
The Intersection Between Data Privacy and Competition Law in Zero-Price Market-Based Digital Platforms

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ABSTRACT

In the digitalization era, business actors' motives to achieve a dominant position are increasingly diverse, especially in the technology sector. One of them is establishing a zero-price market-based service to attract many consumers, who later uses its consumers' personal data to reap profits and build barriers to market entry for its competitors. This paper discusses how competition law intersects with data privacy in the digital era, the relevance of the dominant position provisions in Law No. 5 of 1999 in the digital era, and the preparation for establishing the new Indonesian competition law in the digital era. The research results of this paper show that in the digital age, business competition law, and personal data protection can no longer be separated because many business actors use personal data to conduct unfair business competition. Therefore, establishing new Indonesian competition law in the digital era becomes urgent.

Keywords: competition law, data privacy, digital age, dominant position, zero-price market-based.

INTISARI

Dalam era digitalisasi, modus pelaku usaha, terkhususnya bidang teknologi, untuk dapat meraih posisi dominan semakin beragam. Salah satunya dengan membentuk layanan berbasis *zero-price market* agar menarik banyak konsumen yang mana nantinya mereka menggunakan data pribadi para konsumennya untuk meraup keuntungan serta membangun hambatan untuk masuk pasar bagi pesaingnya. Tulisan ini membahas mengenai bagaimana persimpangan hukum persaingan usaha dengan perlindungan data pribadi di era digital, relevansi ketentuan posisi dominan dalam UU No. 5 Tahun 1999 di era digital, dan persiapan pembentukan Undang-Undang Persaingan Usaha di era digital. Hasil penelitian dari tulisan ini menunjukkan bahwa di era digital hukum persaingan usaha dengan perlindungan data pribadi tidak lagi dapat dipisahkan sebab banyak pelaku usaha menggunakan data pribadi sebagai sarana melakukan persaingan usaha tidak sehat. Maka dari itu, hal ini menjadi urgensi pembentukan Undang-Undang Persaingan Usaha di era digital.

Kata Kunci: era digital, perlindungan data pribadi, persaingan usaha, posisi dominan, *zero-price market*.

INTRODUCTION

The digitalization age, where most people use digital systems to support their daily activities, has brought significant changes.¹ One of these changes is the rise of digital platforms that change people's habits from what used to prioritize physical interactions to interactions without physical meetings and without borders.² This change brings new issues, especially in the utilization of consumers' personal data to improve business services, which opens a new dimension of unfair business competition.³

This trend in the digitalization of the economy has triggered market control by utilizing its consumer's personal data.⁴ The United States has faced cases where personal data has become one of the new modes for a company, especially big tech companies, to abuse a dominant position. These cases include *HiQ Labs, Inc. v. LinkedIn Corp.* and *Klein v. Facebook, Inc.*⁵

The flow of the relationship between market dominance and market utilization commonly carried out by big tech companies is as follows: big tech companies with a dominant position collect a large amount of personal data. The greater amount of data they gather, the more proficient they will become at "profiling" an individual to increase the market attractiveness of their services and later offer the "profiling" results to third parties, such as advertisers, political parties, etc. The more individuals are attracted to their services, the fewer individuals will be attracted to their services. The more individuals attracted to their services, the fewer individuals will leave them because there are no similar services available in the market that can provide similar experiences. This potentially stifles innovation and creates barriers to entry for competitors to enter the market.⁶ This flow is called data network effects.⁷

In this case, big tech companies generally do not charge users to use the services they provide or so-called zero-price markets. Therefore, when big tech companies collect a large amount of personal data of their users, it is difficult to prove that their dominant position has been abused. This is because users only feel the impact of the increasing quality of services from big tech

¹Musnaini, *Digital Business* (Pena Persada 2020), 2.

²E Brynjolfsson and A McAfee, *The Second Machine Age: Work, Progress, and Prosperity in a Time of Brilliant Technologies* (WW Norton & Company, 2014), 6.

³Ioanna D. Constantiou, Attila Márton and Virpi Kristiina Tuunainen, 'Digitization and the New Dimensions of Competition: The Case of Digital Platforms in the Sharing Economy' [2017] Conference: 33rd Colloquium of the European Group of Organization Studies (EGOS) 1, 2.

⁴Privacy International, *Personal Data and Competition: Mapping perspectives, Identifying Challenges and Enhancing Engagement for Competition Regulators and Civil Society* (Privacy International, 2022), 12.

⁵Sammi Chen, 'The Latest Interface: Using Data Privacy as a Sword and Shield in Antitrust Litigation' [2023] 74 *Hastings Law Journal* 551, 551.

⁶Privacy International, *Personal data and Competition: Mapping perspectives, Identifying Challenges and Enhancing Engagement for Competition Regulators and Civil Society* (Privacy International, 2022), 15.

⁷Subhangi Heda and Sakhi Shah, 'Exploring the Intersection of Data Protection and Competition Law' [2021] *Academic Society for Competition Law (ASCOLA) Conference* 1, 16.

companies that consistently provide relevant things to their users for free. However, on the other hand, these big tech companies have created barriers to entry for their competitors.

In Indonesia, the regulation of business competition law is primarily governed by on the Prohibition of Monopolistic Practices and Unfair Business Competition (Law No. 5 of 1999). However, a critical observation reveals that this law does not currently include provisions that specifically address the intersection between personal data and business competition. This is a significant limitation, considering the increasing importance of data as a strategic asset and the potential misuse of data in unfair business competition practices. While Law No. 5 of 1999 has undergone amendments through Government Regulation in Lieu of Law No. 2 of 2022, which subsequently became law through Law No. 6 of 2023 (Job Creation Law), these changes predominantly focus on criteria for sanctions, types of sanctions, the number of fines, and the examination of objections and cassation of decisions by the Komisi Pengawas Persaingan Usaha, the Indonesian Business Competition Supervisory Commission, (KPPU).⁸ Unfortunately, no specific provisions have been introduced regarding using personal data as an instrument in unfair competition practices.

The absence of provisions that address the intersection between personal data and business competition in the existing legal framework poses a significant challenge. As data-driven practices and digital technologies continue to reshape the business landscape, it is crucial to have regulations that effectively govern the use of personal data in competition-related activities. Such regulations would provide clarity, guidance, and safeguards to prevent unfair competition practices that exploit personal data. This gap in the law not only leaves room for potential violations but also hampers the ability of regulatory authorities to effectively address the complex issues arising from the intersection of personal data and unfair competition.

Regarding this problem, the author will discuss (i) how are the intersection of business competition law with the protection of consumer's personal data related to the dominant position of digital platforms based on zero-price market-based?; (ii) how is the relevance of the dominant position provisions of Law Number 5 of 1999 with the practice of abuse of the dominant position of digital platforms based on the zero-price market-based?; and (iii) does Indonesia need to renew the law on business competition in order to adapt to the digital age?

METHODS

This research was conducted using the normative juridical method. This research was conducted in the form of library research. This literature research aims to obtain theories, applicable rules, development of research objects, and other supporting information to solve the main problem.

⁸Government Regulation in Lieu of Indonesia Number No. 2 of 2022, s. 118.

This research uses prescriptive research typology, which means that the author tries to find suggestions related to the issues that have been described.

Since this research is in the form of a literature study, the data used is secondary data. This data is not obtained directly from field research but from library sources. These literature sources consist of primary and secondary legal materials. Primary legal materials include laws and regulations, particularly Law No. 5 the Year 1999 and derivative regulations by the Komisi Pengawas Persaingan Usaha as well as laws and regulations of other countries as comparative materials. Moreover, the research also uses cases that have occurred in other countries as well. Meanwhile, secondary legal materials include books, articles, internet sources, journals, modules, and others. Then the results of this research are in the form of a descriptive report in which the author describes the analysis of the formulation of related problems.

RESULT AND DISCUSSION

1. The Intersection of Competition Law with Personal Data Protection Related to the Dominant Position of Digital Platforms on Zero-Price Market-Based

The era of economic digitalization has resulted in a rapid surge in the processing and gathering of personal information. Nearly every online transaction necessitates collecting personal data for aggregating, analyzing, and exchanging it for future utilization. Nowadays, personal data is so valuable to many companies, especially those in the technology sector, that most companies do not charge users when using the services they provide so that users can easily access them. It can be seen that personal data has monetary value to technology companies.⁹

With this digitalization, business competition and personal data protection have a complementary relationship. There are two theories regarding the relationship between business competition and personal data protection: separation theory and integration theory. Separation theory proposes that personal data protection and competition law should be separated. This theory also encourages the separation of competition and personal data protection authorities. It argues that competition law addresses the anti-competitive behavior of businesses for the welfare of consumers, while personal data protection protects consumers in the collection and processing of personal data.¹⁰ In contrast, the integrative theory argues that competition should consider personal data protection as a factor to be considered in determining activities that cause unfair competition. Most practitioners accept this theory. In the United States, the integrative theory has been accepted by its consumer protection agencies, namely the Federal Trade Commission and

⁹Francisco Costa-Cabral and Orla Lynskey, 'Family Ties: The Intersection Between Data Protection and Competition in EU Law' [2017] 54 Common Market Law Review 1, 2.

¹⁰Erika M. Douglas, 'The New Antitrust/Data Privacy Law Interface' [2021] 130 The Yale Law Journal 647, 648.

the United States Department of Justice, and has been applied in handling corporate merger cases.¹¹

In conducting their business activities, big tech companies focus on collecting and processing their users' personal data rather than concentrating on charging their users or the so-called zero-price market. However, behind the implement a zero-price market, there are two motivations of business actors, such as data acquisition, where business actors collect large amounts of personal data of their users to improve the quality of their services, develop new products, and even sell user data to third parties. Another purpose is advertising, where businesses use the collected user's personal data for advertising purposes.¹²

In addition, this zero-price market-based can also cause data network effects. A simple example of data network effects is when many users use social media, where the more users who come, the more data is collected and will be processed. These data are used to generate a lot of profits for advertisers as well as algorithms to formulate personalization that provides convenience for users by showing them what they need. The result of this personalization is what makes social media users want to continue using the service.¹³ Finally, big tech companies can dominate the market and even achieve a dominant position, which will form barriers to entering the market for other competitors.¹⁴

The existence of network effects data should make personal data protection a consideration related to investigating whether or not there is an abuse of the dominant position. This is due to the impact of data network effects. Is it the ability of business actors to win the competition in the market, or is there an indication of unfair business competition? Given that network effects data is vulnerable to hindering real or potential competitors in the market and also vulnerable to consumer exploitation. Interestingly, the exploitation of consumers is no longer based on pricing, but on consumers' personal data collected and processed by business actors.

There is a case in the United States regarding network effects data being misused to create unfair business competition. This case is the Klein v. Facebook case in 2020. A class action regarding monopolistic practices in the social media and social network market sued Facebook.¹⁵ In this case, the plaintiff acknowledged that users had willingly agreed to provide personal information and receive customized advertisements on Facebook in return for free access to the platform.. The plaintiff claimed that Facebook had engaged in two anti-competitive schemes. First,

¹¹*Ibid.*, 651.

¹²Subhangi Heda and Sakhi Shah, 'Exploring the Intersection of Data Protection and Competition Law' [2021] Academic Society for Competition Law (ASCOLA) Conference 1, 11.

¹³Katharine Kemp, 'Concealed Data Practices and Competition Law: Why Privacy Matters' [2020] European Competition Journal 1, 21.

¹⁴Justus Haucap, 'Competition and Competition Policy in a Data-Driven Economy' 54 *Intereconomics: Review of European Economic Policy* 201, 207.

¹⁵Sammi Chen, 'The Latest Interface: Using Data Privacy as a Sword and Shield in Antitrust Litigation' [2023] 74 *Hastings Law Journal* 551, 575.

Facebook allegedly "consistently and intentionally deceived its users about the use of their personal data." which permits third parties to monitor users' purchases on external websites and encourages users to share those purchases with their Facebook friends. According to the plaintiffs, this grants Facebook unwarranted dominance over the social media and networking market, enabling them to exert unauthorized control. This is unfortunate because at the beginning of the social media era, Facebook guaranteed stricter privacy protections than its competitors. This branding made social media users choose Facebook over its competitors, such as MySpace.¹⁶

In the second scheme, According to the plaintiffs, Facebook allegedly exploited the personal data it acquired through manipulative practices on its users to identify emerging competitors, subsequently acquiring, imitating, or shutting down their businesses, thus effectively eliminating competition from the market. For example, in 2013, Facebook acquired Onavo. The acquisition was done so that Facebook could use Onavo's data to identify and target competitors who would be completely eliminated from competing in the market. Ultimately, the court ruled that Facebook's actions constituted an abuse of its dominant position in the social media and networking market.¹⁷

Upon further examination, the *Klein v. Facebook* case shows that Facebook has gained its dominant position due to its innovative ability to create a platform that protects its user's personal data and the data network effects that make users reluctant to stop using it. Having achieved such a position, Facebook abused it to form huge barriers to market entry and eliminate its competitors in the market. This proves that personal data has become one of the new means for business actors to abuse a dominant position. In addition, it can be concluded that there is a shift in the meaning of losses experienced by consumers when business actors abuse a dominant position, from what used to be monetary losses due to arbitrary pricing to losses in the form of misuse of personal data that violates the right to privacy of its users.

Another case is *LinkedIn v. HiQ Labs*. In this case, LinkedIn is a professional networking service that provides services for its users to offer jobs and build connections between users. Meanwhile, HiQ Labs, a data analytics company that uses automated bots to retrieve publicly available information from the LinkedIn website to build a database of employees' skills and work history. LinkedIn responded by subpoenaing HiQ Labs to desist from such actions, arguing that the data retrieval violated the platform's terms and conditions of use and jeopardized user privacy.¹⁸

HiQ Labs then filed suit, claiming that LinkedIn's actions constituted an abuse of market power that created unfair competition and that HiQ Labs had a legitimate business interest in accessing

¹⁶*Ibid.*, 576.

¹⁷*Ibid.*, 577.

¹⁸*Ibid.*, 569.

public data on LinkedIn's website. The Ninth Circuit United States ruled in favor of HiQ Labs, stating that LinkedIn's efforts to block HiQ Labs' access to the data would likely cause unfair competition and that HiQ Labs had a legitimate business interest in accessing the data.¹⁹

The LinkedIn v. HiQ Labs case shows that even when businesses argue to protect the personal data of their users, they can still be penalized for anti-competitive practices. Meanwhile, the Klein v. Facebook case shows that businesses that misuse the personal data of their users can also be indicated as committing anti-competitive practices. Therefore, it can be concluded that personal data in the digitalization age significantly influences unfair business competition.

2. Relevance of the Provisions of Law No. 5 of 1999 to the Practice of Abuse of Dominant Position of Digital Platforms on Zero-Price Market-Based

A dominant position is where a business actor is superior in the relevant market and to its competitors. In this case, the business actor has market power that can make it take action without influence from its competitors.²⁰ As per Article 1, paragraph 4 of Law No. 5/1999, a dominant position is characterized as a scenario where a business entity either lacks competitors or holds a superior position compared to its competitors in the market. This superiority is determined by factors such as market share, financial capacity, access to supplies or sales, and the ability to regulate the supply or demand of goods or services.

Law No. 5 of 1999 does not prohibit business actors from occupying a dominant position. However, it becomes prohibited if a business actor abuses its dominant position as stipulated in Article 25 of Law No. 5 of 1999. According to the provision, it is forbidden for business entities to abuse their dominant position, whether through direct or indirect means. This can include actions such as (a) imposing trade conditions that prevent or impede consumers from accessing competing goods or services, in terms of both price and quality, (b) restricting the progress of the market and technology, or (c) obstructing potential competitor business entities from entering the relevant market. Then, the measure of a business actor having a dominant position is when one business actor controls 50% of the relevant market share or two or three groups of business actors control 75% of the relevant market share.²¹

Abuse of a dominant position is prohibited because it has a negative impact, both on consumers and on the competition. The impact on consumers is the loss of opportunity for consumers to get lower prices, the loss of opportunity to get many choices of services at the same price, limited

¹⁹*Ibid.*, 571.

²⁰Andi Fahmi Lubis, *et. al.*, *Hukum Persaingan Usaha* (Komisi Pengawas Persaingan Usaha, 2017), 233.

²¹Law Of The Republic Of Indonesia Number 5 Year 1999 Concerning Prohibition Of Monopolistic Practices and Unfair Business Competition, s 25 (2).

alternative choices for consumers, and intangible losses for consumers.²² Meanwhile, the impact on competition is that a business actor that holds a dominant position can provide significant barriers to entry into the market and can even exclude its competitors from the market.²³

Concerning proving the abuse of dominant position, the KPPU uses three stages, which are:²⁴

- a) Defining the relevant market: The KPPU must clarify the boundaries of the market, both geographic and product, in which the company suspected of having a dominant position operates. This is important because competition in different markets can affect the analysis of the dominant position and its abuse.
- b) Proving the dominant position in the relevant market: KPPU must gather sufficient evidence to show that the company has the ability to control or influence the price, production, or quality of products and services provided in that market. This second stage of proof refers to Article 25 paragraph (2) of Law No. 5 of 1999.
- c) Proving whether the business actor that has a dominant position has abused the dominant position: KPPU must gather sufficient evidence to show that the company has committed prohibited practices in utilizing its dominant position in the market, such as restricting competitors' access to the market, setting unreasonable prices, or exploiting consumers. This third stage of proof refers to Article 25 paragraph (1) points a, b, or c of Law No. 5 of 1999.

In order to be said that there is a violation of a dominant position, the three stages above must be fulfilled as a whole.

However, from these stages, the indication of abuse of the dominant position seems to be based on high or low prices that cause harm to consumers. As explained earlier, in the digitalization age, where many big tech companies are developing, indications based on price are no longer relevant. Since the business model they use is generally free of charge, consumers must agree to collect and process their personal data in return.²⁵ This is demonstrated when users do not consent to the collection and processing of their personal data, users cannot access the services provided.

KPPU has investigated alleged anti-competitive violations by big tech companies, which was Google, in 2022. KPPU investigated Google's policy of requiring the use of Google Pay Billing (GPB), a method of purchasing digital services in-app purchases, for applications downloaded through the Google Play Store. Google charges a service fee of 15-30% for the use of GPB. This is clearly burdensome for app developers, considering that the fee is only below 5% if they use

²²Regulation of the Komisi Pengawas Persaingan Usaha on the Guideline of Article 25 on the Prohibition of Abuse of Dominant Position Pursuant to Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, 19.

²³*Ibid.*, 18.

²⁴*Ibid.*, 19.

²⁵Katharine Kemp, 'Concealed Data Practices and Competition Law: Why Privacy Matters' [2020] European Competition Journal 1, 3.

other payment methods. KPPU also found that Google entered into a tying agreement by requiring app developers to bundle Google Play Store and Google Play Billing. In addition, KPPU also found that Google only cooperated with one payment gateway provider for in-app purchases, while several other providers did not get the same opportunity to negotiate payment methods.²⁶

The investigation into Google by the KPPU is still based on prices that are too high for consumers, making it burdensome. So far, none of the KPPU investigations have been based on the misuse of personal data collected by big tech companies. Therefore, KPPU should improve and Law No. 5 of 1999 should be evaluated and renewed following the development of this digitalization age.

Furthermore, KPPU has also tried other big tech companies in Indonesia, namely Grab in Case Number 13/KPPU-I/2019. KPPU has sanctioned PT Solusi Transportasi Indonesia (GRAB) and PT Teknologi Pengangkutan Indonesia (TPI) for violating Article 14 and Article 19(d) of Law No. 5/1999 related to the provision of the Grab App application in several regions in Indonesia. This case was initiated by KPPU, which considered that there was a violation of business competition through GRAB's priority orders to driver partners under TPI. In the trial, the KPPU concluded that the collaboration between GRAB and TPI aimed to dominate Indonesia's technology-based special rental transportation application market, which decreased the number of partners and orders from non-TPI partner drivers. The KPPU also found discriminatory practices committed by GRAB and TPI against individual partners. With these considerations, GRAB and TPI are proven to have violated Articles 14 and 19 letter "d", and are subject to fines in accordance with the decision of KPPU.²⁷

In response to the decision made by KPPU, Grab's attorney strongly objected and criticized the penalization imposed on Grab and TPI (PT Teknologi Pengangkutan Indonesia). According to Grab's attorney, the decision lacked clear legal reasoning and did not align with the factual evidence presented during the trial. The attorney expressed concerns about the potential negative impact this decision might have on foreign investors' willingness to invest in Indonesia.²⁸ With

²⁶Komisi Pengawas Persaingan Usaha, 'KPPU Lakukan Penyelidikan atas Google untuk Dugaan Praktik Monopoli dan Persaingan Usaha Tidak Sehat' (Komisi Pengawas Persaingan Usaha, 15 September 2022) <<https://kppu.go.id/blog/2022/09/kppu-lakukan-penyelidikan-atas-google-untuk-dugaan-praktik-monopoli-dan-persaingan-usaha-tidak-sehat/>> accessed 17 April 2023.

²⁷Komisi Pengawasan Persaingan Usaha vs. PT Grab Teknologi Indonesia & PT Teknologi Pengangkutan Indonesia, Case Number 13/KPPU-I/2019, 573.

²⁸Yuni Astutik, 'Runutan Kasus Grab dan TPI di KPPU' (Komisi Pengawas Persaingan Usaha, 2 Juli 2020) <<https://www.cnbcindonesia.com/tech/20200703181036-37-170110/runutan-kasus-grab-tpi-di-kppu>> accessed 10 June 2023.

this defense, Grab's attorney filed an objection to the KPPU's decision. The case was eventually won by Grab and TPI at the objection and cassation levels.²⁹

In this case, with the defense of Grab's attorney and the inability of the KPPU to impose sanctions, it can be concluded that there needs to be more clarity in Law No. 5 of 1999, especially when taking action against big tech companies such as Grab. Therefore, an update is needed in Law No. 5 of 1999 which includes data as one of the instruments to cause unfair business competition. With such a regulation, KPPU can investigate how partner data in Grab is used and processed to cause unfair business competition. By doing so, the legal basis becomes clear.

3. The Urgency of Renewing the Competition Law in the Digital Age

The last amendment to Law No. 5 of 1999 was through Government Regulation in Lieu of Law No. 2 Year 2022, enacted as law through Law No. 6 Year 2023 (Job Creation Law). In the Job Creation Law, the changes regarding Law No. 5 of 1999 are related to the provisions of business competition procedural law. The amendment regulates the absolute authority regarding the objection of the KPPU's decision which has been transferred from the district court to the commercial court. There were also amendments regarding the provision of sanctions in business competition. There were no changes that made competition law adaptable to the digitalization era.³⁰

The derivative regulation of the Job Creation Law, specifically Government Regulation No. 44 of 2021, changes Law No. 5 of 1999. However, it is important to note that this regulation primarily focuses on the authority of the Indonesian Commission for the Supervision of Business Competition (KPPU). It addresses aspects such as the criteria for sanctions, types of sanctions, the amount of fines, as well as the examination of objections and cassation of KPPU decisions.³¹ Unfortunately, Government Regulation No. 44 of 2021 does not encompass provisions that specifically govern the adaptation of business competition in the era of globalization. This is a significant drawback as it highlights a notable gap in the regulatory framework.

In facing the digitalization age, where the use of personal data, especially for big tech companies, is related to the abuse of its dominant position, Indonesia should learn from other countries responses. In this case, the government and KPPU as the competition authority, must immediately update the competition law to adapt to the digital era. Reflecting on other countries,

²⁹PT Grab Teknologi Indonesia & PT Teknologi Pengangkutan Indonesia vs. Komisi Pengawasan Persaingan Usaha, Case Number 468/Pdt.P /2020/PN Jkt Sel, 482. Also see PT Grab Teknologi Indonesia & PT Teknologi Pengangkutan Indonesia vs. Komisi Pengawasan Persaingan Usaha, Case Number 485 K/Pdt.Sus-KPPU/2021, 8.

³⁰Government Regulation in Lieu of Indonesia Number No. 2 of 2022, s 118.

³¹Government Regulation Of The Republic Of Indonesia Number 44 Of 2021 Concerning The Implementation Of The Prohibition Of Monopolistic Practices And Unfair Business Competition, s 2.

several important provisions should be considered in updating the competition law. These include evaluating the principles of business competition, collaboration between personal data protection and business competition authorities, and re-regulating competition law by considering personal data.

First, the government must evaluate the principles of business competition in Law No. 5 of 1999. Based on Article 3 of Law No. 5 of 1999, one of the objectives of establishing business competition law is to increase economic efficiency to improve people's welfare. Law No. 5 of 1999 still indicates people's welfare through high and low selling prices. This objective should be emphasized that people's welfare is not only indicated by price, but more broadly, including individual freedom, justice, democracy, and even other constitutional rights such as the right to privacy.³² Considering the proliferation of digital platforms that are generally zero-price markets.

In India, the Competition Commission of India (CCI), through a market study conducted on telecommunications in India, recognized that personal data is one of the factors of non-price competition. CCI also stated that abuse of a dominant position could take the form of a decrease in the protection of personal data. Because of this decrease, consumer welfare is reduced.³³

In order to address the evolving dynamics of business competition, it is crucial to make regulatory changes by amending the principles outlined in Law No. 5 of 1999. These changes should acknowledge that competition in the business landscape is not solely dependent on price, but also encompasses non-price factors such as data. To effectively handle cases related to non-price competition, it is recommended to establish specific guidelines and regulations within government legislation or regulations set forth by the KPPU. By introducing these regulatory adjustments, the legal framework can adapt to the changing nature of competition, ensuring fair and transparent practices in the business sector.

Second, enhancing the collaboration between the personal data protection authority and the competition authority is essential for achieving effective regulation of the digital market. One of the key measures in this regard is to foster increased collaboration and cooperation between these two entities. Several countries have already implemented collaboration between the personal data protection authority and the business competition authority as part of their efforts to regulate the digital market optimally. The collaboration is carried out through a joint report in which the competition authority considers a business actor's data collection and processing process to determine whether it causes market entry barriers. For example, the French and German competition authorities issued a joint report on competition and personal data, explaining that "data collection can generate entry barriers when new competitors cannot collect

³²Subhangi Heda and Sakhi Shah, 'Exploring the Intersection of Data Protection and Competition Law' [2021] Academic Society for Competition Law (ASCOLA) Conference 1, 24.

³³PTI, 'Data Privacy Can Take Form Of Non-Price Competition: CCI Study' (The Economic Times, 26 January 2021) <<https://economictimes.indiatimes.com/industry/telecom/telecom-news/data-privacy-can-take-form-of-non-price-competition-cci-study/articleshow/80466660.cms>>, accessed 18 April 2023.

data or purchase access to the same type of data, in terms of volume and/or variety, as established companies." Similarly, Singapore's competition authority has proposed changes to its guidelines to clarify that data can be an entry barrier in a market.³⁴ However, in Indonesia, this kind of collaboration in the investigation process has yet to be implemented.

The regime of Law No. 27 of 2022 on Personal Data Protection (PDP Law) stipulates that there will be an institution that will implement and supervise personal data in Indonesia.³⁵ If the personal data protection institution has been established, KPPU should immediately collaborate with the institution to prevent business competition using data as an instrument. Implementing collaboration between these authorities in Indonesia would be beneficial in several ways. It would promote a cohesive and coordinated approach toward addressing data privacy and market competition issues. Furthermore, it would facilitate the exchange of expertise and knowledge between the two entities, enhancing their ability to identify and address potential violations or anti-competitive practices that may arise from the use of personal data. Ultimately, this collaboration would contribute to a more robust regulatory framework that safeguards both consumer privacy and fair market competition in the digital era.

Third, re-evaluate and renew competition law by considering personal data protection aspects. This has been done in China's Anti-Monopoly Law, where in Article 9 of China's Anti-Monopoly Law, it is stipulated that "*companies shall not use data, algorithms, technology, capital gains, and brokerage rules to carry out monopolistic acts prohibited by this Law*".³⁶ Apart from China, something similar has been done in Germany. In 2021, Germany amended the German Competition Act, the tenth amendment of which is often referred to as the Gesetz gegen Wettbewerbsbeschränkungen Digitalization Act.³⁷ Article 18 paragraph (3) of the GWB Digitalization Act states that in determining a dominant position, competition authorities must also consider financial strength and access to data relevant to competition.³⁸ Not only that, Article 19 paragraph (2) number 4 regulates that one of the activities of abuse of dominant position is that business actors are prohibited from refusing to provide access to data, networks, or other infrastructure that is objectively necessary for other business actors to operate in upstream or downstream markets. If such refusal can threaten to eliminate effective competition in the market, it will be considered a violation of the law. However, if there is an objective

³⁴Erica M. Douglas, *Digital Crossroads: The Intersection of Competition Law and Data Privacy* (Beasley Law School, 2021), 79.

³⁵Law Of The Republic Of Indonesia Number 27 Of 2022 on Personal Data Protection, s 58.

³⁶Glenn Wijaya 'Mempersiapkan UU Persaingan Usaha di Era Digital: Perbandingan antara Indonesia dengan Tiongkok' (Klik Legal, 21 July 2022) <<https://kliklegal.com/mempersiapkan-uu-persaingan-usaha-di-era-digital-perbandingan-antara-indonesia-dengan-tiongkok/>> accessed 16 April 2023.

³⁷Gibson Dunn, "'Digitalization Act': Significant Changes to German Antitrust Rules," (Gibson Dunn, 28 January 2021) <<https://www.gibsondunn.com/digitalization-act-significant-changes-to-german-antitrust-rules>> accessed 17 April 2023.

³⁸German Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), s 18 (3).

justification for the refusal, for example, to maintain data security or privacy, then the action is not considered unlawful.³⁹

Indonesia should immediately follow the example of China and Germany in regulating competition law that considers aspects of personal data protection. Indonesia can amend Law No. 5 of 1999 by changing the principle as China did. The amendment is that business actors are prohibited from using data as an instrument to conduct unfair business competition. Then the regulation as in the GWB Digitalization Act can be regulated in derivative regulations, such as government regulations or KPPU regulations. The derivative regulations will regulate how to handle unfair business competition that uses data as an instrument.

CONCLUSION

In this digitalization age, data is the main commodity in the economic field. This also affects the business model of businesses, especially big tech companies. Most big tech companies implement zero-price market-based services, but in return, they collect their consumers' personal data to reap profits. This collection of personal data is a source of new challenges in which the collection of personal data can enable businesses to achieve a dominant position. Still, at the same time, collecting personal data can lead to abusing a dominant position. As a result, there is harm to the competitive environment in the form of huge barriers to entry for its competitors and also harm to consumers in the form of exploitation of personal data, as happened in the cases of *HiQ Labs, Inc. v. LinkedIn Corp.* and *Klein v. Facebook, Inc.* in the United States.

In light of emerging challenges, the dominant position provisions outlined in Law No. 5 of 1999 of Indonesia have not yet encompassed the issue of collecting personal data as an abuse of dominant position. This becomes evident when examining cases involving big tech companies that the KPPU has addressed. In its decisions regarding Google's Policy on GPB, KPPU's focus has primarily been on the presence of price competition. KPPU has yet to investigate whether unfair business competition involving the use of personal data as an instrument has taken place. Similarly, in the case of GRAB and TPI concerning GRAB's prioritization of orders to driver partners under TPI, GRAB's legal representatives argued that KPPU's decision lacked clarity. This lack of clarity is linked to the legal gap concerning unfair business competition that utilizes data as its instrument.

In order to address the challenges posed by the digital era, Indonesia must undertake a comprehensive evaluation and update of Law No. 5 of 1999. The experiences of countries like India, France, Germany, Singapore, and China, which have already revised their anti-competition laws to suit the digital landscape, can provide valuable insights for Indonesia's reform efforts. To ensure the effectiveness of the reform, it is crucial to consider changing the

³⁹German Act against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*), s 19 (2).

fundamental principles enshrined in Law No. 5 of 1999. Specifically, the principle that business competition is not solely based on price competition should be expanded to encompass non-price competition, focusing on regulating the prohibition of using data as an instrument for unfair business competition. These changes would address the evolving dynamics of the digital market, where data has become a significant driver of competition. To facilitate the necessary adjustments, the government can introduce new provisions through government regulations or regulations by KPPU. These regulations would outline specific measures and guidelines governing the use of data as an instrument in unfair business competition practices.

Through the renewal of Law No. 5 of 1999 to align with the developments of the digital era, Indonesia aims to effectively address future similar cases while promoting economic efficiency and improving the welfare of its people, as outlined in Article 3 of Law No. 5 of 1999. By updating the competition law framework, Indonesia can proactively anticipate and tackle the unique challenges the digital economy presents. This modernization will enable the country to adapt to rapidly evolving market dynamics, foster fair competition, and drive economic growth.

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