

IR – PERPUSTAKAAN UNIVERSITAS AIRLANGGA

CHAPTER I

PREFACE

1.1 RESEARCH BACKGROUND

The internet contributes to the creation of the digital market which refers to a global-scale economic ecosystem where (i) business transactions rely on and are significantly enhanced by big data,¹ and (ii) the normalization of multi-sided platforms where businesses offer zero-price service to different consumers in their platform which affect each other's demand due to *cross-group network effect*.² These platforms, commonly encountered in social networks such as **Facebook**, or information intermediaries such as **Tiket.com**, are often characterized as offering “credence goods” where consumers can evaluate the quality of products and/or services offered after the usage or consumption.³

Multi-sided key players in the digital platform relevant market such as **Google**, **Instagram**, **Youtube**, and **GOJEK** are amongst few which have exploited big data in

¹ OECD, *OECD Handbook on Competition Policy in the Digital Age*, OECD, 2022, <https://www.oecd.org/daf/competition-policy-in-the-digital-age>, p. 8 [hereinafter, **OECD Handbook on Competition Policy**]; see also “Competition Economics of Digital Ecosystems” <https://www.oecd.org/daf/competition/competition-economics-of-digital-ecosystems.htm> accessed on 1 June 2022; see also Deloitte, “What is digital economy? Unicorns, transformation, and the internet of things” <https://www2.deloitte.com/mt/en/pages/technology/articles/mt-what-is-digital-economy.html> accessed on 1 June 2022.

² OECD Handbook on Competition Policy, p. 17.

³ Justus Haucap, et. al., *Modernizing the Law on Abuse of Market Power: Report for the Federal Ministry for Economic Affairs and Energy (Germany)*, CPI Antitrust Chronicle, 2019, p. 4 [hereinafter, **Justus Haucap 2019**].

their business strategy⁴ as big data enabled them to record consumer purchasing behavior⁵ and process the information recorded with predictive algorithms model⁶ for better consumer segmentation and increasing economies of scale.⁷ Therefore, big data becomes a critical input resource⁸ that can leverage the digital platform position in the market⁹ as consumers become increasingly more dependent on this social network and comparison intermediary services, these undertakings are able to access a large data pool of users to increase the quality of their service based on the consumer's preferences.¹⁰ Therefore, the digital market gave a “first-mover advantage” and is characterized as a “winner takes all” market.¹¹ Due to the reasons mentioned, legal scholars and practitioners identify digital market propensity to tip to concentration and monopolization by few undertakings with access to this large data pool.¹²

⁴ Bernard Marr, “The Amazing Ways Instagram Uses Big Data and Artificial Intelligence”, <https://www.forbes.com/sites/bernardmarr/2018/03/16/the-amazing-ways-instagram-uses-big-data-and-artificial-intelligence/?sh=36f7794c5ca6>, accessed on 28 May 2022; see also Mathilda Gian Ayu, “Google memanfaatkan Big Data untuk informasi perjalanan di Travel insights” <https://www.cloudcomputing.id/berita/google-manfaatkan-big-data-informasi-perjalanan> accessed on 21 May 2022.

⁵ Autorite de la Concurrence and Bundeskartellamt Joint Report, *Competition Law and Data*, French and German Competition Authority Joint Report, 2016, p. 34 [hereinafter, **French and German 2016 Report**].

⁶ Kodrat Wibowo dan Chandra Setiawan (Eds.), *Dua Dekade Penegakan Hukum Persaingan: Perdebatan dan Isu yang Belum Terselesaikan*, Komisi Pengawas Persaingan Usaha Cetakan ke-1, Jakarta, 2021, p. 354 [hereinafter, **Kodrat Wibowo and Chandra Setiawan**].

⁷ OECD, *Big data: Bringing competition policy to the digital era*, OECD, 2016 <https://www.oecd.org/competition/big-data-bringing-competitionpolicy-to-the-digital-era.htm> [hereinafter, **OECD 2016**]

⁸ Justus Haucap 2019, p. 4.

⁹ OECD Handbook on Competition Policy p. 22.

¹⁰ Jens Prufer and Christoph Schottmüller, *Competing with Big Data*, The Journal of Industrial Economics Volume LXIX 0022-1821 No. 4, 2021, pp. 967-968 [hereinafter, **Prufer and Schottmüller**].

¹¹ The Economist, “The world’s most valuable resource is no longer oil, but data” <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data> accessed on 18 March 2022.

¹² Kodrat Wibowo and Chandra Setiawan, p. 354.

In the face of this rapid transformation, this undergraduate thesis aim to examine the flexibility of the Indonesian competition law¹³ by comparison to the European Union [hereinafter, “EU”] developments of digital markets act to entertain the questions such as whether (i) the unquantifiable nature of big data will pose an issue to the determination of dominant position departing from the standard used in Article 25 of the Indonesian competition law, (ii) whether multi-sided platform without remuneration can count as the market in the sense of competition law, and whether (iii) these new changes will trigger novel abusive conduct that is not recognized by Article 25 of the Indonesian competition law, or whether (iv) the use of consumer personal data as a business input might raise problems in the perspective of competition and consumer protection law.¹⁴

1.2 RESEARCH STATEMENT

- 1 Big data and its influence to the determination of dominant position; and
- 2 Abusive dominant behavior in the age of big data

¹³ Undang-Undang Republik Indonesia No. 5 tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat [Lembaran Negara Republik Indonesia Tahun 1999 Nomor 33, Tambahan Lembaran Negara Republik Indonesia Nomor 3817] as amended by Undang-Undang Republik Indonesia No. 11 tahun 2020 tentang Cipta Kerja [Lembaran Negara Republik Indonesia Tahun 2020 Nomor 245, Tambahan Lembaran Negara Republik Indonesia Nomor 6573] [**Indonesian 1999 Competition Law**].

¹⁴ Ariane Le Strat, “The rise of Big Data - Intersection between Competition law and customer data” <https://www.twobirds.com/en/insights/2018/uk/the-rise-of-big-data-intersection-between-competition-law-and-customer-data> accessed on 1 March 2022.

1.3 RESEARCH OBJECTIVES

- 1 To analyze and determine whether the use of big data can influence the determination of dominant position pursuant to Article 25 of the Indonesian 1999 competition law and an undertaking competitive power in the digital market; and
- 2 To analyze and determine whether using big data as business strategy and the multi-sided market, can create a new variant of abuse in dominant behaviors that would distort the market.

1.4 RESEARCH PURPOSES

Theoretical purpose: This undergraduate thesis is expected to produce a prescriptive legal suggestion for the development of Indonesian competition law in light of the rapidly changing internet-influenced market structure in in the age of big data. This research is designed to provide an insight into on whether the current legislative condition of the Indonesian 1999 competition framework is enough to accommodate the rise of data-driven undertakings that may tip market balance.

Practical purpose: This undergraduate thesis is expected to address the growing concern of Indonesian 1999 Competition Law ability to mitigate future legal problems caused by the rise of dominant players through the use of big-data that may tip digital-platform market equilibrium through unconventional means that has yet been recognized by the legislation. This research is expected to provide further

consideration when answering the question whether the Indonesian 1999 Competition Law is outdated against the rapidly changing data-driven market field.

1.5 RESEARCH NOVELTY

This undergraduate thesis bears no resemblance to its primary readings.

The first primary reading is the elaborated research conducted by Jens Prufer and Christoph Schottmuller in 2022 titled ‘Competing with Big Data’¹⁵ where they questioned (i) under which conditions a duopoly can be a stable market structure in a data-driven market and (ii) the conditions and how a dominant firm in one data-driven market can leverage its position to another market.¹⁶ Their research relies heavily on economic literature instead of a legal perspective and did not draw any connection to the role of their finding in competition law. This research is thus different from this undergraduate thesis as (i) it did not question the concept of duopoly when determining dominant position, nor (ii) does it question the conditions of how a dominant firm can leverage its position to another market.¹⁷ Even when the subject in the second point coincide, it is only as additional material supporting the density of this work.

The second primary reading is the research conducted by Massimiliano Nuccio and Marco Guerzoni in 2018 titled ‘Big data: Hell or Heaven? Digital platforms and market power in the data-driven economy’ where they questioned (i) whether the

¹⁵ Prufer and Schottmuller, pp. 967-968.

¹⁶ Ibid., p. 968.

¹⁷ Ibid., p. 982.

industrial and information economics and big data, prompt market concentration and limit the possibility of abuse and (ii) contribute to the debate of risk associated with few oligopolistic players in the digital market.¹⁸ To answer their question, this paper examines three aspects of economic theory, namely, entry barriers, effects of innovation, and data as price discrimination section.¹⁹ This paper is different from this undergraduate thesis as they did not aim to contribute to the influence of big data to a dominant position in Indonesian competition law.²⁰

The last primary reading is the joint research conducted by the French Competition Authority and German *Bundeskartellamt* in 2016 titled ‘Competition Law and Data’ where they questioned the key parameters to assess the interplay between data, market power, and competition law.²¹ This joint research is different from this undergraduate thesis as they did not aim to contribute to the influence of big data to a dominant position in Indonesian competition law,²² nor draw a distinction between the existing competition law in the EU to Indonesia.

¹⁸ Massimiliano Nuccio and Marco Guerzoni, *Big data: Hell or Heaven? Digital platforms and market power in the data-driven economy*, Competition and Change 0(0) 1-1, p. 2.

¹⁹ Ibid., pp. 2-3.

²⁰ Ibid., pp. 12-13.

²¹ French and German 2016 Report, p. 4.

²² Ibid., p. 52.

1.6 RESEARCH METHODOLOGY

1.6.1 LEGAL RESEARCH TYPE

This undergraduate thesis is a legal search as it involves the process of identifying, accumulating, and processing law-related data to produce a prescriptive legal decision²³ through a theoretical method,²⁴ particularly in the field of competition law and dominant position in the age of big data. This legal research will employ a (i) rational choice theory²⁵ and (ii) economic analysis of law theory²⁶ as (i) this legal research will examine whether at the outset of the external information encouraging Indonesia to update its competition law to accommodate the rising of data-driven markets is rational with Indonesia's existing socio-legal and economic condition. Additionally, (ii) this legal research will also take into account economic principles and consideration when examining a certain legal issue.

1.6.1 LEGAL PROBLEM APPROACH

Statute-based approach: will examine and analyze Indonesian legislative product pertaining to competition law and dominant position to solve its research statement. Statute-based approach is defined as a problem-based approach through the study of relevant legal products to the research subject-matter systematically.²⁷

²³ Steven Barkan, et. al., *Fundamentals of Legal Research*, University of Treatise Series Foundation Press, 2015, p. 1.

²⁴ Terry Hutchinson, *Researching and Writing in Law*, Lawbook Sydney, 2002, p. 8.

²⁵ John Scott, *Rational Choice Theory in Understanding Contemporary Society: Theories of the Present*, United States: Sage, 2000, pp. 126-128.

²⁶ Richard Posner, *Economic Analysis of Law*, London: Little Brown and Company, 1973, p. 3.

²⁷ Peter Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi*, Cetakan ke-14 Jakarta, 2019, p.

Conceptual-based approach: defined as a problem-based approach where legal analysis is conducted through evaluating relevant principles, doctrine, and theoretical ideas expressed by prominent jurists in the related field.²⁸ This research will study the existing principles, doctrine, and theoretical ideas pioneered by prominent competition law jurists to determine the influence of big-data in the dominant position.

Case-based approach will examine precedents on competition law and dominant position in the age of big-data. Case-based approach is defined as a problem-based approach through the study of relevant Court precedents that has attained final binding effect and opinion that has a relation to the subject-matter studied.²⁹

Comparative-based approach: is defined as a problem-based approach where legal analysis will be carried out through comparing the existing legal regulation to the present territorial and extraterritorial socio-legal and economic conditions to determine the best legal solution.³⁰ This undergraduate thesis will study the Indonesian 1999 Competition Law and compare them to the socio-legal and economic changes happening in the EU countries' competition law.

133.

²⁸ Peter Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi*, Cetakan ke-14 Jakarta, 2019, p. 135.

²⁹ Ibid.9, p. 178.

³⁰ Sunaryati Hartono, *Penelitian Hukum di Indonesia pada Akhir Abad ke-20*, Penerbit Alumni Bandung, 2016, p. 139.

1.6.2 LEGAL SOURCES

The legal source of this undergraduate thesis is classified into three main categories, (1) primary source of law which refers to legislation, regulations, Court precedent, official notes, and opinions pertaining to competition law.³¹

Specifically, this undergraduate thesis will analyse (a) Indonesian 1999 Competition Law, (b) *Peraturan Komisi Pengawas Persaingan Usaha No. 6 Tahun 2010 tentang Pedoman Pelaksanaan Pasal 25 tentang Penyalahgunaan Posisi Dominan berdasarkan Undang-Undang Republik Indonesia No. 5 tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat*, (c) The 1992 Treaty of the European Union, (d) The 1957 Treaty on the Functioning of the European Union, and (e) European Union Court of Justice precedents on Competition Law and Dominant Position. (2) Secondary source of law which refers to supporting materials that will become a guidance to elucidate the application of the primary materials,³² such as academic journals, books, official reports by interregional and international organizations, and (3) tertiary source of law which refers to less official documents to back-up secondary source of law such as Court press-release and news webiste.

1.6.3 LEGAL SOURCES COLLECTION PROCEDURE

The primary and secondary legal materials used in this undergraduate thesis were obtained from library and literature research which takes the form of laws,

³¹ Zainuddin Ali, *Metode Penelitian Hukum*, Sinar Grafika Jakarta, 2016, p. 47.

³² Ibid.

regulations, books, Court precedents with final binding effect, and academic journals that are related to competition law and dominant position in the age of big data. After all relevant legal materials are collected, they will be classified and identified in primary, secondary, and tertiary classifications for further analysis and examination.

1.6.4 LEGAL SOURCE ANALYSIS

This undergraduate thesis will employ normative-juridical methods as this legal research will examine relevant legal materials to resolve a legal problem.³³ As this legal research will employ normative-judicial analysis, this undergraduate thesis will analyze relevant legal doctrine, principles, Court precedents, and the opinion of prominent competition law jurist to address the issue of competition law and dominant position in the age of big data

1.6.5 RESEARCH FRAMEWORK

CHAPTER I – will focus on the legal background of this thesis;

CHAPTER II – will focus on setting the definition, the legal problems, and implications of using big data in the digital market and multi-sided platform to the determination of dominant position pursuant to Article 25 paragraph (2) of the Indonesian 1999 competition law;

³³ Valerine J. L. Kriekhoff, *Metode Penelitian Hukum*, Program Pascasarjana Fakultas Hukum Universitas Indonesia, Depok, 2005, p. 155.

CHAPTER III – will focus on exploring novel theories of harm of abusive dominant practice in the digital market and on the obligation of data sharing; and

CHAPTER IV – will focus on conclusion and recommendations.