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Data Driven Dominance in Digital Markets: Assessing Indonesian Competition Law in the Digital Age

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Abstract

Digital markets and multi-sided platforms are created by the internet, that are characterized by the use of big data as new market power. Big data enabled dominant and digital-based key players such as Instagram and Facebook/Meta to record and forecast their users' personal data and spending capacity to increase their economies of scale by tailoring updates to the users' demand. Therefore, big data becomes an essential market share, and its scarcity determines newer entrants' ability to enter the market and the existing incumbents' ability to survive by grappling with fast-paced digital changes. This legal morphology benefits data-driven undertakings to elevate their position in the market and achieve enough independence to influence market behavior. On the other hand, multi-sided platforms refer to where a single undertaking sells different products to different types of consumers on different sides of the platforms that affect each other's demand due to the cross-group network effect. Undertakings often sell zero-price products to one side while imposing the monetary burden and gaining revenue from the other. This situation triggered legal challenges to the calculation of market share necessary to determine a dominant position that is essentially mathematical based. Furthermore, big data and multi-sided platforms stimulate the rise of novel abusive practices in the digital market. This paper will analyze the Indonesian 1999 competition law's flexibility to deal with these changes by comparing the existing framework on consumer data protection, big data, and multi-sided platforms management to the European Union competition law.

Keywords: Big Data: Abuse Of Dominant Position; Digital Markets; Data Protection, Competition Law.

1. INTRODUCTION

The internet's ubiquitous nature[1] contributes to the digital market's creation. Some main characteristics differentiating the digital market from the conventional market are the use of big data and the emergence of multi-sided platforms. These digital markets present challenges to traditional competition law frameworks, particularly in the context of abuse of dominant position. This paper aims to address a critical gap in the current understanding of how existing competition laws, specifically in Indonesia, can effectively regulate anticompetitive practices in the digital economy.

The primary problem this study investigates is the adequacy of Indonesian competition law, particularly the 1999 Competition Act, in addressing novel forms of abuse of dominant position enabled by big data and multi-sided platforms in digital markets. This research is motivated by the increasing concerns about market concentration and potential anticompetitive practices by dominant digital platforms, which may not be fully captured by traditional antitrust frameworks.

1 Stefan Koos, 'Digital Globalization and Law', *Lex Scientia Law Review* 6, no. 1 (2022): 40–47, https://doi.org/10.15294/lesrev.v6i1.55092.

 DOI: http://dx.doi.org/10.29303/v12i2.1377

While competition law promotes open markets and data access, data protection interests prioritize protecting privacy and limiting data sharing. Mandating interoperability (better: data portability) of data to mitigate lock-in effects and to enable competition may conflict with data protection objectives. This creates a potential conflict between antitrust and data protection law that needs balancing when considering regulating digital markets and issues like compulsory data access.

Multi-sided platforms and most digital platforms in the digital market exploit consumer personal data for their business. This underscores the convergence between the legislative objectives of privacy/data protection law and consumer protection law on one side and competition law on the other regarding the digital economy. As competition authorities grapple with matters of exploitative or abusive data practices and denials of data access (e.g., the investigation against openAI by the US-Federal Trade Commission FTC because of allegations that chatGPT is putting personal reputation and data of natural persons at risk[2]) and data protection regulators or consumer protection authorities examine limits on the use and interchangeability of private data and access to such data, the intertwined nature of these policy realms becomes evident. The siloed regulation of data-related competition issues separately from private data protection issues is increasingly inadequate in this complex landscape. The intersection of these domains suggests a paradigm shift in regulatory approach, reflecting the intricate dynamics of digital markets and the need for a coordinated, holistic approach to data governance.

The novelty of this research lies in several key aspects:

1. It provides a comprehensive comparative analysis of Indonesian competition law against the backdrop of recent European Union (EU) developments in digital market regulation.
2. The study examines how the concepts of big data and multi-sided platforms challenge traditional notions of market power and dominance.
3. It analyzes recent landmark cases from the EU, particularly the Google Shopping case and the Facebook/Meta case, to identify emerging theories of harm in digital markets.
4. The research evaluates the flexibility and potential gaps in Indonesian competition law in addressing these new forms of anticompetitive behavior.
5. As an important innovative systematic aspect, the study explores the intersection and necessary compatibilization of multiple branches of digital law, specifically data protection law and antitrust law. This approach aligns with recent developments in EU jurisprudence, where these legal domains are increasingly understood as interrelated in the context of digital markets. The research investigates how this multipurpose approach can be adapted and applied within the Indonesian legal framework.

Based on these analyses, the paper proposes recommendations for enhancing Indonesia's competition law framework to better address the unique challenges posed by digital markets.

By focusing on the nexus of competition law, data protection, and digital market dynamics, this research contributes to the ongoing global discourse on the adaptation of regulatory frameworks to the digital age. It offers insights for policymakers, legal practitioners, and scholars engaged in the challenging task of applying antitrust principles in rapidly evolving digital ecosystems. Furthermore, it offers a novel perspective on how Indonesian law can evolve to address the multifaceted nature of digital market regulation, taking into account both competitive dynamics and data protection concerns.

The paper combines a comparative legal analysis with a case study approach, reviewing Indonesian competition law against the backdrop of the EU's framework. It examines cases, legal provisions, literature, and the broader implications of digital market dynamics on traditional competition law principles.

2. ANALYSIS AND DISCUSSION

2.1. Big Data and Multisided Platforms in the Digital Market

2.1.1. The Difference between Digital and Conventional Markets

2 See Dan Milmo, 'US's Top Competition Watchdog Opens Investigation into ChatGPT Maker', *The Guardian*, 13 July 2023, https://www.theguardian.com/technology/2023/jul/13/ftc-investigate-chat-gpt-openai.

The digital market is identified as markets within the digital economy where data-driven business models influence business processes extrapolated from consumer personal data.[3] "Big Data" is often used to describe the recent developments in data collection and utilization in the digital economy.[4] Therefore, big data is characterized by its (i) volume, (ii) velocity, and (iii) variability, as they can process, evaluate, and generate results from processing a vast amount of data than usual computer software.[5]

The German and French Competition Authority classified big data in a joint paper 2016 according to its usage, types of information, ways of gathering them, and whether they are structured.[6] The focal point of its existence is not its amount but the purpose of its usage. This is especially relevant when business undertakings use big data to create predictive algorithm models for their marketing strategy—gaining relevant information and knowledge from it to increase their economies of scale by way of (i) forecasting consumer purchasing behavior in a perpetual (*feedback loop*) cycle,[7] (ii) expand their product to neighboring markets[8] and (iii) discriminate against older incumbents and newer entries. Due to these characteristics, the digital market is differentiated from the conventional market as (i) its range of networks exhibits a preordained propensity to concentration by a few data-driven undertakings with big market power,[9] (ii) the market is multi-sided as all relevant economic actors in the market will have leverage over each other,[10] and (iii) big data becomes a competitive asset, and potential barriers.[11]

2.1.2. Multi-sided platforms and their Legal Implication in the Assessment of Abusive Dominant Practice in the Competition Law

Multi-sided platforms are one of the few characteristics that differentiate conventional and digital markets. A multi-sided market is generally defined as a market that acts as a platform and sells different products and/or services to different groups of consumers that affect each side's demand.[12] Generally, multi-sided platforms are divided into demand and supply sides, with the demand side combining one-sided, direct, and indirect cross-group network externalities.[13] An example of positive network effects happens on Meta Platform (former Facebook) and Instagram, where users benefit more significantly from increased participation. The more users the social network has, the more appealing it is to their eyes.

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3 German Federal Ministry for Economic Affairs and Energy - Commission 'Competition Law 4.0', 'A New Competition Framework for the Digital Economy' (Berlin, 2019), 13, https://www.bmwk.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob = publicationFile&v = 3.

4 Bruno Lasserre and Andreas Mundt, 'COMPETITION LAW AND BIG DATA: THE ENFORCERS' VIEW', *Antitrust & Public Policies* 4, no. 1 (n.d.): 2017.

5 See Facebook vs Verbraucherzentrale Bundesverband e.V., No. B6-22/16 (Bundeskartellamt 6 February 2019) Recital 495.

6 The French Autorité de la concurrence and the German Bundeskartellamt, 'Competition Law and Data' (Bundeskartellamt, May 2016), 4–6, https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big % 20Data % 20Papier.pdf % 3Bjsessionid % 3D9F9A418331598CA75471DEA51872F638.1_cid371 % 3F__blob % 3DpublicationFile % 26v % 3D2.

7 Wibowo and Setiawan, *Dua Dekade Penegakan Hukum Persaingan Usaha : Perdebatan dan Isu yang belum terselesaikan*.

8 Martin Schallbruch, Heike Schweitzer, and Achim Wambach, 'A NEW COMPETITION FRAMEWORK FOR THE DIGITAL ECONOMY – REPORT BY THE COMMISSION "COMPETITION LAW 4.0"', Law Report, 2019, https://www.competitionpolicyinternational.com/wp-content/uploads/2019/12/CPI-Schallbruch-Schweitzer-Wambach.pdf.

9 Massimiliano Nuccio and Marco Guerzoni, 'Big Data: Hell or Heaven? Digital Platforms and Market Power in the Data-Driven Economy', *Competition and Change* 23, no. 3 (2019): 312–28, https://doi.org/10.1177/1024529418816525; Eric Brousseau and Thierry Pénard, 'The Economics of Digital Business Models: A Framework for Analyzing the Economics of Platforms', *Review of Network Economics* 6, no. 2 (June 2007): 81–114, https://doi.org/10.2202/1446-9022.1112.

10 Nuccio and Guerzoni, 'Big Data: Hell or Heaven? Digital Platforms and Market Power in the Data-Driven Economy'.

11 Nuccio and Guerzoni.

12 Lapo Filistrucchi et al., 'Market Definition in Two-Sided Markets: Theory and Practice', *Journal of Competition Law and Economics* 10, no. 2 (2013): 2–3, http://dx.doi.org/10.1093/joclec/nhu007; OECD Directorate for Financial and Enterprise Affairs Competition Committee, 'Market Definition in Multi-Sided Markets - Note by Sebastian Wismer & Arno Rasek - Hearing on Re-Thinking the Use of Traditional Antitrust Enforcement Tools in Multi-Sided Markets', 15 November 2017, 2–3, https://one.oecd.org/document/DAF/COMP/WD % 282017 % 2933/FINAL/En/pdf.

13 Oxera, 'Two-Sided Market Definition : Some Common Misunderstandings' (Oxera Compelling Economics, September 2020), https://www.oxera.com/wp-content/uploads/2020/09/Two-sided-market-definition-1.pdf.

Cross-group external effects happen in Google, where the increase of users from one side impacts the growth on the other. As more people use the Google search engine, advertisers will likely gain more profits. On the supply side, a multi-sided platform may exhibit economies of scale.[14]

Therefore, multi-sided platforms are distinct from conventional single platforms due to demand-supply externalities and reinforcing feedback effects from one side of the user to the other.[15] As such, multi-sided platforms have different legal implications for ordinary market definition and determining market boundaries: (i) they work as an intermediary facilitating two or more different groups of users interdependent to one another,[16] (ii) the demand side on each side will affect each other simultaneously.[17] This poses legal challenges to applying the standard SSNIP test to determine market boundaries, as the increase in price on one side of the market will influence the price structure and the volume of users on the other. This challenge is also prevalent in firms that (iii) charge their services for free to attract paid participants as the price increase in absolute terms from zero equals zero.[18]

2.1.3. Limiting the Research: Consumer Personal Data and Big Data Advantage

This paper focuses on consumer personal data. Personal data refers to "information relating to an identified or identifiable natural person ['data subject']…" "…in particular by reference to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity…" (Article 4 Nr. 1 EU General Data Protection Regulation, hereinafter as GDPR). In the Definition of the Indonesian Personal Data Protection Act (hereinafter as UU PDP), personal data are "data about an individual who is identified or identifiable individually or in combination with other information either directly or indirectly through electronic or non-electronic systems" (Article 1[1] UU PDP).[19]

The EU Commission has recognized the value of these personal data for increasing the undertaking's quality of service and products to the benefit of the consumer as it enabled undertakings to "*match the individual users' past search histories to their past surfing behavior on the internet to be used for better target ads" that "better aligned to their preferences.*".[20]

These algorithms made those webs more appealing to the consumers due to the direct network group effects.[21] Consequently, the platform becomes more valuable to the advertisers as the more detailed the profiles of the consumers the web can offer would increase its advantage for better consumer segmentation, leading to economics of scale.[22] Therefore, an

14 Des Traynor, 'Surviving and Thriving in Two-Sided Markets', 14 August 2012, https://www.intercom.com/blog/surviving-thriving-in-two-sided-markets/.

15 Oxera, 'Two-Sided Market Definition : Some Common Misunderstandings'.

16 OECD, *OECD Handbook on Competition Policy in the Digital Age*.

17 Jean Rochet and Jean Tirole, 'Two-sided Markets: A Progress Report', *RAND Journal of Economics* 37, no. 3 (2006): 645–67, https://doi.org/10.1111/j.1756-2171.2006.tb00036.x.

18 David S. Evans, 'Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms', *University of Chicago Coase-Sandor Institute for Law & Economics Research Paper No. 753*, 10 March 2016, https://dx.doi.org/10.2139/ssrn.2746095.

19 'Undang-Undang Republik Indonesia Nomor 27 Tahun 2022 Tentang Pelindungan Data Pribadi' (n.d.). "*Data Pribadi adalah data tentang ora.ng perseorangan yang teridentifikasi atau dapat diidentifikasi secara tersendiri atau dikombinasi dengan informasi lainnya baik secara langsung maupun tidak langsung melalui sistem elektronik atau nonelektronik.*"

20 Marc Bourreau, Alexandre de Streel, and Inge Graef, 'Big Data and Competition Policy: Market Power, Personalised Pricing and Advertising', *Centre on Regulations in Europe*, 16 February 2017, https://dx.doi.org/10.2139/ssrn.2920301; COMMISSION OF THE EUROPEAN COMMUNITIES, COMMISSION DECISION of 11/03/2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (COMP/M.4731 – Google/ DoubleClick 11 March 2008).

21 EUROPEAN COMISSION, Case M.7217 – Facebook/ WhatsApp Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004, Office for Publications of the European Union L-2985 Luxembourg (2014).

22 Emma Fröderberg Shaiek, 'Excessive Data Collection as an Abuse of Dominant Position. The Implications of the Digital Data Era on EU Competition Law and Policy', *Law Pub Stockholm*, 2021, https://doi.org/10.53292/ea460f0b.e3038e00; Justus Haucap et al., 'Modernizing the Law on Abuse of Market Power in the Digital Age: A Summary of the Report for the German Ministry for Economic Affairs and Energy', CPI Antitrust Chronicle, December 2019, 3, https://www.researchgate.net/profile/Justus-Haucap/publication/328204203_Modernising_the_Law_on_Abuse_of_Market_Power_Report_for_the_Federal_Ministry_for_Economic_Affairs_and_Energy_Germany/links/5e20219a92851cafc3874923/Modernising-the-Law-on-Abuse-of-Market-Power-Report-for-the-Federal-Ministry-for-Economic-Affairs-and-Energy-Germany.pdf.

online platform's competitive strength in the digital market is directly proportional to the amount and quality of the consumer data it collects. Firms strive to acquire data advantage.[23]

2.2. Abuse of Dominant Position in Article 25 of the Indonesian Competition Law

2.2.1. The Indonesian Competition Law in General

Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition [hereinafter, "Competition Act 1999"][24] makes the primary regulation prohibiting anti-competitive conduct that can distort the market equilibrium[25] and harm the consumers. Competition law is enforced and supervised by the *Komisi Pengawas Persaingan Usaha* (officially translated as the *'Indonesian Competition Commission'*, hereinafter as KPPU, see Article 30[1] Competition Act 1999 and Keputusan Presiden No. 75/1999), that is defined as an impartial and independent institution responsible to the President (Article 30[2]-[3] Competition Act 1999).

2.2.2. On Article 25 Indonesian 1999 Competition Law and Abuse of Dominant Position

Normatively, Article 25 paragraph (1) has anticipated three anticompetitive practices by dominant undertakings that are prohibited due to their anticompetitive effect on the market, *per se*: (i) imposing unfair trade terms to prevent or impede consumers from purchasing its competitor's goods and services, in both terms of price and quality, (ii) limiting the market and technological innovation to the prejudice of the competition, and (iii) imposing entry barriers.[26] However, in practice, these theories of harm also encompass anticompetitive strategy regulated within Article 6 on discriminative behavior, Article 15 on closed dealing (KPPU Guidelines on Article 15[27]), Article 19 on monopolistic behavior and discriminative pricing (KPPU Guidelines on Discriminatory behavior), and Article 20 on predatory pricing.[28]

Generally, Article 25 is applied using a *per se illegal* approach. However, in practice, KPPU is not prohibited from applying the *rule of reason* approach due to the case's circumstances, as in the 2015 case concerning PT Forisa Nusapersada where KPPU examines whether PT. Forisa Nusapersada business strategy, in light of its ultra-dominant position in the soft drink relevant market, amounts to exclusionary conduct that raises the entry barrier and restraint PT Karniel Pacific Indonesia from entering the market. KPPU held that the business strategy of PT Forisa Nusapersada caused PT Karniel Pacific Indonesia, as its competitor, to decrease its selling volume by 50 %.[29] The same also happened in the case of Temasek Holdings, where KPPU decided violations against Article 25 are based on the *rule of reason* approach and not *per se illegal* after KPPU determined the relation between Article 17 and abuse of dominant behavior.[30]

2.2.3. Application to Digital Markets: Big Data and Multi-Sided Platforms

In the context of digital markets, the abuse of dominant position takes on new dimensions:

a) Consumer Data Protection: The collection and use of consumer data by dominant digital platforms can potentially fall under Article 25(1)(i) if it impedes consumers from using competitors' services. For instance, a dominant platform might use its vast data

23 Inge Graef, 'Market Definition and Market Power in Data: The Case of Online Platforms', World Competition: Law and Economics Review 38, no. 4 (2015): 473–506, https://dx.doi.org/10.2139/ssrn.2657732.

24 'Undang-undang (UU) Nomor 5 Tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat' (1999), https://peraturan.bpk.go.id/Details/45280/uu-no-5-tahun-1999.

25 Peter Mahmud Marzuki, 'Telaah Filosofis Terhadap Undang-undang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat', *Yuridika* 16, no. 4 (2001): 505–27, https://doi.org/10.20473/ydk.v16i4.14408.

26 Wibowo and Setiawan, *Dua Dekade Penegakan Hukum Persaingan Usaha : Perdebatan dan Isu yang belum terselesaikan*.

27 KPPU, 'PERATURAN KOMISI PENGAWAS PERSAINGAN USAHA NOMOR 3 TAHUN 2011 TENTANG PEDOMAN PASAL 19 HURUF D (PRAKTEK DISKRIMINASI) UNDANG- UNDANG NOMOR 5 TAHUN 1999 TENTANG LARANGAN PRAKTEK MONOPOLI DAN PERSAINGAN USAHA TIDAK SEHAT' (Komisi Pengawas Persaingan Usaha (KPPU), 2020), https://kppu.go.id/wp-content/uploads/2020/03/Nomor-3-2011-Pedoman-Ps-19-Huruf-D-Praktek-Diskriminasi.pdf.

28 Salinan Putusan KPPU terhadap PT Arta Boga Cemerlang (PT. ABC) Perkara Nomor: 06/KPPU-L/2004 (Komisi Pengawas Persaingan Usaha (KPPU) Indonesia 2004).

29 Komisi Pengawas Persaingan Usaha (KPPU), *Salinan Putusan KPPU terhadap PT Forisa Nusapersada, Perkara Nomor: 14/KPPU-L/2015* (Komisi Pengawas Persaingan Usaha (KPPU), 2015), https://www.kppu.go.id/docs/Putusan/2015/Putusan_Perkara_No14_KPPU-L_2015_Upload30092016.pdf.

30 Putusan Perkara No. 07/KPPU-L/2007 Kepemilikan Silang yang Dilakukan oleh Kelompok Usaha Temasek dan Praktek Monopoli Telkomsel, No. 07/KPPU-L/2007 (n.d.) Recital 150.

resources to create switching costs for consumers, making it difficult for them to move to competing services.

b) Big Data: The accumulation and use of big data by dominant firms can relate to all three prohibited practices under Article 25(1):
   1. It can be used to impose unfair trade terms.
   2. It might limit innovation if smaller competitors are denied access to crucial data.
   3. The control of large datasets can act as an entry barrier for new competitors.

c) Multi-Sided Platform Management: The management of multi-sided platforms[31] by dominant firms can potentially abuse their position in several ways:
   1. By leveraging dominance on one side of the platform to gain advantage on another side
   2. By using data from one side of the platform to impose unfair terms on another side
   3. By creating ecosystem lock-ins that make it difficult for users (on any side of the platform) to switch to competitors

2.2.4. Challenges in Application

While the set of laws within Article 25 has helped contain anti-competitive practices in conventional markets, its application to digital markets faces several challenges:

Firstly, the law does not explicitly address whether the current framework is well-equipped to address the mentioned potential anti-competitive strategies that stem from market dominance in the digital market.[32] Secondly, the accumulation and use of big data, which is central to many digital business models, is not directly addressed in the current framework. Thirdly, the complex dynamics of multi-sided platforms, where dominance on one side can be leveraged to gain advantage on another, are not explicitly covered. Fourthly, the intersection of competition law with data protection law in cases of data-driven abuse of dominance is not clearly defined.

These challenges show the need for either a broader interpretation of the existing law or potential amendments to address the unique characteristics of digital markets effectively.

2.3. Setting the Scene: Abuse of Dominant Position and Its Development in Indonesia and the European Union

2.3.1. Existing Indonesian Regulation on Consumer Personal Data

KPPU has prioritized the legal implications of big data and the digital market to the competitive climate in Indonesia since 2020.[33] Specifically on the issue of abusive practice by way of excessive data collection, KPPU has held that the current national regulation on e-commerce, which governs online transactions, is no longer relevant to the current development of business practice in the digital economy.[34] As of 2022, any potential harm to users is regulated independently by (i) UU No. 8 of 1999 on Consumer Protection [hereinafter, "Indonesian Consumer Protection Law"], which sets consumer and seller legal obligations and rights during online business transactions, and (ii) UU No. 11 of 2008 on Electronic Information and Transaction as Amended by UU No. 19 of 2016 [hereinafter, "Indonesian ITE Law"] which prohibits the using of personal data without explicit consent from the owner.

The concerns on consumer personal data leak non-consensual sharing are still pending the promulgation of the new bill on the Protection of Personal Data [hereinafter, "UU PDP"]

31 See Marc Rysman, 'The Economics of Two-Sided Markets', Journal of Economic Perspectives 23, no. 3 (2009): 126, https://doi.org/10.1257/jep.23.3.125.

32 Ahmad Sabirin and Raafid Haidar Herfian, 'Dampak Ekosistem Digital terhadap Hukum Persaingan Usaha di Indonesia serta Optimalisasi Peran Komisi Pengawas Persaingan Usaha (KPPU) di Era Ekonomi Digital', *Jurnal Persaingan Usaha* 1, no. 2 (2021): 75–82, https://doi.org/10.55869/kppu.v2i.23.

33 CNN Indonesia, 'KPPU Nilai Indonesia Butuh UU Pasar Digital.', *CNN Indonesia Ekonomi Bisnis* (blog), 3 March 2021, https://www.cnnindonesia.com/ekonomi/20210302161830-92-612756/kppu-nilai-indonesia-butuh-uu-pasar-digital.

34 Direktorat Ekonomi Kedeputian Kajian dan Advokasi and Komisi Pengawas Persaingan Usaha, 'RINGKASAN EKSEKUTIF PENELITIAN KEBIJAKAN DI SEKTOR EKONOMI DIGITAL' (Komisi Pengawas Persaingan Usaha (KPPU) Indonesia, 2019), https://kppu.go.id/wp-content/uploads/2020/07/EkSum-Penelitian-Kebijakan-Sektor-Ekonomi-Digital.pdf.

that is expected to govern the limits and prohibitions on the collection and the processing of sensitive and non-sensitive personal data.[35]

2.3.2. Regulation of the European Union and Germany Related to the Role of Data in the Competition

The new EU's Digital Markets Act (DMA[36]) imposes ex-ante obligations on large online platforms acting as gatekeepers in digital markets. Its goal is to ensure fair competition and prevent behavior exploiting gatekeepers' dual role as platform operators and market participants.[37] The DMA contains several obligations related to personal data sharing to promote competition in digital markets: Article 6(2) prohibits gatekeepers from using non-public business user data to compete against them, preventing misuse of partner data. Article 6(10) requires providing access to user and business user data, including personal data if consent is obtained, facilitating third-party data leveraging while respecting privacy rights. Article 6(11) mandates access to search engine ranking data for auditing purposes. As far as person-related data are concerned, they must be anonymized. Finally, Article 6(7) compels interoperability to prevent user lock-in. However, this raises potential privacy risks regarding personal data access and sharing that would need to be mitigated through adequate consent, anonymization, cybersecurity, and data minimization mechanisms. The DMA does recognize this in Article 6(7) by noting that measures should not compromise the integrity of systems that also embrace data security.

Together, these obligations aim to balance open data access with preventing the exploitation of gatekeeper power and dual roles.

Similarly, the German Competition Act (GWB[38]) accounts for data-related power. Section 18(3a) states that market position depends on competitive data access. Section 20(1a) addresses relative market power via data dependence. In Section 19a, abusive conduct of undertakings of paramount significance for competition across markets is addressed. That established a new form of ex-ante market regulation with the per-se prohibition of self-preferencing (Section 19a[2]).[39]

That demonstrates how legal regimes like the EU and Germany are evolving competition laws to enable data sharing while protecting against anti-competitive data misuse and leveraging. Indonesian law, however, still lacks comparable nuanced provisions governing data's role in digital markets and could benefit from similar tailored regulations.

2.3.3. Exploring Abuse of Dominant Position in the Digital Market: *Google Shopping* Case Study

2.3.3.1. Factual Background and Decision

The case concerns the EU General Court's findings in the Google Shopping decision as of November 10, 2021, that Google, a United States company specializing in internet-related products and services, had abused its dominant position in the online general search service relevant market in the European Economic Area.[40] Google appealed the decision to the European Court of Justice,[41] where the case is

35 Komisi I DPR RI, 'PENJELASAN PEMERINTAH MENGENAI RANCANGAN UNDANG-UNDANG TENTANG PELINDUNGAN DATA PRIBADI' (DPR RI, 25 February 2020), https://www.dpr.go.id/dokakd/dokumen/RJ5-20200305-121009-3116.pdf.

36 'REGULATION (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2022 on Contestable and Fair Markets in the Digital Sector and Amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act)', accessed 22 February 2024, https://eur-lex.europa.eu/eli/reg/2022/1925/oj.

37 REGULATION (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) considerations 2-4.

38 'Gesetz gegen Wettbewerbsbeschränkungen (GWB)', accessed 22 February 2024, https://www.gesetze-im-internet.de/englisch_gwb/index.html.

39 OECD Directorate for Financial and Enterprise Affairs Competition Committee, 'Ex-Ante Regulation and Competition in Digital Markets – Note by Germany', 22 November 2021, 4–5, https://one.oecd.org/document/DAF/COMP/WD(2021)61/en/pdf.

40 Judgement of Google and Alphabet v Commission (Google Shopping) Case T-612/17 (General Court of the European Union November 2021); see also Natalia Belloso Moreno, 'Google v Commission (Google Shopping): A Case Summary', 17 November 2021, https://dx.doi.org/10.2139/ssrn.3965639.

41 Appeal brought on 20 January 2022 by Google LLC and Alphabet, Inc. against the judgment of the General Court (Ninth Chamber, Extended Composition) delivered on 10 November 2021 in Case T-612/17, Google and Alphabet v Commission, No. C-48/22 P (n.d.).

still pending as of February 2024.[42] The outcome of this appeal could have significant implications for defining the scope of abusive conduct by dominant digital platforms.

The case is relevant for the personal data-driven abuse of the dominant position. Google collects many personal data about its users, including their search history, location data, and browsing habits. This data gives Google a significant advantage over its competitors, as it can use this data to improve its search results and target its advertising more effectively.

Google has developed various general and specialized search services where advertisers would pay space to ensure that when an internet user clicks on a selection criterion, a hyperlink would automatically get activated in their ad, leading to their own website. Presently, Google argued that (i) it did not commit abuse because the EU Commission has failed to prove the improvements in its services have departed from the competition on the merits, (ii) Google is not bound by the duty to supply as the EU Commission failed to fulfill strict conditions laid in the Bronner-judgement of the European Court of Justice as of 26 November 1998 as its competitor's access to its services does not constitute an indispensable "*essential facility*".[43]

The Bronner case has created a significant precedent in European competition law, setting out the conditions under which a company with a dominant position can be obligated to offer access to its facilities to other competing firms. The ECJ determined that such a duty could be imposed only under a stringent set of three conditions: Firstly, the facility or infrastructure must be essential for conducting business. That means there must be no actual or potential substitutes available. Secondly, refusing access must eliminate all effective competition in the relevant market, excluding all current or potential rivals. Finally, refusing access must lead to harmful consequences for consumers, such as price increases or a decrease in the quality of services due to a lack of competition.[44] These principles had significant implications for the arguments put forward by Google against the widespread imposition of duties to provide access under competition law.

2.3.3.2. Whether Google's conduct has departed from the Competition on The Merits

Google claims its quality improvements constitute competition on the merits and are not abusive.[45] However, the General Court held otherwise as Google's special responsibility from its ultra-dominant position in the general search services relevant market[46] to ensure that its "universal vocation" of general search engine will be designed to index all results containing every possible content[47] as the rationale and the value of general search engines rest on its "*capacity to be accessed from external (third-party) sources*" and to display the variety of sources to the general public "*and enable it to benefit from the network effects and economy of scale that are important for its development*".[48]

Based on the arguments of the European Commission in its preliminary decision,[49] the Court held Google is not competing on the merits due to three specific considerations:[50] (i) the importance of traffic generated by Google's general search engine for comparison shopping services to increase advertisers' revenue and enhancing virtuous circle by exploiting network effects. Conversely, when Google purposely decreases the visibility of these ads on its web, this could "lead to a vicious circle and, eventually, market exit due to an inability to compete on essential elements such as the relevance of results and innovation, which are linked, since comparison shopping services innovate in order to improve the relevance of their results and thus attract more traffic and therefore

42 See 'OPINION OF ADVOCATE GENERAL KOKOTT Delivered on 11 January 2024 - C-48/22 P', accessed 22 February 2024, https://curia.europa.eu/juris/document/document.jsf?text = &docid = 281162&pageIndex = 0&doclang = en&mode = lst&dir = &occ = first&part = 1&cid = 3666190.

43 Google and Alphabet vs European Commission (Google Search), No. T-612/17 (General Court 10 November 2021) recital 122.

44 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG, No. C-7/97 (European Court of Justice 26 November 1998) recital 39-47.

45 Google and Alphabet vs European Commission (Google Search) recital 558.

46 Google and Alphabet vs European Commission (Google Search) recital 180.

47 Google and Alphabet vs European Commission (Google Search) recital 176.

48 Google and Alphabet vs European Commission (Google Search) recital 178.

49 COMMISSION DECISION of 27.6.2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the Agreement on the European Economic Area (AT.39740 - Google Search (Shopping)), No. C(2017) 4444 final (European Commission 27 June 2017).

50 Google and Alphabet vs European Commission (Google Search) recital 185.

more revenue".[51] (ii) Google conduct that can influence internet user behavior that will likely choose the first result that pops in,[52] and (iii) Google traffic that others cannot effectively replace.[53]

2.3.3.3. The applicability of the *Bronner* test

The *Bronner* case established that a duty to supply can be imposed under EU competition law when certain conditions are met. Specifically, access to infrastructure or services must be essential and indispensable for a company to compete in a market with no actual or potential substitutes.[54] If denying access risks eliminating all competition, then a duty to supply may apply. However, for the *Bronner* test to be triggered, there must first be a request for access and a refusal that causes exclusionary effects. More than merely possessing characteristics of an essential facility is required. There must be demonstrated harm to competition resulting from a denial of access. In the Google case, the General Court did find that Google's general results pages have qualities *like an essential facility*.[55] These pages accounted for a substantial proportion of traffic to rival comparison-shopping services.

Moreover, this traffic could not be effectively replaced by other sources and was indispensable for competitors. Nonetheless, the General Court concluded that the requirements for imposing a duty to supply under *Bronner* were not satisfied. Critically, the Court did not find that Google had refused access or caused exclusionary effects. Since no refusal or exclusionary impact was demonstrated, the conditions for applying Bronner were not met despite Google's general results pages having essential facility characteristics. Therefore, the Court's application of *Bronner* focused on the need to prove exclusionary abuse, not just indispensability.[56]

The Court, therefore, held that it is unnecessary to examine the *Bronner* test as it is irrelevant to the case context. Instead, the focus of the dispute rests on Google's discriminatory abuse against its competitors for the sole benefit of its own comparison service, which must be distinguished from the refusal of access.[57] Advocate General *Kokott* recently shared this assessment in her opinion on the appeal procedure to the ECJ.[58]

2.3.3.4. Theory of Harm: Discriminative Practice

The case of Google and Alphabet demonstrated an example where dominant undertakings could abuse their position by imposing differentiated behavior to the prejudice of their competitors by way of non-price terms such as (i) less preferential access and (ii) different input quality.[59]

The EU competition authorities have considered and acknowledged the possibility of such a theory of harm as the effect of such discriminatory practice would, without doubt, harm and limit the consumer from the freedom of choosing from an array of options as the less-favored competitors can be led to exit the market. Here, competition authorities are recommended to focus on the clear-cut indications of potential harm that can be seen from: (i) when the input in question is indispensable, thus a refusal to access can amount to a margin squeeze, (ii) when the alleged behaviour results in the exit of competitors or restrain the entrance of new or other incumbents to the relevant

51 Regarding the Commission's argumentation see Google and Alphabet vs European Commission (Google Search) recital 171.

52 regarding the Commission's argumentation see Google and Alphabet vs European Commission (Google Search) recital 172.

53 General Court of EU Press Release No. 197/21 on Google and Alphabet v. Commission (Google Shopping) (Case Number: T-612/17) (General Court of the European Union 10 November 2021).

54 Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co. KG and Mediaprint Anzeigengesellschaft mbH & Co. KG recital 37-41.

55 Google and Alphabet vs European Commission (Google Search) recital 229.

56 Google and Alphabet vs European Commission (Google Search) recital 230-233.

57 Google and Alphabet vs European Commission (Google Search) recital 240.

58 'OPINION OF ADVOCATE GENERAL KOKOTT Delivered on 11 January 2024 - C-48/22 P' recital 90.

59 OECD Directorate for Financial and Enterprise Affairs Competition Committee, 'ABUSE OF DOMINANCE IN DIGITAL MARKETS - Executive Summary -', 8 December 2020, 3, https://one.oecd.org/document/DAF/COMP/GF(2020)7/en/pdf.

market, and (iii) when a competitor that has an equal level of efficiency to the dominant undertaking result in a negative margin.[60]

2.3.3.5. New Standalone Theory of Harm: Self Preferencing

In the literature, the Google judgment was seen as the introduction of a standalone "*novel form of the theory of harm*"[61] under Art. 102 TFEU in the sense of self-preferencing or "favoring". However, the abusive practice of self-preferencing relied upon by the Commission remains controversial. Critics argue that prohibiting self-preferencing could undermine the recognized benefits of vertical integration and prevent efficiency gains by integrated undertakings. By leveraging dominance in one area to benefit its services in another, companies like Google defend such strategies as maximizing innovations that ultimately benefit consumers.[62] In the past, self-preferencing cases have typically involved dominant companies giving their own products or services preferential treatment over those of their competitors. For example, a dominant online retailer might give its products more prominent placement on its website than its competitors. In the Google Shopping case, however, the primary concern was not merely that Google was giving preferential treatment to its own services. The crux of the issue was that Google leveraged its dominance in one market (online search) to give its products and services an unfair advantage in another distinct market (online shopping comparison). That is an example of leveraging, where a company uses its strength in one market to gain an advantage in another. By prominently displaying its own shopping comparison service in search results, Google effectively reduced the visibility of its own services. This behavior was seen as anti-competitive because it didn't necessarily reflect the organic relevance or quality of the search results but was influenced by Google's commercial interests in promoting its own service.[63]

A standalone theory of harm of self-preferencing specifically addresses the design of digital platforms and services. It widens the applicability of Article 102 TFEU, which can oblige dominant companies in digital markets to design their platforms[64] so that distortion of the market is avoided. Systematically, it could be seen as an aspect of "safety by design" as it is known from the data protection law (see Art. 25 GDPR) and in line with the ex-ante regulation of platforms, e.g., in the DMA and the German Competition Act (see 3.2). Clear criteria, though, for a case group of self-preferencing was not developed by the Commission or the General Court.[65]

2.3.3.6. Theory of Harm: Refusal to Access

The *Bronner* test failed in the case, and the abusive behavior was found based on other case groups of Article 102 TFEU instead of the refusal to access the theory of harm. However, the commission did apply elements of the essential facilities doctrine within the theory of harm of self-preferencing. Also, the General Court mentioned expressively that characteristics *similar to essential facilities* can be found on Google's general search results page.[66] It was criticized in the literature[67] that it shows an unclearness regarding the relation between refusal to access and self-preferencing.

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60 OECD Directorate for Financial and Enterprise Affairs Competition Committee, 'ABUSE OF DOMINANCE IN DIGITAL MARKETS - Executive Summary -'.

61 Elias Deutscher, 'Google Shopping and the Quest for a Legal Test for Self-Preferencing Under Article 102 TFEU', *European Papers* 6, no. 3 (2021): 1347, https://doi.org/10.15166/2499-8249/52; Massimo Motta, 'Self- Preferencing and Foreclosure in Digital Markets: Theories of Harm for Abuse Cases', *Barcelona School of Economics Working Papers*, no. 1374 (n.d.): 8; Doubting about a standalone novel theory of harm Giuseppe Colangelo, 'Antitrust Unchained: The EU's Case Against Self-Preferencing', *Gewerblicher Rechtsschutz und Urheberrecht International*, 2023, 538–56.

62 Peter Alexiadis and Alexandre de Streel, 'Designing an EU Intervention Standard for Digital Platforms', *European University Institute Robert Schuman Centre for Advanced Studies Florence School of Regulation* 14 (2020): 11, https://doi.org/10.2139/ssrn.3544694.

63 Google and Alphabet vs European Commission (Google Search) at 283–93.

64 Deutscher, 'Google Shopping and the Quest for a Legal Test for Self-Preferencing Under Article 102 TFEU', 1346.

65 Deutscher, 1350.

66 Google and Alphabet vs European Commission (Google Search) recital 224.

67 Deutscher, 'Google Shopping and the Quest for a Legal Test for Self-Preferencing Under Article 102 TFEU', 1351; Inge Graef, 'Rethinking the EssentialFacilities Doc-

The *Google Search* case demonstrates that the application of traditional doctrines like the *essential facility* doctrine and specifically the *Bronner* test might not sufficiently meet the challenges of digital markets, but it also shows that the specific situation of digital markets can be addressed properly by a wider interpretation of the rule on abuse of dominant behavior.

Refusal to access is classified into three formats:[68] (i) unconditional refusal, which refers to when alleged dominant players refuse access in an absolute term; (ii) conditional refusal, where the alleged dominant player will open access only when its competitors agree to certain terms to the dominant benefit, and (iii) constructive refusal, where access is opened only when competitors agree to comply with restrictive terms to their prejudice and which disadvantage them.[69] Constructive refusal, however, does not fall under the Bronner requirements, but it still can be assessed under other case groups of abusive behavior.[70]

"*Constructive refusal*" refers to situations where a dominant firm does not outright deny access to an essential facility but imposes conditions or engages in behaviors that effectively amount to a refusal. That can be through discriminatory practices, unfair pricing, or other means that make access unviable or less effective for competitors. In the Google Shopping case, Google was found to have favored its own comparison-shopping service over those of competitors in its search results. While Google did not outright deny competitors access to its search platform, the way it displayed results effectively reduced the visibility of competing services, thereby disadvantaging them.

Given this context, one could argue that Google's actions in the Shopping case can be seen as a form of constructive refusal. Instead of outright denying access to its platform, Google's preferential treatment of its own service over competitors had a similar effect, making it harder for competitors to compete effectively.

The *Google Search* case raises questions about whether the *essential facility* doctrine is still fit for purpose in the digital age.[71] The doctrine was developed in the context of traditional markets, where it was relatively easy to identify *essential facilities*. However, in the digital age, determining whether a facility is essential is often more challenging. Digital markets are often more complex and dynamic than traditional ones. In addition, the *essential facility* doctrine can be difficult to apply in the digital age because it can be difficult to prove that a dominant company has denied access to a facility. That is because dominant companies can often justify their refusal to grant access on the grounds of commercial confidentiality or technical reasons. The case shows that the classic case groups of abusive behavior must be interpreted widely.

However, as learned from the Google case, the relevance of the *Bronner* test diminishes for digital platforms, as the self-preference case group is a probate remedy integrating elements of the essential facility doctrine.

2.3.4. Comparison: Indonesian Competition Law on Discriminatory Practice and Refusal to Access

There are no specific provisions in the Indonesian Competition Act governing the prohibition of denial of access. However, it may constitute a discriminatory practice prohibited under Article 19 paragraph (d) of the Indonesian Competition Act.

Article 19 paragraph (d) acknowledged non-price discriminatory practices that took place in the Google and Alphabet case. Normatively, the prohibition of discriminatory practice is especially relevant when the undertaking fulfills the requirement of durable market power, market control, and the ownership of a "specific facility" not owned by its competitors.

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trine Forthe EU Digital Economy', *Revue Juridique Thémis de l'Université de Montréal* 53, no. 1 (2019): 72.

68 OECD, 'Abuse of Dominance in Digital Markets', *Organisation for Economic Co-Operation and Development*, 2020, https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf.

69 Pablo Colomo Ibáñez, 'Indispensability and Abuse of Dominance: From Commercial Solvents to Slovak Telekom and Google Shopping', *Orthcoming, Journal of European Competition Law & Practice*, 11 December 2019, 8, https://doi.org/10.2139/ssrn.3502519.

70 Slovak Telekom/Commission, No. C-165/19 (European Court of Justice 25 February 2021) recital 49-51.

71 Jacques Crémer, Yves-Alexandre de Montjoye, and Heike Schweitzer, 'Competition Policy for the Digital Era' (European Commission - Directorate-General for Competition, 2019), 98, https://data.europa.eu/doi/10.2763/407537.

Alleged discriminatory behavior will be examined using the *rule of reason* approach. KPPU will determine whether the conduct in question can be justified with social, economic, technical, and other efficiency argumentation to ensure the flow of supply and distribution.[72]

Although Article 19 paragraph (d) is not specifically tailored for abusive, discriminatory practice in the digital market, the law has been designed to encompass a variety of differentiated price and non-price behavior by way of (i) imposing unfair terms or (ii) refusing business offers without objective justification. Either of the examples facilitates the context of Google's case. The focal point of Article 19 paragraph (d) rests on whether the conduct in question is capable of distorting the market at horizontal (among undertakings in the relevant market) and/or vertical level (to consumers), which may cause (i) several competitors to exit the market, (ii) decreasing the role of its competitors in the relevant market, (iii) raising the entry barrier, (iv) lessening the number of competitors in the relevant market, and (v) limiting consumers to small options of product variety due to the small number of businesses in the market.[73]

2.3.5. Exploring Abuse of Dominant Position in the Digital Market: *Facebook* Case Study

2.3.5.1. Factual Background and Decision

The German competition authority (*Bundeskartellamt*) held that *Facebook* (now *Meta*) had abused its dominant position in the social media relevant market for collecting "*off Facebook data*" by giving contractual terms—as a condition before they can use *Facebook* service—which permit *Facebook* to collect their data during their activities within the app and across an extensive range of third-party websites and apps.[74] While *Facebook* provides a network facility without charge, which most of its users consider useful, they are nonetheless subjected to "*non-transparent analyses, profiling, and other obscure algorithmic processing*".[75]

The *Bundeskartellamt* held *Facebook* to be a dominant player in the relevant social media market[76] and that *Facebook* failed to gain meaningful consent from users for its data tracking practices and processing of this data to users' *Facebook* profiles.[77]

The *Bundeskartellamt's* decision was based on an abuse of dominance under Section 19(1) of the German Competition Act (GWB), which also encompasses the protection of end consumers.[78] An abuse of conditions ("*Konditionenmissbrauch*") under Section 19(1) GWB can be found when data processing terms used by a company with market power violate the values of the General Data Protection Regulation (GDPR) as a manifestation of that market power.[79] Section 19(1) GWB is fully applicable alongside data protection law and its enforcement system.[80]

In its assessment, the *Bundeskartellamt* also referenced the EU General Data Protection Regulation (GDPR), concluding that *Facebook* had abused its dominant position due to (i) a lack of transparency that forced consumers to consent to data access without

72 KPPU, 'PERATURAN KOMISI PENGAWAS PERSAINGAN USAHA NOMOR 3 TAHUN 2011 TENTANG PEDOMAN PASAL 19 HURUF D (PRAKTEK DISKRIMINASI) UNDANG- UNDANG NOMOR 5 TAHUN 1999 TENTANG LARANGAN PRAKTEK MONOPOLI DAN PERSAINGAN USAHA TIDAK SEHAT', accessed 2 February 2024, https://kppu.go.id/wp-content/uploads/2020/03/Nomor-3-2011-Pedoman-Ps-19-Huruf-D-Praktek-Diskriminasi.pdf.

73 Risma Intan Fitriani and Ria Setyawati, 'FAIR COMPETITION AND ABUSE OF DOMINANT POSITION: HOW MARKET LEADER CAN BE ABUSIVE IN THE RELEVANT MARKET?', *PalArch's Journal of Archaeology of Egypt / Egyptology* 17, no. 3 (2020): 1893–1901, https://doi.org/10.48080/jae.v17i3.928; Andi Fahmi Lubis et al., *Hukum Persaingan Usaha - Buku Teks*.

74 Facebook vs. Verbraucherzentrale Bundesverband e.V., No. B6-22/16 (Bundeskartellamt 6 February 2019).

75 Facebook vs. Verbraucherzentrale Bundesverband e.V. recital 483-487.

76 Facebook vs. Verbraucherzentrale Bundesverband e.V. recital 374 et seq.6]]}},"label":"page","suffix":"recital 374 et seq."}],"schema":"https://github.com/citation-style-language/schema/raw/master/csl-citation.json"}

77 Facebook vs. Verbraucherzentrale Bundesverband e.V. recital 639-665.

78 Facebook vs. Verbraucherzentrale Bundesverband e.V. recital 525; Entega II, No. KZR 5/10 (Federal Court of Justice (BGH) 7 December 2010) recital 24.

79 Facebook vs. Verbraucherzentrale Bundesverband e.V. recital 526 et seq.

80 Facebook vs. Verbraucherzentrale Bundesverband e.V. recital 535 et seq."plainCitation":"Facebook vs. Verbraucherzentrale Bundesverband e.V. recital 535 et seq.

options[81] and (ii) data practices designed to leverage *Facebook's* position.[82] Specifically, consumers could not know the full extent of data collection when sharing information, exemplifying the exploitation of users enabled by *Facebook's* market power. Therefore, the *Bundeskartellamt* concluded that *Facebook's* expansive collection of user data from third-party sources enabled through its terms of service imposed on users due to its market power, constituted an abuse under German competition law. This theory of harm focused on the scope of data collection as a condition of *Facebook* use, which violated GDPR principles and directly harmed consumers.

Meta appealed the decision to the Higher Regional Court (*Oberlandesgericht*, *OLG*) of Düsseldorf,[83] which asked the ECJ, based on Art 267 TFEU (preliminary ruling), about the interpretation of provisions of the GDPR and to what extent the *Bundeskartellamt* can consider norms of the GDPR. The ECJ's decision was issued on July 4, 2023.[84] The ECJ agreed with the view of the *Bundeskartellamt*, stating that in the context of the examination of an abuse of a dominant position by an undertaking, "*it may be necessary for the competition authority of the member state concerned also to examine whether that undertaking's conduct complies with rules other than those relating to competition law*".[85]

2.3.5.2. Theory of Harm: Exploitative Abuse

The case of *Facebook* demonstrates an example where abusive dominant behavior in the digital market can stem from non-price factors such as unfair contractual terms, diminished product volume, quality, variety, and innovation. These exploitative behaviors do not necessarily hamper competition through anticompetitive (exclusionary) conduct[86] but rather non-monetary acts that directly harm the consumers by way of worsening privacy and data collection terms, explicitly limiting the ability of users to move their content to other platforms.[87]

2.3.5.3. Comparison: Indonesian Competition Law on Exploitative Abuse of Consumer Personal Data

Excessive data collection has never been considered an anticompetitive behavior that falls within the KPPU jurisdiction in Indonesia. Instead, it is regulated within a separate body of law as described in Section 2.3.1., *supra*.

Personal data is identified as information relating to an identifiable natural person that is stored, maintained, and kept confidential under the Indonesian Ministry of Communication and Information Regulation No. 20 of 2016 on Protection of Personal Data in Electronic Systems (hereinafter, "*Indonesian Perkominfo Law*"[88]] and the Private Data Protection Act of 2022 (hereinafter, "*PDP Law*"[89]).

Normatively, Indonesia recognized the protection of personal data as a "right for privacy", which encloses the freedom to enjoy personal life without interference and disturbance from the State authorities as stated in Number 3 of the legislative Explanation to the 2016 amendment of Article 26 Paragraph (1) of the Law on Electronic Information and Transactions of 2008.[90] In the utilization of Information Technology, the protection

81 Facebook vs. Verbraucherzentrale Bundesverband e.V. recital 641 et seq."plainCitation":"Facebook vs. Verbraucherzentrale Bundesverband e.V. recital 641 et seq."

82 Facebook vs. Verbraucherzentrale Bundesverband e.V. recital 871 et seq."plainCitation":"Facebook vs. Verbraucherzentrale Bundesverband e.V. recital 871 et seq.

83 Request for a preliminary ruling from the Oberlandesgericht Düsseldorf (Germany) lodged on 22 April 2021 — Facebook Inc. and Others v Bundeskartellamt, No. C-252/21 (Oberlandesgericht Düsseldorf 22 April 2021). No. C-252/21 (Oberlandesgericht D\\uc0\\u252{}sseldorf 22 April 2021

84 Meta Platforms Inc and Others v Bundeskartellamt, No. C-252/21 (European Court of Justice (Grand Chamber) 4 July 2023).

85 Meta Platforms Inc and Others v Bundeskartellamt recital 48.

86 OECD, 'Abuse of Dominance in Digital Markets', 2.

87 Maurice E. Stucke, 'Should We Be Concerned About Data-Oligopolies?', *Georgetown Law Technology Review* Vol. 2.2, no. 275 (2018): 287–90, https://dx.doi.org/10.2139/ssrn.3144045; Aleksandra Gebicka and Andreas Heinemann, 'Social Media & Competition Law', *World Competition* 37, no. 2 (2014): 170–72, https://doi.org/10.5167/uzh-102778.

88 'Peraturan Menteri Komunikasi dan Informatika Republik Indonesia Nomor 20 Tahun 2016 tentang Perlindungan Data Pribadi dalam Sistem Elektronik', accessed 26 February 2024, https://peraturan.bpk.go.id/Details/150543/permenkominfo-no-20-tahun-2016.

89 'Undang-Undang Republik Indonesia Nomor 27 tahun 2022 tentang Perlindungan Data Pribadi', UU No. 27/2022, accessed 26 February 2024, https://peraturan.bpk.go.id/Details/229798/uu-no-27-tahun-2022.

90 'Penjelasan atas Undang-Undang Republik Indonesia Nomor 19 Tahun 2016 tentang Perubahan atas Undang-Undang Nomor 11 Tahun 2008 tentang Informasi dan Transaksi Elektronik', accessed 26 February 2024,

of personal data is one part of the right to privacy. Personal rights include the following understanding:

a. Personal rights entail the right to enjoy a personal life and be free from interference.
b. The right to privacy is the right to communicate with other people without being spied on.
c. The right to privacy is the right to control access to information about one's personal life and data.

That can only be derogated under specific grounds set by law. The basis for the formulation of norms and implementation in Personal Data Protection is grounded in the principles of protection, legal certainty, public interest, expediency, prudence, balance, and responsibility.[91]

People have the right to know and supervise how their personal data are collected, processed, displayed, published, transmitted, and disseminated.[92] Therefore, explicit consent obtained in writing or electronically becomes a requisite, and the personal data owner has the right to demand and receive a guarantee that all reasonable steps by the State are taken to ensure that when their data is no longer necessary or relevant, or when they revoke their consent, the data will be deleted permanently at the request of the data owner under Court decision.[93]

It is useful to discuss whether Indonesia could consider including a provision in the data protection law to anticipate future abusive competition law conduct that may be related to excessive data collection, and to determine what kind of data collection is "excessive" and therefore exploitative. Such a provision could give the competences to assess this to KPPU.

However, it should be mentioned that one general problem with granting antitrust authorities the competence to enforce private data protection rules directly is that without further discussion on the relation between data protection and antitrust law, this could promote an overly unilateral view of data accessibility. The interests of market regulation in enabling data portability and interchangeability to foster competition do not automatically align with the interests of private data protection laws. Competition authorities may need more expertise to balance these competing interests properly. First, a more balanced interpretation of the relationship between data property rights, data-driven business models, and personal data protection would be prudent. Big data constitutes an economic asset for platforms, but personal data also represents a non-commercial consumer asset.[94] Rules granting data access and interoperability in the interest of the competition in digital markets must be aligned with data protection principles. Without care, compelled data access risks undermining rights guaranteed by privacy laws. Competition and data protection regimes should be well coordinated to ensure robust data governance without sacrificing consumer welfare.[95] Therefore, the inclusion to assess infringements of the data protection law into the competencies of KPPU should be clearly limited to the purpose of assessing abusive market conduct. Preliminary decisions of the data protection authorities should bind the decision of KPPU.

The European Court of Justice expressly underscored this important aspect in its July 4, 2023 ruling.[96] Regarding the 2019 *Bundeskartellamt* decision, the ECJ determined that competition authorities could judge an entity's compliance or non-compliance with the European *General Data Protection Regulation* (GDPR) only within the context of a decision about an abuse of a dominant market position. Both antitrust and data protection authorities must coordinate their actions. Antitrust authorities are obliged to comply with preliminary decisions by Data Protection Authorities that have already deemed a

https://peraturan.bpk.go.id/Details/37589/uu-no-11-tahun-2008.

91 Article 3 Undang-Undang Republik Indonesia Nomor 27 tahun 2022 tentang Perlindungan Data Pribadi.

92 See Article 6-11 Undang-Undang Republik Indonesia Nomor 27 tahun 2022 tentang Perlindungan Data Pribadi.

93 See Article 43 Undang-Undang Republik Indonesia Nomor 27 tahun 2022 tentang Perlindungan Data Pribadi.

94 Stefan Koos, 'Protection of Behavioural Generated Personal Data of Consumers' (1st Workshop on Multimedia Education, Learning, Assessment and its Implementation in Game and Gamification in conjunction with COMDEV 2018, Medan Indonesia, 26th January 2019, WOMELA-GG, Medan: EAI, 2019), 3–4.

95 PROSPERA/KPPU, 'PROSPERA Policy Brief - Digital Platform Regulation', 17.

96 Meta Platforms Inc and Others v Bundeskartellamt recital 48.

particular practice to conform with data protection guidelines. As early as the preliminary *Facebook* decision, the *Bundeskartellamt* emphasized that it assessed data protection law exclusively within the context of abusive market behavior under the umbrella of competition law. The data processing conditions employed by *Facebook* were deemed to violate the GDPR principles due to market dominance.[97]

2.3.6. Data interoperability and the surrounding legal implications: Indonesia and the EU

In contexts where personal data becomes a competitive asset for businesses to outperform their rivals, they encounter regulatory frameworks that govern their access to such data. This scenario is addressed in the Indonesian Personal Data Protection Law (UU PDP). However, this legislation presents specific legal challenges.[98] These challenges arise from two perspectives: first, from the personal data protection side,[99] and second, from the competition law side. The obligation to share essential input with a rival might (i) undermine a firm's incentives to develop such input independently, (ii) discourage other firms from developing novel innovations, (iii) dissuade firms from making investments that may carry risks but could ultimately benefit consumers and the economy, and (iv) might undermine firms' efforts to develop substitutes for these inputs.[100] Therefore, these considerations present significant challenges to Indonesian authorities when addressing how failing to comply with access obligations might amount to a refusal to access or how economic efficiencies can justify such behaviors.

3. CONCLUSION

This study looked at how companies abuse their dominant position in digital markets. It compared Indonesian competition law with EU regulations and found several key findings:

1. *Novel Theories of Harm*: The EU General Court's ruling in the *Google/Alphabet* case demonstrates how discriminatory self-preferencing can constitute an abuse of dominance under EU competition law. The Court held that Google (1) acted in prejudice toward its competitors through preferential access despite knowing its services amount to an indispensable facility that cannot be easily substituted, and (2) failed to apply a similar standard of display and positioning to competing comparison shopping services and its own in its generalized search page.
2. *Exploitative Abuse in Digital Markets*: The *Facebook* case reveals that abusive dominant behavior in digital markets can stem from non-price factors such as unfair contractual terms on personal data sharing. Although such business behavior does not hamper competition directly, it harms consumers.
3. *Indonesian Competition Law Framework*: Despite having no direct law governing the digital market, the Indonesian 1999 Competition Act has some provisions that could potentially address novel theories of harm: The prohibition of discriminatory practice and refusal to access can be found in Article 19 paragraph (d) of the law, whereas the prohibition of exploiting consumer personal data can be found in (1) Indonesian Perkominfo Law, (2) Indonesian ITE Law, and (3) the Private Data Protection Act of 2022 which recognize the consumers' rights to know precisely in what way and for what purpose their data will be used.
4. *Gaps in Indonesian Regulation*: The study identifies critical shortcomings in Indonesia's competition law framework for effectively regulating anti-competitive practices and abuse of dominance in digital markets: Currently, Indonesia lacks robust regulations and enforcement precedents tailored for digital platforms and data-driven business models. There are no clear prohibitions or case law precedents regarding potentially abusive behaviors enabled by big data and multi-sided platforms, such as excessive data collection, self-preferencing, denial of interoperability, or leveraging power from one market to another. Indonesia also does not have specific ex-ante regulations designed for dominant online platforms and

97 Facebook vs Verbraucherzentrale Bundesverband e.V. recital 525.

98 See also Eleanor M. Fox, 'Monopolization and Abuse of Dominance: Why Europe Is Different', *The Antitrust Bulletin* 59, no. 1 (2014): 129–52.

99 Beatriz Kira, Vikram Sinha, and Sharmada Srinivasan, 'Regulating Digital Ecosystems: Bridging the Gap between Competition Policy and Data Protection', *Industrial and Corporate Change* 30, no. 5 (October 2021): 1347, https://doi.org/10.1093/icc/dtab053.

100 OECD, 'Abuse of Dominance in Digital Markets'.

intermediaries. The EU's Digital Markets Act (DMA) and Section 19a of the German Competition Act (GWB) regarding abusive conduct of undertakings of paramount significance for competition across markets provide models for the type of ex-ante rules.

5. *Challenges in Assessing Market Power*: The unique dynamics of multi-sided markets pose challenges for traditional methods of assessing market power and dominance. This issue is explicitly addressed in German law (Sections 18(2a) and 18(3a) of the GWB) but not in Indonesian legislation.

6. *Data Protection and Competition Law Intersection*: The study highlights the need for a balanced approach in addressing the intersection of data protection and competition law, as exemplified in the EU's approach to the Facebook case.

Based on these findings, the study recommends that Indonesia consider

(i) Expanding KPPU's jurisdiction to assess exploitative anticompetitive abuse related to personal data collection.
(ii) Developing clear thresholds for excessive data collection in the context of abuse of dominance.
(iii) Assessing obligations for sharing indispensable inputs (especially consumer personal data) from both consumer protection and competition law perspectives.
(iv) Clarifying the relationship between decisions of the data protection authority and KPPU to avoid contradictory interpretations of data protection law in competition cases.

These findings and recommendations highlight the necessity for Indonesia to develop its competition law framework in order to address the specific challenges of digital markets, particularly with regard to data-driven market dominance and the interrelationship between competition and data protection concerns.

4. LIMITATIONS AND FURTHER STUDY

This paper does not intend to tackle all possible new theories of harm in the context of abuse of dominant behavior in digital markets. It is limited to the issues identified in the EU General Court judgment in the case of *Google Search*, the *Facebook/Meta Case* of the German *Bundeskartellamt*, and the recent judgment of the ECJ regarding this case. Furthermore, although this research broadly touches on the term big data and how it can be used for varied purposes during business, this paper discussion eventually boils down to a single type of big data, namely, consumer personal data. The comparison study in this paper is also limited by the lack of case law from Indonesian competition law. That prevents the authors from fully understanding how KPPU, or the Indonesian competition law enforcement, would handle cases stemming from the digital market. Instead, the comparison study to the EU was mainly done by comparing the existing regulations that "could possibly be used" by KPPU to cases inspired by EU territory disputes.

Further studies could be done in a few areas:

1. More comprehensive research on the types of big data employed by undertakings in more varied categories of relevant markets,
2. continued study on consumer personal data protection after the Indonesian bill on consumer personal data protection is promulgated and its relevance to the findings in this academic paper,
3. research on the compatibility between the legislative purposes of the Private Data Protection Act and a future Indonesian market regulation similar to the EU DMA, and
4. continued study on whether it is possible to involve KPPU in exploitative abuse related to consumer personal data collection by business undertakings, also in the interest of the protection of privacy of consumers.

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All authors in this research have contributed to completing this paper. All authors are responsible for conducting an in-depth study of the EU competition law, the new digital market regulation, and personal data protection developments in Europe and Indonesia. All authors have read and approved the final manuscript.

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