

THE URGENCY OF ESTABLISHING A DIGITAL MARKET LAW AS AN INSTRUMENT FOR MONITORING BUSINESS COMPETITION IN THE DIGITAL

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ABSTRACT

The digital age has significantly transformed trading practices. Transactions that were traditionally conducted in conventional ways have now shifted to online platforms. The COVID-19 pandemic has further accelerated developments in the digital industry, which has consequently impacted how the Indonesia Competition Commission (KPPU) oversees business competition. However, Law Number 5 of 1999 concerning Monopolistic Practices and Unfair Business Competition has proven inadequate for enforcing regulations against business operators in the digital market. This research aims, first, to identify and analyze Indonesia's legal framework for addressing unfair competition in the digital market. Second, it seeks to examine the role of the KPPU in supervising and addressing unfair competition in this sector. The study employs a normative legal approach with a qualitative research design. Law Number 5 of 1999 serves as the foundation for regulating unfair competition in Indonesia, complemented by Government Regulation (PP) Number 80 of 2019, which facilitates trade through electronic systems. In practice, the KPPU's enforcement and monitoring efforts in the digital market, particularly against active foreign business operators with detrimental effects on Indonesia, are far from optimal. This highlights the urgent need to establish a Digital Market Law to incorporate extraterritorial principles and strengthen the KPPU's capacity to enforce fair competition in the digital marketplace.

Keywords: Market, Digital, Supervision, Business.

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1. INTRODUCTION

The Industrial Revolution 5.0 has brought significant changes to various fundamental aspects of human life. It represents a continuation of previous revolutions and is understood as a major transformation in the management of human, social, cultural, and economic resources.[1] Following the Industrial Revolution 4.0, which introduced computers and the internet into human activities, the 5.0 Revolution pushes humanity to coexist with the internet in their daily lives. Indonesia is predicted to enter the 5.0 era by 2045, although its driving elements can already be observed. Indonesia is one of the countries with the highest internet usage rates in the world. According to data from the Central Statistics Agency (BPS) in 2021, 62.10% of the Indonesian population uses the internet.[2] This reflects the acceptance of technology and information, especially in economic activities. A shift from conventional to digital economic behaviors is evident, and dynamic changes in the digital market have influenced business competition among market players and the enforcement of competition laws. (Pusat Penelitian dan Pengembangan Aplikasi Informatika dan Informasi Kementerian Komunikasi dan Informatika, Vol. 1. 2019).

The digital era can be understood as a transformation in transaction patterns, moving from traditional methods of visiting markets or stores to conducting transactions

digitally or online (Z. Ali, 2013). This fundamental shift in transaction patterns may lead to unfair competition practices, which in turn affect the enforcement of laws related to business competition. Digitalization presents challenges for both business actors and legal enforcers. Businesses are required to adapt to new market mechanisms, carefully navigating the risks and opportunities of the digital market. Meanwhile, legal instruments must be reviewed to align with the dynamics of digital trade, curb unfair competition, and safeguard businesses. Existing regulations must consider all strategic aspects to support the functioning of digital market mechanisms. Law serves as an instrument to define permissible and impermissible actions, aimed at preventing the emergence of unforeseen unfair competition practices. Unforeseen circumstances must be anticipated, considering that the structure and mechanism of digital markets operate differently from conventional markets. Business competition must be fostered within a healthy environment for all market participants, whether individuals or corporations. The supervision of unfair competition is carried out by a competition oversight commission, in this case, the Indonesia Competition Commission (KPPU). As an independent state institution tasked with overseeing business competition, the KPPU plays a pivotal role in this regard. Law Number 5 of 1999, which prohibits monopolistic practices and unfair business competition, serves as the legal framework for KPPU's functions.

The term "digital market" is not defined in Law Number 5 of 1999. According to this law, a market is a place where buyers and sellers can conduct commercial transactions for products and/or services, either directly or indirectly.[4] This nomenclature does not encompass the supervision of unfair competition in digital markets, presenting a challenge for KPPU. Both consumers and businesses should benefit from digital markets. However, without clear boundaries for participation, these markets could backfire. The rights and obligations of businesses and consumers must be safeguarded by clear legislation, prohibiting unfair commercial practices in the digital marketplace.

Competition in digital markets requires comprehensive legal provisions to curb unfair practices effectively. Law is essential for regulating social life in all its aspects, including social, political, and cultural dimensions, and for addressing its impact on economic growth during trade activities (Undang-Undang Nomor 5 Tahun 1999 Nomor 3, Tambahan Lembaran Negara Nomor 3817. 1999). In practice, law plays a critical role in preventing disputes over economic resources, especially given the scarcity of resources on one hand and the endless demands or needs on the other. Clearly, law is instrumental in fostering economic growth to achieve social welfare.

PROBLEM FORMULATION

Based on the background described above, the issues to be examined in this article are as follows:

1. How are regulations designed to prevent unfair business competition in Indonesia's digital market?
2. How does the Indonesia Competition Commission (KPPU) play its role in monitoring business competition in the digital market?.

2. RESEARCH METODOLOGY

This study employs a qualitative research design with a normative juridical approach and a comparative method.[2] Legal research and literature relevant to the issues under investigation serve as the foundation for normative research (Z. Ali, 2013). The author conducted an analysis of Government Regulation Number 80 of 2019 on Trading Through Electronic Systems and Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition. The data were then compared with digital market regulations in the European Union to analyze the

supporting and inhibiting factors in establishing a legal framework for the digital market in Indonesia, aimed at strengthening the Indonesia Competition Commission's (KPPU) role in supervising business competition effectively.

3. RESULTS AND DISCUSSION

Regulation of Competition Supervision in the Digital Market by the Business Competition Supervisory Commission (KPPU)

The KPPU, as an independent institution, supervises all activities occurring in Indonesia. This is emphasized in Article 1, Number 18 of Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, which states that the KPPU is a commission established to supervise business actors in their activities for public order, aiming to avoid monopolies and/or unfair competition. The supervision carried out by the KPPU in the digital era has, of course, expanded. This is inseparable from the development of electronic trading processes.

Digital trade can be understood as a business process conducted through intermediary systems, whether through websites or applications, covering the processes of purchasing, selling, payment, product information, and services that utilize the internet. In terms of market structure, the digital market certainly has a structure that differs from conventional markets. The digital market has a layered structure, which means that in the digital market, it can bring together two or more groups on a digital platform. This results in competition not only among service providers but also against the digital platform providers. Therefore, such conditions, being distinct, need to be balanced with supervision through a more complex mechanism as an effort to prevent monopolistic practices and unfair business competition. Monopolistic practices, as described in Article 1, Number 2 of Law No. 5 of 1999, refer to the concentration of economic power by one or more business actors, which leads to the domination of the production and/or marketing of specific goods and/or services in a way that fosters unhealthy commercial competition and may harm public interest (Undang-Undang Nomor 5 Tahun 1999, Lembaran Negara Tahun 1999 Nomor 3, Tambahan Lembaran Negara Nomor 3817. 1999). According to Article 1, Number 6, unfair business competition refers to competition between business actors who produce and/or market products or services in an unfair manner, violate the law, or disrupt business competition. Such practices need to be anticipated in the expansion of the digital market or e-commerce structure.

Chissic and Kelman explain that "e-commerce is a broad phrase that includes commercial operations with related technical data performed electronically when defining digital transactions." Electronic commerce, often known as e-commerce, is defined by Sultan Remy Sjahdeini as "activities involving customers, producers, service providers, and intermediaries using computer networks, particularly the internet." Thus, it can be said that there are several elements of the digital market, including the following: a. There is a business contract; b. The contract is executed electronically; c. Physical presence of the parties is not required; d. The contract is made in a public network; e. Jurisdictional boundaries of countries are not considered in the contract; f. It has economic value.

Any action taken by one or more business actors that binds themselves to one or more other business actors under any name, whether written or oral, is prohibited under Law No. 5 of 1999. In its role as an instrument for supervising business competition, Law No. 5 of 1999 employs two approaches. The first approach is the rule of reason, which means the approach used by the KPPU to evaluate the effects of a specific agreement or activity that causes the outcomes outlined in Law No. 5 of 1999 (Undang-Undang Nomor 7 Tahun 2014, Tambahan Lembaran Negara Nomor 5512. 2014). The per se illegal approach is also a principle applied in the same law. This principle asserts that any agreement or specific activity is considered illegal by

law without needing further details regarding the harm caused by the contract or actions.

Both of these approaches will indirectly intersect in the competition occurring among business actors in the digital market. The digital market emerges as a new process in trade that will create competition with a more complex business model. Business competition exists not only in conventional markets but also among new business actors in the digital market. Competition is a normal occurrence in trade and can provide benefits to support economic growth. Competition also benefits consumers by giving them options in choosing goods or services. However, competition becomes problematic when the competition among business actors cannot be controlled or supervised, leading to adverse effects. Furthermore, until now, there is no regulation regarding business competition in the digital market. This lack of regulation affects the KPPU's ability to oversee and enforce competition law, which can lead to even more complex problems. A comprehensive regulatory framework is crucial and necessary to optimize the KPPU's role in overseeing the digital market

Competition in the trade sector should be seen as a positive force. Perfect competition is the desired state in economic theory. Perfect competition in the market is based on at least four premises, which are: (Peraturan Pemerintah Nomor 80 Tahun 2019, Lembaran Negara Tahun 2019 Nomor 222, Tambahan Lembaran Negara Nomor 6420. 2019) a. Business actors are not allowed to set the prices of goods or services unilaterally; b. Goods and services produced by entrepreneurs can freely enter or exit the market; c. Business owners are free to enter or exit the market; d. Market actors and consumers have good information about the products

Law No. 7 of 2014 on Trade regulates trade activities in Indonesia. Electronic System-Based Trade (PMSE), which signifies that trade transactions are carried out through various electronic devices and methods, is regulated under this law. This law stipulates that the use of electronic systems in trade using such systems must comply with the provisions set out in the Electronic Information and Transactions Law (ITE Law). However, the term "digital market" is not defined in either the Trade Law or the ITE Law. Electronic transactions, in general, are defined in the ITE Law as legal activities carried out using computers, computer networks, and/or other electronic media. E-commerce and digital markets are not covered by any additional clauses.

The electronic systems used for trade are regulated in Government Regulation (PP) No. 80 of 2019, which functions as the implementer of Law No. 7 of 2014 on Trade. Compared to the Trade Law and the Law on the Prohibition of Monopolistic Practices and Unfair Business Competition, the scope of this Government Regulation is indeed broader. Government Regulation No. 80 of 2019 regulates the delivery system, payment systems, electronic advertising, electronic contracts, requirements for trade through electronic systems, personal data protection, dispute resolution, and business development and supervision. If analyzed further, this regulation has provided a comprehensive foundation for the practice of electronic commerce.

According to Government Regulation No. 80 of 2019, domestic business actors are those who engage in activities related to PMSE and are Indonesian citizens or legal entities domiciled in Indonesia. Meanwhile, individuals or organizations from abroad who are officially based outside of Indonesia are referred to as "foreign business actors" with involvement in PMSE in Indonesia. With the entry of both domestic and international business actors actively participating in the Indonesian digital market, the scope of the application of Government Regulation No. 80 of 2019 becomes very broad. Since PMSE business actors as regulated in Government Regulation No. 80 of 2019 must comply with the laws governing business competition, Law No. 5 of 1999 applies to the enforcement of unfair competition in the digital market.

Based on Government Regulation No. 80 of 2019, Article 7, foreign business actors who meet certain criteria and actively engage in PMSE activities and/or offer services to consumers within the territory of the Unitary State of the Republic of Indonesia (NKRI) are required to appoint a representative to operate in their respective locations and regions. Related to this, With these provisions in place, the government needs to give further and clearer attention to the phrase "actively engaged." This is due to the large number of Indonesian citizens who engage in shopping activities through foreign platforms.

Attention must be given in order to implement consumer protection and personal data protection provisions as stipulated in the aforementioned Government Regulation. Business actors in electronic systems must uphold consumer rights in various contexts, including electronic contracts, exchanges & cancellations, advertising, offers, and the delivery of products & services. Government Regulation No. 80 of 2019 further stipulates that consumers can report damages to the Minister if PMSE activities harm them (who handles matters in the trade sector). The reported business actors must be responsible for resolving such reports. If they fail to do so, the business actors may be included in the Minister's Priority Oversight List, which is publicly available. Therefore, the operation of trade through electronic systems must, *mutatis mutandis*, be subject to the rules and laws governing business competition, such as Law No. 5 of 1999.

The understanding of the digital market in Indonesia has increased in the current era. However, the level of understanding in developed countries is still higher. This can be seen in the European Union, where in 2022, they established and enacted legal provisions regulating the digital market in a *sui generis* manner through the European Union's Digital Markets Act (DMA). The Digital Markets Act is intended to improve the competitive prospects for technology businesses, which must compete with the hegemonic influence of digital giants. Companies are required to provide business users with access to their data and ensure that their messaging services are compatible with other platforms under the new rules. The DMA regulates that large platforms must not restrict customers from immediately removing preinstalled programs and must instead prohibit internet companies from dominating with their own services. The European Union's Digital Markets Act is seen as an initial step toward ensuring fair competition among digital market service providers, currently dominated by giant tech companies.

The theory used to address the first problem formulation is the theory of justice and legal certainty by Gustav Radbruch. Legal provisions that regulate activities involving the rights and obligations of every individual are necessary to guarantee the rights and obligations involved. Regulations governing business competition in the digital market are intended to achieve fair competition among business actors. Regulations that govern and underpin digital trade activities can provide legal certainty for the practice of trade in the digital market. Law No. 5 of 1999, which prohibits monopolistic practices and unfair business competition, Law No. 7 of 2014, which regulates trade, and Government Regulation No. 80 of 2019, which regulates trade using electronic systems, are legal instruments that provide a foundation for legal certainty. Legal certainty means that all business actors operating in the digital market do so in accordance with all applicable regulations and laws.

STRENGTHENING THE ROLE OF THE BUSINESS COMPETITION SUPERVISORY COMMISSION (KPPU) IN MONITORING THE DIGITAL MARKET

Law No. 5 of 1999 was born as a solution during the 1998 financial crisis, which impacted the economic situation and created a more conducive environment. Legal provisions became an important instrument in maintaining a balance between rights and obligations through the supervision of an independent institution. The KPPU, as

an independent institution responsible for overseeing business competition in Indonesia, is expected to carry out its duties effectively.

The KPPU is a state institution with the legal authority to enforce competition law and contribute to the development of an environment that supports such activities. As an independent institution, the KPPU is free from any form of external interference. Additionally, the KPPU holds authority over corporate competition cases, which makes it similar to judicial powers (quasi-judicial). The KPPU is tasked with upholding the law and is accountable to the President for the execution of its duties. In reality, healthy competition is absent in the digital economy era, and there are still unfair regulations contributing to this issue. According to Article 1 Number 18 of Law No. 5 of 1999, the KPPU is a commission established to supervise business actors to prevent monopolistic practices and/or unhealthy business competition. Law No. 5 of 1999 regarding the prohibition of monopolistic practices and unhealthy business competition is overseen and enforced by the KPPU, an autonomous institution. However, since the KPPU is not a judicial body for business competition, it does not have the authority to impose criminal or civil sanctions. The KPPU is an administrative body, and thus, the only type of penalty it can impose is an administrative one, as confirmed by the Constitutional Court Decision No. 85/PUU-XIV/2016.

In terms of business competition oversight, or the implementation of Law No. 5 of 1999, the KPPU's duties include evaluating, monitoring, taking actions within its authority, providing advice and recommendations, developing guidelines or publications, and submitting periodic reports to the President and the People's Representative Council (DPR) as regulated in Article 35 of Law No. 5 of 1999. Meanwhile, the KPPU's authority primarily consists of investigation, enforcement, and litigation powers. The KPPU's authority is outlined in Article 36 of Law No. 5 of 1999. The KPPU's stance on competition practices in the digital market remains a subject of debate because, under Law No. 5 of 1999, the KPPU does not have enforcement authority in this domain.

The conventional market business model has undergone significant changes due to the development of digital market competition in the 4.0 Industry era, making existing regulations ineffective in overseeing the digital market. Therefore, regulators need to shift their perspective to enforce laws in the business sector. To measure the impact of business actors in the market, legislators must first understand the dynamic nature of digital business models. Additionally, legislators face challenges with the definition of "business actors" in Law No. 5 of 1999. The KPPU, as an autonomous organization, faces limitations in its ability to enforce laws against unhealthy competition because of the restricted definitions of "business actors" and "business competition." A comprehensive regulatory framework for business actors is needed so that the KPPU can monitor not only domestic business actors but also those operating internationally whose activities affect domestic transactions.

Digital monopolies are one example of unhealthy competition in the digital market. The KPPU can contribute by halting monopolistic practices that lead to unhealthy competition, such as discrimination, exploitation of suppliers or other platforms, exclusive agreements, and more. Various forms of unhealthy competition, including predatory pricing and exploitation of dominant positions, can hinder market competition and limit platform innovation. Digital monopolies can also occur in other markets when service providers grow their customer base by integrating multiple channels, thereby gaining power over other providers and becoming dominant. In such cases, oversight is necessary.

Enforcement of Law No. 5 of 1999 as a business competition oversight instrument by the KPPU involves legal principles and concepts. Law enforcement is an effort to realize these concepts. According to Soerjono Soekanto, law enforcement involves

a series of actions aimed at constructing, maintaining, and preserving relationships based on solid values.

The KPPU is a regulatory body that implements legal provisions, not a law enforcement agency in the criminal justice system like the police, the prosecutor's office, or the courts, which use coercive tactics to bring suspects before a judge. However, the correct understanding of how Article 36 of Law No. 5 of 1999 grants the KPPU investigatory powers, which are often seen as falling within the realm of criminal law, is frequently used as a basis for the KPPU to investigate whether business actors are violating the regulations set out in Law No. 5 of 1999. However, the KPPU has limitations in performing business competition oversight in the digital market.

As previously discussed, the author has examined the Digital Market Law in the European Union as a comparison regarding the importance of having a Digital Market Law in a country. To create appropriate rules, plans, and strategies for addressing the digital market era, policymakers and the KPPU in Indonesia can look to the regulations of countries that already have laws regulating the digital market. A democratic economy, more efficient market expansion, national economic progress, and legal clarity in the enforcement of business competition laws in Indonesia—both in traditional and digital markets—will be better guaranteed with the correct legal framework. It is essential to remember that there are three main pillars for achieving legal certainty: substance, structure, and culture, which work in synergy. Therefore, regulations need to be adaptable to the times to ensure legal certainty.

Digital trade practices are not covered by Law No. 5 of 1999, which should be followed by foreign business actors. Since Law No. 5 of 1999 does not apply the concept of extraterritoriality, it is difficult for international corporate actors who negatively impact Indonesia to enforce these restrictions.

Based on the justification above, it is important to amend or replace the current regulations to align with the circumstances. However, when forming the Digital Market Law, extraterritorial considerations must be taken into account. In practice, the KPPU uses an interpretative method to regulate business actors operating outside Indonesia's territory but affecting Indonesia's economy. The application of this principle becomes crucial in special jurisdiction expansion conditions. Therefore, the enforcement of the Digital Market Law and all of its implementing regulations can be applied to digital market actors.

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Digital trade practices are not covered by Law No. 5 of 1999, which should be followed by foreign business actors. Since Law No. 5 of 1999 does not apply the concept of extraterritoriality, it is difficult for international corporate actors who negatively impact Indonesia to enforce these restrictions. (A. Sabirin and R. Haidar Heffian, 2021).

Based on the justification above, it is important to amend or replace the current regulations to align with the circumstances. However, when forming the Digital Market Law, extraterritorial considerations must be taken into account. In practice, the KPPU uses an interpretative method to regulate business actors operating outside Indonesia's territory but affecting Indonesia's economy. The application of this principle becomes crucial in special jurisdiction expansion conditions. Therefore, the enforcement of the Digital Market Law and all of its implementing regulations can be applied to digital market actors.

4. CONCLUSION

Based on the discussion above, business competition oversight is regulated by Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, along with trade regulations under Law No. 7 of 2014 concerning Trade. Law No. 5 of 1999 only defines domestic business actors as those operating within conventional markets. Transactions in the digital era, conducted electronically, are regulated by Government Regulation No. 80 of 2019 concerning Electronic System-Based Trade. This regulation serves as a guideline and framework for all electronic trade activities. The law enforcement efforts carried out by the KPPU against foreign business actors negatively impacting Indonesia's economy make it difficult to oversee the digital market. Foreign business actors have become a crucial consideration, given that they can play a role in the digital market. However, this is not yet addressed in the current regulations. This limitation poses a challenge for the KPPU in carrying out its oversight duties. For this reason, the establishment of a legal instrument for the digital market through the creation of a *sui generis* regulatory framework that strengthens the KPPU's role is essential. Therefore, the author recommends that the KPPU provide advice and considerations to the government and regulators to help establish regulations at the level of the law concerning the digital market.

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