



E-COMMERCE, BIG DATA, ESSENTIAL FACILITIES DOCTRINE IN COMPETITION LAW

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Abstract-- With our entry into the era of industry 4.0 brings all activities, one of which is business to an online base commonly called e-commerce. However, with all the conveniences provided through buying and selling on online platforms, there is a new conversation about whether online platforms make competition stronger or actually facilitate market monopolies. Especially when discussing digital platforms, it's impossible to ignore market-related information, which comes in all types of information. Nonetheless, with the introduction of Big Data, previously raw data may now be processed to provide a competitive advantage to business actors who have access to it, and this facilitates the occurrence of exploitation if the business actor does not choose to share access to Big Data. Hence, a regulation is needed to discuss the ownership of Big Data access in an online platform and how the role of the essential facilities doctrine as a basis so that business actors do not hold back is actually required to provide access to other competitors in order to access these essential facilities.

Keywords— Access Data, Big Data, Competition Law, E-Commerce, Essential Facilities Doctrine

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INTRODUCTION

With the development of the increasingly advanced times leading us to the era of technology 4.0 where all things can be done easily using an online system, of course one of the most visible things is the ease of buying and selling goods through an online system through a media platform or commonly called e-commerce (Apdillah et al., 2022). The rapid growth of online platforms certainly also causes a lot of discussion, one of which is in the field of academia about whether this online platform strengthens a path of competition in the market or in this platform is actually more facilitating about market monopolies (Arora, 2018). The reach of the word monopoly can be seen if someone is monopolists control a market share of more than 50 percent, and with thus in the market there are still other business actors (competitors). In a broader sense, the definition of monopoly also encompasses frameworks of multiple-actor markets; yet, in practice, the concentration of market power resides only in a single business actor due to their dominant role (Margono, 2009).

The term "e-commerce" originally referred to the practice of conducting business electronically (Silvia & Anwar, 2021). It means the electronic media and the internet for dealing with goods and services. Besides, e-Commerce also refers to as a company accessing the internet as well as IT, such as the electronic data interchange (EDI) (Jain et al., 2021). E-commerce generally relates to an internet vendor's website, trading goods or services directly to the user through the platform. E-commerce can be said to be a business activity that involves consumers, service providers, and marketing agencies by using computer-based networks and the internet using a medium. For example, using search engines, web browsers, social media, and others where the main characteristics of the platform are buyers and sellers who can gather at the right one and interact to make a trade. The advantage with the use of e-commerce is the strong network effect which can be said to be the meaning of network effect is a phenomenon whereby increased numbers of people or participants improve the value of a good or



service (Banton, 2022).

With the advent of one user group in e-commerce, it becomes possible to expand the value of the platform for all users and groups. However, with the network effect it also invites a new conversation in the form of if a group or group already has a high ranking in a platform it will make it difficult for newcomers to the platform to be able to enter into healthy market competition because the old group or group already has a strong position in the platform (Lasserre & Mundt, 2017).

It can also be said that if a group or group that has a dominant position in the market has a facility then the group or group in that market can facilitate a collusion and it can also be said that the e-commerce platform has special power in order to direct a direction from the market lane (Ezrachi & Stucke, 2017).

As for the understanding of competition law according to experts as stated by Christopher Pass and Bryan Lowes, competition law is part of the legislation that regulates about monopolies, mergers and acquisitions, trade agreements restrict and anticompetitive practices (Hermansyah, 2008). Competition law itself exists in order to create a path of competition in the relevant market in order to run healthy and fairly. The merger makes the character of the field of business competition law is very thick with economic nuances which is not only aimed at creating public order, but more or less concerned with the creation of efficiency economy through the creation and maintenance of a competitive business climate conducive (Sarjana, 2012). Uncontrolled competition in a positive way will lead to divisions and even wars that create many casualties nor treasure and in this case the so-called business competition must be the party will do anything to win against the competitors because a company rarely stands alone in selling to a specific customer market (Rokan, 2010).

Therefore, this research was made to be able to know and also study the potential if a party uses the e-commerce platform by using a system of collecting data in large positions and processing data in the form of many and large for its own interests to be able to produce decisions or analysis results that quickly and benefit the party who has access and can be called Big Data. Data is a broad enough thing to understand, Andri Kristanto argues that data is a reality that describes an event-unity of reality (Kristanto, 2008). The data collected also comes from various sources, one of which is and most importantly comes from the data of the users of the e-commerce platform where data from users of the platform in the form of habits and desires of users is collected and processed in order to produce a conclusion and make those who can access Big Data have more access to the dominant position in market access. This is also the reasoning that behind this research, which is why it is vital to take into consideration the position of platforms and e-commerce, and it is also necessary to have special anti-trust intervention on this issue (Sokol & Comerford, 2016).

Specifically, how the idea of business competition is examined in light of data on e-commerce platforms or digital markets needs further evaluation, and this evaluation should be conducted alongside the evaluation of existing business competition. It is also impossible to deny the possibility of rejection from market leaders who control key access to data on online platforms, or it is possible to argue that Big Data is exclusive to market leaders and prevents other businesses or entrants from using the resource.

Data is currently one of the most important things because the data is needed in various activities, one of which is to base in online platforms or e-commerce and also data obtained from users of the online platform. Likewise, if there is no institution or regulator regarding competition / anti-trust that regulates the issue of ownership of data access then the dominant position actors can arbitrarily use the existing facilities and do not allow the data and facilities to be shared with other competitors who participate in the online platform. This will be one of the factors that reduce competition in the market path where if a competition in the market is reduced due to the dominant business actors in the market, then business actors with a dominant position will become competitors without competitors which will kill other competitors and make consumers will lead to fewer choices in an online platform and faced with higher price.

Hence, the role of the essential facilities doctrine is needed in this case which this doctrine makes anti-competitive conduct actors to be required to provide these important facilities so that a competition in the market lane can run and there is no dominant position that can bring down other competitors until other competitors cannot enter into a competition in the market. Therefore, it can



be drawn a problem that the e-commerce platform can bring new challenges and also conversations for institutions or law enforcement in the field of competition law, because also if using the analysis of traditional methods in this case will not be sufficiently based on that the e-commerce online platform also has a multi-sided market nature as a parameter of competition law.

1. METHODOLOGY

The research methodology used for this writing was normative legal research, namely a research done by studying valid or applied law regulation against certain legal issues. This legal research method uses legal research methods which were normative juridical, namely legal writing which was done with normative law study focus. Normative law refers to an inventory of positive law in Indonesia, legal principles, legal doctrine, and law discovery.

The theory to be employed in this paper is both legal theory and theory from outside the legal system as W. Friedmann said that "Legal theory is a science that study the essence of law relating between the philosophy of law on the one hand and political theory on the other hand." Since, the discipline of legal theory has no place as independent science, then the discipline of legal theory must gain a place in in the discipline of law independently (Friedmann, 1990).

In normative law research, written law was studied from various aspects such as theory aspect, philosophy, structure/composition, consistence, synchronization, general explanation and every article's explanation, formality and binding force of a law, and the language used was legal language.

Consequently, it was expected that by using normative juridical law method of research in this work, conclusions as well as suggestions could be drawn on a linkage between ownership of Big Data access in e-commerce platforms in competition law, what legal rules should be used in the event of a violation action related to the ownership Big Data that causes a dominant position of a business actor or creates a barrier for business actors who seeks to enter the market in competition law.

2. RESULTS AND DISCUSSION

2.1. Results

It is often said that anyone who has relevant data that can help these business actors in the market then the person will master the economic path because the importance of the data is needed to be able to help access market routes, especially if the market has entered the online-based category and even allows the occurrence of multi-sided markets then data is one of the important components for the continuity of the market. In Indonesia itself, competition law does not yet govern clearly the ownership of relevant data, when ownership of the data has the potential to give one group of business players a dominant market position.

The anti-trust regulations that apply in Indonesia itself have been considered for quite a long time and have not undergone revisions or additions at all until now, and also have not regulated further regarding how regulations should be regulated regarding electronic markets or related to e-commerce and online platforms. Which at this time has been very much done buying and selling transactions between sellers and buyers that occur online and also the possibility of multi-sided market which of course has been felt not relevant enough to anti-trust regulations in Indonesia which are considered long enough, the relationship between ownership of access to Big Data within the scope of the online platform is indeed very helpful for those who can access Big Data, which by having access to Big Data can make a person have a dominant position in the market where the dominant position is prohibited if it violates the regulation of Law No. 5 of 1999 article 25 paragraph (1) concerning the ban on monopolistic practices and unfair business competition which regulates the dominant position, which reads:

- 1) Entrepreneurs are prohibited from taking advantage of their dominant position, either directly or indirectly, in order to:
 - a. Impose trade terms with the intention to prevent and/or hamper the consumers to acquire competitive goods and/or services, both in prices or quality; or
 - b. Restrict the market and technology development; and/or
 - c. Hamper other entrepreneurs having the potential to become their competitors to enter the relevant market.



Hence, the dominant position is not prohibited if it does not violate the things mentioned earlier. However, if one of the parties in the online platform has a dominant position in owning data and can access Big Data then this will cause the potential to make the Big Data owner have a dominant position where the business actor is so dominant that there are no other competitors who can match it, this also directly and indirectly makes other competitors who want to enter the competition in the online platform will automatically hindered and even the efforts of its competitors will die because it cannot compete with the dominant business actors.

Due to a number of obstacles and reasons, big data ownership is also considered to be highly difficult. For example, regarding the costs that must be paid for the initial inventive and also to be able to access and maintain big data is relatively very large, as for some other factors such as the need for adequate experts to be able to access and maintain big data as well. Therefore, not many parties can access Big Data easily for their own interests, this is also a factor that not all parties can access the Big Data and become one of the basis that is the reason only a few parties can access Big Data, this is also the reason for parties who can access Big Data does not want to share access to the facility to other parties.

However, by not sharing the facility to other competitors in the market will eliminate the intention of fair business competition in the market, which will make business actors who have big data access in business competition have the necessary data in the online platform and make other competitors unable to compete fairly due to lack of access to be able to compete in the market path.

As such, it is necessary for regulation in the field of business competition law in order to prevent the actions of business actors who do not want to share these facilities with other competitors in the market so that fair business competition can be created. Although it is believed to have an unintended and coordinated effect on competition in pertinent markets and the growing dominance of business actors in the digital market, there is currently no specific regulation on ownership of "Big Data" as one of the parameters of competition in the digital market. Meanwhile, when discussing other countries, one of which is in competition law in Germany is entitled "the Act against Restraints of Competition (Competition Act - GWB), The competition law in Germany has explicitly regulated the ownership of Big Data access in the context of this is the essential facility in section 18 paragraph (3a) and also section 19 of the Act against Restraints of Competition (GWB) regulations.

The term "essential facility" can also be used to describe a business actor's facility, which may be superior to that of other business players in the market. Bronner requires the facility must be indispensable for an important interest. Apart from being a restriction, on in fact, Bronner can also be used as a test that leads to the answer to whether "refusal to deal" will lead to a monopoly to the relevant market (Evrard, 2003). These facilities which are very different certainly benefit business actors who have relevant facilities in the market. In addition, the idea that the owner of vital facilities has the ability to monopoly is fundamental to the essential facilities concept in this instance (Lipsky & Sidak, 1999).

One of the important indicators of why a facility can be said to be essential if the facility is a facility that is quite essential for the continuity of business competition in the relevant market, and also if competitors in that market cannot access the facility, then competitors cannot compete effectively in the market concerned. When it comes to essential facilities, one issue that may arise is the morality of a facility that should be used by all business actors but is only used or is only capable of being used by one business actor, and business actors who use the facility do not permit their competitors to use the facility for a purpose that is with the facility, the business actor will get many advantages in various relevant aspects, and customers will undoubtedly choose business actors who have more facilities.

In this case, misuse of strategic facilities can be found in the structure of a market that has more than one business actor which is like an online platform or e-commerce and also this will cause a healthy business competition market to be unstable and unhealthy.

2.2. Discussion

Big Data and Essential Facilities Doctrine



The doctrine of Essential Facilities is known in the practice of business competition since in 1912 with a U.S. Supreme Court ruling between the United States v Terminal Railroad Assn. of St. Louis. The term of essential facilities it has been used since the case was decided in Hecht v. Pro-Football, Inc. in 1977, where the case contains and tells the story of a new American football team that want access to the RFK stadium in Washington. The court in this case used the term essential facility theory and Likening it to bottleneck theory (Mäihäniemi, 2010).

The “essential facility” itself is known as a concept which generally started from the premise that the owner of some facility has a ‘monopoly’ in marketplace or relevant market. A conclusion that there is no place to interfere in a refusal to deal case unless the facility in question is owned by a monopoly/dominant business actors to undertaking can also be deduced upon analyzing the relevant judgments (Ünver, 2004). Apart from those described above, this essential facilities doctrine is also can be applied to business actors who do excessive mastery against an essential facility that provides supply services that are very important for its competitors and the business actor made a refusal to provide access to supply services are meant (Amboro, 2014).

The relationship between essential facilities doctrine and monopoly in the relevant market can be seen in the opinion of Susanti Adi Nugroho which mentions common forms of abuse of dominant positions occurs in business competition, one of which is refusing to transacting in the market (refusal to deal) (Nugroho, 2012).

Competition law itself also already recognizes the essential facilities doctrine which states the opinion that the essential facilities doctrine will punish companies that monopolize, who control essential facilities, deny other companies’ reasonable access to a product or service that must be obtained in order to compete with monopolists.

German Competition Law (GWB) has regulated the ownership of Big Data in correlation with essential facilities. Section 19 paragraph 2 (4) of GWB states as follows : (Cannataci et al., 2020)

“Refuses to supply another undertaking with such a good or commercial service for adequate consideration, in particular to grant it access to data, networks or other infrastructure facilities, and if the supply or the granting of access is objectively necessary in order to operate on an upstream or downstream market and the refusal threatens to eliminate effective competition on that market, unless there is an objective justification for the refusal”.

In the practice of competition law enforcement in the digital era, the SSNDQ (small but significant and non-transitory decrease in quality) method can be substituted for the SSNIP (small but significant non-transitory increase in price) method, primarily when assessing Big Data in relation to the dominant position in the digital market, which typically involves non-financial transactions. This allows KPPU as the Business Competition Supervisory Commission to undertake its job as an enforcer of competition law by monitoring the extent to which quality suffers when a customer or user switches from one digital business actor to another, both of which operate in the digital market.

CONCLUSION

In accordance with what has been explained above, it can be concluded that, in several perspectives both in the field of practitioners and especially academics that the online platform increases a new conversation in the enforcement of competition law. Since competition now occurs in the digital market category and also the multi-sided market itself, judging from the online platform and how the dominance of innovation as the basis of competition parameters, it is felt that analysis using traditional research methods and materials will not be enough and able to reflect where the competition can be explored. Although the online platform discussed has some special characteristics that must be taken into account in the analysis of competition law, the tools used to define the digital market in this case are also not sufficient, therefore to be able to define the relevant market that has multi-sided must consider the interaction between the two and also to see the dominance that exists in a business actor or the dominant position that belongs to the business actor or the dominant position that belongs to the business actor. A business actor who can have access to Big Data, then data can be taken from the multi-sided nature between online intermediaries in the analysis of competition law.


Accordingly, it is essential that competition law enforcement in Indonesia immediately begin



evaluating online platforms and the ownership of Big data access in Indonesia, as well as their impact on effective competition on the digital market or online platform. With the ownership of Big Data in online platforms raises the possibility of a business actor monopolizing these essential facilities, it is also felt that KPPU needs to consider the use of essential facilities doctrine early on business actors in online platforms in order to prevent a business actor from wanting to provide essential facilities to other competitors in the market. This proposition is in the line with the mandate who given to the KPPU as a competition law watchdog in Indonesia under Article 2 and Article 3 paragraph (a) of Commission Regulation No. 01 of 2014 concerning KPPU Organization and Work Procedures and Presidential Decree No. 75 of 1999 concerning the Business Competition Supervisory Commission which states explicitly that KPPU has the function of supervising and enforcing the law prohibiting monopolistic practices and unfair business competition and conducting prevention and supervision of monopolistic practices and unfair business competition, in the context of maintaining the sustainability of effective competition in the digital market in Indonesia (Parluhutan, 2021).

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