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The Exclusionary Data Conduct in Digital Mergers: An Indonesian Competition Law Perspective

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Abstract

The aim of this study is to examine the regulatory gap in Indonesian competition law regarding the use of user data by platform-based companies after a digital merger, by examining how the current legal framework responds to data-based exclusive practices and assessing its adequacy in regulating the dynamics of digital merger control.

The method of this study examines the norms, principles, and legal doctrines contained in legislation, court decisions, legal theory, and scientific writings related to competition law, which are analyzed using current theories of harm.

The novelty of this research is the application of the Newer Theory of Harm in analyzing digital mergers and acquisitions, particularly in privacy-based theory, where consumer data protection is an important aspect that needs to be considered in mergers and acquisitions. Consumer data privacy protection can be used as a quality assessment that must be met in the testing process that must be carried out before mergers and acquisitions.

The results of the study show that merger regulations in Indonesian competition law are still oriented towards market concentration and price impacts, so they are not yet fully capable of addressing data-based exclusive practices and digital ecosystem dominance post-merger. This study concludes that digital merger supervision in Indonesia needs to be developed by expanding the analysis of big data control and its implications for fair business competition, taking lessons from the experience of the German Competition Authority and the European Union's Digital Markets Act regulations.

The conclusion of this study concerns the assessment of mergers and acquisitions in Indonesian Competition Law; learning from the German Competition Authority and the European Union's Digital Markets Act, the government must expand its analysis of how access to big data affects a healthy competition ecosystem.

Keywords: Competition Law; Digital Economy; Digital Mergers; New Harm Theory

Abstrak

Tujuan penelitian ini untuk mengkaji adanya kesenjangan pengaturan dalam hukum persaingan usaha Indonesia terkait penggunaan data pengguna oleh perusahaan berbasis platform pasca terjadinya merger digital, dengan menelaah bagaimana kerangka hukum yang berlaku saat ini merespons praktik eksklusif berbasis data serta menilai kecukupannya dalam mengatur dinamika pengendalian merger digital.

Metode penelitian ini mengkaji norma, asas, dan doktrin hukum yang terkandung dalam peraturan perundang-undangan, putusan pengadilan, teori hukum, dan karya tulis ilmiah terkait hukum persaingan usaha yang dianalisis dengan teori-teori kerugian terkini.

Kebaruan dari penelitian ini adalah penerapan *Newer Theory of Harm* dalam menganalisis merger dan akuisisi digital, khususnya dalam teori berbasis privasi, perlindungan data konsumen menjadi aspek penting yang perlu diperhatikan dalam merger dan akuisisi. Perlindungan privasi data konsumen dapat dijadikan sebagai penilaian kualitas yang harus dipenuhi dalam proses pengujian yang harus dilakukan sebelum merger dan akuisisi.

Hasil penelitian menunjukkan bahwa pengaturan merger dalam hukum persaingan usaha Indonesia masih berorientasi pada konsentrasi pasar dan dampak harga, sehingga belum sepenuhnya mampu menjangkau praktik eksklusif berbasis data dan dominasi ekosistem digital pasca merger. Penelitian ini menyimpulkan bahwa pengawasan merger digital di Indonesia perlu dikembangkan dengan memperluas analisis terhadap penguasaan big data dan implikasinya terhadap persaingan usaha yang sehat, dengan mengambil pelajaran dari pengalaman Otoritas Persaingan Usaha Jerman dan pengaturan Digital Markets Act Uni Eropa.

Kesimpulan dari penelitian ini adalah mengenai penilaian merger dan akuisisi dalam Hukum Persaingan Usaha di Indonesia; belajar dari Otoritas Persaingan Usaha Jerman dan Undang-Undang Pasar Digital Uni Eropa, pemerintah harus memperluas analisisnya tentang bagaimana akses big data mempengaruhi ekosistem persaingan usaha yang sehat.

Kata Kunci: Hukum Persaingan Usaha; Ekonomi Digital; Merger Digital; Teori Kerugian Baru

1. INTRODUCTION

The rapid advancement of digital platforms has revolutionized conventional business models, transitioning from in-person transactions to more efficient and pervasive online market systems. These platforms have emerged as essential intermediaries, enabling the exchange of products and services and connecting businesses with consumers. As noted by Sebastian Hermes (2020), digital platforms have redefined market structures by bridging the gap between sellers and buyers, fundamentally altering how business transactions are conducted.¹ This transformation is especially evident in e-commerce, where businesses leverage digital platforms to eliminate the need for physical interactions, creating seamless virtual marketplaces.

In this new landscape, businesses increasingly compete by innovating and developing various online marketplace platforms, such as websites and mobile applications. These tools serve as gateways for consumers, enhancing convenience and accessibility while allowing businesses to reach a broader customer base without the limitations of physical storefronts.² The competitive dynamics of these digital platforms are driven by the ability to offer superior products or services and the capacity to innovate technologically. Remaining ahead of technological trends becomes paramount as businesses strive to differentiate themselves.

Digital platforms are unique since they operate within two-sided or multi-sided markets, a concept extensively explored in network economics and information systems. According to

¹ Sebastian Hermes, "Digital Platforms and Market Dominance: Insights from a Systematic Literature Review and Avenues for Future Research," in *PACIS*, 2020, https://www.researchgate.net/publication/341452662_Digital_Platforms_and_Market_Dominance_Insights_from_a_Systematic_Literature_Review_and_Avenues_for_Future_Research.

² Prima Amri, "The Urgency of Regulating The Misuse of Personal Data Possession By E-Commerce From The Perspective of Competition Law," *Domus Legalis Cogitatio* 1, no. 1 (2024): 1–20.

Alessio Cozzolino, platform-based companies often aim to internalize network externalities, which refer to the benefits that users of a platform gain as more participants join the system.³ By connecting multiple user groups, such as consumers, sellers, and service providers, platforms create a value proposition that increases as more users interact. This integrated approach allows platforms to consolidate various markets under a single umbrella, driving growth and market share.

The ability of digital platforms to collect and process vast amounts of data is central to their market power. Information and communication technologies (ICT) enable businesses to gather insights into consumer behavior, preferences, and trends, providing them with a competitive advantage that traditional firms may lack.⁴ This data-driven advantage allows platforms to tailor their offerings to individual consumers, improving user experience and fostering customer loyalty. At the same time, it enables platforms to gain significant control over market dynamics, potentially leading to a dominant position in the relevant market.

In the contemporary digital economy, digital mergers frequently involve consolidating companies with substantial user data. However, these corporate actions increase efficiency and market reach and establish new market power through data dominance. Data has evolved into a strategic commodity that enables organizations to provide highly personalized services, retain consumers, and impede competitors' innovation. In this context, the primary source of market power is the exclusive control over data, which allows firms to engage in systematic exclusionary conduct⁵. In the post-merger, dominant firms frequently use data power to prevent competitors from accessing critical markets or inputs, such as user behavioral data. This situation is accomplished by restricting system interoperability, data foreclosure, or tying data access to essential products.⁶

These procedures exacerbate information asymmetry and establish substantial entry barriers. Consequently, mergers that may appear economically neutral or efficient can pose long-term competitive risks due to less visible exclusionary effects that traditional antitrust analysis may fail to consider. Regulators have acknowledged the close relationship between data-based exclusion and digital mergers in various jurisdictions, including the European Union and Canada. For instance, regulators noted that the merger of Facebook and WhatsApp exacerbated Facebook's dominant position and impeded the ability of new competitors to compete.⁷ Consequently, numerous scholars and policymakers have advocated for implementing revised merger review frameworks that account for the potential imposition of

³ Alessio Cozzolino, Leonardo Corbo, and Paolo Aversa, "Digital Platform-Based Ecosystems: The Evolution of Collaboration and Competition between Incumbent Producers and Entrant Platforms," *Journal of Business Research* 126 (March 2021): 385–400, <https://doi.org/10.1016/j.jbusres.2020.12.058>.

⁴ Antonio Robles Martín-Laborda, "Standard Arbitration Agreements and Cartel Damages Under EU Law," 2024, <https://doi.org/10.2139/ssrn.4944291>.

⁵ A Gorecka, "Abuse of Platform Power: Leveraging Conduct in Digital Markets under EU Competition Law and Beyond," in *Edinburgh Law Review*, 2024.

⁶ Sachin Mishra, "The Legal Status of Electronic Agents," 2022, <https://www.legalserviceindia.com/article/l245-Electronic-agents.html>.

⁷ Qarri Bednar, V., "Study of Competition Issues in Data-Driven Markets in Canada," colindeacon, 2022, <https://www.colindeacon.ca/s/vivic-research-competition-data-driven-markets-final-report-2022.pdf>.

data-sharing remedies and the consequences of data-driven exclusionary conduct.⁸

The development of digital mergers in Indonesia has not been balanced with comprehensive regulations, especially regarding merger activities in the digital market. Haodan Tang's study shows that the effect of digital mergers on market value is greater than that of non-digital mergers and acquisitions.⁹ This study shows that digital mergers and acquisitions positively affect the acquiring company's market value, and this effect is even greater than non-digital mergers and acquisitions.¹⁰ Digital mergers have been shown to stimulate companies' innovation activities, increasing their intrinsic value and competitive position, and ultimately reflected in an increase in market value. Digital technologies used in mergers and acquisitions, such as AI, machine learning, cloud technology, and predictive analytics, can reduce production and operating costs and bring higher markups to companies, which can increase their innovation vitality.¹¹ In the context of Indonesian law, Law Number 7 of 2014 concerning Trade regulates trade activities in Indonesia and explains that the use of electronic systems in trade that uses electronic systems must comply with the provisions as stipulated in the Law on Information and Electronic Transactions (ITE Law). Unfortunately, the term "digital market" is not defined in the Commerce Law or the ITE Law.¹²

This study examines the impact of digital mergers on platform-based enterprises' use of user data and whether the Indonesian Competition Law can regulate the development of digital mergers. These include the statutory approach, which involves an in-depth analysis of relevant laws and regulations; the case approach, which examines Indonesia Competition Laws to understand how legal norms are applied in practice, namely provides a rigorous analytical framework for understanding and evaluating the legal dimensions of digital mergers and Exclusionary Conduct of Data as the important legal issue in the Indonesia digital economy.

2. METHOD

This study employs a legal research method that examines legal norms, principles, and doctrines contained in statutory regulations, court decisions, legal theories, and scholarly writings related to the competition law analysed with the newer theories of harm. The newer theories of harm in competition law refer to evolving analytical approaches used to identify competitive harm that is not reflected solely in direct price increases, particularly in digital and data-driven markets. These theories respond to the limitations of traditional frameworks that focus on price effects and market dominance by capturing more subtle and dynamic forms of anti-competitive conduct. They include concepts such as data-driven foreclosure, killer

⁸ Monika Woźniak-Cichuta, "Digital Data-Driven Mergers: Is Data-Sharing Remedy a Panaceum?," *SSRN Electronic Journal*, 2024, <https://doi.org/10.2139/ssrn.4718520>.

⁹ Haodan Tang, Senhui Fang, and Dianchun Jiang, "The Market Value Effect of Digital Mergers and Acquisitions: Evidence from China," *Economic Modelling* 116 (November 2022): 106006, <https://doi.org/10.1016/j.econmod.2022.106006>.

¹⁰ Tang, Fang, and Jiang.

¹¹ Samer Adra and Leonidas G. Barbopoulos, "The Valuation Effects of Investor Attention in Stock-Financed Acquisitions," *Journal of Empirical Finance* 45 (January 2018): 108–25, <https://doi.org/10.1016/j.jempfin.2017.10.001>.

¹² Rohmat, "Urgensi Pembentukan Undang-Undang Pasar Digital Sebagai Instrumen Pengawasan Persaingan Usaha Di Era Digital," *Jurnal Persaingan Usaha* 2, no. 2 (December 31, 2022): 118–26, <https://doi.org/10.55869/kppu.v2i2.76>.

acquisitions, ecosystem leveraging, and non-price effects such as reduced innovation, quality, consumer choice, and privacy. Consequently, the newer theories of harm emphasize that competitive harm may be structural and long-term in nature, requiring competition authorities to adopt forward-looking and innovation-sensitive merger and conduct assessments. These include the statutory approach, which involves an in-depth analysis of relevant laws and regulations; the case approach, which examines Indonesia Competition Laws and the OECD working paper to understand how legal norms are applied in practice, namely provides a rigorous analytical framework for understanding and evaluating the legal dimensions of digital mergers and Exclusionary Conduct of Data as the important legal issue

3. DISCUSSION

3.1. The Regulation of Platform-Based Business Actors in Indonesia by Competition Law

Platform-based enterprises in Indonesia have seen swift expansion during 2024–2025, propelled by an anticipated rise in the digital economy's worth to exceed US\$150 billion by 2025. Critical areas such as e-commerce, fintech, and various digital services are driving this growth, with over 22 million MSMEs having undergone digitization via platforms such as Tokopedia, Shopee, and Bukalapak.¹³ The government has bolstered this momentum via rules and programs like the "Gernas BBI" (National Movement for Proudly Made in Indonesia Products). At the same time, obstacles persist, including the predominance of huge platforms, disparate access to data, and consumer protection issues. The incorporation of artificial intelligence and the emergence of omnichannel approaches have enhanced the worldwide competitiveness of Indonesia's digital business environment.¹⁴

Platform-based enterprises markedly contrast with conventional firms as they operate as multi-sided markets. In a multi-sided market, cross-side network effects manifest, indicating that the quantity of users on one side of the platform affects the advantages realized by users on the opposing side. The expansion of digital platforms has resulted in an abundance of services, including marketplaces (Amazon, Alibaba, Shopee, Tokopedia, Blibli), app stores (Apple, Android, Microsoft), social media platforms (Facebook, Instagram, X, TikTok), online transportation services (Uber, Gojek, Grab), and search engines.¹⁵

These digital platforms enable companies to scale their operations rapidly.¹⁶ Simultaneously, creating several platform-based enterprises may result in heightened

¹³ Kementerian Koordinator Bidang Perekonomian Republik Indonesia, "Siaran Pers Kemenko Perekonomian Nomor HM. 4.6/385/SET.M.EKON.3/10/2021 Tentang Pengembangan Ekonomi Digital Di Indonesia" (Jakarta, 2021).

¹⁴ McKinsey and Company, "The Economic Potential of Generative AI: The Next Productivity Frontier," 2023, <https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/the-economic-potential-of-generative-ai-the-next-productivity-frontier#introduction>.

¹⁵ Daniel Susskind Richard E. Susskind, "The Future of the Professions: How Technology Will Transform the Work of Human Experts," Oxford University Press, 2015, https://books.google.co.id/books?hl=en&lr=&id=iYpmCgAAQBAJ&oi=fnd&pg=PP1&dq=Richard+Susskind,+et+al.,+2015,+The+Future+of+The+Professions:+How+Technology+&ots=utrBcBBctX&sig=AYKnQL087_2RAy56Kn0wNagrkI&redir_esc=y#v=onepage&q=Richard+Susskind%2C+et+al.%2C.

¹⁶ Rhido Jusmadi and Aru Armando, "Structure, Conduct, Performance (SCP) Approach & Fairness Principle in Business Competition Law in The Era of Digital Platforms," *Justitia Jurnal Hukum* 8, no. 2 (September 30, 2024), <https://doi.org/10.30651/justitia.v8i2.23074>.

competition within the digital market as companies strive for dominance and competitive advantages. As a result, certain platform-based enterprises may adopt methods that contravene legislation, thereby affecting other market participants and customers. Before recognizing an abuse of a dominating position, it is crucial to ascertain whether a corporation fulfills the criteria necessary to be designated as a dominant entity.

Two strategies exist for cultivating a multi-sided market: (1) direct network effects within a single group, wherein users derive immediate advantages from the presence of other users on the same platform, and (2) indirect network effects, where the value perceived by one user group escalates as the user base of another group on the same platform expands.¹⁷ Another method to gain market dominance and market power is through mergers and acquisitions (M&A). These actions are beneficial as they can optimize business development.¹⁸ Three common types of mergers are used to attain a dominant position: vertical, horizontal, and conglomerate.

Vertical mergers entail consolidating two or more firms functioning at distinct levels of the supply chain for a particular product or service, typically to achieve increased control over the supply chain and improve operational.¹⁹ Horizontal mergers occur when companies operating in the same or similar industries merge, aiming to achieve economies of scale, increase market power, and leverage cost and revenue-based synergies.²⁰ Conglomerate mergers, on the other hand, involve companies that produce unrelated products, with the primary goal of accelerating business growth and improving performance.²¹ However, such mergers may negatively affect market competition by creating overly dominant firms, reducing competition, and influencing antitrust policy.²² According to the Indonesian Competition Commission (KPPU), mergers can create dominant players in digital markets, leading to situations where a single entity holds significant market power. Such concentration may enable the merged entity to exert market control, potentially harming competition and limiting consumer choices.²³

¹⁷ Devina Tanzil and Kristianto P.H. Silalahi, "Pelindungan Data Pribadi Dalam Analisis Penyalahgunaan Posisi Dominan Berdasarkan Hukum Persaingan Usaha," *Gloria Justitia* 2, no. 1 (June 10, 2022): 1–18, <https://doi.org/10.25170/gloriajustitia.v2i1.3359>.

¹⁸ Hernawan Hadi, "Analisis Pengaturan Merger, Akuisisi, Dan Konsolidasi Perseroan Terbatas Dalam Ketentuan Undang-Undang No.5 Tahun 1999 Tentang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat," *Privat Law* 9, no. 2 (2021), <https://doi.org/10.20961/privat.v9i2.60053>.

¹⁹ CFI Team, "Horizontal Merger," CFI, 2025, <https://corporatefinanceinstitute.com/resources/management/horizontal-merger/>.

²⁰ Will Kenton, "Vertical Merger: Definition, How It Works, Purpose, and Example," Investopedia, 2022, <https://www.investopedia.com/terms/v/verticalmerger.asp#:~:text=A%20vertical%20merger%20is%20the%20process%2C%20and%20ramp%20up%20business.>

²¹ Arfin and R.D. Lindawati, "Green Constitution Concept to Achieve Green Indonesia 2030," *International Journal of Advanced Science and Technology* 29, no. 3 Special (2020): 1251–56.

²² Alifia Zahra Lathifah et al., "Integrasi, Merger, Dan Konglomerasi : Implikasinya Terhadap Kebijakan Persaingan Usaha," *JURNAL MANAJEMEN DAN BISNIS EKONOMI* 3, no. 1 (December 18, 2024): 360–68, <https://doi.org/10.54066/jmbe-itb.v3i1.2800>.

²³ Esmeralda Ivana Rismauli and Suherman Suherman, "Market Domination Through Social Media and E-Commerce Merger in Business Competition Law's Perspective," *Journal of Law, Politic and Humanities* 4, no. 4 (June 10, 2024): 752–65, <https://doi.org/10.38035/jlph.v4i4.435>.

Digital mergers in Indonesia between two horizontal digital companies do not pose a risk of creating a monopoly and resulting in concentration in the market. However, it should be remembered that digital companies do not operate in conventional markets; they operate in digital markets that have different characteristics. The concern is that a duopoly will emerge by utilizing big data to exploit consumers. Merger between Gojek and Tokopedia has drawn public attention to corporate mergers because Gojek is the only company that will become a Decacorn in Indonesia, and its valuation will reach 10 billion US dollars.²⁴ Merger deals are more likely to succeed because Gojek and Tokopedia run businesses in different relevant markets but complement each other.²⁵ Nonetheless, there are concerns that unfair business competition practices will emerge due to GoTo's significant strength, which could position it as a dominant player in the digital world in terms of serving the daily needs of the metropolitan area.²⁶ However, KPPU's press release Number 05/KPPU-PR/II/2022 stated that there was no allegation that it resulted in monopolistic practices and unfair business competition because Gojek and Tokopedia were not competitors in the same relevant market.

Article 1, number 2 of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition defines "Monopolistic Practices" as the concentration of economic power by one or more business entities that leads to the control of the production and/or marketing of specific goods and/or services, resulting in unfair business competition and potential harm to the public interest. Studying the phrase "concentration of economic power" necessitates measuring the elements that determine its existence. Moreover, Article 1, 3 of Law Number 5 of 1999 defines "the concentration of economic power" as the actual control over a significant market by one or more business entities, enabling them to dictate the prices of goods and/or services".²⁷ First, the precise determination of the "relevant market" is required to identify the extent of market domination by business actors and to identify real competitors of the dominant business actor which can limit their behavior. Second, the element of "price" can result in monopolistic practices, one of which is "predatory pricing" or "setting prices" that are very low with the intention of getting rid of or killing competitors' businesses in the relevant market.

Indonesia Competition Authority also has issued new guidelines for defining the relevant market to accommodate the evolution of platform-based businesses, as stipulated in KPPU Regulation Number 4 of 2022. This rule recognizes that market research should encompass both single-sided markets and multi-sided and digital economy markets. This rule stipulates the following processes for ascertaining the relevant market: (1) Identifying the product or product set for market evaluation; (2) Analyzing the pertinent product market; (3)

²⁴ H.-J. Lee, H.-J. Cha, and D Won, "Economic Routing of Electric Vehicles Using Dynamic Pricing in Consideration of System Voltage," *Applied Sciences (Switzerland)* 9, no. 20 (2019), <https://doi.org/10.3390/app9204337>.

²⁵ Jakarta Globe, "Gojek, Tokopedia Create GoTo in a Landmark Merger Deal," *Globe*, 2021, <https://jakartaglobe.id/business/gojek-tokopedia-create-goto-in-a-landmark-merger-deal>.

²⁶ D. Daniel Sokol and Jingyuan Ma, "Understanding Online Markets and Antitrust Analysis," *SSRN Electronic Journal*, 2017, <https://doi.org/10.2139/ssrn.2813855>.

²⁷ KPPU, "Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat" (1999).

Analyzing the applicable geography market; (4) Performing a temporal analysis if required.

Regulation of the Chairman of KPPU Number 4 of 2022 concerning the Determination of the Relevant Market has welcomed the development of the digital economy. However, attention to the use of consumer big data has not been regulated. Business actors utilize consumer big data as one of the materials for their business decision analysis studies. Unfortunately, the development of KPPU Regulation Number 4 of 2022 needs to be improved by encouraging consumer data privacy protection, especially for digital economy actors. Reports propose several approaches to include privacy as a non-price parameter for healthy business competition parameters.

The initial proposed approach is theories of harm, specifically "privacy as quality," wherein injury to privacy is regarded as a decrease of quality. This theory precisely delineates the pertinent features of privacy competition to ascertain what constitutes a deterioration of privacy concerning the European Union (EU) General Data Protection Regulation (GDPR) and the cases that have addressed this matter thus far. Consumer preferences on data gathering and utilisation vary. Consequently, privacy diminutions may arise from augmenting the volume of personal data solicited or broadening the utilisation of existing data and from relinquishing end-to-end encryption and practices that adversely affect users' capacity to manage their data and make educated choices.

Based on the SSNIQ method, a test method in competition law also covers privacy issues, especially in the digital economy. as digital platforms become more data-dependent, privacy issues become intertwined with competition issues, the use of consumer data should be a concern for Indonesian competition law in the future. Alexandra Mitretodis's writing explains that business actors often support broad data sharing to promote market efficiency, while privacy advocates emphasize limiting data sharing to protect consumer rights.²⁸ The tension between these perspectives reflects the regulatory challenge of balancing competition and privacy goals. Using algorithms artificial intelligence in platform enterprise, the potential for algorithmic collusion can occur when competing companies use algorithms to coordinate their pricing or market strategies in a way that reduces competition, often without express agreement. This view poses unique challenges to competition law, particularly regarding SSNIQ and privacy considerations.

Regarding the analysis of geographic markets in the digital economy in the Regulation of the Chairman of KPPU Number 4 of 2022 concerning the Determination of the Relevant Market, it is stated that the determination of geographic markets can use the nature of goods or services marketed on the platform (durable or non-durable or have a delivery period or service), Platform user information, provisions of relevant laws and regulations, and online and offline integration. These factors are interesting if elaborated on the findings of Dory Reiling's dissertation, which states that Internet technology in judicial practice must consider advances

²⁸ Alexandra Mitretodis, "Interaction Between Privacy and Competition Law in a Digital Economy," Fasken, 2019, <https://www.fasken.com/en/knowledge/2019/07/interaction-between-privacy-and-competition-law-in-a-digital-economy>.

in Internet technology and digitalization.²⁹ In defining the relevant market, especially the geographical market in Indonesia, Indonesia Competition Authority should also pay attention to equal access to internet technology, especially for platform-based business actors, in all regions of Indonesia.

Related to durable or non-durable or delivery time or services must also be considered by digital platform-based business actors. Marketplaces that provide online shops should pay attention to product durability factors and shipping accessibility to consumer buyers who are in areas with limited infrastructure. Digital markets operate on a global scale beyond traditional geographic boundaries. This global reach complicates defining geographically relevant markets because digital products and services can be accessed anywhere. A platform may have a global reach, but local regulations or logistical constraints may limit the distribution of certain goods and services. The KPPU, as a regulator, may be reluctant to impose strict geographic restrictions on digital markets due to their dynamic and interconnected nature.

Additionally, Law Number 5 of 1999 contains a framework for evaluating mergers or acquisitions, as stipulated in Article 28 of the same law concerning Mergers, Consolidations, and Acquisitions. Article 28, paragraph (1), stipulates that "Business entities are forbidden from merging or consolidating in a manner that could lead to monopolistic practices or unfair competition; (2) Business entities are prohibited from acquiring shares of other companies if such actions may result in monopolistic practices or unfair competition." Article 1, points 2, 3, and 10, along with Article 28 of legislation Number 5 of 1999, are pertinent for assessing whether a merger or acquisition contravenes business competition legislation. The parameters included for analysis are mergers that lead to monopolistic practices. Consequently, commercial entities will exhibit greater flexibility in circumventing the aspect of "monopoly" in merger or acquisition endeavors by engaging in distinct relevant markets.

Furthermore, Article 2, paragraph (1) of Government Regulation Number 57 of 2010 regarding Mergers or Consolidations of Business Entities and Acquisition of Company Shares that may result in Monopolistic Practices and Unfair Business Competition stipulates that "monopolistic practices and/or unfair business competition occur if the business entity resulting from the merger, consolidation, or acquisition of shares is suspected of engaging in a) prohibited agreements; b) prohibited activities; and/or c) abuse of dominant position" (Law Number 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition, 1999). The requirements of the three measures relate to the same pertinent market; nevertheless, identification within the digital market environment is difficult. The KPPU approved the merger of Gojek and Tokopedia, as the two digital platform firms function in separate marketplaces.

If associated with contemporary theories of damage (ecosystem and innovation), the combination of Gojek and Tokopedia may influence anti-competitive mergers, as it possesses the potential to establish online business ecosystems and data monopolies across the supply

²⁹ Dory Reiling, *Technology for Justice (Dissertation)* (Amsterdam: Amsterdam University Press, 2009).

chain. Initially, IT acquires substantial quantities of pertinent data from big data to enhance tactics for capitalizing on consumer delight products and services. In addition to eliminating emerging competitors. Secondly, proficiency in the ecosystem from upstream to downstream (including online transportation, food ordering services, e-payments, inter-logistics services, and marketplaces) will enhance consumer comfort despite the merged entities engaging in "predatory pricing" and/or establishing significantly low prices to eliminate or undermine their competitors' businesses.

3.2. Digital Mergers: Dominant Position and the Exclusionary Conduct of Data

In digital platforms, users are generally required to provide certain personal information when creating an account, such as personal data (name, email, and phone number), and to disclose user preferences-actions carried out voluntarily by users. These digital platforms utilize information technology and the collected data to offer various services to third parties and to create a multi-sided market that serves different user segments. The value of such services increases as the number of users grows.³⁰ This aligns with findings from the Organization for Economic Cooperation and Development (OECD) in its 2020 report, Abuse of Dominance in Digital Markets, highlighting the possibility of privacy policy tying-where a dominant firm imposes data collection requirements, allowing it to utilize consumer data in various contexts. Such a firm may leverage data gathered in one market, where it holds a dominant position, to enter a new market with overlapping user bases (even when the products are unrelated) and then use data collected in the new market to entrench further its dominance in the original one.³¹

Competition authorities must acknowledge that many platform-based businesses achieve dominant positions by controlling vast volumes of data, which can serve as a source of market power. This "big data" can be misused in ways that are anti-competitive and may provide such businesses with a competitive advantage by enabling them to act more swiftly than their rivals.³² Big data emerges from the proliferation of online personal and professional activities and represents a new capacity to capture, store, and analyze user activity. These data are processed, shared, and transferred continuously across global networks.³³

Furthermore, once a digital platform business secures a dominant position, it may engage in abusive conduct. One form of such abuse is self-preferencing-when a competing entity leverages its platform advantages for disproportionate gain.³⁴ According to the OECD's study Theories of Harm for Digital Mergers, competition authorities can assess key elements

³⁰ X Song et al., "Incentive Framework for Mobile Data Offloading Market under QoE-Aware Users," *IET Communications* 14, no. 13 (2020): 2151–61, <https://doi.org/10.1049/iet-com.2019.0498>.

³¹ Mancini James, "THE EVOLVING CONCEPT OF MARKET POWER IN THE DIGITAL ECONOMY OECD Competition Policy Roundtable Background Note," 2022, www.oecd.org/daf/competition/the-evolving-concept-of-.

³² Beata Mäihäniemi, *Competition Law and Big Data* (University Researcher (Sustainable Transition), Faculty of Law, University of Lapland, 2020), https://www.e-elgar.com/shop/gbp/competition-law-and-big-data-9781788974257.html?srsltid=AfmBOopXiAZG5IraMKrJ0y6dQVnffSBMwjOiq21uJa9RZ_LwElq95cqP.

³³ Mäihäniemi.

³⁴ Yuta Kittaka, Susumu Sato, and Yusuke Zennyo, "Self-Preferencing by Platforms: A Literature Review," *Japan and the World Economy* 66 (June 2023): 101–91, <https://doi.org/10.1016/j.japwor.2023.101191>.

of digital markets such as ecosystems and innovation by applying the following theories:³⁵

Ecosystem-Based Theories: These apply to mergers involving platform companies. The protective role of ecosystems, combined with significant informational advantages, raises entry barriers for newcomers and distorts competition. This includes the concept of "platform envelopment," whereby a dominant platform in one market enters another-complementary, substitutive, or unrelated-by bundling or tying services. Ecosystem theories of harm are incongruent with conventional merger theories and can be utilized for products or services the merging firm provides that are complimentary, substitutive, or a combination of both.³⁶ Within the digital ecosystem, a strategic market position is established through the concerted efforts of one or more digital platform companies to exert significant control and influence over the interactions between buyers and sellers and advertiser access to potential buyers. This situation includes the capacity to manipulate product ratings or the reputations of providers or sellers through reviews or ratings, which are referred to as gatekeepers.³⁷ The gatekeeper function of the ecosystem significantly impedes the entry of new enterprises into any market in which the ecosystem functions. It also enables merging businesses to actively exploit their ecosystem to weaken competition in specific markets.

Privacy-Focused Theories: These adopt the view of "privacy as quality," where the degradation of privacy is akin to a reduction in product quality. Such theories consider consumer preferences regarding data use, where diminished privacy may stem from data usage and neglect of end-to-end encryption or other safeguards that limit user control over personal data.

Beyond these OECD theories, the Treaty on the Functioning of the European Union (TFEU) supports an effect-based approach to applying Article 102. This approach includes assessing whether the anti-competitive effects of a practice are more than hypothetical. The European Court has clarified that while the impact need not be fully realized, authorities must demonstrate that harm is more than speculative. The practice must pose a credible risk of excluding competitors to fall within the scope of Article 102.³⁸

Esayas suggests multiple methodologies to integrate privacy as a non-price competitive factor in evaluating digital mergers.³⁹ The initial recommended method is the 'privacy as quality' theory of harm, wherein injury to privacy is regarded as synonymous with a decline in quality. This theory delineates the pertinent dimensions of competition regarding privacy, aimed at elucidating the concept of privacy degradation about the European Union (EU) General Data Protection Regulation (GDPR) and the cases that have addressed this matter thus

³⁵ William R Andersen, *Antitrust Law: Policy and Practice* (Carolina Academic Press, 2017).

³⁶ Chaehyeon Lee et al., "Toward Detecting Illegal Transactions on Bitcoin Using Machine-Learning Methods," in *International Conference on Blockchain and Trustworthy Systems*, 2020, 520–33, https://doi.org/10.1007/978-981-15-2777-7_42.

³⁷ Jacques Cremer, *Competition Policy for The Digital Era* (Luxembourg: European Commission, 2019), <https://doi.org/10.2763/407537>.

³⁸ Antonio Capobianco, "Theories of Harm for Digital Mergers," 2023.

³⁹ Samson Esayas, "Privacy as a Non-Price Competition Parameter: Theories of Harm in Mergers," *SSRN Electronic Journal*, 2018, <https://doi.org/10.2139/ssrn.3232701>.

far.⁴⁰ Be aware that consumer preferences regarding data gathering and utilization vary. Consequently, diminished privacy may arise from augmenting the volume of personal data solicited or broadening the utilization of existing data and from the disregard of end-to-end encryption and actions that adversely affect users' capacity to manage their data and make educated choices.

The European Union introduced the Digital Markets Act (DMA), which regulates digital platforms and services. It complements traditional competition law enforcement, including Article 102 TFEU. The DMA notes that providers may exploit specific platform characteristics, and when combined with unfair practices, can undermine the contestability of platform services, harming the fairness of commercial relationships among providers, business users, and consumers. In practice, this could rapidly diminish consumer choice. Therefore, platform providers designated as "gatekeepers" are subject to special obligations under the DMA, including transparency and fairness requirements and avoiding abusing their dominant market position.

In addition, Germany's national competition law, codified in the German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen—GWB), modernizes and enhances oversight of anti-competitive practices. The Bundeskartellamt (Federal Cartel Office) is empowered to intervene more swiftly and effectively against large digital firms, particularly concerning big data and artificial intelligence (AI).

4. CONCLUSION

The conclusion of this article criticizes the limitations of Indonesian competition law, which remains predominantly focused on price-based and structural market indicators, thereby failing to adequately capture data-driven exclusionary conduct arising from digital mergers. The novelty of this article lies in advancing privacy as quality through the application of newer theories of harm, positioning consumer data protection and control over big data as central parameters in digital merger assessment within Indonesia's competition law framework. Furthermore, Competition law in the digital era should underlines the importance of analysing digital mergers using the Newer Theory of Harm, specifically the privacy-based theory. This theory considers the protection of consumer data to be a quality indicator in determining whether or not mergers and acquisitions are feasible. Indonesia needs to learn from the Digital Markets Act of the European Union and the German Competition Authority, both of which increase the analysis of how access to big data affects the ecology of corporate competition. Indonesia should consider these lessons. Furthermore, the implementation of Law Number 27 of 2022 on Personal Data Protection presents an opportunity for Indonesian competition law to develop regulations that are more responsive to the challenges posed by digital enterprises' exploitation of consumer data. For this reason, there is a requirement for a regulatory framework that not only avoids monopolies but also guarantees a balance between

⁴⁰ European Commission, "The Digital Markets Act: Ensuring Fair and Open Digital Markets," An official website of the European Union, 2022, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

protecting personal information, promoting innovation, and maintaining fair competition in digital marketplaces.

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