

Unveiling The Dataopolies through Indonesia and The United Kingdom's Eyes

Valencia Ardella

Student of International Business Law, Prasetiya Mulya University
BSD City Kavling, Jl. Edutown Jl. BSD Raya Utama No.1, BSD City, Kec. Pagedangan,
Kabupaten Tangerang, Banten 15339

Corresponding author: valenciaardella.bus@gmail.com

ABSTRACT

Digitalization has not only brought the advantages, but also drawbacks. One of the drawbacks can be in the form of potential challenges to competition law that was established in the conservative era. The United Kingdom is one of the states that has been alert to the issue of monopoly in the digital era. Therefore, the paper will take a comprehensive comparison to measure Indonesia's and the United Kingdom's measures in preparing its competition authorities to embattle data-driven monopoly. The outcome of the paper will be a reflection to be more alert to drawbacks in the digital market, especially data-driven monopoly.

Keywords: Data Monopoly, KPPU, Digital Market

INTISARI

Digitalisasi tidak hanya membawa banyak keuntungan, tetapi juga membawa kelemahan. Salah satu kelemahannya dapat berupa dalam bentuk sebuah tantangan yang potensial terhadap hukum persaingan usaha, yang pada kalanya dibentuk pada era konservatif dan tradisional. Negara Inggris merupakan salah satu negara yang telah mewaspadaai isu monopoli pada era digital. Oleh karena itu, makalah ini akan mengambil studi dari perbandingan komprehensif untuk mengukur langkah-langkah Negara Indonesia dan Negara Inggris dalam mempersiapkan otoritas persaingan usahanya dalam memerangi potensi monopoli berbasis data. Hasil dari pembuatan makalah ini akan menjadi refleksi untuk lebih waspada terhadap berbagai kelemahan di pasar digital, khususnya monopoli yang berbasis data.

Kata Kunci: Monopoli Data, KPPU, Pasar Digital

INTRODUCTION

Data is the new oil. At current times, business actors with Big Data—dataset that is so large and complex that cannot be stored or processed using traditional database software¹, and Big Data Analytics—a complex process of examining the big data to uncover information such as hidden patterns, correlations, market trends and customer preferences that can help corporates make personalized business decisions², will allow them to enhance information flows; access to

¹ Per Christensson, 'Big Data Definition' (*Techterms.com*, 2013) <https://techterms.com/definition/big_data> accessed 3 July 2022

² Wesley Chai, Mark Labbe and Craig Stedman, 'What Is Big Data Analytics And Why Is It Important?' (*SearchBusinessAnalytics*) <<https://www.techtarget.com/searchbusinessanalytics/definition/big-data-analytics>> accessed 3 July 2022

markets;³ building Internet Protocol—a unique identifier of a system not the protocol itself⁴; build personalized new markets and products.⁵ Data and algorithms enable companies to predict market trends, map consumers, and adjust pricing strategies.⁶ Access and control of consumer data plays an important role in providing market power to digital platforms.⁷ Business actors in need of economic benefits might bespoken data to meet their aims to enlarge their market shares and market powers. Data is a strategy – it has the ability to become a monopoly tool to prevent competitors from entering the market, this is not markedly different from that of the oil monopolist in one case happened^{8,9}

Digital markets are growing rapidly nowadays as well as the anti-competitive challenges that could arise such as monopolizing the data held (hereinafter “**Dataopolies**”). We could recognize that business or private sectors are always ahead of the law. Firing spirits and taking baby steps on this concern are needed. Also, regulation that should not be forgotten on entire industries is anti-monopoly.

Therefore, competent authorities observing and supervising the market competition need to direct specialized concentration on the monopoly of digital markets with the purpose to unveil or control the alleged companies in their usage of Big Data to dominate the markets and create unfair barriers-to-entry. Although we also agree not to limit innovations and commercial flows in the market, instead, regulations are made to protect consumers and business law for business actors to get a benchmark for doing something. In addition, the regulations that are made do not need to be too strict as long as the enforcement is going well. Although the novelty may bring some gaps in the laws but one thing is for sure, justice delayed is justice denied.

Therefore, this paper will research, analyze, and answer the issues, of:

1. To what extent Indonesia and United Kingdom have concerned about Dataopolies?
2. What can Indonesia learn from United Kingdom’s concerns and authorities regarding the Dataopolies?
3. What can Indonesia implement to its regulatory framework from United Kingdom’s concerns and authorities about the Dataopolies?

METHODS

³ Ariel Ezrachi and Maurice E Stucke, 'Virtual Competition' (2016) 7 JECLP 585

⁴ Per Christensson, 'IP (Internet Protocol) Definition' (Techterms.com, 2016) <<https://techterms.com/definition/ip>> accessed 3 July 2022.

⁵ Kira Radinsky, 'Data Monopolists Like Google Are Threatening The Economy' (Harvard Business Review, 2015) <<https://hbr.org/2015/03/data-monopolists-like-google-are-threatening-the-economy>> accessed 3 July 2022.

⁶ 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' (2021) 02 JPU 75, 78.

⁷ 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' (2021) 02 JPU 75, 77.

⁸ Standard Oil Co. of New Jersey v United States [1910] 221 US 1, [1911] 221 J

⁹ Kira Radinsky, 'Data Monopolists Like Google Are Threatening The Economy' (Harvard Business Review, 2015) <<https://hbr.org/2015/03/data-monopolists-like-google-are-threatening-the-economy>> accessed 3 July 2022.

This paper uses a qualitative research method by utilizing normative juridical approach and comparative legal research in order to compare issue in Indonesia and the United Kingdom and to answer the question raised in the paper. Normative juridical approach is done by doing a legal research through examining the primary sources and the secondary sources. The primary sources contain of regulations and cases, and the secondary sources contain of books, journals, videos, websites, blogs, and newspapers. The writer chooses to compare Indonesia and the United Kingdom because the latter country has welcomed a new regime in anti-trust laws in order to keep up with digital markets and its potentiality to be monopolized by the big coporates.

RESULTS AND DISCUSSION

1. Definition of Dataoppolies

Dataoppolies is a digital platform that has evolved to be a dominant ecosystem leading consumer, seller, and advertiser to be dependent upon them.¹⁰ Using the ecosystem, Dataoppolies obtained a massive volume and variety of data with high velocity making the knowledge of Big Data to be punctual for them to create a strategy with an objective on eliminating competitors and exploiting consumers,¹¹ as well as personalizing consumer trends and patterns more quickly and accurately than their smaller counterparts.¹² The degree of data occupancy can be a barrier-to-entry to the market resulting in the tribulation of the overall industry competitiveness that would then lead to a hurting economy.¹³ Ariel Ezrachi and Maurice Stucke, Digital Market Competition Experts, have warned that the potential harm of Dataoppolies can exceed those of the earlier conservative monopolies.¹⁴

Asep Ridwan, the Executive of the Indonesian Competition Lawyers Association (ICLA), said that digital platforms have not only provided many benefits to the community, but also have significant control over consumer data which possess many challenges that are not only related to personal data protection, but also to the anti-competition that can be in the form of:¹⁵

- a. The abuse of dominance such as refusal to deal, predatory pricing, exclusive dealing & loyalty discount, tying and bundling.
- b. The potential of cartels or deals.
- c. Enforcement of mergers, acquisitions, and consolidations (mergers) control, because only the mergers met certain criteria that must be reported to the competition

¹⁰ Muhammaf Rifky Wicaksono, 'Merger GoTo dan Bahaya Dataopoli' (Media Indonesia, 16 March 2022) <<https://mediaindonesia.com/opini/478375/merger-goto-dan-bahaya-dataopoli>> accessed 3 July 2022

¹¹ *Ibid*

¹² Shion Britten, 'WHAT IS DATA MONOPOLY AND SHOUD WE CARE? WITH EVERY TECHNOLOGY, THERE IS GOOD AND BAD (Beaverton Resource Guide, 1 November 2021) <<https://beavertonresourceguide.com/what-is-data-monopoly-and-should-we-care-with-every-technology-there-is-good-and-bad/>> accessed 4 July 2022

¹³ Kira Radinsky, 'Data Monopolists Like Google Are Threatening The Economy' (Harvard Business Review, 2015) <<https://hbr.org/2015/03/data-monopolists-like-google-are-threatening-the-economy>> accessed 3 July 2022.

¹⁴ *Wicaksono* (n 10).

¹⁵ Fitri Novia Heriani, 'Ini Potensi Pelanggaran Persaingan Usaha di Era Digital' (Hukum Online, 19 January 2022) <<https://www.hukumonline.com/berita/a/ini-potensi-pelanggaran-persaingan-usaha-di-era-digital-lt6006b094f0131>> accessed 4 July 2022

authority, however, generally the criteria do not include data values controlled by the parties conducting the merger.

- d. Killer Acquisition is a situation where incumbent firms acquire targets solely to discontinue the target's innovation projects in order to preempt future competition¹⁶.

Ariel Ezrachi and Maurice Stucke, Digital Market Competition Experts, have also expressed their opinions on one of the potential issues in digital markets that may arise from data-driven, *id est* behavioral discrimination, where the strategy involves firms harvesting our personal data by tracking and collecting, to identify which emotion (or bias) will prompt us to buy a product and what is the most we are willing to pay so then they can tailor their advertising and marketing to target us at critical moments with the right price and emotional pitch.¹⁷ “Companies can harm consumer even if the products they're offering are free. That's important because in today's digital economy, free is in. You don't pay money to use Google search, Maps, or Translate, but you do pay something of value, access to your personal data.” Quoted from a report done by Wall Street Journal.¹⁸

Competition authorities must accordingly devote resources to understand how the new market can significantly change our paradigm of competition. Consumers will likely experience an array of abuses from data-driven monopolies that is done by controlling key platforms (such as the operating system of smartphones), dictating, and exploiting the flow of consumers' personal data.¹⁹ In assessing mergers and monopolistic abuses, competition authorities will only picture an incompleteness of the market realities, if they consider only the traditional entry barriers and traditional network effects.²⁰ In digital markets, authorities should pay special attention to markets with such characteristics, especially when analyzing mergers and behavior involving dominant firms.²¹

Organisation for Economic Co-operation and Development (OECD) also expressed the potential competition harms a competition authorities can currently deal with:²²

- a. Excluding, such as Kill-Zone,. Kill-zone is a situation where potential companies that want to enter the market may have given up challenging certain incumbents protected by network effects and a lack of willingness (or ability) of users to coordinate on alternative products or services²³.

¹⁶ Geoffrey Parker, Georgios Petropoulos and Marshall Van Alstyne, 'Platform mergers and antitrust, Industrial and Corporate Change' (2021) 30 ICC 1307

¹⁷ Ariel Ezrachi and Maurice E Stucke, 'Virtual Competition' (2016) 7 JECLP 585

¹⁸ *What Facebook, Google and Others Can Learn From Microsoft's Antitrust Case* | WSJ (Directed by Wall Street Journal, 2019) <https://www.youtube.com/watch?v=frA5_sTj_8A> accessed 20 March 2023.

¹⁹ Ariel Ezrachi and Maurice E Stucke, 'Virtual Competition' (2016) 7 JECLP 585

²⁰ Asher Schechter and Guy Rolnik, 'Is the Digital Economy Much Less Competitive Than We Think It Is?' (Promarket, 23 September 2016) <<https://www.promarket.org/2016/09/23/digital-economy-much-less-competitive-think/>> accessed 4 July 2022

²¹ Lina Khan, "Amazon's Antitrust Paradox," Yale Law Journal 126, vol. 3, 2017 2016.

²² OECD, 'The concept of potential competition' (OECD Competition Committee Discussion Paper, 2021) <<https://www.oecd.org/daf/competition/the-concept-of-potential-competition.htm>> accessed 4 July 2022

²³ Massimo Motta and Martin Peitz, Intervention triggers and underlying theories of harm: Expert advice for the Impact Assessment of a New Competition Tool (Expert Report, Publications Office of the European Union, 2020)

- b. Agreement not to compete, such as pay-for-delay agreements.
- c. Acquired memento, such as killer acquisition.
- d. Third party to provide constraints that might mitigate concerns over a merger.

1.1 Indonesia's Concern about Dataoppolies

Asep Ridwan, the Executive of the Indonesian Competition Lawyers Association (ICLA), has shown his concern on the incapacity of Law of Republic of Indonesia No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter “**Law 5/1999**”) to define ‘Business Actor in the digital markets (*Pelaku Usaha Digital*)’ because the scope of the definition is only on the limitation of business activities under the jurisdiction of Indonesia and has not carried out the business activities outside the jurisdiction of Indonesia, and yet it has an impact on the Indonesian economy. However, there is a KPPU decision for external parties *it est* Putusan Nomor: 07/KPPU-L/2007 Temasek Case.

Although Law of Republic of Indonesia No. 27 of 2022 concerning Personal Data Protection (hereinafter “**Law 27/2022**”) has been legalized as per 17 October 2022, thus serving some barriers to swim for persons and/or corporations in processing one’s personal data. The barriers contained within its articles, such as requisites to process data; requisites to own a data-owner’s consent; requisites on transferring cross-border data; Right to Object to Automatic Processing; Right to Transfer Data; Right to Objection; and Profiling and Right to Restrict Processing, may help to unveil up to half of the potency of data monopolies. At the moment, the Law 27/2022 is still in a transitional period for 2 years since the legalization and survision institution has not yet exist.

Law 27/2022 also has extraterritorial impact, so does Law of Republic of Indonesia No. 19 of 2016 concerning Electronic Information and Transaction (hereinafter “**Law 19/2016**”), Regulation of the Minister of Communication and Informatics No. 5 of 2020 concerning Private Electronic System Operators, and Regulation of the Minister of Communication and Informatics No. 10 of 2021 concerning Amendments to the Regulation of the Minister of Communication and Informatics No. 5 of 2020 concerning Private Electronic System Operators.

However, the problem discussed—regarding the anti-monopoly ones—do not stop there and are yet to be unveiled. This would then lead to a complication for Indonesian Competition Commission (*Komisi Pengawas Persaingan Usaha*) to take necessary measures. Digital era gives new challenges to define what is ‘Relevant Market (*Pasar Bersangkutan*)’, as there is given only narrow definition for the word ‘Relevant Market (*Pasar Bersangkutan*)’ under Law 5/1999. ‘Relevant Market (*Pasar Bersangkutan*)’ only takes consideration to a certain range or are (geographical market) by business actors for the same or similar goods and/or services or substitution of goods and/or services (product market). The questions are of whether or not data can be defined as assets in relevant market and the word “Dataoppolies” as a legal definition in the anti-monopoly law in Indonesian legal framework?

Since, digital markets are different from conservative markets, they are often more complex because they often include several key factors such as platform model business. A multi-sided market is where it offers free services to maximize the collection of user-owned data in one market, then it monetizes in other markets such as the advertising market and small technology companies that have access to or mastery of large amounts of data, network effect.²⁴

Anna Maria Tri Anggraini, a member of the National Consumer Protection Agency (*Badan Perlindungan Konsumen Nasional*), said that the development of market power in the digital era is carried out through network effects and the application of information technology. Moreover, it can occur across sectors and industries. There are also two-sided markets, and cross borders. There are new criteria as important as market share in assessing the market power of digital firms:²⁵

- a. Network effects: one user's utility from participating in a platform can increase with the participation of other users in the platform²⁶;
- b. Economies of scale: where digital firm's cost of production is much less than proportional to the number of customers served²⁷.
- c. Single-homing: where customers can choose of whether or not to switch to new platform;
- d. Multi-homing: a method of configuring one computer, called the host, with more than one network connection and IP address²⁸;
- e. Differentiation degree: a way for corporation to stand out from their competitors by bespoking special features in order meet a unique customer needs;
- f. Data sources;
- g. Potency of innovation in digital markets;
- h. Data-driven economies of scope: machine learning and artificial intelligence has vastly improved the value of data for firms by collecting, analyzing, and aggregating large amounts of data, firms can improve product quality and expand their activities into new areas²⁹.

To date, Indonesian Competition Commission (*Komisi Pengawas Persaingan Usaha*) has done research regarding business actors and market structure in digital economy to define Relevant Market (*Pasar Bersangkutan*). Research has shown that there is a connection

²⁴ Fitri Novia Heriani, 'Ini Potensi Pelanggaran Persaingan Usaha di Era Digital' (hukumonline.com, 19 January 2021) <www.hukumonline.com/berita/a/ini-potensi-pelanggaran-persaingan-usaha-di-era-digital-lt6006b094f0131> accessed 30 June 2022.

²⁵ Jovanka Lingkanaya and Muchamad Ahessa Zachary, 'Kepastian dan Kedudukan Hukum KPPU di Era Industri 4.0: Pengawasan dan Pemberantasan Praktek Persaingan Usaha Tidak Sehat Pasar Digital' (Klik Legal, 10 July 2020) <<https://kliklegal.com/kepastian-dan-kedudukan-hukum-kppu-di-era-industri-4-0-pengawasan-dan-pemberantasan-praktek-persaingan-usaha-tidak-sehat-pasar-digital/>> accessed 4 July 2022

²⁶ Geoffrey Parker, Georgios Petropoulos and Marshall Van Alystin, 'Digital platforms and antitrust' (2020) WP 2

²⁷ *Ibid*

²⁸ F5 Glossary, 'What Is Multi-Homing?' (F5) <<https://www.f5.com/services/resources/glossary/multi-homing>> accessed 4 July 2022

²⁹ Geoffrey Parker, Georgios Petropoulos and Marshall Van Alystin, 'Digital platforms and antitrust' (2020) WP 2

between market monopolist in e-commerce and the control of social media, downloaded e-commerce applications, number of visits, number of employees, and the amount of advertising costs incurred by the company.³⁰ The geographical dimension in digital platforms is highly dependent on the rates/costs for shipping goods, the price of goods, and the length of time for delivery.³¹ The cheaper and more efficient the cost of shipping goods offered by courier companies, the bigger the geographical dimension of the relevant market for a group of goods.³² The value of the goods will affect the geographical area because customers still tolerate providers of goods from out of town to be alternative providers with a cost difference of no more than 10%.³³ The domestic market has not been significantly influenced by foreign markets.³⁴ Customers still tend to choose domestic providers, unless the goods they are looking for/want to buy cannot be provided by domestic providers or the fees offered by foreign providers are much cheaper than domestic providers (differences above 10% or getting stronger if the difference is above 20%).³⁵

Research has not obtained data regarding contracts or cooperation with search engines such as OSE (optimized search engine), it can be shown from the results of data processing that customers generally use search engine media in finding items to buy before choosing to make transactions with certain e-commerce.³⁶ The currently dominant search engine platform is a product from Google, which is integrated with YouTube video sharing.³⁷ This proves that search engines as platforms are gateways in the process of selecting and purchasing goods in the online transaction cycle. Research done then has not arrived to considering the occurring data flows that business actors can own to make decisions.

He was also concerned that the narrow definitions in Law 5/1999 could highlight the fact that Law 5/1999 are no longer in accordance with the current state of times. He also expressed the need for renewal or amendment of Law 5/1999 that can cover the legal side and economic side of transactions in digital markets and ascertain the duties and authorities of the Indonesian Competition Commission (*Komisi Pengawas Persaingan Usaha*) to adjudicate competition issues in digital markets so that the conventional market and digital market can take place fairly.³⁸

³⁰ 'Ek.-Digital-2020-Ringkasan-Eksekutif.Pdf' <<https://kppu.go.id/wp-content/uploads/2021/01/Ek.-Digital-2020-Ringkasan-Eksekutif.pdf>> accessed 21 March 2023.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Fitri Novia Heriani, 'Ini Potensi Pelanggaran Persaingan Usaha di Era Digital' (Hukum Online, 19 January 2022) <<https://www.hukumonline.com/berita/a/ini-potensi-pelanggaran-persaingan-usaha-di-era-digital-lt6006b094f0131>> accessed 4 July 2022

1.2 United Kingdom's Concern about Dataopolies

The Competition and Markets Authority of the United Kingdom (hereinafter “UK”) has confessed its concern on the asymmetry of the UK's existing regulation to digital world problems. They are also concerned that big platforms might share user data freely across their own sizable business ecosystem, while at the same time refusing to share data with reputable third parties—which could have a detrimental impact on smaller players.

2. A Comparison into Competition Authorities: Indonesia and United Kingdom

2.1 The Indonesian Competition Commission (*Komisi Pengawas Persaingan Usaha*)

As for the antitrust realm, Indonesia has Indonesian Competition Commission (“ICC”) or *Komisi Pengawas Persaingan Usaha (KPPU)* as a competent authority to adjudicate the matter. Chapter IV on Law 5/1999 and KPPU Regulation No. 1 of 2014 concerning the Organization and Work Procedure of the Business Competition Supervisory Commission (hereinafter as “**KPPU Regulation 1/2014**”) regulates the formation of ICC. Article 4 (f) of KPPU Regulation 1/2014 states that in carrying out the function of prevention and supervision, KPPU has the authority to cooperate with state institutions and related agencies both inside and outside the country in the framework of preventing and supervising monopolistic practices and unfair business competition.

On this matter of unveiling Dataopolies, Indonesia has not put a prioritized position on this unprecedented situation that is happening at the current state of the digital world. However, Indonesia has come to the recognition that as to the date, ICC and the Ministry of Communication and Information Technology of Indonesia (*Kementerian Komunikasi dan Informatika*) (here in after “MCIT”) have signed a Memorandum of Understanding (MoU) regarding Prevention and Treatment Monopoly and Unfair Competition Practice in the Communication and Informatics Industry in 2016 and 2019. The 2019 MoU then led to the Cooperation Agreement (hereinafter “CA”) between institutions where the agreement gave equivalent power to both institutions to cooperate in the anti-competition challenges in digital markets.³⁹

Article 3 paragraph (3) of the CA states the ability for the organizations to exchange data and/or information with certain mechanisms: The parties propose in written form with backgrounds and predetermined targets; the parties are able to give help in gathering sources such as data and/or information as demanded; the parties undertake action of gathering data and/or information with prior coordination. Whilst the regulatory framework makes it possible for the cooperation between organizations, it is impossible to add working units inside ICC because based on Article 3 paragraph (3)(d) on the CA, the implementation of supervision on the digital market is still a direct competency of the Secretariat General and the Head of the Bureau of Public Relations and Cooperation of the KPPU as a liaison officer.

³⁹ Redaksi Gencilnews, ‘Gandeng Kominfo, KPPU Awasi Persaingan Usaha Ekonomi Digital’ (Gencil News, 4 October 2019) <<https://gencil.news/bisnis/gandeng-kominfo/>> accessed 4 July 2022

Under article 47 of Law 5/1999, ICC has the authority to impose sanctions in the form of administrative measures against business actors who violate anti-trust law in the form of a stipulation of the cancellation of the agreement; an order to business actors to stop vertical integration; an order to business actors to stop activities proven to have given rise to monopolistic practices and or to unfair business competition and or to the detriment of society; order to business actors to stop abuse of dominant position; stipulation of cancellation of the merger or consolidation of business entities and acquisition of shares as referred to in Article 28; determination of payment of compensation; imposition of a fine of not less than IDR 1,000,000,000.00 (one billion rupiah) and a maximum of IDR 25,000,000,000.00 (twenty-five billion rupiah).

According to Article 28 *juncto* Article 47 of Law 5/1999, ICC authorizes to stipulate of the cancellation of the merger and/or consolidation and/or acquisition and the implementation is contained in derivative regulations, Government Regulations. The Government Regulation in question is Government Regulations No. 57 of 2010 concerning Mergers or Consolidations and Acquisitions of Business Entities that Can Result in Monopolistic Practices and Unfair Business Competition (hereinafter as “**GR 57/2010**”). However, the said GR does not regulate the cancellation of the merger at all nor has ICC ever unwinded any merger.

The Merger of Gojek and Tokopedia (GoTo)

ICC has expressed its concern in the case of merger between two tier digital firms, case for instance is the merger of Gojek and Tokopedia. Daniel Agustino, a Director of Merger and Acquisition of ICC, has even expressed that his goal of merging both tier big data firms is to dominate the market.⁴⁰ ICC then analyzed the flowing data between both firms to decide whether or not there are deliberated exchange directions for each firm’s consumers to use each firm’s platform. For example, there are a certain number of Tokopedia consumers who currently do not use Gojek services and these consumers will later be targeted to switch to using Gojek services by being given certain incentives based on their logistics. His concern about the merger of Gojek and Tokopedia also included concentrated market competition that the firms could make through the merger; and the high barrier-to-entry in the relevant market that the transaction could cause another potential competitors, because the set standard was exceeding and too far for the capabilities of the potential competitors.

After the analysis, ICC has come to the conclusion that the transaction did not have a possibility to become a monopolistic market. The analysis included assessing the entry barrier, anti-competitive effects, and unilateral conduct effects.⁴¹ Irrespective of the

⁴⁰ CNN Indonesia, ‘KPPU Ungkap Risiko di Balik Isu Merger Gojek Tokopedia’ (CNN Indonesia, 4 February 2021) <<https://www.cnnindonesia.com/ekonomi/20210204164520-92-602375/kppu-ungkap-risiko-di-balik-isu-merger-gojek-tokopedia>> accessed 4 July 2022

⁴¹ Nidia Zuraya, ‘KPPU Putuskan Merger Gojek-Tokopedia tidak langgar Persaingan Usaha’ (Republika Online, 30 March 2022) <<https://www.republika.co.id/berita/r9iafi383/kppu-putuskan-merger-gojektokopedia-tidak-langgar-persaingan-usaha>> accessed 4 July 2022

decision, the case can be a welcoming door and an eye-opening for the ICC to be more aware of anti-competitive challenges in digital markets.

2.2 The Competition and Markets Authority of the United Kingdom

As for the UK, they have the Competition and Markets Authority (hereinafter “**CMA**”) supervising the anti-trust sphere. As of 6 May 2022, the UK has arrived at the welcoming door of the new regime, a pro-competition regime, as the state is now under a discussion of reforming its competition and consumer legislation in favor of unveiling the potency of monopoly in the digital market,⁴² as well as providing a respondent survey to drop their views regarding this matter, including both large and small technology firms, non-technology sector businesses, trade associations, academics, and campaign groups such as Google, Facebook, Amazon, Apple, Twitter, Spotify, TikTok, Advertising Standards Authority, News Media Association, The Guardian Media Group, American Bar Association, etc.

The UK has set up a unit specializing in unveiling the competition issues in digital markets, Digital Markets Unit (hereinafter “**DMU**”) within CMA, which currently is operating in shadow form for pending legislation.⁴³ The heart objective of DMU is to promote digital markets in a pro-competition manner in regards to the benefit of customers. DMU will have a duty to also consult and synergize with other regulators when proportionate and relevant, such as Financial Conduct Authority, Ofcom, the Information Commissioner’s Office, the Bank of England, and the Prudential Regulation Authority. It has competences in assessing of whether or not a firm holds a strategic position in the market, within the deadline of 9 months and can be extended by 3 months in exceptional circumstances. DMU also has an obligation to publish guidance on these concepts. DMU’s decision is open for a judicial review in assuring checks and balances. The roles of DMU are including, but not limited to, of:

a. Assessing and imposing the Strategic Market Status

DMU will assess a number of substantial and established market power which gives them a strategic position to be marked with Strategic Market Status (hereinafter “**the SMS**”) in one or more activities. DMU will in advance introduce a threshold to clarify which firms are out of scope of designation containing minimum revenue, through then designate legislation and guidance. The SMS will be expected by the DMU to behave alongside the designated code of conduct. DMU will also has the competency to make interventions in supporting pro-competition in the market such as forcing interoperability—the ability for mutually exchanging informations for two or more

⁴² *Ibid.*

⁴³ Will Hayter, ‘CMA’s Digital Markets Unit: exciting opportunities to influence the regulation of big tech’ (Competition and Markets Authority, 7 January 2022) <<https://competitionandmarkets.blog.gov.uk/2022/01/07/cmas-digital-markets-unit-exciting-opportunities-to-influence-the-regulation-of-big-tech/>> accessed 4 July 2022

components or systems and utilizing the exchanged information⁴⁴, which will potentially change the fundamentals of digital markets. Examples of assessing and imposing the SMS including but are not limited to: ordering Facebook to increase its interoperability with social media platforms competitors nevertheless with a condition of seam that requires platforms to have consumer's consent for using any of their data; limiting or restricting Google's ability in securing itself as the default search engine on mobile devices and browsers, in order to introduce more choice for users; ordering Facebook to give consumers a choice over whether or not to receive personalized advertising; introducing a “fairness-by-design” — a concept where fairness relates to the balanced and proportionate data processing as the processing of personal data should not intrude unreasonably upon the privacy, autonomy, and integrity of data subjects, and organisations should not exert pressure on data subjects to provide personal data⁴⁵; and putting a duty on the platforms in ensuring that they make an easy possibility for users to make meaningful choices of their own.

b. Doing a robust evidence-based investigation

Awaken by the fact that nowadays large information are being stored online, and may not be placed in place. Therefore, DMU have the competency to interrogate algorithms—a set of instructions designed to perform a specific task⁴⁶, that might have impact on market competition. If necessary, DMU will also have the competency to order SMS carrying out field trials, including A/B testing or split testing—a method of comparing two versions of a web page or app against each other to determine which one performs better⁴⁷, in regards to evaluating the impact of new innovations or processes. Moreover, DMU will also be powered to request compliance reports from the SMS to assist their monitoring of compliance with the pro-competition regime

c. Imposing Penalty

In the realm of forfeit, DMU will have the power of enforcement to impose financial penalties for any regulatory breaches of up to 10% of a firm's global turnover. DMU also has the power to apply to the court for disqualifying individuals from holding directorship roles in the UK, applying civil penalties to the named senior managers who fail to ensure that their firm complies with requests for information. For instance, imposing necessary fines when enforcing a code of conduct to the SMS to not engage in exploitative or exclusionary practices, or practices that are likely to reduce trust and transparency.

⁴⁴ Techopedia, 'Whats is Interoperability?' (Technopedia)

<<https://www.techopedia.com/definition/631/interoperability>> accessed 4 July 2022

⁴⁵ Paolo Balboni, 'Cambridge Analytica and the concept of fairness by design' (Maastricht University, 23 July 2018) <<https://www.maastrichtuniversity.nl/blog/2018/07/cambridge-analytica-and-concept-fairness-design>> accessed 4 July 2020

⁴⁶ Per Christensson, 'Algorithm Definition' (Techterms.com, 2 August 2013)

<<https://techterms.com/definition/algorithm>> accessed 4 July 2022

⁴⁷ Optimizely, 'A/B testing' (Optimizely) <<https://www.optimizely.com/optimization-glossary/ab-testing/>> accessed 4 July 2022

d. Merger Control

Another way of preventing dataopolies is merger control. The purpose of merger control is to regulate the impact of mergers to the market competition in advance.⁴⁸ The UK is already aware of the potency of monopoly of data. However, the UK also considers the excessive burden that businesses need to carry on. Thus, in equalizing these two, the UK ensures that the burdens will be proportionate, as the SMS will only have to report their most significant transactions prior to completion of the merger. The requirements are⁴⁹:

- a. The SMS firm to have over a 15% equity or voting share after the transaction;
- b. The value of the SMS firm's holding is over £25m; and
- c. The transaction meets a UK nexus test.

CMA will also be provided power to unveil SMS transactions with a potential to raise competition issues for UK businesses and consumers before the firm's integration occurs, as the CMA will be assessing the merger to determine of whether or not to look into it further. For example, requesting further information, doing a merger investigation, or both.⁵⁰ In reforming competition and consumer policy, the UK is also concerned and will implement new requirements regarding different jurisdiction mergers of SMS

2.2.1 An Instance of Supervise in Digital Markets by UK Authority

Even before the establishment of DMU, CMA has actively supervised the digital markets and frequently released reports through the government website. For example, CMA published a press release on 1 July 2020 where it observed the two big technology companies in the UK, Facebook and Google. Although being valued highly by consumers because they give best services and help many small businesses to reach new customers, both firms have cultivated entrenched market positions that might raise the inability for other competitors to compete on equal terms or with the same start. CMA expressed its concern on Facebook that because of their large user base as a source of market power therefore potentially making Facebook a must-have platform for users. CMA also raised concerns about Google's ability to train its search algorithms in a way that other search engines cannot. Hence, both technology companies have an unmatched access to user data that benefits them in targeting advertisements to individual consumers and tailoring their services. Furthermore, both use default settings to nudge people into using their services and giving up their data. In 2019, Google paid around £1.2 billion to be the default search provider on mobile devices and browsers in the UK, while Facebook requires people to accept personalized advertising as a

⁴⁸ Competition and Markets Authority, 'CMA fines Facebook over enforcement order breach'(Gov.uk, 20 October 2021) <<https://www.gov.uk/government/news/cma-fines-facebook-over-enforcement-order-breach>> accessed 4 July 2022

⁴⁹ Department for Business, Energy & Industrial Strategy and Department for Digital, Culture, Media & Sport, Consultation outcome: A new pro-competition regime for digital markets - government response to consultation (Command Paper, CP 657, 2022)

⁵⁰ *Ibid.*

condition for using their service. They acquired partial of their presence through many acquisitions over the year, besides the fact that their presence was already all over the market differentiate. The fact makes it harder for rivals to compete with them.

The CMA has also discovered that Google and Facebook's market positions also have a profound impact on newspapers and other publishers where newspapers are dependent on Google and Facebook for almost 40% of all visits to their sites. Consequently, the CMA opines that this fact potentially squeezes their share of digital advertising revenues, undermining their ability to produce valuable content. CMA also learned that Google's prices in selling goods or products are around 30% to 40% higher than Bing when comparing vis-a-vis search terms on desktop and mobile. CMA's concern was based on the consumers' perspective where it speculated that weak competition in search and social media leads to reduced innovation and choice that would lead consumers to giving up more data than they would like.

2.2.2 Facebook's Acquisition on Giphy

Even before there is an establishment of DMU, CMA has dealt with the case concerning Dataoppolies in the advertising area, such as in the case of Facebook and Giphy. Facebook's takeover of Giphy can be a notable instance of the potency of Dataoppolies in the advertising area of digital markets. Facebook's ownership of Giphy could lead it to deny other platforms access to its Graphics Interchange Format (hereinafter "GIFs").⁵¹ Facebook could pull GIFs from competing platforms or ask users to hand over more data in order to access and process them. The deal also removes a "potential challenger" to Facebook in the £5.5 billion display advertising market, quoted Stuart McIntosh chair of the independent inquiry group carrying out the latest phase of the investigation. Although Facebook and Giphy are headquartered in the United States, CMA can investigate mergers when the business being acquired has an annual turnover of at least £70 million (\$88 million), or when the combined businesses have at least a 25% share of any "reasonable" market.⁵²

On 12 August 2021, CMA officially posted a press release through UK Government website, calling them in a provision that Facebook's ownership of Giphy could lead it to deny other platforms access to its GIFs and that they are still accommodating investigation in the matter that the final decision was due on 6 October 2021. On 30 November 2021, through a press release, CMA finally come to a conclusion that the acquisition of Facebook on Giphy might has an impact to reducing competition between social media platforms. As through the deal, Giphy, that has a potential to be a competitor in the display advertising market to Facebook, has already been removed by Facebook. By the decision, the CMA then required Facebook to unwind the deal and

⁵¹ Sam Shead, 'Facebook's takeover of Giphy raises serious competition concerns, UK regulator says' (CNBC, 12 August 2021) <<https://www.cnbc.com/2021/08/12/facebook-takeover-of-giphy-raises-competition-concerns-says-cma.html>> accessed 4 July 2022

⁵² Ibid.

sell off Giphy in its entirety. CMA's reasonings were that Facebook had already a significant market power. The transaction would increase its power in relation to other social media platforms, such as by limiting other platforms' access to Giphy GIFs, driving more traffic to Facebook-owned sites like Facebook, WhatsApp, and Instagram which already account for 73% of user time spent on social media in the UK, or the possibility to change the terms of access as for example, requiring TikTok, Twitter, and Snapchat to provide more user data in order to access Giphy GIFs. Also, the acquisition would affect the display advertising market as Giphy had launched innovative advertising services which it was considering expanding to countries outside the US, including the UK, before the dealing. Giphy's services allow companies to promote brands through visual images and GIFs, such as Dunkin' Donuts and Pepsi.

CMA also found that Giphy had the potential to compete with Facebook in the display advertising services market as the competition then would have encouraged them for greater innovation in the market in respect to the customers' interests. However, Facebook cut the possibility through the acquisition and by then removing an important source of potential competition. CMA considers this as particularly concerning given that Facebook controls nearly half of the UK's £7 billion display advertising market. The concern of owning massive volume and variety of data that would possibly enable corporation's algorithm to be more complex and beneficial for their business purposes, such as making personalized decision.

CONCLUSION

Data is an essential thing for today's digital market players. Ownership of a large amount of data can be a steal-start for a firm from its competitors, therefore data ownership can potentially be a barriers-to-entry that can create a monopoly market. 'Dataoppolies' can be one of the antitrust challenges in the new era of the market.

States all over the world have been concerned about this issue, including Indonesia and the United Kingdom. The paradigm of monopoly needs to be enlarged. Law 5/1999 of Indonesia is no longer able to accommodate the digital market so that uncovering the potential for dataoppolies may become a problem in the future. Incompetence in Law 5/1999 of Indonesia is in the scope of definition. Like Indonesia, UK antitrust legislation cannot adequately accommodate monopolies in the digital market. In addition, there are differences in conducting unfair competition assessments that occur in the digital era that need to be carried out by competition authorities, *id est* network effects; economies of scale; single-homing; multi-homing; differentiation degrees; and data sources.

The Indonesian competition authority, ICC, has arrived at the point to make sufficient cooperation with the Ministry of Communication and Information Technology of Indonesia. As for the UK's competition authority, CMA, has arrived at the welcoming door of pro-competition in digital markets by reforming its legislation and by installing unit within CMA to supervise the digital markets—Digital Markets Unit. DMU can assign "Strategic Market Status" status to firms

with entrenched market power and then firms with “Strategic Market Status” status are required to follow a certain code of conduct. DMU will also be active on assessing on Merger Control. In analyzing, DMU is also given broad discretion to search for evidence that is deemed appropriate, such as analyzing algorithms and conducting A/B testing or split testing. Even before the formation of the DMU, it was the CMA itself that adjudicated digital cases, such as the case of Facebook's acquisition of Giphy. The case ended in the decision that Facebook should resell Giphy because the transaction could potentially create an unfair business practice.

Unlike Indonesia, it is impossible to add working units inside ICC, just as what CMA of UK did. According to Article 4 (f) of KPPU Regulation 1/2014, ICC is only given authority to cooperate with state institution and related agencies both inside and outside Indonesia, under such regulatory framework. In the case, ICC has made sufficient cooperation with Ministry of Communication and Information Technology of Indonesia in supervising the digital markets.

Although given such authorities to unwind transactions, there has never been a case where the ICC requires the transaction to be cancelled, whether in the conservation market nor in digital market. GR 57/2010 as the derivative regulation also does not govern any steps on the said authorities of ICC. However, for Indonesia, the case of GoTo can be a welcoming door of concerns for the monopoly in digital market

Knowing that creating new legislation requires a long time and high feasibility to be prioritized, perhaps, the writer opines that it is time to just take an amendment to Law 5/1999, tailoring the definition's scope and several articles of Law 5/1999 to fit the matter. Moreover, the competition challenges in the digital market can be unveiled through the readiness of competent authorities as long as authorities' human resources must be sufficient to deal with problems. Or at the very least, the writer opines that Indonesia can maximize the cooperation between ICC or *Komisi Pengawasan Persaingan Usaha* with Ministry of Communication and Information Technology of Indonesia (*Kementerian Komunikasi dan Informatika*) as a reflection to bold steps the UK has taken as installing specialized units supervising digital markets inside its competition authority.

BIBLIOGRAPHY

Primary Sources

Cases

Standard Oil Co. of New Jersey v United States [1910] 221 US 1, [1911] 221 J 221

Statues

Law of Republic of Indonesia No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition

Secondary Sources

Book

Motta, M, and Peitz, M, Intervention triggers and underlying theories of harm: Expert advice for the Impact Assessment of a New Competition Tool (Expert Report, Publications Office of the European Union, 2020)

Journal Articles

Ezrachi A, and Stucke M, 'Virtual Competition' (2016) 7 JECLP 585

Parker, G, Petropoulos, G and Alstyne, MV, 'Platform mergers and antitrust' (2021) 30 ICC 1307

Parker, G, Petropoulos, G, and Alstyne, MV, 'Digital platforms and antitrust' (2020) WP 2

Sabirin, A and Herfian, RH, 'Dampak Ekosistem *Digital* terhadap Hukum Persaingan Usaha di Indonesia serta Optimalisasi Peran Komisi Pengawas Persaingan Usaha (KPPU) di Era Ekonomi *Digital*' (2021) 02 JPU 75

Command Paper

Department for Business, Energy & Industrial Strategy and Department for Digital, Culture, Media & Sport, Consultation outcome: A new pro-competition regime for digital markets - government response to consultation (Command Paper, CP 657, 2022)

Videos

What Facebook, Google and Others Can Learn From Microsoft's Antitrust Case | WSJ (Directed by Wall Street Journal, 2019) <https://www.youtube.com/watch?v=frA5_sTj_8A> accessed 20 March 2023

Websites and Blogs

Authority, CM, 'CMA fines Facebook over enforcement order breach' (Gov.uk, 20 October 2021) <<https://www.gov.uk/government/news/cma-fines-facebook-over-enforcement-order-breach>> accessed 4 July 2022

Balboni, P, 'Cambridge Analytica and the concept of fairness by design' (Maastricht University, 23 July 2018) <<https://www.maastrichtuniversity.nl/blog/2018/07/cambridge-analytica-and-concept-fairness-design>> accessed 4 July 2022

Britten, S, 'WHAT IS DATA MONOPOLY AND SHOULD WE CARE? WITH EVERY TECHNOLOGY, THERE IS GOOD AND BAD (Beaverton Resource Guide, 1 November 2021) <<https://beavertonresourceguide.com/what-is-data-monopoly-and-should-we-care-with-every-technology-there-is-good-and-bad/>> accessed 4 July 2022

Chai W, Labbe M, and Stedman C, 'What Is Big Data Analytics And Why Is It Important?' (*SearchBusinessAnalytics*) <<https://www.techtarget.com/searchbusinessanalytics/definition/big-data-analytics>> accessed 3 July 2022

Christensson, P, 'Algorithm Definition' (*Techterms.com*, 2 August 2013) <<https://techterms.com/definition/algorithm>> accessed 4 July 2022

Christensson P, 'Big Data Definition' (*Techterms.com*, 2013) <https://techterms.com/definition/big_data> accessed 3 July 2022

Christensson P, 'IP (Internet Protocol) Definition' (*Techterms.com*, 2016) <<https://techterms.com/definition/ip>> accessed 3 July 2022

CNN Indonesia, 'KPPU Ungkap Risiko di Balik Isu Merger Gojek Tokopedia' (CNN Indonesia, 4 February 2021) <<https://www.cnnindonesia.com/ekonomi/20210204164520-92-602375/kppu-ungkap-risiko-di-balik-isu-merger-gojek-tokopedia>> accessed 4 July 2022

'Ek.-Digital-2020-Ringkasan-Eksekutif.Pdf' <<https://kppu.go.id/wp-content/uploads/2021/01/Ek.-Digital-2020-Ringkasan-Eksekutif.pdf>> accessed 21 March 2023

F5 Glossary, 'What Is Multi-Homing?' (F5) <<https://www.f5.com/services/resources/glossary/multi-homing>> accessed 4 July 2022

Hayter, W, 'CMA's Digital Markets Unit: exciting opportunities to influence the regulation of big tech' (Competition and Markets Authority, 7 January 2022) <<https://competitionandmarkets.blog.gov.uk/2022/01/07/cmas-digital-markets-unit-exciting-opportunities-to-influence-the-regulation-of-big-tech/>> accessed 4 July 2022

Heriani, FN, 'Ini Potensi Pelanggaran Persaingan Usaha di Era Digital' (Hukum Online, 19 January 2022) <<https://www.hukumonline.com/berita/a/ini-potensi-pelanggaran-persaingan-usaha-di-era-digital-lt6006b094f0131>> accessed 4 July 2022

Lingkanaya, J, and Zachary, MA, 'Kepastian dan Kedudukan Hukum KPPU di Era Industri 4.0: Pengawasan dan Pemberantasan Praktek Persaingan Usaha Tidak Sehat Pasar Digital' (Klik Legal, 10 July 2020) <<https://kliklegal.com/kepastian-dan-kedudukan-hukum-kppu-di-era-industri-4-0-pengawasan-dan-pemberantasan-praktek-persaingan-usaha-tidak-sehat-pasar-digital/>> accessed 4 July 2022

OECD, 'The concept of potential competition' (OECD Competition Committee Discussion Paper, 2021) <<https://www.oecd.org/daf/competition/the-concept-of-potential-competition.htm>> accessed 4 July 2022

Optimizely, 'A/B testing' (Optimizely) <<https://www.optimizely.com/optimization-glossary/ab-testing/>> accessed 4 July 2022

Radinsky K, 'Data Monopolists Like Google Are Threatening The Economy' (Harvard Business Review, 2015) <<https://hbr.org/2015/03/data-monopolists-like-google-are-threatening-the-economy>> accessed 3 July 2022

Redaksi Gencilnews, 'Gandeng Kominfo, KPPU Awasi Persaingan Usaha Ekonomi Digital' (Gencil News, 4 October 2019) <<https://gencil.news/bisnis/gandeng-kominfo/>> accessed 4 July 2022

Schechter, A, and Rolnik, G, 'Is the Digital Economy Much Less Competitive Than We Think It Is?' (Promarket, 23 September 2016) <<https://www.promarket.org/2016/09/23/digital-economy-much-less-competitive-think/>> accessed 4 July 2022

Shed, S, 'Facebook's takeover of Giphy raises serious competition concerns, UK regulator says' (CNBC, 12 August 2021) <<https://www.cnbc.com/2021/08/12/facebooks-takeover-of-giphy-raises-competition-concerns-says-cma.html>> accessed 4 July 2022

Techopedia, 'Whats is Interoperability?' (Technopedia) <<https://www.techopedia.com/definition/631/interoperability>> accessed 4 July 2022

Wicaksono, MR, 'Merger GoTo dan Bahaya Dataopoli' (Media Indonesia, 16 March 2022) <<https://mediaindonesia.com/opini/478375/merger-goto-dan-bahaya-dataopoli>> accessed 3 July 2022

Zuraya, N, 'KPPU Putuskan Merger Gojek-Tokopedia tidak langgar Persaingan Usaha' (Republika Online, 30 March 2022) <<https://www.republika.co.id/berita/r9iafi383/kppu-putuskan-merger-gojektokopedia-tidak-langgar-persaingan-usaha>> accessed 4 July 2022