</sup> October 2017

<sup>56</sup> Indonesia - 7-State Owned Enterprises, <https://www.export.gov/article?id=state-owned-enterprises>, accessed on 22<sup>nd</sup> October 2017

<sup>57</sup> <http://www.businessdictionary.com/definition/private-enterprise.html>, accessed on 22<sup>nd</sup> October 2017

is not legal entities. In enforcing its transportation business, private enterprises have to obtain permission from the government. There are two kinds of permission for private enterprises, which are first, Transportation Services Business License for Company's permission to run its business in transportation, second, Transport Business License for the approval in using vehicle specification as a facility to run the business, therefore it is emphasis on the regulatory compliance of vehicles.

c. Individual-owned enterprises

It is a business or industry owned by an individual who is fully responsible towards all risk and activities in that enterprise, for example is PO Putra Remaja.

Transportation enforcement has several obligations in running their business. The obligation is included as transporting or enforcing transportation from one place to another place safely.<sup>58</sup> The general obligations of transportation enforcement are as follows:

- a. If consumer has paid the transportation cost which has been agreed, consequently, transportation enforcer is obligated to transport consumers and/or goods.<sup>59</sup>
- b. If there is a transport cancelation happens because transportation enforcer is at fault as a consequence the transportation enforcer has to refund the transportation cost.<sup>60</sup>

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<sup>58</sup> Purwosutipto, *Pengertian Pokok Hukum Dagang Indonesia*, Jakarta, Penerbit Djambatan, 1984, p.33.

<sup>59</sup> Article 186 Law No. 22 of 2009

<sup>60</sup> Article 187 Law No. 22 of 2009

- c. If there is a damage loss happens to consumer caused by transportation enforcer, as the result transportation enforce is obligated to pay compensation.<sup>61</sup> In addition, transportation enforce shall ensure its responsibility.<sup>62</sup>
- d. If there is a danger caused by passengers and/or goods, the driver could drop off the passenger and/or goods.<sup>63</sup>

## 5. Transportation Agreement

Agreement is when a person binds themselves towards another person.<sup>64</sup> Transportation is a bilateral agreement between carrier and consigner or owner of goods and/or passenger in the perspective of contract law.<sup>65</sup> By entering to transportation agreement, carrier is bound themselves to carry out transportation of goods and/or passenger to a particular destination. While the other party, the consigner and/or passenger, is bound themselves to pay certain amount of money for transportation services conducted by carrier.<sup>66</sup> In addition, transportation agreement is as an agreement where one party is undertaken to transport people or goods from one place to another place, while the other party is willing to pay the transportation cost.<sup>67</sup> Therefore, there are two parties involved in transportation agreement namely:<sup>68</sup>

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<sup>61</sup> Article 188 Law No. 22 of 2009

<sup>62</sup> Article 189 Law No. 22 of 2009

<sup>63</sup> Article 190 Law No. 22 of 2009

<sup>64</sup> Article 1313 Indonesian Civil Code stipulates an agreement is an act pursuant to which one or more individuals bind themselves to one another.

<sup>65</sup> Ridwan Khairandy, *Pokok-Pokok Hukum Dagang Indonesia*, Yogyakarta, FH UII Press, Juli 2013, p. 375

<sup>66</sup> *Ibid.*

<sup>67</sup> R. Subekti, *Aneka Perkanjian*, Bandung, Citra Aditya Bakti, 1995, p. 69 is cited in Ridwan Khairandy, *Pokok-Pokok Hukum Dagang Indonesia*, Yogyakarta, FH UII Press, Juli 2013, p. 375

<sup>68</sup> *Ibid*, p.70

a. Carrier

The main obligation of a carrier is to carry out transportation from origin place to destination place. Besides that, a carrier is obligated to maintain the safety of goods and/or passenger which is transported until to the destination place that has been agreed from the beginning. Carrying out transportation means that carrier can transport goods and/or passenger by themselves or carrier can ask other party to do transportation at their command. Moreover, carrier merely undertakes to carry out the transportation but don't need for them to work on transportation equipment even though generally the carrier is the one who carries out transportation by themselves. Carrier has right to receive payment towards their services.

b. Consigner or passenger

The obligation for consigner or passenger is to pay transportation service conducted by carrier. While consignee does not consider as parties in transportation agreement because consignee is included as a third party who has interest in taking the goods.

Once both parties, carrier and consigner/passenger, has consent and agreed to enter into agreement then it is when transportation agreement happens.<sup>69</sup> If carrier has carried out their obligation in which to conduct transportation of goods or passenger, carrier has bound themselves to consequences towards the goods and/or passenger they are transported. Article 1320 Indonesian Civil Code has stipulated on the conditions that are required for the validity of agreements, namely:

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<sup>69</sup> Ridwan Khairandy, *op.cit*, p. 377

- a. There must be consent of the individuals who are bound thereby
- b. There must be capacity to enter into an obligation
- c. There must be a specific subject matter
- d. There must be a permitted cause

In order for transportation to be valid, the agreement must fulfil those four conditions above. The first and second requirement is subjective requirement which must be satisfied by the legal subject of agreement.<sup>70</sup> While the third and fourth requirement are an objective requirement which must satisfied by the subject of agreement. In other words, it is only goods which are tradable properties may form the subject matter of agreements.<sup>71</sup> All of agreement which has been legally made is applicable as a law for parties who have bound themselves into agreement.<sup>72</sup> As the consequences, agreement cannot be withdrawn, except if both of parties are agree, or because of reason which has been stipulated by law can justify the withdrawal.

Carrier and passenger have to carry out their rights and obligation if the agreement has fulfilled the requirement in article 1320 Indonesian Civil Code. If the first and second requirement is not fulfilled by passenger, hence the agreement can be canceled. While, if the third and fourth requirement is not fulfilled then it is null and void. However, to make a transportation agreement of goods and/or passenger does not have to be in written, as required to those fours requirements.

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<sup>70</sup> According to article 1330 Indonesian Civil Code, the individuals who are incompetent to conclude in agreement are:

1. minor;
2. individuals under guardianships;
3. married in the events stipulated by law, and in general, individuals who are prohibited by law from concluding specific agreements

<sup>71</sup> Article 1332 Indonesian Civil Code

<sup>72</sup> Article 1338 Indonesian Civil Code

It is enough to enter into transportation agreement by verbal, it can be concluded transportation agreement is consensual.<sup>73</sup>

Transportation agreement is made legally as a law for parties who enter into agreement. Hence, agreement is opened to give chances for all parties to stipulate their own agreement based on their needs. The agreement itself has to be made and carry out in a good faith.<sup>74</sup>

As a result of transportation agreement, carrier is obligated to bear all losses which is suffered by consigner or passenger through compensation.<sup>75</sup> There are three kinds of responsibility principles namely:<sup>76</sup>

a. Liability Based on Fault Principle

The liability principle is based on who is at fault. If there is a conduct done by someone which causes any damages to another then they oblige to repair or compensate the damage. In other words, if any party commits conduct which violates law that brings damages to another party then they are obligated to compensate.<sup>77</sup> The burden of proof is hold by plaintiff.

b. Rebuttable Presumption of Liability Principle

Carrier as defendant is assumed to hold responsibility toward all damages or losses, but defendant can free themselves from their responsibility if they can prove that they are absence of fault. In this case, the burden of proof is

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<sup>73</sup> Siti Utari, *Pengangkutan Laut di Indonesia Suatu Tinjauan Yuridis*, Jakarta, Balai Pustaka, 1994, p.13

<sup>74</sup> Article 1338 Indonesian Civil Code

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> Article 1365 Indonesian Civil Code stipulates A party who commits an illegal act which causes damage to another party shall be obliged to compensate therefor

shifting to the defendant.<sup>78</sup> It can be seen in article 192 Law No. 22 of 2009 that public transportation company is at fault to be responsible towards any loss and damages which is suffered by passenger expect if there is an event that can't be prevented or *force majeure* or because of passenger is at fault.<sup>79</sup>

### c. Strict Liability or Absolute Liability

The party who caused damages will be responsible without recognizing if there if any fault or not and not recognizing who is at fault.

According to article 234 (1) Law No. 22 of 2009 is determined that driver or owner of vehicle, and/or the transportation company is responsible towards the damage or loss suffered by owner of goods or passenger or the third party because of the fault of drivers in which carrier or company takes part in holding the responsibility as an employer.<sup>80</sup> Responsibility in which done by someone else or replacement responsibility or known as vicarious liability.<sup>81</sup> Vicarious liability can be categorized as respondent superior or a superior risk bearing theory because employer as a person who has superior position compared to the driver must be responsible towards the conduct done by its employee.<sup>82</sup>

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<sup>78</sup> Ridwan Khairandy, *op.cit*, p. 382

<sup>79</sup> Article 192 Law No. 22 of 2009 stipulates Public transportation company is responsible towards damages suffered by passenger that passes away or injured caused by transportation enforcement, with the exception that the event occurred cannot be prevented or avoided or it is because of passenger's fault

<sup>80</sup> Article 234 (1) Law No. 22 of 2009 stipulates Drivers, Owner of Motorized Vehicles, and/or Public Transportation Company is responsible towards the loss suffers by Passenger and/or owner of goods and or/ the third party because of the fault of drivers.

<sup>81</sup> Munir Fuady, *Perbuatan Melawan Hukum – Pendekatan Kontemporer*, Bandung, Citra Aditya Bakti, 2002, p. 17

<sup>82</sup> Article 1367 Indonesian Civil Code stipulates an individual shall be responsible for the damage which he has caused by his own act, as well as for that which was caused by the acts of the individuals for whom he is responsible, or caused by matters which are under his supervision. (S.27-31 jis. 390, 421) Parents or guardians shall be responsible for the damage caused by minor children who live with them and over whom they exercise parental authority or guardianship.

## 6. Legal Relationship in Transportation

### a. Legal Relationship Between Transportation Company and Its Driver

Legal Relationship (*rechtbetrekkingen*) is a relationship between two legal subjects or more regarding rights and obligations from one party towards another party.<sup>83</sup> Work relationship is a reciprocal relationship between employee and employer based on work agreement made by involved parties. Work agreement will raise labour relationship. According to Law No. 13 of 2003 concerning Manpower, a work agreement is an agreement which is made between a worker and employer in which specifies work requirements, rights and an obligation of both parties.<sup>84</sup> A worker states their willingness to work towards employer with receiving wage and as a reciprocal the employer states their willingness to hire the worker with giving wage.<sup>85</sup> Legal relationship between driver and business actors in the aspect to fulfil goods and/or service is a part of civil relationship.<sup>86</sup> To have a work agreement, there must be three requirements fulfilled, which are:<sup>87</sup>

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Employers and those who have been assigned to manage affairs of other individuals shall be responsible for the damage caused by their servants and subordinates in the course of duties assigned to them. Teachers and work supervisor shall be responsible for the damage caused by their students and apprentices, during the period that they are under their supervision. (S.27- 31 jjs. 390, 421) The above-mentioned responsibility shall cease, if the parents, guardians, school teachers and work supervisor can prove that the act, for which they could be held responsible, could not have been prevented.

<sup>83</sup> Soeroso R., *Pengantar Ilmu Hukum*, Jakarta, PT. Rajagrafindo Persada, 2006, p.269

<sup>84</sup> Article 1(14) Law No. 13 of 2003 stipulates An [individual] work agreement (*perjanjian kerja*) shall be defined as an agreement made between a worker/ labourer and an entrepreneur or an employer. The agreement specifies work requirements, rights and obligations of both sides.

<sup>85</sup> Neltje F, *Hubungan Industrial Pancasila*, Gunadarma, can be accessed in [http://elearning.gunadarma.ac.id/%20%20index.php?option=com\\_wrapper&Itemid=36](http://elearning.gunadarma.ac.id/%20%20index.php?option=com_wrapper&Itemid=36), accessed on November 11 2017

<sup>86</sup> Happy Susanto, *Hak-Hak Konsumen Jika Dirugikan*, Jakarta, Visi Media, 2008, p.19

<sup>87</sup> Supreme Court decision No. 841 K/Pdt.Sus/2009 in the case of taxi driver and taxi company

- 1) There is work to do: this requirement is fulfilled if company give a job to worker.
- 2) There is command by employee: this requirement if fulfilled if the one who give a command to work is company, not by the initiative of worker.
- 3) There is wage: this requirement is fulfilled if a worker receives compensation in the form of money for certain period of time. And it is not based on commission/percentage.

Conventional transportation driver such as taxi driver does not bind with Manpower Law due to their profession cannot be categorized as worker or labourer defined by Manpower Law.<sup>88</sup> Legal relationship in transportation between a transportation company and its driver does not fulfil the third requirement, which is wage.<sup>89</sup> It depends on how a transportation company and its driver apply their wage system, whether it is profit sharing, or deposit in certain amount of money. If company does not give wage to its driver, as consequence it cannot be called as a work agreement and Manpower Law cannot be applied to them. Besides wage, there is command element by company because taxi driver is given the freedom to look for their own passenger

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<sup>88</sup> Dodi Oktarino,, “SOPIR TAKSI BUKAN PEKERJA?” can be accessed in <http://www.dodioktarino.com/2014/12/sopir-taksi-bukan-pekerja.html>, accessed on November 11<sup>th</sup> 2017

<sup>89</sup> Pande Putu Tara Anggita Indyaswari and Dewa Nyoman Rai Asmara Putra, *ANALISIS MENGENAI HUBUNGAN SUPIR GO-JEK DENGAN PT. GOJEK INDONESIA*, Bagian Hukum Perdata Fakultas Hukum Universitas Udayana, p. 5

Legal relationship between a transportation company and its driver is partnership agreement.<sup>90</sup> Hence, partnership does not bind by Manpower Law. The differences between partnership and work relationship is in partnership is likely to use mutualism between party. In other words, partnership is likely to emphasis on mutual relationship which has equal position between parties.<sup>91</sup>

A partnership is a voluntary agreement between two or more competent person to put their money, effects, labour, and skill, or even some or all of them in a lawful business with the understanding that there must be a proportional sharing of the profits and losses between parties.<sup>92</sup> While according to Regulation of the Commission for the Supervision of Business Competition no. 01 Year 2015 on Procedures for Supervision of Partnership Implementation, partnership is cooperation in business relation, either directly or indirectly, based on mutual requirement, trust, strengthen and benefits involving micro, small and medium business actors by big business.<sup>93</sup> There are four basic principles in partnership which are mutual need, mutual trust, to strengthen each other, and to benefit each other.<sup>94</sup> In addition, partnership agreement must be contained at least, as follows:<sup>95</sup>

- 1) Business activities
- 2) Rights and obligations of both parties

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<sup>90</sup> Hukum Online, *Sopir Taksi, Karyawan atau Mitra Usaha?*, can be accessed in <http://www.hukumonline.com/klinik/detail/lt51d2eb82cc175/sopir-taksi,-karyawan-atau-mitra-kerja?>, accessed on November 11<sup>th</sup> 2017

<sup>91</sup> *Ibid*

<sup>92</sup> Can be accessed in <http://thelawdictionary.org/partnership/>, accessed on November 11<sup>th</sup> 2017

<sup>93</sup> Article 1(1) KPPU Regulation No. 1 of 2015

<sup>94</sup> Article 2(2) KPPU Regulation No. 1 of 2015

<sup>95</sup> Article 30(2) KPPU Regulation No. 1 of 2015

- 3) The form of development
- 4) Period of time
- 5) Dispute resolution

Partnership company is valued their partner to respect their rights. Determining partnership is done openly, and it is referring to work system which has been by company. In the relationship between partner and company, company has responsibility as follows:<sup>96</sup>

- 1) To ensure that the appointment of partners is done honestly and fairly, objective, and free from the elements of coercion and collusion in accordance with applicable regulation.
- 2) To ensure that the chosen partner has the criteria and competencies which the Company requires, and has no conflict of interest with the Company
- 3) Maintain relationship by making agreement / contract in writing which explains the rights and obligations of each party
- 4) Carry out the Company's obligations by keeping track of schedules and mechanisms payment in accordance with agreements / contracts that have been agreed
- 5) To ensure that partners have done their obligations accordingly by agreement / contract.
- 6) To ensure partners work to follow the standard operating operations that have been determined by the Company

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<sup>96</sup> <http://www.angkasapura1.co.id/834-bab-iv-pedoman-etika-usaha.htm>, accessed on November 11<sup>th</sup> 2017

a. Legal Relationship Between Transportation Company and Consumer

Legal relationship happens between legal subjects, or legal subject with goods. It can happen between legal subject with legal subject in which between persons, or person with legal entity, or legal entity with legal entity.<sup>97</sup> Hence, consumer as person can have legal relationship with a transportation company as legal entity and its driver. In Indonesia, consumers' rights have been regulated in Article 4 Law No. 8 of 1999 concerning Consumers Protection which stipulates as follows:<sup>98</sup>

- a. to obtain comfort, security and safety in using or consuming the goods and/or service;*
- b. to choose the goods and/or services and obtain Point b the said goods and/or services in accordance with the promised conversion value and condition and warranty;*
- c. to obtain correct, clear and honest information on the condition and warranty of the goods and/or services;*
- d. to be heard in expressing opinion and complaints on the goods and/or services they use or consume;*
- e. to obtain proper advocacy, protection and settlement in the consumer's protection dispute;*
- f. to obtain consumer's training and education;*
- g. to receive proper and honest and nondiscriminatory treatment or service,*
- h. to obtain compensation, redress and/or substitution, if the goods and/or services received are not in accord with the agreement or not received as requested,*
- i. to obtain rights as regulated in the other provisions of the law.*

Point b and c which has been stated above means that consumer has right toward every promises which has been promised by business actors in promoting their products and/or services and consumer has right to get clear and honest information related to products and/or services. Therefore, it can

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<sup>97</sup> Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, Jakarta, Prenada Media Grup, 2012, p.254

<sup>98</sup> Article 4 Law No. 8 of 1999 concerning Consumers Protection

be said that business actor has an obligation to fulfil their promises and to give information related to their goods and/or services. The obligation of business actor to conduct their business stipulates in Article 7 Law No. 8 of 1999 which states as follow:

- a. to act in good faith in conducting the business;*
- b. to provide correct, clear and honest information with regard to the condition and warranty of the goods and/or services and provide explanation on the use, repair and maintenance;*
- c. to treat and serve the consumers properly and honestly and non discriminatively;*
- d. to guarantee the goods and/or services produced and/or traded based on the prevailing quality standard provisions of the goods and/or services;*
- e. to provide the opportunity to the consumers to test and or/try on certain goods and/or services and provide warranty and/or guarantee on the produced and/or traded goods;*
- f. to provide compensation, redress and/or substitution for the damages caused by the use, consumption and application of the goods and/or services;*
- g. to provide compensation, redress and/or substitution if the goods and/or services received or used do not accord with the agreement*

Legal relationship between business actors and consumers has happened once business actors give promises and information related to their products and/or services, it is because since then there exist rights and obligations between parties, whether it is for business actors and consumers.<sup>99</sup> Legal relationship is based on 1320 and 1338 Indonesian Civil Code where business actors is agreed towards what they have promised when they publish their promises in advertisement, leaflets or brochure. Those promise is applicable as a law for party who makes it.<sup>100</sup>

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<sup>99</sup> Dewa Gede Ari Yudha Brahmanta Anak, Agung Sri Utari, *HUBUNGAN HUKUM ANTARA PELAKU USAHA DENGAN KONSUMEN*, Bagian Hukum Perdata Fakultas Hukum Universitas Udayana, p.4

<sup>100</sup> *Ibid.*

In the protection of consumer is based on principles and objectives stated in Consumer Protection Law, which are principle of benefits, principles of fairness, principles of equilibrium, principles of safety and security of consumer, and principle of legal certainty.<sup>101</sup> The right of consumers as passengers which is stated in Consumer Protection Law is mutually related between consumer and traffic transportation company, the issue of consumers' right on convenience, security and safety is the main concerned.<sup>102</sup>

Safety in transportation agreements means persons and/goods which are transported are in a good condition without suffering from damage, loss, deprivation, annihilation, and the goods remain the same as before. Meanwhile, safety of consumers means they are in good health, no illness, no injuries, no death.<sup>103</sup>

## **B. Competition Law**

### **1. Background, Objectives and Principles of Competition Law**

#### **a. Background of Competition Law**

The agreement between International Monetary Fund (IMF) with Indonesian government was as a motive in making Law No. 5 of 1999 concerning The Ban Monopolistic Practices and Unfair Business Competition or known as Competition Law in January 15<sup>th</sup> 1998.<sup>104</sup> IMF agreed to give funding to Indonesian government to solve monetary crisis with particular

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<sup>101</sup> Rizka Amelia Azis and Yusuf Aninidita, *Perlindungan Hak Konsumen Terkait Kenyamanan, Keamanan dan Keselamatan Penumpang Transportasi Bus Kopaja*, Fakultas Hukum Universitas Esa Unggul, p.24

<sup>102</sup> *Ibid*, p. 28

<sup>103</sup> Abdulkadir Muhammad, *Op. Cit.*, p.70

<sup>104</sup> Andi Fahmi, *Hukum Persaingan Isaha Antara Teks & Konteks*, Second Edition, Komisi Pengawas Persaingan Usaha (KKPU), p. 33

condition which was to do reformation of economic and law.<sup>105</sup> Aside from the agreement, since 1989, Indonesia had an idea to formulate on antimonopoly regulation due to several reasons such as conglomerate business actors controlled by certain family or parties seemed to eliminate micro or middle business actor.<sup>106</sup> Therefore, state needs to guarantee the process of business competition towards disruption from conglomerate business actors.<sup>107</sup>

In making the regulations, state needed not to be biased and to protect only certain interest. State needed to put end on discrimination because it would lead to high cost economy as the effect from the misusing of market power to harm micro business actor.<sup>108</sup> Since Indonesia is a rule of law state or *Rechtsstaat* which is stated in Elucidation of 1994 Indonesian Constitution article 1 section 3.<sup>109</sup> State of law prevents government from abusing its power and for conducting discriminative act.

Law is not meant to guarantee several interests of people who hold power but to guarantee of all people's interest without any exception for the sake's of public welfare.<sup>110</sup>

The existence of Law No. 5 of 1999 concerning The Ban Monopolistic Practices and Unfair Business Competition was as a follow-up of Special Session of the People's Representative Council of Republic Indonesia in (MPR RI) in MPR RI Decision No. X/MPR/1998 concerning on Principles of Development Reform in the Framework of Rescue and Normalization of

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<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid*, p. 34.

<sup>107</sup> *Ibid*, p. 34.

<sup>108</sup> *Ibid*, p. 34.

<sup>109</sup> Article 1 section 3, 1945 Indonesian Constitution.

<sup>110</sup> Jimly Asshiddiqie, *Gagasan Negara Hukum Indonesia*, [http://jimly.com/makalah/namafile/57/Konsep\\_Negara\\_Hukum\\_Indonesia.pdf](http://jimly.com/makalah/namafile/57/Konsep_Negara_Hukum_Indonesia.pdf), accessed on October 29<sup>th</sup> 2017.

National Life. This means Indonesia has entered into a new of economy organizing which has market orientation.<sup>111</sup>

b. Objectives and Principle of Competition Law

Enhancing consumer welfare by promoting competition is a main objective of competition law. By encouraging competition means to increase economic efficiency.<sup>112</sup>

The core competition objectives are actually for promoting and protection the competitive process, and attaining greater economic efficiency.<sup>113</sup> But now and then the competition shall be promoted in order to achieve greater accomplishment such as economic efficiency, economic welfare or the welfare of society and/or to provide consumers with competitive prices and product of choices. While in other jurisdictions have different objectives on competition such as to promote efficient resource allocation by means of workable or effective competition.<sup>114</sup> While to a different place competition is for protecting consumers, consumers interest, free enterprise, free competition, competition, a free market environment or “competition in markets for the long term benefit of consumers” which is by restraining or even preventing anti-competitive conducts or abuse of economic power such as market power.<sup>115</sup> In other words, competition is to promote economic development or to lower the monopolization level in economy by preventing, restricting, termination the monopoly activities or the obstacles to effective competition.

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<sup>111</sup> Andi Fahmi, *op.cit*, p. 34.

<sup>112</sup> Michael Gestrin, et. Al, *A Policy Framework for Investment: Competition Polic*, OECD Conference Investment For Development: Making It Happen, OECD Investment Committee in Partnership with the World Bank, October 2005, p. 2.

<sup>113</sup> OECD Global Forum on Competition, *The Objectives of Competition Law and Policy*, CCNM/GF/COMP(2003)03, January 2003, p.9.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

While Jones and Sufrin listed the main objective of competition law as first, economic welfare such as consumer, social, public, or total welfare, second is economic efficiency such as allocative, productive and dynamic, And the last is free and fair competition.<sup>116</sup> While United Nations Conference on Trade and Development (UNCTAD) has stated the objectives of competition law as follows:<sup>117</sup>

*“To control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development”*

In UNCTAD “The United Nations Set of Principles and Rules on Competition” on The Set of Multilateral The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980) has stipulated the objectives of competition law which are to not impede or negate the realization of benefits that should arise from the liberalization, to attain greater efficiency through first, the creation, encouragement and protection of competition, second through control of the concentration of capital and/or economic power, and third is through encouragement of innovation, and to protect as well as promote social welfare and consumers, and the final is to eliminate the disadvantages to trade and development.<sup>118</sup>

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<sup>116</sup> Cassey Lee, *The Objectives of Competition Law*, ERIA Discussion Paper Series, Institute of Southeast Asian Studies, Singapore, August 2015, p. 3.

<sup>117</sup> United Nations Conference on Trade and Development, *Model Law on Competition (2010) – Chapter I*, TD/RBP/CONF.7/L.1, August 2010, p.2.

<sup>118</sup> The United Nations Set Of Principles and Rules on Competition (1980) A. Objectives: Taking into account the interests of all countries, particularly those of developing countries, the Set of Multilaterally Agreed Equitable Principles and Rules are framed in order to achieve the following objectives:

1. To ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries;

In Indonesian jurisdiction, Law No. 5 of 1999 stipulates the objectives of competition law as follows:<sup>119</sup>

- a. to maintain public interest and improve the efficiency of the national economy as one of the means to improve public welfare;*
- b. to create a conducive business climate through healthy business competition, thus securing equal business opportunity for large, middle and small scale entrepreneurs;*
- c. to prevent monopolistic practices and/or unfair business competition by the entrepreneurs; and*
- d. to create effectiveness and efficiency in business activities.*

Public interest and economic efficiency becomes important elements for ideal policy objectives in regulating competition as it is stated in article 3(a).<sup>120</sup> Besides that, article 33(1) of The 1945 Constitution of the Republic of Indonesia is aligned with article 3(a)(b) Law No. 5 of 1999.<sup>121122</sup> The objectives of competition law is to guarantee free and fair business competition to increase public welfare as well

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2. To attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through: (a) The creation, encouragement and protection of competition; (b) Control of the concentration of capital and/or economic power; (c) Encouragement of innovation;

3. To protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;

4. To eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries;

5. To provide a Set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices for adoption at the international level and thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels. <http://unctad.org/en/docs/tdrbpconf10r2.en.pdf>, accessed on October 30<sup>th</sup> 2017.

<sup>119</sup> Article 3 Law No. 5 of 1999

<sup>120</sup> Andi Fahmi Lubis, . Op.cit, p. 35.

<sup>121</sup> *Ibid.*

<sup>122</sup> Article 33 of The 1945 Constitution of the Republic of Indonesia stipulates that:

1. The economy shall be organized as a common endeavour based upon the principles of the family system.
2. Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State.
3. The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.
4. The organisation of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy.
5. Further provisions relating to the implementation of this article shall be regulated by law.

as to create system of economic efficiency which is conformable with the 1945 Constitution. This means to give the same opportunity for all business actors and to abolish limitation of business competition particularly in abuse of authority in the economic sector.<sup>123</sup>

In addition, according to Sunan Remi Syahdeni, the main objectives of Law No. 5 of 1999 is efficiency which can be divided into two kinds, namely:<sup>124</sup>

- 1) Productive efficiency for companies in producing goods and services. Producing goods and services would be efficiency if it is done with the lowest cost because it will minimize the resources.
- 2) Allocative efficiency is for public as consumers. If producer is able to make an efficient goods or services which is needed by consumers in affordable price.

To summarize it, there would be three objectives in Law No. 5 of 1999 which are first, to give a chance for every people or business actor to conduct business activity, second to create a good environment which is fair, conducive and competitive, third to increase public welfare for public interest.<sup>125</sup>

Principles of Competition Law explicitly stipulates in Article 2 Law No. 5 of 1999 *“Entrepreneurs in Indonesia in conducting their business activities are based on economic democracy by considering the balances between entrepreneurs’ interest and public interest.”*<sup>126</sup> It is mentioned about economic

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<sup>123</sup> Andi Fahmi Lubis,. *Op.cit*, p. 35.

<sup>124</sup> Galuh Puspaningrum, *Hukum Persaingan Usaha Perjanjian dan Kegiatan yang Dilarang dalam Hukum Persaingan Usaha di Indonesia*, Aswaja Pressindo, Yogyakarta, 2013, p. 46

<sup>125</sup> *Ibid*, p. 47

<sup>126</sup> Article 2 Law No. 5 of 1999

democracy principle, in which, has been elucidated in article 33 The 1945 Constitution.<sup>127</sup>

## 2. Relevant Market on Competition Law

### a. The General Importance of Market Definition in Competition

Examining and evaluating the competitiveness between firms and its behavior on competition can be obtained by defining market analytical tools. The purpose of market definition is to identify the scope of competition in a particular market. Assessing the market competition, creating or strengthening market power is the major target of market definition. The market power can be obtained by observing the market shares of the respective firms. Besides that, market definition can identify the relevant competitors on particular market and to prevent the risk of the possibility of mergers as well as analyzing other competition areas like the possibility barrier to entry.<sup>128</sup> In every competition analysis is needed the definition of relevant market to identify relevant competitors, computation and

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<sup>127</sup> Article 33 of The 1945 Constitution

(1) The economy shall be organized as a common endeavour based upon the principles of the family system.

(2) Sectors of production which are important for the country and affect the life of the people shall be under the powers of the State.

(3) The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.

(4) The organisation of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy. (5) Further provisions relating to the implementation of this article shall be regulated by law

<sup>128</sup> OECD, *Market Definition*, can be accessed in <http://www.oecd.org/daf/competition/Marketdefinition2012.pdf>, accessed on 11 October 2017, p.21

assignment of market shares. The three main purposes of defining market definition as follows:<sup>129</sup>

- 1) It allows to focus the analysis to the type of trade and the geographic areas in which a competitive concern may arise;
- 2) It allows to identify market participants and measure market shares and market concentration, which are commonly used for a preliminary assessment of market power;
- 3) It allows understanding the existing mode of competition among the market participants, its likely evolution, and the existence of barriers to entry.

Sharing economy platform has created various problems and questions on the applying competition principles and models. Defining relevant market in sharing economy can be the first step to take to determine whether there is an existence of anti-competitive conduct such as predatory conduct, excessive profits, price-cost margins, price discriminations or elasticities of supply and demand.<sup>130</sup> In the other words, it is necessary to define relevant market as a measurement of market power to provide a context in which competition analysis or assessment can be undertaken. In addition, market definition provides a framework for competition analysis in which most anti-competitive cases can be determined by using market power through defining a relevant market itself. The economists define market power as an ability to raise prices consistently and make profit above competitive market or marginal costs. While, lawyers, they use the definition from the Court of Justice of the European Union, which market power as the power to act “to an

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<sup>129</sup> Practical Guidelines on Market Definition, [http://economia.uniroma2.it/public/ppm/files/lecture%20content/Guidelines\\_on\\_Relevant\\_Market\\_Definition.pdf](http://economia.uniroma2.it/public/ppm/files/lecture%20content/Guidelines_on_Relevant_Market_Definition.pdf), accessed on October 31<sup>st</sup> 2017.

<sup>130</sup> Robert G. Harris and Thomas M. Jorde, *Antitrust Market Definition: An Integrated Approach*, Vol. 72:1, 1984, p.4

appreciable extent independently of its competitors, its customers and ultimate of the consumers”<sup>131</sup>

Competition law promotes a fair competitive business and economy to obtain economic efficiency. An appropriate market definition can achieve competition goals. Antitrust laws itself has three basic policy objectives in maintaining competitiveness business, as follows:<sup>132</sup>

#### 1) Fairness

The process in which antitrust laws in carried out shall be based on procedural fairness. The court shall be aware of applying fairness especially in market exchange because the society concerns is not about with the market transactions’ outcomes but also the process of exchange in fair practices of business. The role of government in democratic society is to define and protect the participatory and procedural rights of individual without any discrimination. In addition, fairness is concerned on the process of law enforcement.

#### 2) Equity

The second criteria is concerned about the outcomes of the process of law enforcement. To obtain equity, business actors such as individual or companies shall earn an income based on socially valuable goods and services, not by exploiting the markets and doing illegal activities. Moral philosophy in democratic market societies shall be applied in conducting competitiveness such as a fair price.

#### 3) Efficiency

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<sup>131</sup> Francesco Russo, Maria Luisa Stasi, *Defining the Relevant Market in the Sharing Economy*, Internet Policy Review – Journal on internet regulations, Volume 5 – Issue 2, p.5.

<sup>132</sup> *Ibid*, p.9

Maintaining limited resources to fulfill human necessities shall be served efficiency by antitrust laws. It is needed an efficiency allocation which is included in economic efficiency concerning quantity and prices of outputs, and technical efficiency. This relates to managing the best possible way of cost-minimizing in using of inputs. Efficiency does not only apply to market activities but also the exercise of authority as well which evaluates the effect of policies on market exchange.

In the easier way, a market in competition law is a forum which is in undertakings to seek to sell or to buy certain substitutable products or services.<sup>133</sup> While according to European Commission on market definition, it shall have an objective dimension (commodity-based or product) which comprises any goods and/or services that according to consumers are substitutable or at least are close substitute, based on their characteristic, price and, function, and geographical dimension which the market constitute an area which is given undertakings offer relevant goods or services, and which the conditions of competition are uniform, and within the same time different from neighboring markets.<sup>134</sup>

#### b. General Principles of Relevant Market

A market without an effective competition will only lead to inefficiencies as the consequences of the form of higher prices and/or lower quality of products, reduce of R&D investment and/or regression of innovation. The role of competition law in here is to guarantee that effective competition will prevent from creating or strengthening market power or to prohibit the position abuse of

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<sup>133</sup> T Rosenthal, S Thomas, *European Merger Control*, CH Beck 2010, p. 89 in Darla Kostecka-Jurczyk, *Determination of the Relevant Market as A Criterion of Assessment of Concentration Effects in the Practice of Antitrust Authorities*

<sup>134</sup> *Ibid*

substantial market power. Market power is defined by the ability of firms to keep the price of their products is profitable but above the competitive price among other firms for an extended period of time in economic.<sup>135</sup> There are several basic principles on market definition, as follows:<sup>136</sup>

1) Demand substitution

Demand substitution determines other products which consumers seem to put interest in substituting the relevant product. Demand substitution arises from small, non-transitory changes in relative price into consideration for consumers. Market definition starts from the products and sales regions in the relevant undertaking, other particular products and regions be added to the market definition if it affects and limits the short-term pricing decision of these undertakings. It's very essential to know whether the customers willingly switch to easier accessible substitute products or to suppliers from different places when customers face a small but evident and non-transitory price increase in hypothetically. Basically, the market definition depends on whether or not there is a competition between one product to other products and areas affect or restrain the price of firms' product in a short time.<sup>137</sup>

An analysis of merger between firms who produces beverages can be an example of demand substitution of customer to know whether or not beverages of different flavors are on the same market or not. If a sufficient number of customers of flavor A would likely to switch to different flavors when they

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<sup>135</sup> OECD, *Market Definition*, *op.cit*, p.24

<sup>136</sup> Guidelines on the Definition of Relevant Market, accessed in <http://www.rekabet.gov.tr/File/?path=ROOT/1/Images/Application+Guide/kilavuz8.pdf>, accessed on 11 October 2017.

<sup>137</sup> Official Journal of the European Communities, *COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law*, 97/C 372/03, p.7

face a small and non-transitory price increase of flavor A and choose to change into flavor B which causes the sales reduction of flavor A consequently increase in its price becomes non-profitable, as the conclusion it makes flavors A and B are operating in the same market. However, this shall also examine on other existing flavors in the market into analysis. Then again, this may not be valid if the price in existing market is determined by a situation where there is insufficient market where the dominant position is in abuse, therefore the price in existing market is higher than the competitive price because of the existence of market power.<sup>138</sup>

## 2) Supply substitution

It is important to put supply substitution into consideration because it may have equivalent effect to demand substitution. The suppliers shall be able to adjust their production to other product when they face a small and non-transitory price increase. Besides that, they shall be able to put their product in market without adding additional costs and risks in the short time period of time.<sup>139</sup>

Paper production can be an example of supply substitution. Papers have various of kind and quality, from standard writing papers to high quality papers. Different quality of papers has different utilities, therefore, papers companies have to be ready to produce papers for all qualities to consumers. They need to switch from their production from one quality to another low cost

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<sup>138</sup> Guidelines on the Definition of Relevant Market, *Op.cit.*

<sup>139</sup> Official Journal of the European Communities, *COMMISSION NOTICE on the definition of relevant market for the purposes of Community competition law., Op.cit.*

production in a short time. In this case, all kinds of papers are included in the relevant market.<sup>140</sup>

### 3) Potential Competition

Generally, potential competition is not taken into consideration for market definition.<sup>141</sup>

## 3. Competition Law in Islam

Islam provides all guidance in every aspect of life whether it is individual, economic, politic, moral or intellectual property rights. Islam covers all aspects includes *shariah, akhlak, and aqidah*.<sup>142</sup> In surah Al Baqarah 148 and Al Maidah 48 has stated that “Then strive towards all that is good” which means it motivates us and encourages us as a Muslim to compete and to vie towards all of good things in the world. Competition is one of good thing, means seller can earn money to fulfill their needs.<sup>143</sup>

Competition is a good thing because it is held in order to earn money to fulfill their needs in which supporting seller to compete continuously. Without competition, they will likely won't earn money and fulfill their daily needs. In addition, competition does not mean being to a rivalry and hostility due to those are not included in goods things.<sup>144</sup>

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<sup>140</sup> Guidelines on the Definition of Relevant Market, *op.cit.*

<sup>141</sup> *Ibid*

<sup>142</sup> Zulkifli Hasan, “Islamic Perspective on the Competition Law and Policy” accessed on <http://www.iefpedia.com/english/wp-content/uploads/2010/03/ISLAMIC-PERSPECTIVE-ON-THE-COMPETITION-LAW-AND-POLICY.pdf>, accessed in 11 November 2017.

<sup>143</sup> Agung Riyardi, Ahmad Mardalis, *PROMOTING A MARKET COMPETITION: AN ISLAMIC PERSPECTIVE*, Economics and Business Faculty Muhammadiyah of Surakarta University, p. 237

<sup>144</sup> *Ibid*

Sharing economy is part of Islamic economic concept. In sharing economy, it matches underutilized good with potential benefits. Online traffic transportation has transformed unutilized goods becomes economic value which can be useful for other people. It is all about enjoying the benefits of sharing goods.<sup>145</sup> The Qur'an underlines this as:<sup>146</sup>

"... Help (cooperate) one another in Al-Birr and At-Taqwa (virtue, righteousness and piety); but do not help (cooperate) one another in sin and transgression ..."  
(Surah Al-Maidah, 5:2)

The Prophet ﷺ said:

"The relationship between one believer and another is like a structure, parts of which support other parts," and he interlaced his fingers. (Sahih al-Bukhari, 467; Sahih Muslim, 2585)

Every human being in the world needs cooperation among each other in order to achieve pleasant and comfortable life. Without cooperation, human can never acquire happiness. Besides that, cooperation with one another human being is a good deed in which guarantee the progress of human society in accomplishing many things. Therefore, Muslims are encouraged to get acquainted with the needs of one another.<sup>147</sup>

Competition is openly welcomed under Islamic values but there are certain kinds of investment which are disapproved because each investment comes with certain risks, but highly speculative risks are not desired. This means Islam is principally opposed to financial deals that can hurt another party, that is why a

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<sup>145</sup> Hazik Mohamed, *Cooperation and the Sharing Economy – An Islamic Perspective*, Industry Insights , September 17, 2017

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

devout Muslim must not invest in goods that will not be benefit for mankind.<sup>148</sup> In surah Hud verse 6 Allah says “Islam concerns on man’s living and his livelihood” This laid down that there is prohibition to accumulate wealth in hands of few cause they may be discrimination in riches and wealth. Therefore, justice must be observed and established in which involves equality of all men before the law and in exercising of human rights and social rights.<sup>149</sup>

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<sup>148</sup> *Islamic Economic Thought and the Social Market Economy*, can be accessed in [http://www.kas.de/wf/doc/kas\\_21925-544-2-30.pdf?110216095211](http://www.kas.de/wf/doc/kas_21925-544-2-30.pdf?110216095211), accessed on 12 November 2017

<sup>149</sup> Zulkifli Hasan,, *Op.cit*

## CHAPTER III

### RELEVANT MARKET ON ONLINE TRAFFIC TRANSPORTATION

#### A. Relevant Market on Online Traffic Transportation and Conventional Transportation

##### 1. KPPU Guidelines on Article 1 (10) Concerning Relevant Market

The definition of relevant market in according to Indonesian jurisdiction stipulates in Article 1 (10) Law No. 5 of 1999 concerning The Ban on Monopolistic Practices and Unfair Business Competition or known as Competition Law, it is stated that “*relevant market is a market related to the range or certain marketing area of the entrepreneurs for the same kind or type of goods and/or services or substitutes of the said goods and/or services.*” The Business Competition Supervisory Commission or in Indonesian language namely is *Komisi Pengawas Persaingan Usaha* (KPPU) has released a guideline on determining relevant market to elucidate Article 1 (10) on Competition Law. In the KPPU’s guideline stipulates four important elements in relevant market, namely:<sup>150</sup>

##### a. Market

Market is an economic organization, in which, buyers and sellers can make transaction of goods and/or service trade whether it is direct or indirect.

##### b. Range or Market Area

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<sup>150</sup> Komisi Pengawas Persaingan Usaha (KPPU) in Guidelines of Article 1 (10) Relevant Market

Range or market area means relevant market is based on geographic aspect or area/territory in which a location of business actor in running their business activity, and/or location for availability or distribution of product and service and/or some areas which has condition of relative uniform competition and dissimilar compared with condition of competition with another area.

c. Business Actor

Business actor is an individual or company in a form of corporation or non-corporation established and having a domicile or engages in business in the territory of Republic of Indonesia, whether it is individually or collectively through an agreement in which carries out various business in economic field.

d. Equal or similar type or substitute

Definition of relevant market is based on product in which product will be categorized in the same relevant market or may be substituted with each other when consumer thinks that there is any similarity in the function/allotment/use, specific character, and comparison of the product price level up to other goods and/ service price. While from supply, substitute goods and/or service is potential product engaged by business actor which has potential to enter into the market.

a. The Concept of Relevant Market

While in the concept of relevant market in competition law has two aspect, namely product and geography (location). By analysis this two aspects, the relevant market of online traffic transportation and conventional transportation are in the same market or not.<sup>151</sup>

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<sup>151</sup> *Ibid.*

### 1) Product market

Product market has characteristic in which interchangeability or substitutability of goods and/or services by consumers. Good and/or services bought by consumer will be considered as substitute to each other if they are in the same product market.<sup>152</sup>

On the demand side, the relevant market includes all substitutes that consumer would likely to switch to if the price of product relevant increases. It examines if the consumers would likely to confronted with the unavailability of one particular product or if the product is available but at a higher price, then how easily the consumer can switch to a different product. While on the supply side, this would include to identify the business actors or producers who might switch to the production of such substitute goods and/or services with their existing facilities.<sup>153</sup> On supply side, it examines on how easy it would be for a new competitor to enter the market, or for an existing company to expand their distribution area or add a new product.

### 2) Geographic Market

Geographic market is where the business actors might enhance their price of products without having to attract new business actors to enter the market or without losing significant consumers to other business actors.<sup>154</sup>

Geographic market involves identification of the geographical area within

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<sup>152</sup> S Chakravarthy, *Relevant Market in Competition Case Analyses*, accessed in [http://www.circ.in/pdf/Relevant\\_Market-In-Competition-Case-Analyses.pdf](http://www.circ.in/pdf/Relevant_Market-In-Competition-Case-Analyses.pdf), assessed on November 2<sup>nd</sup> 2017

<sup>153</sup> *Ibid.*

<sup>154</sup> Komisi Pengawas Persaingan Usaha (KPPU) dalam pedoman pasal 1 angka 10 pasar bersangkutan

competition takes place. It could be local, national, international or occasionally global, it depends on the facts in particular case.

Geographic market has relevant factors which includes consumption and shipment pattern, transportation cost, perishability and existence of barrier to shipment of product between adjoining geographic areas.<sup>155</sup> Limits of geographic markets are determined by transportation costs, tariffs, trade barriers etc. In addition, the relevant geographic market could be determined by Competition Authority to have regard to all or any of the following factors namely regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport cost, language, consumer preferences, need for secure or regulator supplies or rapid after-sales services.<sup>156</sup>

#### b. Relevant Market of Online Traffic Transportation and Conventional Transportation

To know whether online traffic transportation are in the same market as conventional transportation can be done by using three parameters which may provide valid and comprehensive information about substitute nature of conventional transportation and online traffic transportation, by using an appropriate methodology and analysis process with data constraint and time limit of the writer. These are the description from using three parameters to define product and geographic market.

##### 1) Product Market

###### a) Price indicator

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<sup>155</sup> S Chakravarthy,. *Op.cit*

<sup>156</sup> *Ibid*

As we know that the range of price between online traffic transportation such as UberX, Go-Car and Grab-Car compared to conventional transportation such as Blue Bird Taxi, Express Taxi has a huge amount of disparity. The list of price between them are listed below:

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#### Conventional Transportation:

Table 1. 1 Prices of Taxis

<b>Classification</b>	<b>Blue Bird Taxi</b>	<b>Express Taxi</b>
Opened door fare	Rp.6.500, 00	Rp.6.500,00
Minimum fare	Rp.20.000,00	Rp.15.000,00
Fare per kilometers	Rp.4.100,00	Rp.3.800,00
Waiting fare per hour	Rp.42.000,00/hour	Rp.42.000/hour

In conventional transportation does not apply the different price when rush or busy hours.

#### Online Traffic Transportation:

Table 1. 2 Price of Taxi Online

<b>Classification</b>	<b>Go-Car</b>	<b>Grab-Car</b>	<b>UberX</b>
Normal fare	Rp.10.000,00/1-2,85 km Rp.3.500/more than 2,85 km	Minimum fare: Rp.10.000,00 Per km fare: Rp.4.000,00	Base fare: Rp.3.000,00 Minimum fare: Rp.10.000,00 Per second fare: Rp.300,00 Per kilo fare: Rp.2.000,00
Rush hours fare	Rp.10.000,00/1-2,35 km Rp.4.250,00/more than 2,35 km	Determined by an amount of supply and demand in a certain location. Busy circumstances and rain will affect the fare.	Determined by amount supply and demand in a certain place. Surge price in UberX will do redirects towards normal fare in which subjected

<sup>157</sup> Infografis: Membandingkan Tarif Taksi dengan UberX, GrabCar, Go-Car, <https://kumparan.com/jofie-yordan/infografis-membandingkan-tarif-taksi-dengan-uberx-grabcar-go-car>, accessed on November 2<sup>nd</sup> 2017.

			to approval of passenger.
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The huge price disparity between online traffic transportation and conventional transportation is caused by additional requirement sets by government for conventional transportation such as a license to drive, which means the drivers have to pay certain amount of money to meet the requirements.<sup>158</sup> Besides that, for drivers of online traffic transportation, they have some freedom and independence in choosing how many hours they would like to work and when to end and to start their shift, unlike drivers of conventional transportation.<sup>159</sup>

Indonesian government, Ministry of Transportation, has acknowledged this issue. Hence, Ministry of Transportation revised the previous regulation by issuing Transportation Ministry Regulation No. 108 of 2017 concerning the Implementation of People Transportation with Public Vehicles Not in Particular Routes. This regulation is effective from November 1<sup>st</sup>, 2017 as it becomes the legal umbrella for online traffic transportation.<sup>160161</sup>

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<sup>158</sup> Moira McGregor, *Disrupting the Cab: Uber, Ridesharing and the Taxi Industry*, <http://peerproduction.net/issues/issue-6-disruption-and-the-law/essays/disrupting-the-cab-uber-ridesharing-and-the-taxi-industry/>, accessed on November 2<sup>nd</sup> 2017.

<sup>159</sup> *Ibid.*

<sup>160</sup> According to Law No. 12 of 2011 concerning Establishment Law and Regulation, Ministry Regulation is legally binding and people shall obey it as it is stated in article 8(1)

<sup>161</sup> Netralnews.com, *Transportation Ministry Issues 'Online Taxis' Regulation to be Effective by November 1*, <http://www.en.netralnews.com/news/business/read/14118/transportation.ministry.issues....online.taxis....regulation.to.be.effective.by.november.1>, accessed on November 2<sup>nd</sup> 2017.

By the existence of Transportation Ministry Regulation, online traffic transportation shall apply upper and lower limit price. Determining the price of online traffic transportation is based on the agreement of consumer or service users and the driver or service provider in which through the information technology application with the upper and lower limit price.<sup>162</sup> Upper and lower limit price is must be based on the area of operation of online traffic transportation in which set by Director General of Land Transportation of particularly for online traffic transportation which operates surpass one province.<sup>163</sup> For areas in Jakarta, Bogor, Depok, Tangerang, Bekasi (Jabodetabek), the upper and lower limit price will be set by Director General upon the suggestion from Head of Transportation Management Agency.<sup>164</sup> While upper and lower limit price for online traffic transportation which operates in one povince will be determined by Director General upen the suggestion from Governor throught the discussion first by all of the stakeholders.<sup>165</sup>

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<sup>162</sup> Article 28 (1) Ministry Regulation No. 108 of 2017 stipulates ““Determination of tariffs Special rental transfers shall be made on the basis of an agreement between the Service User and the transport service provider through the application of information technology with reference to the upper limit tariff and the lower limit tariff”

<sup>163</sup> Article 28 (2) Ministry Regulation No. 108 of 2017 stipulates “The upper limit tariff and the lower limit tariff as referred to in paragraph (1), for the operational area Special lease transport that extends beyond 1 (one) provincial area shall be guided by the upper limit tariff and the lower limit tariff determined by the Director General.”

<sup>164</sup> Article 28 (3) Ministry Regulation No. 108 of 2017 stipulates “The upper limit tariff and the lower limit tariff as referred to in paragraph (1), for the operational area Special lease transport that extends beyond 1 (one) province in Jakarta, Bogor, Depok, Tangerang, Bekasi (Jabodetabek) shall be guided by the upper limit tariff and the lower limit tariff set by the Director-General on the proposal of the Head of the Agency.”

<sup>165</sup> Article 28 (3)(4) Ministry Regulation No. 108 of 2017 stipulates ““The upper limit tariff and the lower limit tariff as referred to in paragraph (1), for the operational territory Special rental transports entirely within 1 (one) provincial area shall be guided by the upper limit tariff and lower limit tariff stipulated by the Director General on the proposal of the Governor . "And" Proposed tariff of upper and lower limit of special lease transport as referred to in paragraph (3) and paragraph (4), firstly discussed with all stakeholders.”

The upper and lower price limit will be divided into two regions which first regions are included in Sumatera, Jawa and Bali. While second regions are included Sulawesi, Kalimantan, Nusa Tenggara, and Papua. For the first region, the upper limit price will be Rp.6.000/km and the lower limit price will be Rp.3.500/km. In the other areas, in second region, the upper limit price will be Rp.6.500/km and the lower limit price will be Rp.3.700/km.<sup>166</sup>

The aim of applying upper and lower limit price are to maintain the safety of consumer in case they do not have enough budget allocation. Tariff which is way too low can caused the online drivers do not have budget allocation to maintain their vehicle with the result that will lead to consumer's safety. Furthermore, upper and limit price can maintain fair business competition and to maintain investor or driver of public transportation or particular driver of online traffic transportation can maintain their vehicles.<sup>167</sup>

## b) Character Factor and Product Utility

### 1) Conventional Transportation

The writer in here will discuss taxi as one of the examples of conventional transportation. Taxi is a part of public transport, they provide a door-to-door service, flexibilities and availabilities to

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<sup>166</sup> BeritaTRANS, *Besaran Tarif dan Wilayah Operasi Taksi Online Ditetapkan Gubernur*, can be accessed in <http://beritatrans.com/2017/10/22/besaran-tarif-dan-wilayah-operasi-taksi-online-ditetapkan-gubernur/>, accessed on November 5<sup>th</sup> 2017.

<sup>167</sup> Kemenhub Resmi Mengeluarkan Permenhub Nomor 108 Tahun 2017, <http://news.liputan6.com/read/3149442/kemenhub-resmi-mengeluarkan-permenhub-nomor-108-tahun-2017>, accessed on November 3rd 2017.

consumer.<sup>168</sup> Taxi is basically a vehicle with a driver available to hire for the general public which smaller than buses.<sup>169</sup> Taxi industry has particular characteristic which are<sup>170</sup> first is hail, taxi's consumer often wait for taxi for coming in uncertainty as they don't know when the next available taxi will come or how much taxi will charge them. This kind of condition will give bargaining power to the taxi driver especially in unregulated market because it will cause the price to rise and be unpredictable. Beside the capital needs is a car Furthermore, there is little or no economic of scare in operating taxis in which will lead to high number of taxi vehicles, high fares and low salaries, quality and profits as a free market solution. Imposing regulation is seen as a solution by government which usually includes licensing, restricting the number of vehicles allowed, restricting the type of vehicle, requiring the drivers to have certain qualification.<sup>171</sup>

Second, a taxi rank or stand is a place where taxis waiting for customers which usually located outside major transportation hubs like railway station, airport etc.<sup>172</sup> Third, telephone/pre-book means consumer orders a taxi from dispatcher or operator in which would likely to allocate a vehicle to the particular place by done it automatically.<sup>173</sup>

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<sup>168</sup> Jørgen Aarhaug and Kåre Skollerud, *Taxi: Different Solutions in Different Segments*, Institute of Transport Economics, p.1

<sup>169</sup> *Ibid*, p.2

<sup>170</sup> *Ibid*.

<sup>171</sup> *Ibid*

<sup>172</sup> *Ibid*, p. 3

<sup>173</sup> *Ibid*

People transportation using taxi stipulates in article 1(15) Law No. 108 of 2017 which means “*Transportation of Persons by Taxi is Transport by Public Car marked with a special sign and equipped with a door-to-door operational argometer with the area of operation within the Urban Area.*” Taxi can be classified into two kinds namely regular<sup>174</sup> and executive.<sup>175</sup> People transportation using taxi shall fulfill services as follows:<sup>176</sup>

- a) Operational region is the urban areas
- b) Unscheduled
- c) Door to door service
- d) Destination is decided by consumer
- e) Amount of tariff based on what states in argometer or application based on information technology
- f) Obligated to fulfil Minimal Standardization Service which has been decided
- g) Order by application based on information technology

Payment system in people transportation using taxi is based on amount of tariff stated in the argometer by equipped with tools of printer payment based on upper and lower limit price that has been

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<sup>174</sup> Article 5(2) Law No. 108 of 2017 stipulates “Transport Service Persons with a regular Taxi as referred to in paragraph (1) letter a shall be taxis using vehicles with limits of at least 1,000 (one thousand) cubic centimeters up to 1,500 (one thousand five hundred) cubic centimeters equipped with standard facilities on vehicles.”

<sup>175</sup> Article 5(3) Law No. 108 of 2017 stipulates “The Transport Service of Persons Using the executive Tax as referred to in paragraph (1) letter b is a taxi using vehicles above 1,500 (one thousand five hundred) cubic centimeters equipped with standard facilities and additional facilities on vehicles.”

<sup>176</sup> Article 6 ) Law No. 108 of 2017

agreed by Director General, Head of Agency, Governor and Mayor.<sup>177</sup>

The vehicles which is used as people transportation using taxi shall meet certain requirements as follows:<sup>178</sup>

- a) The vehicles must Passenger Car Sedan that has 3 (three) spaces; and / or and Non-Sedan Passenger Car which has 2 (two) rooms
- b) There must be written “TAXI” which can be read clearly and must be put in the up over the roof outside the vehicle. Besides that, TAXI symbol must light up when there is no passnenger and the lights off if the argometer is on.
- c) The vehicle must have nomor of vehicles with yellow as the background and black as the text.
- d) The vehicle must equipped with an agrometer which has been sealed by authorized instance.
- e) the name of the company and / or trade mark, as well as the logo placed on the front door of the center, with the upper is the company logo and the bottom is the name of the company and / or trademark
- f) The yellow hazard light is placed to the right of the taxi sign;
- g) The identity of the driver is placed on the cabin of the vehicle, easily visible to the passengers, issued by each company Taxi;
- h) A communication device as a liaison between the driver and the control center of operation and / or vice versa, whether audio, visual, or data;

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<sup>177</sup> Article 6(2) Law No. 108 of 2017

<sup>178</sup> Article 7 Law No. 108 of 2017

- i) A description of the initial cost, kilometer, time, and additional cost placed on the inside of the rear door;
- j) With a valid Travel Document;
- k) The serial number of the vehicles of any company transportation placed on the right or left side of the vehicle, the rear, and the inside of the vehicle; and
- l) Including telephone numbers of public complaint services placed on the inside and / or outside of the vehicle.

Typical regulations that are commonly issued by government on taxi business sector usually involve:<sup>179</sup>

1) Licensing entry to market

This regulation is aimed at limiting number of subjects operating in a certain given area, hence the number of such licenses is mostly limited. As a result, there will be only given number of taxi companies that is allowed to operate and compete with one another with a certain given area. The purpose of limitation is to prevent oversupply of taxis in which would result in ruinous competition between taxies, this would cause in decreasing of drivers' life quality as they would be dropping prices to attract more passenger where they wouldn't be able to make profit from them anymore. A ruinous competition would likely to lead to a

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<sup>179</sup> Laura Barainsky, *Uber and Taxi Regulations: are Member States preserving a legal monopoly to the detriment of consumers?*, Frankfurt (Oder), September 2016, p.11

huge increase number of taxi in which creating more traffic that will harm environment.<sup>180</sup>

2) Quality and performance for cars and drivers to comply with

Those standards usually regulate on certain characteristic, such as driving age, existence of particular safety facilities and regular car inspection and along with the requirements for drivers to go through to some training or even criminal background check, as well as car accessibility facility to ensure equal treatment of passenger with disability. Those standards are meant to maintain passengers' safety and equal treatment as well as non-discrimination.<sup>181</sup>

3) Financial responsibilities for the companies to ensure their cars

This is to aim to prove passenger with safety, such as insurance requirements which might incentivize drivers and companies to properly maintain the cars and ensure that they are new to avoid insurance rates to go up.<sup>182</sup>

Those standards of measure are for public policy reasons instead of economic reasons. If deregulation happens in taxi business sector ruinous competition will happen, decreased living standards for taxi drivers, increased traffic along with increased pollution, worse and unsafe car.<sup>183</sup> Historically, drive unlicensed taxis will increase in

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<sup>180</sup> *Ibid*

<sup>181</sup> *Ibid*

<sup>182</sup> *Ibid*

<sup>183</sup> *Ibid*

accident rates, poor insurance coverage, road congestion.<sup>184</sup> In addition, remove regulations on fares, licencing, accessibility requirement will cause prices for taxi consumer increase, vehicle quality decrease, average ag of vehicle increase, fares become confusing and unpredictable to passengers, taxi ride in low-density areas are abandoned by drivers so 24/7 transportation become difficult, living standards for taxi drivers decrease as a result of over-supply, accident increase caused by inexperienced driver, traffic increases, and pollution increase.<sup>185</sup>

Taxi market is indeed needed to be regulated because if there happens the absence of control of entry, there would be over supply taxis in certain area which will cause congestion.<sup>186</sup> Also, if taxis happen in excessive amount of number, they would be running in ruinous competition, that will lead to low quality of services. Furthermore, to have correct information asymmetries as a rate control is important because consumer will have a guarantee about the fare that fair and reasonable for them. The last, the consumer will have means to know whether they will be driven in a safe vehicle.<sup>187</sup>

Besides taxi market regulation, the legal relationship between drivers and taxi companies is partnership. The legal relationship cannot be categorized as work relationship because it does not fulfil the

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<sup>184</sup> Meltem BAGIS AKKAYA, *Uber, the online car-sharing service: a critical review of European approach to competition vs. local regulation*, Turkish Competition Authority, 10 September 2015.

<sup>185</sup> *Ibid*

<sup>186</sup> *Ibid*

<sup>187</sup> *Ibid*

requirements. First, the taxi companies does not pay wage for drivers. Drivers get their earning by percentage/commission, it is cannot be classified as wage. Second, companies do not command the drivers to look for consumers because the drivers are given a freedom by companies. Besides, there is no particular time in their relationship, the drivers are given time start from 04.00 up to 24.00.<sup>188</sup>

The legal consequences for not having work relationship between drivers and taxi companies are they don't have rights which usually attached with worker such as overtime wage, social security or *jamsostek*, severance wage when work relationship ends.<sup>189</sup>

## 2) Online Traffic Transportation

The writer will be focusing on UberX, GrabCar and Uber as the example of online traffic transportation. Online traffic transportation has direct impact to the transportation field which once dominated by conventional taxies as the premium services they provide to consumers.<sup>190</sup> Online traffic transportation such as Uber, GrabCar and Go-Car are classified as new modes of transportation under the name of Transport Network Company (TNC). Online traffic transportation is likely to claim themselves as a ride-sharing services in which compared to conventional taxi services is that where the marketplace is

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<sup>188</sup> Putusan Mahkamah Agung Nomor 841 K/Pdt.Sus/2009

<sup>189</sup> Pande Putu Tara Anggita Indyaswari and Dewa Nyoman Rai Asmara Putra, *ANALISIS MENGENAI HUBUNGAN SUPIR GO-JEK DENGAN PT. GOJEK INDONESIA*, Bagian Hukum Perdata Fakultas Hukum Universitas Udayana, p. 5

<sup>190</sup> Arden Glenn A. Paronda, *An Exploratory Study on Uber, GrabCar, and Conventional Taxis in Metro Manila*, 07 August 2017

independent drivers connected to consumers through an online platform.<sup>191</sup>

A marketplace of online traffic transportation is to connect drivers offering rides and consumer who in seeking a ride through their mobile application. Consumer is required to download the software on their smartphone then create a user account by fulfilling several personal data. Consumer is able to know how long their car will take to show up to their location because the application has given them time estimation. The ride charges are based on a combination of time and distance parameters.<sup>192</sup>

The strong point of online traffic transportation is that it is considered reducing search cost for users. By calling a dispatcher and waiting for it without have uncertainty in knowing for sure when taxi will show up, consumers can hail a ride through an online platform and see where the location of the ride is. This business model propose numerous advantages to consumers which are first, the application is easy to use and it gives clear information to consumer about the car they are about to hire such as the type of car, the location, as well as the facility to monitor its progress on the screen of smartphone. This would likely to reduce the time and anxiety to wait for a taxi. Second, based on surveys, online traffic transportation prices tend to be attractive compared to conventional taxi. Third, some transaction are

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<sup>191</sup> Damien Geradin, *Should Uber Be Allowed to Compete in Europe? And If So How?*, Competition Policy International, Forthcoming 2015, p.5

<sup>192</sup> Bill Gurley, *A Deeper Look at Uber's Dynamic Pricing Model*, Above the Crowd, available at <http://abovethecrowd.com/2014/03/11/a-deeper-look-at-ubers-dynamic-pricing-model/>, accessed on November 5<sup>th</sup> 2017.

performed electronically, therefore consumer does not need to carry cash with them. The fourth, consumer can rate the performance of drive whether they provide a good service or not.<sup>193</sup>

In Indonesian jurisdiction, online traffic transportation can be classified as particular transportation or special hire car as stipulates in article 23 section 2 (b) as a transport service from door to door with its driver, has operational region and order by using an application based on information technology.<sup>194</sup> Therefore, the requirement of online traffic transportation must be based on particular transportation which are:

- a) Operational region is the urban areas;
- b) Unscheduled;
- c) Door to door service;
- d) Destination is decided by consumer;
- e) Amount of tariff based on what states in application based on information technogloy;
- f) In using this service has to through an order or agreement first and not to pick up consumer directly in the traffic.
- g) Order by application based on information technology, and;
- h) Obligated to fulfil Minimal Standardization Service which has been decided.

Regarding license, application companies of online traffic transportation does not own license in the field of transportation. They

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<sup>193</sup> *Ibid.*

<sup>194</sup> Article 23 section 2 (b) Ministry Regulation No. 108 of 2017

hold a business licence. The scheme of buy and sell through application technology is based on two parts. First, direct transaction which means consumer directly order goods and/services to business actors through application technology. Afterwards, the goods and/or service will be provided direction by providers.<sup>195</sup>

Second, transaction through an intermediaries means consumers order goods and/or services to business actor which provide intermediaries services. Afterwards, business actor will order to goods and/or services provider which suitable with consumers' order. Goods and/or services provider will give their goods/and services to consumers.<sup>196</sup>

Application of online traffic transportation is part of transaction through intermediaries. Mostly they are in the form of limited company. The license and requirements which is owned by them is business license and Certificate of Company Registration.<sup>197</sup>

## 2) Geographic Market

According to The Commission Notice by European Union, they define the relevant geographic as “comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which

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<sup>195</sup> According to an interview with Mr. Tibol Harahap, the employee of Department of Transportation on March 21<sup>st</sup> 2016, can be accessed on <http://repository.usu.ac.id/bitstream/handle/123456789/60181/Chapter%20II.pdf;jsessionid=903EFD074FB7CD29FC4926EAD2274889?sequence=3>, accessed on October 2017

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area”<sup>198</sup>

The relevant geographic market consists of the areas where consumer can find demand-side substitutes for the product of the company under scrutiny and there are suppliers who are ready to shift production to the markets where the company whose commercial practices are investigated operated. It is based on demand-side substitution and supply-side substitution.<sup>199</sup>

Company in producing their products and/or service is always in a certain geographic area because if between one competitor to other competitors are located way too far from each other, they are not in competition.<sup>200</sup>

In 2015, conventional transportation such as Blue Bird Taxi has undertakings big cities in Indonesia. The company services can easily be enjoyed in Jakarta, Bali, Bandung, Batam, Cilegon, Lombok, Manado, Medan, Padang, Pekanbaru, Palembang, Semarang, Surabaya and Yogyakarta, both in the business center as well as tourism destination by continuing to serve millions of passengers each month.<sup>201</sup> While according to article 9 (1) of Ministry Regulation No. 108 of 2017, people transport using taxi is a door to door service with an operational region in urban areas and services from and to airport, harbor and other transportation areas.<sup>202</sup>

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<sup>198</sup> Commission Notice on the definition of relevant market for the purposes of Community competition law, Official Journal C 372, 09/12/1997.

<sup>199</sup> Ebba Hedlund, *Definition of the geographic market for the purposes of EC competition law*, University of Örebro, January 2007.

<sup>200</sup> *Ibid.*

<sup>201</sup> Can be accessed in [http://www.bluebirdgroup.com/wp-content/uploads/2015/05/AR\\_bluebird\\_2014\\_29apr\\_2015\\_lowres-audit-report1.pdf](http://www.bluebirdgroup.com/wp-content/uploads/2015/05/AR_bluebird_2014_29apr_2015_lowres-audit-report1.pdf), accessed on November 5<sup>th</sup> 2017

<sup>202</sup> Article 9 of Ministry Regulation No. 108 of 2017, operational region on taxi is based on several considerations in which stipulates on article 9 (2), as follows:

a. stipulation of the classification of Urban Areas;

For online traffic transportation is a door to door service which has an operational region and order through an application based information technology.<sup>203</sup> Hence, according to the Ministry Regulation No. 108 of 2017, online traffic transportation is only can be operated in particular region depends on where they register to become online traffic transportation driver. They can't operate beyond their operational region, if they do, there will be sanction to be applied towards them.<sup>204</sup> In addition, every operational region has a quota limitation or limitation on amount of number of online traffic transportation operated. A quota limitation is based on amount of population, and amount of movement of society and to determine estimation on how many

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- b. estimates of the need for the services of People using Taxi;
  - c. urban or urban development; and
  - d. the availability of adequate road infrastructure.

The official government who are in charge in determining the operational region stipulates in article 9(3) as follows:

- a. The Director General, for the area of operation of Taxion Transportation which extends beyond 1 (one) provincial area;
- b. Head of Agency, for the operation area of People Transport by Taxi which exceeds 1 (one) provincial area in Jakarta, Bogor, Depok, Tangerang, Bekasi (Jabodetabek);
- c. The Governor, for the operation area of the Transportation of Persons Using Taxi which exceed 1 (one) regency / municipality within 1 (one) provincial area; or
- d. Regent / Mayor, for the operational area of the Transportation of Persons Using Taxis which are entirely within the district / city.

<sup>203</sup> Article 26 (1) Ministry Regulation No. 108 of 2017, operational region on online traffic transportation is based on several consideration in which stipulates on article 29 (1), as follows:

- a. approximate needs of services Special hire transport;
- b. regional development;
- c. regional characteristics; and
- d. the availability of adequate road infrastructure.

The official government who are in charge in determining the operational region stipulates in article 29 (2) as follows:

- a. Director General, for the operating area Special lease transport that exceeds 1 (one) province area;
- b. Head of Agency, for operation area Special lease transport that exceeds 1 (one) province in Jakarta, Bogor, Depok, Tangerang, Bekasi (Jabodetabek); or
- c. Governor, for operation area Special rental transportation which is entirely in the region within 1 (one) province

<sup>204</sup> BBC Indonesia, *Tarif taksi online makin mahal dan yang keluar wilayah operasi akan 'ditangkap polisi*, can be accessed in <http://www.bbc.com/indonesia/indonesia-41683355>, accessed on November 5<sup>th</sup> 2017.

people will likely to use online traffic transportation, conventional taxi, bus and then government can make a quota limitation.<sup>205</sup>

To sum it up, taxi companies in all part of the world relies on a similar kind of business model for a very long time. Moreover, the taxi regulations usually contain control of entry, licensing, and financial standards or insurance and setting maximum rates. However, taxi fares always remain expensive while the quality of service always depends on the individual driver. As time passes by, countries try to engage to improve the performance of taxi sectors, however the effort did not result to a massive innovation as new entrants in the market would likely to use the same existing business model. Therefore, the consumers have to accept whatever the taxi service is.<sup>206</sup>

In a future scenario, online traffic transportation can come as disruptors in taxi sector then taking advantages of regulator gaps had increased prices or limited production in which harming competition. Hence, to avoid such kind of situation, to not regulating online traffic transportation but regulation conventional transportation, government obtain rights to online traffic transportation in which affecting trade between conventional and online transportation which can harm and violate competition.<sup>207</sup>

As we know that online traffic transportation could take consumer away from conventional transportation because it increases the convenience and reduces the cost of taking a taxi-like service. As in UberX case, UberX provides a 20 to 30

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<sup>205</sup> *Ibid.*

<sup>206</sup> Mohammad Nurul Amin, *Uber and Taxi Regulation*, Europa-Universität Viadrina Frankfurt (Oder)

<sup>207</sup> *Ibid.*

reduction of prices relative to conventional taxis.<sup>208</sup> The case for online traffic transportation in which complementing conventional transportation comes from the fact that most of public transit systems use fixed routes and fixed schedules, in the conventional taxi case they are mostly uncertain and have higher price than the online one.<sup>209</sup>

- 1) Online traffic transportation makes transport cheaper and easier to move from one place to another place, and at times what conventional transportation serves consumer poorly. As a consequence, the combination between conventional transportation such as public transit in general and online traffic transportation can make it possible to complete all desired trips without having to own a car. Moreover, online traffic transportation can decrease the cost of using conventional one for the main option of the trip.
- 2) Online traffic transportation helps to deal with the risk of relying on fixed schedule and fixed routed in conventional transportation. Some people who in need transportation for personal emergencies or changes in work schedule will likely to choose online traffic transportation rather than conventional one who is uncertain.

To strengthen the mechanisms above, online traffic transportation has heterogeneous effects on conventional, it is either positive or negative. In big cities where consumer tends to be wealthier and able to pay online traffic

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<sup>208</sup> Greenwood and Wattal (2017) cited in Jonathan D. Hall, Craig Palsson, *Is Uber a substitute or complement for public transit?*, October 31, 2017, p.4

<sup>209</sup> Jonathan D. Hall, Craig Palsson, *Is Uber a substitute or complement for public transit?*, October 31, 2017, p.4

transportation fare. Small conventional transportation will be to have less complete coverage over space and time. This might mean that conventional transportation services is so bad that online transportation will be having a strong substitute, or the ability of online traffic transportation to fill holes in conventional one coverage is all the more valuable so that online traffic transportation will be a strong complement.<sup>210</sup>

To sum it up, online traffic transportation is merely filling the gap in an artificially under-served market, as the company claims<sup>211</sup> eventhough online traffic transportation has significant effect on the conventional transportation. It is proven by PT. Express Transindo Utama Tbk (TAXI) has announced to do work termination towards their 250 employees.<sup>212</sup> The data showed that in first semester of 2017, the income of company was decreased 15,74 from Rp.2,47 trillion to Rp.2,08 trillion. The net profit was decreased as well, from 15,68 from Rp.228,97 billion to Rp.193,07 billion.<sup>213</sup> This happened to Blue Bird also, their income was decreased from Rp.5,47 trillion in 2015 to Rp.4,79 trillion and their net profit was decreased from Rp.824,02 billion to Rp.507,28.<sup>214</sup>

The analysis of Bahana Sekuritas Gregorius Gary stated that as the result of the existence of traffic online transportation, conventional transportation such as taxi like PT Blue Bird Tbk and PT Express Transindo Utama Tbk is estimated to

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<sup>210</sup> Jonathan D. Hall, Craig Palsson, *Is Uber a substitute or complement for public transit?*, October 31, 2017, p.4

<sup>211</sup> *Uber Nyatakan Tak Gantikan Transportasi Umum yang Sudah Ada*, can be accessed in <http://ekonomi.kompas.com/read/2016/05/18/174821326/uber.nyatakan.tak.gantikan.transportasi.umum.yang.sudah.ada>, accessed on November 12<sup>th</sup> 2017

<sup>212</sup> *Marak Taksi Online, Begini Dampaknya ke Blue Bird dan Express*, can be accessed in <https://finance.detik.com/bursa-valas/3671606/marak-taksi-online-begini-dampaknya-ke-blue-bird-dan-express>, accessed on November 12<sup>th</sup> 2017

<sup>213</sup> *Ibid*

<sup>214</sup> *Ibid*

decrease up until around 10 percent in 2016. They stated that the taxi's consumer does not sum up which in it stays in the same number but it is only the consumer move from conventional to online one.<sup>215</sup> In addition, the analysis of First Asia Capital, David Sutyanto stated that the decreasing of financial report of both companies is as the result of the existence of traffic online transportation.<sup>216</sup>

## **B. Applying Competition Law on Disruptor of Traffic Transportation Market**

### **1. Competition Law on Disruptive Innovation**

The entrance of new technology that can displace existing market is commonly referred as dynamic competition or simply competition for the market in which contradict with competition in the market or static competition. Dynamic competition would likely results in a monopoly position that is to persist some time until a new monopolist comes to that take over the position of the prior incumbent.<sup>217</sup> The concept of creative destruction introduced by Schumpeter as a decent example, he stated the process that “incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one.”<sup>218</sup> Market that involves competition can be seems as a

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<sup>215</sup> *Untung Rugi Duet Perusahaan Taksi dengan Aplikasi*, can be accessed in <https://www.cnnindonesia.com/ekonomi/20170306110718-92-198071/untung-rugi-duet-perusahaan-taksi-dengan-aplikasi/>, accessed on November 12<sup>th</sup> 2017

<sup>216</sup> *Kinerja Keuangan Blue Bird dan Express Anjlok, Akibat Taksi Online?*, can be accessed in <https://kumparan.com/wiji-nurhayat/kinerja-keuangan-blue-bird-dan-express-anjlok-akibat-taksi-online>, accessed on November 12<sup>th</sup> 2017

<sup>217</sup> Graef, Inge; Wahyuningtyas, Sih Yuliana; Valcke, Peggy “*How Google and others upset competition analysis: disruptive innovation and European competition law*” 25th European Regional Conference of the International Telecommunications Society (ITS), Brussels, Belgium, 22-25 June 2014.

<sup>218</sup> J.A. SCHUMPETER, *Capitalism, Socialism and Democracy*, 1942 (Routledge 2003), p. 82-83. In Graef, Inge; Wahyuningtyas, Sih Yuliana; Valcke, Peggy, *How Google and others upset competition analysis: disruptive innovation and European competition law*, 25th European Regional Conference of the International Telecommunications Society (ITS), Brussels, Belgium, 22-25 June 2014.

horizontal competition which contains the development of competing products that are mutually substitutable, this market tends to lead to disruptive innovation. While market that has vertical competition contains sustaining innovation which leads to products improvement or complementary products.<sup>219</sup>

Schumpeter's "Creative Destruction" as the example of disruptive innovation in which the creation of competitive strength through innovation followed by new demand in new markets which possibly destroy older and less competitive technologies and destroy existing market which is based on older and less competitive technologies.<sup>220</sup>

Needless to say, innovation is inevitable. Government can play their roles in dealing with disruptive innovation. Instead of banning disruptive innovation government can face them with different ways since disruptive innovation can be useful for the development of competition. Disruptive innovation can give benefits to competition and consumer for better services, stimulate innovation, and price competition among competitors.<sup>221</sup> The links between disruptive innovation and competition are that disruption can come from both an existing market or from a new market entrant, it can occur on large market dominated by entrenched and often inefficient incumbents, disruptors move up rapidly because their services and products are provided through internet or mobile technology hence they offer consumers new ways to satisfy their demand so they bring consumer benefit through enhanced competition. Besides that, disruption also

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<sup>219</sup> Graef, Inge; Wahyuningtyas, Sih Yuliana; Valcke, Peggy, *ibid.*

<sup>220</sup> Wulf A. Kaal, and Erik P.M. Vermeulen, *HOW TO REGULATE DISRUPTIVE INNOVATION— FROM FACTS TO DATA*, 57 *Jurimetrics J*, Winter 2017, p.175

<sup>221</sup> OECD, *Disruptive innovations and their effect on competition*, can be accessed in <http://www.oecd.org/daf/competition/disruptive-innovations-and-competition.htm>, accessed on November 5<sup>th</sup> 2017.

challenge existing products and/or services and business model as well they can threaten incumbent and business models by reducing or destroying incumbent' market shares. Furthermore, disruption is not only challenge existing companies and business models but they also challenge regulators and legal enforcement agencies.<sup>222</sup>

In the beginning, the phase before gaining substantial market share, disruptors create products or services that don't fit to the existing regulatory framework. Latter, disruptors will argue they should not compliance with the existing regulatory. Then, incumbents are threaten, they may force disruptors to use existing regulatory to create obstacles for disruptors to compete.<sup>223</sup>

Disruptive innovations can affect existing regulation including competition law. Those impacts can be seen as follows:<sup>224</sup>

a. Procompetitive effects of innovation

The result from competition law perspective in disruptive innovation is to liberalizing markets or some parts of innovation by bypassing the regulation that slow down competition in the market.

b. Review of the existing framework because of the presence of disruptors.

The feature of disruptive innovation is new products and/or services or technologies in which does not suitable with existing regulation framework. This can cause concerns between incumbents and disruptors, hence it challenges regulators to review their existing framework and

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<sup>222</sup> OECD, *KEY POINTS OF THE HEARING ON DISRUPTIVE INNOVATION*, DAF/COMP/M(2015)1/ANN8/FINAL

<sup>223</sup> Wulf A. Kaal, and Erik P.M. Vermeulen, *Op.Cit.*, p.183

<sup>224</sup> OECD, *Op.cit.*

modify them to take into account of the new products and/or services. Existing regulation can hinder innovation or worse, it can block innovation in order to protect existing companies. In other hand, disruptors will likely to argue that they are not subject to the existing regulatory framework, while for incumbent will force regulators to guarantee that disruptors will face the same standards as the incumbent for a matter of regulatory fairness.

c. Anti-competitive effects from disruptive innovations.

If there is a case where incumbents successfully convincing regulators in harden and strengthen the existing regulatory framework to make disruptors more difficult or even impossible for their new products and/or services or business model to pass the market, subsequently competition will suffer. Therefore, a new adopted regulatory framework have outcome to eliminate entry of disruptors or make it difficult to enter the market.

Regulators shall carefully evaluate the existing regulatory framework whether it could be adapted to the situation of allowing disruptors to develop or not. Regulators have put a balance between promoting innovation and adopting measure that only serve the interest of incumbents.<sup>225</sup>

In regulated areas such as public transportation or conventional taxi in particular, conventional market incumbents recognizes disruptive innovation is not complying with existing regulations. Thus, they can compete on an unfair

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<sup>225</sup> *Ibid.*

environment.<sup>226</sup> Apart from competition law violations such as abuse of dominance, price fixing and etc, competition law regulators has been challenged by disruptive innovation whether they need to be concerned with competition in digital markets era, when competition is for the market will likely to drive innovation.<sup>227</sup>

After continuing loss of costumers, conventional taxi drivers has been protesting against the existence of online traffic transportation in which they claim that online traffic transportation has unfair competition due to they are not subjected to the same regulatory restrictions as them, and besides, they don't have to obey some obligation as they do. As the consequences, the government needs to undertake enforcement regarding this issue.<sup>228</sup> In competition law, protecting competition rather than competitors, and ensuring consumers' welfare are the core purposes of competition policy. Therefore competition law does not have a rule in protecting innovation but then again, competition agencies shall be taken measures in ensuring the efforts for disruptive innovation is not impeded by dominant companies.<sup>229</sup>

## 2. Applying Competition Law on Disruptors

Online traffic transportation such as Uber in particular does not claim themselves as a transportation company but in fact, they have successfully disrupted conventional transportation market such as taxi in particular.<sup>230</sup> One of

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<sup>226</sup> Can be accessed on <http://antitrust.freshfields.com/disruptive-innovation>, accessed on November 5<sup>th</sup> 2017

<sup>227</sup> *Ibid.*

<sup>228</sup> Hsin-Fang Wei, *Does Disruptive Innovation "Disrupt" Competition Law Enforcement? The Review and Reflection*, p.9

<sup>229</sup> *Ibid.*

<sup>230</sup> Steven Rahe, *Economics of the Taxi Industry: An Uber Shake-up*, University of Wyoming, Spring 2016, p. 3.

the biggest arguments against online traffic transportation industry is the lack of regulation imposed towards the companies. Transport Network Companies or ride-hailing companies which connect paying consumers to drivers by a mobile application and deliver rides like a conventional taxi service but in fact, they are not taxi companies.<sup>231</sup> This makes TNC is hard to regulate since they are not a transportation company and they don't own any vehicles but instead they are just a company who provides information on connecting consumer and driver.

TNC seems cannot be classified as transportation company due to the business of this TNC is information technology. However, competition law shall take into account on regulation fair business activities within transportation field between TNC and conventional transportation. Anti-competitive practices are common with two causes:<sup>232</sup>

a. Business conduct restraining competition.

Business conduct that restrains competition are included as agreement between business not to compete against each other by carter, price fixing and territorial divides.

b. Government policies burdening competition.

Government have restrictive licensing for certain sectors and products.

Hence, competition policy is aiming to overcome anti-competitive environment by applying a set of market rules which can guarantee a fair business activities. Competition policy is to preserve or promote among competition market players and processes that enable a competitive environment to develop. Some features

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<sup>231</sup> Quinton of The Pew Charitable Trust (2015) in Steven Rahe, *Economics of the Taxi Industry: An Uber Shake-up*, University of Wyoming, Spring 2016, p. 3.

<sup>232</sup> UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *UNCTAD Perspective on Competition Law and Policy 2013*, New York and Geneva, 2014, p. 19.

that characterize efficient competition agencies are independent, transparency, accountability, ensuring due process, being well funded in proportion to the mandate, being staffed by well-educated, well-trained and non-corrupt person and also having an appellate process that is well structured and not corrupt.<sup>233</sup>

In dealing with online traffic transportation, in order to establish which rules should be applied is whether they should be labelled as TNC or transportation services. The lack of clarity over the proper legal qualification on online traffic transportation gives complexity. It is a different issue to assume whether assuming taxi regulation should apply to online traffic transportation. Moreover, online traffic transportation does not harm consumer welfare by providing them a better service than conventional taxi, this means online traffic transportation's business harms conventional taxi companies.<sup>234</sup> To sum it up, through the existence of online traffic transportation, it has changed and shaped the competitive dynamics in transport sector, which in essentially it is not a matter for antitrust law because antitrust law welcomes and accepts new business and displacing technologies.<sup>235</sup> Antitrust law understands competition as the driver of innovation. However, competition agencies have to condemn any anti-competitive conduct. The enforcement of competition is based on different instruments.<sup>236</sup>

However, competition authorities should focus on preventing the creating of entry barriers, facilitates entry to market, and foster the development of innovation. In response to these challenges caused by disruptors. KPPU has three

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<sup>233</sup> *Ibid.*

<sup>234</sup> Margherita Colangelo, *UBER: A NEW CHALLENGE FOR REGULATION AND COMPETITION LAW?*

<sup>235</sup> *Ibid.*

<sup>236</sup> OECD, *DISRUPTIVE INNOVATION AND COMPETITION POLICY ENFORCEMENT*, Note by Alexandre de Stree and Pierre Larouche, DAF/COMP/GF(2015)7

points on giving suggestion to Ministry of Transportation when they were making Ministry Regulation No. 26 of 2017 which has been revoked by Supreme Court.

- a. Suggestion by KPPU is to ask government to remove the policy in regards determining lower limit price which has been enacted by conventional taxi. However, KPPU as an arbiter of completion suggested to only determining upper limit price. By determining lower limit price will likely effect on the increasing price of online traffic transportation which in further can be the source of inflation<sup>237</sup>.
- b. KPPU suggested to not regulate on the quota or amount of transportation, whether it is for conventional taxi or online traffic transportation in operational region. The quote of transport will be based on the market mechanism because it will adjust to the needs of consumer. To determine quote will only just harm consumer to get an adequate ride. However, government shall be strictly monitory on licensing, whoever violates the regulation must be taken care of by revoking operational permit. Extra monitory will maintain both conventional and online traffic transportation to realize minimal service standardization. As the consequences, the government has to determine minimal service standardization which must be obeyed by all business actors conducting transportation services.<sup>238</sup>
- c. KPPU suggested government to remove policy regarding Vehicles Registration Certificate or Surat Tanda Nomor Kendaraan (STNK) for

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<sup>237</sup> KPPU, *KPPU Berikan Tiga Rekomendasi ke Pemerintah terkait Kisruh Taksi Online dan konvensional*, can be accessed on <http://www.kppu.go.id/id/blog/2017/03/kppu-berikan-tiga-rekomendasi-ke-pemerintah-terkait-kisruh-taksi-online-dan-konvensional/>, accessed on November 5<sup>th</sup> 2017

<sup>238</sup> *Ibid.*

online traffic transportation in which has to be legal entity because to obligated online traffic transportation driver to have STNK under the name of legal entity will have effect as transfer of ownership from individual to legal entity.<sup>239</sup>

To summarize it, the disruptors can be processed by competition law if there is an anti-competitive conduct done by disruptors. However, advocacy for more reasonably regulatory system to raise awareness of the benefits of competition are the alternative the competition authorities can have.<sup>240</sup> In this case, KPPU has reached out to give some suggestion to Ministry of Transportation in order to maintain competition. Hence, to facilitate disruptors, competition authorities have better to take opportunities for advocacy to public and to other regulators. Competition advocacy is activities conducted by competition authority in promoting competitive environment for economic activities by not using enforcement mechanism through its relationship with others government entities or regulators and by increasing public awareness of the benefits of competition.<sup>241</sup>

In doing advocacy, there will be no enforcement from competition authorities. This means, the initiatives is undertaken by competition authorities to other government entities or public with the purpose of influencing the regulatory framework and its implementation in an approachable way. The aimed of advocacy is raising awareness of benefits competition by promoting and protecting competition.<sup>242</sup> By releasing comments on proposed or on existing

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<sup>239</sup> *Ibid.*

<sup>240</sup> Hsin-Fang Wei, *op.cit*, p. 21

<sup>241</sup> Advocacy Working Group, *ADVOCACY AND COMPETITION POLICY*, CN's Conference Naples, Italy, 2002, p.25

<sup>242</sup> *Ibid.*

regulations appearing before regulators to discuss competition matters, competition agencies can influence regulators and public.

Disruptive innovation causes several legal issues in the competition field because new technologies and business may not fit within the existing regulations. Disruptive innovation might give positive competition effects such as disruptive innovation enabling new market entry, so some industries finally see significant competition for the first time. Online traffic transportation is putting pressure on the taxi industry to improve services and cut prices as the example.<sup>243</sup> Despite these positive competition effects, disruptive innovation also raises some anti-competitive concerns in the future.

Consumers on conventional and online will wish to use online platform that the most consumers are using and a single platform can come to dominate the market. When a consumer at one time can only join to one platform, as the result then the market may tip and entry by a new competitor is very difficult.<sup>244</sup>

Monopoly raises the usual competitive issue because one company or platform can charge a price above average price which will lead to deadweight loss and transfers of surplus between consumers.<sup>245</sup> A monopoly company will likely face little threat from other new entrants starting up has less incentive to innovate than companies that are about to enter the market. Over time, consumers will move to the most popular platform, a single monopoly platform emerges.<sup>246</sup>

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<sup>243</sup> Productivity Commission 2016, *Digital Disruption: What do governments need to do?*, Commission Research Paper, Canberra, p. 144

<sup>244</sup> *Ibid.*, p.145

<sup>245</sup> *Ibid.*

<sup>246</sup> *Ibid.*, p. 146

In the future, one platform to serve the entire market might become monopoly which could lead to winner-takes-all nature.<sup>247</sup>

As disruptive competition creates the multisided nature of online platform such as online traffic transportation, it might establishing market power which is more complicated than in one-side markets.<sup>248</sup> After there is only one platform left in the market, it could lead dominant position. Once a dominant position of a disruptive company is identified, the next step is to determine whether the conduct should be considered anti-competitive.<sup>249</sup> The anti-competitive conducted by disruptors refer to rival interactions which are not based on the merits but rather on collusion, foreclosure or leveraging and impose hard to competitors and consumers.<sup>250</sup>

Disruptors can empower a company to drive out and supplant an existing monopoly. Instead of encouraging competition between companies, disruptors can merely just replace a monopoly with another monopoly. This could create barriers to entry.<sup>251</sup>

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<sup>247</sup> *Ibid.*

<sup>248</sup> Zuluaga, D, *Platform for debate: Antitrust and the challenge of regulation for online platforms*, European Policy Information Center (EPICENTER), 2017

<sup>249</sup> Nicolai Van Gorp and Olga Batura, *Challenges for Competition Policy in a Digitalised Economy*, Directorate General For Internal Policies, July 2015, p. 55

<sup>250</sup> *Ibid.*

<sup>251</sup> Shawn Ho and Jiang Zhi Feng, *Disruptive Innovation and Competition Policy: Friend or Foe*, p.7

## CHAPTER IV

### CONCLUSION AND RECOMMENDATION

#### A. Conclusion

From the comprehensive explanation in the previous chapters, there are two points that could be drawn:

1. The Business Competition Supervisory Commission (KPPU) has made Guidelines on Article 1 (10) Law No. 5 of 1995 concerning on The Ban Monopolistic Practices and Unfair Business Competition which can be used in knowing whether online traffic transportation through application based on information technology such as Uber, GrabCar and Go-Car and conventional transportation such as taxi in general are in running the same market or not. To identify, there are product and geographic market. Based on product market, online traffic transportation has low-priced tariff than conventional transportation due to online traffic transportation does not face the same regulation which has been set by government as conventional transportation. Besides that, online traffic transportation does not claim themselves as transportation company, they are counted as Transportation Network Company (TNC) who only in behalf as matchmaker to driver and consumer in need. While conventional transportation is clearly under the transportation company. Furthermore, conventional transportation started to lose their consumer once online traffic transportation takes part in transportation markets, it is because consumer considers online traffic

transportation is way easier and cheaper than conventional one. Based on geographic market, both of online traffic and conventional transportation are running in the big cities in Indonesia which has a lot of demand from consumer. However, Indonesian government has made a move by making Ministry Regulation No. 108 of 2017 concerning the Implementation of People Transportation With Public Vehicles Not in Particular Routes as the legal umbrella for online traffic transportation. Nonetheless, online traffic and conventional transportation are not running in the same market due to their existence to complement each other, consumer who has a low budget and in need for convenience and fast transportation would likely to prefer online traffic transportation rather than the conventional one. Besides the fact that online traffic transportation does not claim themselves as transportation companies but TNC. Online traffic transportation and conventional traffic transportation serve same field but in the different business model and new modes of transportation. Therefore, they both do /not exist in the same relevant market. Online traffic transportation as a disruptor create new market which is different from the market of conventional traffic transportation in taxi industry.

2. The entrance of new competitor in the market can be disruptive. Competition law has aimed to maintain fair business competition among business actors. If disruptor violates competition law in consequence, competition authority can imposed sanction towards disruptors. Disruptors in online traffic transportation such as GrabCar, Uber, Go-Car can harm competition in the future because they can destroy existing companies such

as taxi companies. There are possibilities for consumers to choose one platform only, as one platform can be the one who stays remain in the market. This could lead to monopoly which can be imposed by competition authorities. Therefore, Competition Law can be imposed whenever condition are disruptor merely just replaces a monopoly with another monopoly, charge a price above average price which will lead to deadweight loss and transfers of surplus between consumers.

## **B. Recommendation**

1. Competition authority and Ministry of Transportation need to harmonize the regulatory framework in order to not hamper competition. Online traffic transportation should have not be hampered by particular unnecessary requirements set by Ministry of Transportation. It is because innovation is a part of competition who will produce a cheaper and better product for the sake of public. On the other hand, competition authority shall be monitory the conduct of business actors for them to know violates any competition law. To sum it up, put the same requirement for online traffic transportation and convention traffic transportation is unnecessary at some point because it will erase the speciality of online traffic transportation and it will lead to increase the ride-price. Therefore, in order to protect the consumer and its driver, government needs to focus on the regulatory framework which regulates online traffic transportation but by not erasing their speciality. Besides that, government needs to take direct action and role to protect the drivers and consumers from companies in abusing their power to make their own contract. The companies and government need to cooperate to make

the contract between drivers and companies more adequate in order to protect consumer for their own safety, security and convenience.

2. In sharing economy era, competition authority has to monitor the conduct of business actors. Competition authority can do particular research in the relevant market to know whether there is a disruptor violates the competition. Besides, competition authority can do comparison to other countries to apply competition law in Indonesia. In addition, competition authority has to actively advocate other government institution to harmonize the regulatory so it will be competition friendly.

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