

## Digital Markets and Data Exploitation: Addressing Abuse of Dominance Under Indonesian Competition Law

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### Abstract

Practices exploiting personal data, particularly by dominant players, can lead to unfair competitive advantages. The power derived from service providers' access and control over users' data can capture the market from existing competitors and potential entrants, potentially resulting in higher and even discriminatory consumer prices. This article, employing a combination of normative juridical research and Reform-Oriented Research methodology, aims to establish the exploitation of personal data as a form of abuse of the dominant position in the digital market under Indonesian competition law. The article argues that the practices of digital service providers exploiting personal data, facilitated by the conditions of the digital market and their dominant positions, create barriers for competitors and deter potential entrants. This ultimately meets the element of abuse of dominant position under Article 25 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, rendering such practices *per se* illegal. The article concludes by suggesting that lawmakers should establish a framework and adequate regulations to address the exploitation of personal data by business actors in the digital market. This would promote fair business competition and protect the interests of digital service users.

**Keywords:** Personal Data, Competition Law; Digital Market; Dominant Position.

### 1. Introduction

The emergence of the digital market has heightened the need for distinct legal measures to ensure adequate protection for all economic actors. Inseparable from data<sup>1</sup>, the digital market relies heavily on data as a crucial resource for delivering quality services to consumers (hereinafter referred to as "Service Users") across various sectors. This reliance on data suggests that it has been a source of market power, triggering the enforcement of competition rules.<sup>2</sup> Consequently, Service User data has become a valuable asset, granting a competitive edge to companies that can access and own it.

In the digital market era, service providers (hereinafter "Service Providers") heavily rely on collecting, storing, analyzing, and monetizing vast amounts of personal data. Accessing and monetizing user data is crucial for Service Providers to gain competitive advantages and compete

1 Roberto Augusto Castellanos Pfeiffer, "Digital Economy, Big data and Competition Law," Mkt. & Competition L. Rev. 3, no.1 (2019): 53.

2 Moch Marsa Taufiqurrohman and Elisatris Gultom, "Corporate Digital Responsibility: Tanggung Jawab Etis Penggunaan Teknologi Digital dalam Bisnis Perusahaan" Humani (Hukum dan Masyarakat Madani)13, no. 2 (2023): 311.

effectively in the digital economy.<sup>3</sup> The role of data in competition law analysis has been highlighted in several high-profile cases. The case raises concerns about using user data in the digital market to manipulate search results, potentially leading to dominance through network effects. Similar concerns regarding potential data misuse have been raised in other cases involving Facebook, WhatsApp, and Google's previous acquisition of DoubleClick.<sup>4</sup>

Service User data also serves as a critical resource for Service Providers, driving fierce competition in data collection. This intense competition incentivizes Service Providers to aggressively collect user data, sometimes leading to practices that exploit Service User's data. Through data analysis,<sup>5</sup> the collected data is merged and refined to create detailed customer profiles. These profiles enable service providers to offer timely, personalized, and appropriately priced new products.<sup>6</sup> The process of exploiting Service User's data is then transformed into value through targeted advertisements or personalized recommendations, known as Big Data.<sup>7</sup> The ultimate goal of this data collection and analysis is to convert Service Users into paying customers.

Dominant exploitation of Service Users' data appears to engage more extensively among Service Providers who have established dominant positions in the digital market. This allows them to leverage personal data processing for deeper insight into user preferences. Consequently, such practice can bias user behavior.<sup>8</sup> As a result, individual control over product choices in the market becomes illusory.<sup>9</sup> In some cases, this data exploitation can contribute to the "network effect," where the platform's value increases for both users and service providers as the user base grows. For example, platforms like Gojek or Grab become more valuable for drivers as the number of users increases.

The collection and control of significant amounts of data do not necessarily lead to immediate harm to competition. The efficiency and innovation achieved by Service Providers can benefit Service Users. However, there is potential for Service Providers to exploit their increased market share and abuse their dominant positions. The power derived from their access and control over Big Data enables them to capture the market from potential competitors and potentially impose higher or even discriminatory prices on consumers. If proven, such practices constitute abuse of dominance as defined in Article 25 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition as several of its articles were amended by Law Number 6 of 2023 concerning the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 concerning Job Creation into Law (Law 5/1999).

Although the protection, management, and processing of personal data have been safeguarded by the provisions of the Republic of Indonesia Law Number 27 of 2022 concerning Personal Data Protection (Law 27/2022), Law 27/2022 conditions consent from the data subject for the Personal Data Controller to manage and process their data.<sup>10</sup> However, Law 27/2022 lacks explicit provisions against the exploitation of personal data, even with consent.<sup>11</sup> Law 27/2022 does not explicitly prohibit the exploitation of personal data as long as the data

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3 Viktoria HSE Robertson, "Excessive data collection: privacy considerations and abuse of dominance in the era of big data", *Common Market Law Review* 57, no. 1 (2020): 162.

4 Reuben Binns and Elettra Bietti, "Dissolving Privacy, One Merger at a Time: Competition, Data and Third Party Tracking," *Computer Law & Security Review* 36, no.1 (2020): 105.

5 Ariel Ezrachi, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press, 2016), 20.

6 Silvan Gabathuler, Roland Müller, and Walter Brenner, "Big Data Management In Theorie Und Praxis Aus Rechtlicher Sicht", (Ph.D Thesis, Universität St. Gallen, 2018), 19.

7 Andrea De Mauro, Marco Greco, and Michele Grimaldi, "A Formal Definition of Big data based on its Essential Features", *Emerald Group Publishing Limited Library review* 65, no. 3 (2016): 129.

8 Moch Marsa Taufiqurrohman dkk., "Meninjau Perang Siber: Dapatkah Konvensi-Konvensi Hukum Humaniter Internasional Meninjau Fenomena Ini?," *Jurnal Kawruh Abiyasa*, 1 no. 2 (2021): 21.

9 Faizal Kurniawan, Moch Marsa Taufiqurrohman, dan Xavier Nugraha, "Legal Protection of Trade Secrets Over The Potential Disposal Of Trade Secrets Under The Re-Engineering Precautions," *Jurnal Kebijakan Ilmiah Hukum* 16, no. 2 (2021): 17.

10 Sinta Dewi Rosadi, *Pembahasan UU Perlindungan Data Pribadi (UU RI No. 27 Tahun 2022)*, (Jakarta: Sinar Grafika, 2023), 24.

11 Article 20 paragraph (2) letter a of Law 27/2022 stipulates that Personal Data Controllers must have a legal basis for processing Personal Data. Article 21 paragraph (1) of Law 27/2022 states that the processing of Personal Data based on the consent of the Personal Data Controller must provide Information regarding: a. the legality of the processing of Personal Data; b. the purpose of processing Personal Data; c. the types and relevance of Personal Data to be processed; d. the retention period of documents containing Personal Data; e. details regarding the Information; f. the processing period

subject consents to the management and processing of personal data.<sup>12</sup> This distinction highlights the differing focus of data protection law and competition law. While both ultimately serve consumer interests, data protection law prioritizes user control over their personal information, while competition law emphasizes ensuring fair market competition by eliminating entry barriers and promoting free and effective competition.

How data exploitation can be effectively addressed is part of a clear and broader discussion on the interaction between data protection and competition law. This research contributes to the ongoing discussion on how competition law can address unfair data collection practices by dominance under Article 25 of Law 5/1999.<sup>13</sup>

This research examines the issue of data exploitation imposed by Service Providers in the digital market. Specifically, it seeks to determine whether such practices constitute an exploitative abuse of dominance under Article 25 of Law 5/1999. This research aims to answer three questions. First, what is the relationship between the exploitation of personal data and competition law? Second, how can personal data exploitation be established as an abuse of a dominant position in the digital market? Third, what policy recommendations are there for addressing the behavior of data exploitation by business actors in the digital market?

In its development, many studies have offered ideas similar to those in this article. Notably, insightful analyses on this topic include studies on relevant cases, such as the one examining *Bundeskartellamt vs. Facebook* written by Siti Shalima Safitri.<sup>14</sup> Building the concept of market power, this research examines how dominant businesses can exploit personal data to achieve a domination position, potentially constituting an abuse of dominance under competition law. One relevant study in this area is the analysis of the abuse of dominance through pricing algorithms by Ria Setyawati and Rayhan Adhi Pradana.<sup>15</sup> This article argues that the exploitation of personal data through pricing algorithms can lead to the abuse of dominant positions. In abuse of dominant positions. Based on reports from business competition authorities in the Netherlands and the United Kingdom, the research demonstrates how dominant businesses can leverage data-driven algorithms to exploit consumers, maintain market dominance, and restrict competition.

Third, studies on personal data protection in the analysis of abuse of dominant position based on competition law compiled by Devina Tanzil and Kristianto Pustaka Halomoan.<sup>16</sup> This research posits that data protection is not only crucial for individual privacy rights but also plays a vital role in preventing anti-competitive practices in the digital age. Fourth, the discussion regarding abuse of dominance in a non-negotiable privacy policy was researched by Sih Yuliana Wahyuningtyas.<sup>17</sup> This research also finds that dominance alone may not justify legal intervention

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of Personal Data; and g. the rights of the Personal Data Subject. Article 22 paragraph (1) of Law 27/2022 stipulates that Consent for the processing of Personal Data is done through written or recorded consent. Article 26 paragraph (3) of Law 27/2022 stipulates that the processing of Personal Data for persons with disabilities must obtain consent from the person with disabilities and/or the guardian of the person with disabilities. Article 40 of Law 27/2022 stipulates that Personal Data Controllers must cease processing Personal Data if the Personal Data Subject withdraws their consent for the processing of Personal Data.

- 12 The prohibitions stipulated in Law 27/2022 are limited to those regulated in Chapter XIII Prohibitions in the Use of Personal Data, which include: Article 65 of Law 27/2022: (1) acquiring or collecting Personal Data that does not belong to oneself with the intention of benefiting oneself or others that may result in harm to the Personal Data Subject. Prohibition of disclosing Personal Data that does not belong to oneself. (3) Prohibition of using Personal Data that does not belong to oneself. Article 66 of Law 27/2022: Prohibition of creating false Personal Data or falsifying Personal Data with the intention of benefiting oneself or others that may result in harm to others. Chapter XIV Criminal Provisions, which include: Article 67 of Law 27/2022: (1) Criminal sanctions for violations of Article 65 paragraph (1); (2) Criminal sanctions for violations of Article 65 paragraph (2); (3) Criminal sanctions for violations of Article 65 paragraph (3).
- 13 Article 25 of Law 5/1999 states: (1) Business actors are prohibited from using their dominant position, both directly and indirectly, to: a. establish trade conditions with the aim of preventing and/or obstructing consumers from obtaining competitive goods and/or services, both in terms of price and quality; or b. limiting markets and technological development; or c. obstructing other business actors who have the potential to become competitors from entering the relevant market.
- 14 Siti Shalima Safitri, "Interaksi Persaingan Usaha dan Perlindungan Data: Menelaah *Bundeskartellamt v. Facebook*," *Jurnal Persaingan Usaha* 3, no. 1 (2023): 44–53.
- 15 Ria Setyawati and Rayhan Adhi Pradana, "Penyalahgunaan Posisi Dominan Oleh Pelaku Usaha Dominan Melalui Penggunaan Algoritma Harga," *UIR Law Review* 6, no. 2 (2023): 10–20.
- 16 Devina Tanzil and Kristianto Pustaka Halomoan, "Pelindungan Data Pribadi Dalam Analisis Penyalahgunaan Posisi Dominan Berdasarkan Hukum Persaingan Usaha," *Jurnal Online Atmajaya* 1, no. 3 (2022): 1-18.
- 17 Sih Yuliana Wahyuningtyas, "Abuse of Dominance in Non-Negotiable Privacy Policy in the Digital Market," *European Business Organization Law Review* 18, no. 4 (2017): 785.

against non-negotiable privacy policies. Fifth, an Article written by Dian Parluhutan regarding competition law analysis of Big Data and the Essential Facility doctrine in merger transactions in Indonesia.<sup>18</sup> This article finds that there is a positive correlation between competition analysis of the increasingly dominant position of business actors in the market and merger analysis in the digital market.

However, there is insufficient research to establish the exploitation of personal data as a form of abuse of a dominant position in the digital market within the competition law framework. The research above is not enough to establish the exploitation of personal data as a form of abuse of a dominant position in the digital market within the framework of business competition law. Moreover, the research above offers limited guidance on how Article 25 of Law 5/1999 can be enforced.

The novelties of this article aim to address this gap by providing a refined analysis of Indonesian business competition law within the framework of Article 25 of Law 5/1999. This article provides an in-depth analysis of the suitability of Article 25 of Law 5/1999 with the phenomenon of exploitation of personal data in relation to fair business competition. This article will also provide a *per se* illegal theoretical perspective in overcoming personal data exploitation behavior in relation to the abuse of a dominant position in the digital market, where this approach is not outlined in the studies above. In essence, this article offers a comprehensive analysis of the determination of personal data exploitation behavior that can be determined as an abuse of a dominant position in the digital market based on Indonesian business competition law.

This article is organized into several parts. After introduction and research methods. The first part of the discussion of this article will discuss the relationship between the exploitation of personal data and competition law. This section will analyze the clear understanding of the correlation and connection between the exploitation of personal data and competition law data. This section will begin with modern dominance criteria. The second part of the discussion of this article will justify how acts of exploitation of personal data can be designated as a form of abuse of a dominant position based on Article 25 of Law 5/1999. This part will discuss defining the market, proving the dominant position of Service Providers, the behavior of abusing a dominant position by Service Providers, and conclude with an analysis of the approach *per se* illegal. The third part of the discussion of this article will provide an overview of an effective regulatory framework to tackle the exploitation of personal data, particularly when it has the potential to facilitate abuse of a dominant position in the digital market. Finally, the concluding section summarizes the key takeaways from this discussion and presents recommendations for moving forward.

## 2. Method

This research employs a doctrinal legal research method, specifically normative legal research, combined with a Reform Oriented Research approach. Normative legal research involves examining legal products, legal principles, legal systematics, legal synchronization, both vertical and horizontal legal synchronization, and comparative law, including historical legal analysis.<sup>19</sup> This research employs a normative legal research methodology, focusing on the analysis of relevant legislation concerning the utilization of personal data and dominant positions within business competition. Specifically, the study examines Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition and Law Number 27 of 2022 concerning Personal Data Protection. Furthermore, the research utilizes a comparative law approach, drawing upon relevant legal precedents and case studies to provide context and support the analysis of the aforementioned legislation. This research also incorporates the Reform Oriented Research method. This method evaluates the adequacy of existing regulations and recommends necessary changes.<sup>20</sup> This method empowers researchers to propose new legal principles that can be incorporated into the legal framework, potentially informing future law enforcement practices. All collected data will be analyzed using a qualitative normative methodology.

## 3. Findings and Discussion

The differences in regimes between the characteristics of personal data protection and competition law make the issues in this article quite interesting to discuss. Therefore, the discussion section in this article will be

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18 Dian Parluhutan, "Analisis Hukum Kompetisi Terhadap "Big Data" Dan Doktrin "Essential Facility" Dalam Transaksi Merger Di Indonesia," *Jurnal Persaingan Usaha* 1, no. 1 (2021): 83–96.

19 Aan Efendi, Dyah Ochterina Susanti, dan Rahmadi Indra Tektone, *Penelitian Hukum Doktrinal* (Yogyakarta: LaksBang Justitia, 2019), 34.

20 *Ibid.*

preceded by an understanding of the relationship between the exploitation of personal data and competition law. After this section has been explained, the next section will discuss the extent to which Indonesian competition law under clause 25 of Law 5/1999 and competition law principles can bind the behavior of Service Providers who exploit personal data in the digital market. Ultimately, the discussion of this article will provide recommendations that are at least the most appropriate in justifying the behavior of personal data exploitation by business actors in the digital market.

### 3.1 The Relationship between the Personal Data Exploitation and Competition Law

*“Ad recte docendum oportet primum inquirere nomina, quia rerum cognitio a nominibus rerum dependet,”*<sup>21</sup> a classic legal postulate that carries the profound meaning that understanding a legal concept must begin with a definition.<sup>22</sup> Therefore, it is essential to initiate research with a clear understanding of the correlation and connection between the exploitation of personal data and competition law. Based on the definition of dominant position in Law No. 5/1999,<sup>23</sup> there is no direct connection between a dominant position and the exploitation of personal data. However, the concept of dominance becomes more relevant when considering modern criteria for a dominant position. These criteria typically include market share, barriers to entry, buyer power, and technological innovation.<sup>24</sup>

This body of work, drawing upon insights from scholars like Shoshana Zuboff (“The Age of Surveillance Capitalism”) and Maurice Stucke (“Competition Policy for the Digital Economy”), reveals a fraught relationship between personal data exploitation and competition law. Zuboff’s work underscores how the commodification of personal data, often procured through exploitative practices by dominant platforms, distorts market competition. This research collectively emphasizes the urgency of integrating data protection principles into competition law enforcement. By acknowledging data as both an engine of innovation and a potential tool for anti-competitive behavior, scholars like Ariel Ezrachi and Maurice Stucke (“Virtual Competition: The Promise and Perils of Algorithm-Based Dynamic Pricing”) advocate for a holistic approach. This entails strengthening data protection regulations, promoting data portability, and empowering consumers to curb exploitative practices, and fostering a digital economy characterized by both dynamism and fairness.<sup>25</sup>

The mastery of personal data, which is then processed into Big Data, can be a critical factor in the criteria of technology and innovation and can be a barrier for new entrants to enter the market so that both aspects can strengthen the suspicion of the existence of a dominant position by certain companies. There are several possibilities as to how the exploitation of personal data can affect a company’s dominant position, especially in the context of dominant position criteria. As Lubyova argues, control and processing of data can trigger the emergence of a dominant position, especially when access to data becomes a strategic advantage in market competition.<sup>26</sup>

The transition process from leveraging personal data to a dominant position can be facilitated by a phenomenon known as feedback loops.<sup>27</sup> This demonstrates a causal relationship between data usage and the strengthening of a dominant position, as illustrated by the following feedback loop example.

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21 Eddy O.S. Hiariej, *Prinsip Hukum Pidana: Edisi Revisi* (Yogyakarta: Cahaya Atma Pustaka, 2016), 2.

22 Moch Marsa Taufiqurrohman, “Adopting Osman Warning in Indonesia: An Effort to Protect Potential Victims of Crime Target,” *Jurnal Hukum Dan Peradilan* 11, no. 3 (2022): 479.

23 Article 25 of Law 5/1999 stipulates: (1) Business actors are prohibited from using their dominant position, either directly or indirectly, to: a. establish trade conditions with the aim of preventing and/or obstructing consumers from obtaining competitive goods and/or services, both in terms of price and quality; or b. limiting markets and technological development; or c. obstructing other potential business actors from entering the relevant market. (2) Business actors shall be deemed to have a dominant position as referred to in paragraph (1) in the following events: a. if one business actor or a group of business actors controls 50% (fifty percent) or more of the market segment of a certain type of goods or services; or b. if two or three business actors or a group of business actors’ control 75% (seventy-five percent) or more of the market segment of a certain type of goods or services.

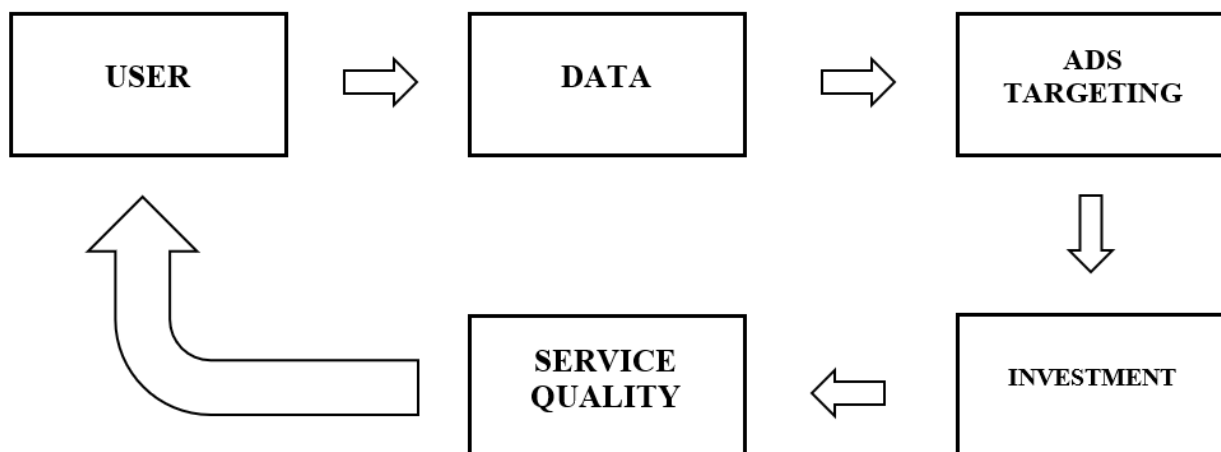
24 Moch. Marsa Taufiqurrohman, et al., “Meninjau Perang Siber: Dapatkah Konvensi-Konvensi Hukum Humaniter Internasional Meninjau Fenomena Ini?” *Jurnal Kawruh Abiyasa* 1, no. 2 (2021): 145-165.

25 Ariel Ezrachi, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press, 2016), 20.

26 Linda Holková Lubyová, “Big data in the EU Competition Law,” *SSRN* 18, No, 2 (2018): 19.

27 Organisation for Economic Co-operation and Development, *Exploring Data-Driven Innovation as a New Source of Growth: Mapping the Policy Issues Raised by Big Data* (Washington: OECD Publishing, 2013), 25.

**Figure 1. Feedback Loops Cycle**



Source: Organization for Economic Co-operation and Development, *Exploring Data-Driven Innovation as a New Source of Growth: Mapping the Policy Issues Raised by Big Data* (OECD Publishing, 2013).

Service users with access data can leverage it through transactions with personalized advertising providers. The revenue generated by these transactions allows companies to invest in service improvements and innovations, ultimately encouraging user retention and forming a recurring feedback loop. This feedback loop cycle can be weakened if users switch to competitors due to a lack of exclusivity in the data provided. Therefore, the role of independent or non-affiliated data providers becomes crucial, as they can offer more specialized or differentiated data sets. However, even third-party data providers face limitations. Personal data is often specific to its original purpose, and its effectiveness for another company can be limited.<sup>28</sup>

Service providers with data processing capability, including automation, may not necessarily translate these costs directly to consumers. Instead, companies may prioritize using this data processing for purposes beyond immediate revenue generation from the processing itself. This processed data can be used for various purposes, such as targeted advertising, product personalization, or improving user engagement. Such conditions are widespread, especially in the markets of social networking products and search engines, which generally have highly concentrated market structures. Competition in the market will be disrupted if access to data is restricted, especially by dominant companies that control the service or process. Access denial practices for competitors can be highly detrimental, especially if the data is considered a crucial facility for the relevant company. Besides access denial, discrimination can also hinder competition, especially by vertically integrated companies or core companies with Over the Top (OTT) services. Service users with access to personal data at the retail level gain an unfair advantage by processing it to understand consumer behavior and accurately estimate demand. This information remains inaccessible to competitors within the same company, hindering their ability to compete effectively.

### **3.2 Personal Data Exploitation as an Abuse of a Dominant Position in the Digital Market**

Article 25, paragraph (2) of Law No. 5/1999 stipulates that a business actor is considered to have a dominant position if they meet the requirements of market share dominance in 50% of market. Point 4.3 on Page 20 of the Attachment to Commission for the Supervision of Business Competition Regulation Number 6 of 2010 regarding the Implementation Guidelines for Article 25 on Abuse of Dominant Position Based on Law Number 5 of 1999 concerning Prohibitions of Monopolistic Practices and Unfair Business Competition (PKPPU 5/2010), stipulates that the normative evidence of abuse of dominant position involves an approach that can be divided into three systematically organized process stages. KPPU has adjudicated several cases concerning the abuse of dominant market positions. In KPPU Case No. 21/KPPU-L/2005, the KPPU determined that PT Pertamina had exploited its market dominance by compelling PT Igas Utama to acquiesce to a Mutual Agreement Letter, leveraging the threat of discontinuing the gas supply as a coercive tool. This finding underscores the KPPU's role in scrutinizing and addressing the misuse of market power to the detriment of competition and market fairness. Moreover, in

28 Moch Marsa Taufiqurrohman, Helza Nova Lita, and Gress Gustia Adrian Pah. "THE INTERRELATION BETWEEN PERSONAL DATA PROTECTION AND COMPETITION LEGAL REGIME IN THE INDONESIAN DIGITAL MARKET." *Syiah Kuala Law Journal* 8, no. 3 (2024): 347.

KPPU Decision No. 06/KPPU-L/2004, the KPPU identified and subsequently nullified promotional activities constituted as a “Competitor Shift Agreement” implemented by PT. Panasonic Gobel Indonesia. While the KPPU recognized the anti-competitive nature of the agreement, it opted not to levy compensatory sanctions against the company. The analysis of these decisions is vital in comprehending the approach and jurisprudence of the KPPU in matters of market dominance and the abuse thereof. The outcomes of such cases provide critical insights into the regulatory environment governing dominant firms and the extent to which the KPPU exercises its authority to deter and rectify anti-competitive practices. The absence of compensatory sanctions in certain instances may reflect the KPPU’s discretion in imposing remedies and the consideration of various factors, such as the potential deterrent effect of its rulings and the proportionality of sanctions in relation to the infraction. Both cases contribute to the legal precedent and enforcement landscape of competition law in Indonesia, illustrating the complexities involved in regulating dominant entities and the necessity for a nuanced application of legal principles to uphold market competition and protect consumer interests.

This section will discuss the stages in determining the exploitation of personal data as an abuse of a dominant position in the digital market. The first stage involves defining the relevant market. The second stage focuses on proving the dominant position of Service Providers. After these two stages have been fulfilled and proven, the next step is proving the behavior of abusing a dominant position by Service Providers. The proof of this behavior is determined by several things. First, determining trading conditions, second, market restrictions and technology development, third, inhibiting potential competitors. To refine and confirm this determination, a per se illegal approach is used, as an academic theoretical basis in determining the exploitation of personal data as an abuse of a dominant position in the digital market.

### 3.2.1 Defining Market

The first stage involves defining the relevant market for the case under examination. In this stage, it is essential to identify the parameters and characteristics of the involved market, including the products or services offered, its geographical area, and its key players. However, defining the market when big data plays a crucial role presents a significant challenge for competition law. This is because Law No. 5/1999 and PKPPU 5/2010 provide guidelines for mapping relevant product and geographical markets. Defining the market is crucial. The KPPU consistently considers the scope of the market definition in every decision it issues. In the Indonesian Competition Commission (KPPU) Decision No. 20/KPPU-M/2019, involving respondent PT FKS Multi Agro, the KPPU provided clarification on the criteria pertaining to the presence of a market structure. Similarly, in KPPU Decision No. 06/KPPU-L/2020, with PT Garuda Indonesia (Persero) as the respondent, the Commission delivered considerations concerning the relevant market that is under the influence of the respondent. The challenge in defining the market lies in the fact that the behavior of exploiting personal data can apply to more than one type of market-based on products and geography. Thus, exploiting personal data crosses various relevant market dimensions (Multi-Sided Market) and collects the same Service User’s data in each market.<sup>29</sup>

Collecting and analyzing personal data in the digital market ultimately results in market power. This market power empowers dominant companies to offer lower-quality products or services, inundate consumers with targeted advertising, and potentially amass, scrutinize, or trade excessive consumer data.<sup>30</sup> Market power in the digital economy cannot be accurately described by the methods traditionally used by competition law. Market share may not reflect market power in innovative markets with short product cycles and frequent market entry. At the same time, once a company establishes market power, it often consolidates its position swiftly.<sup>31</sup> Zero-price markets have also been applied to contexts such as credit cards and shopping centers in a multi-sided market. However, zero-price markets are becoming increasingly common in the rapidly developing digital economy with diverse characteristics and broad coverage.<sup>32</sup>

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29 Noby Thomas Cyriac, *Big Data and the Abuse of Dominance by Multi-Sided Platforms: An Analysis of Art. 102 TFEU*, vol. 85 (Baden: Nomos Verlag, 2022), 18.

30 David J. Teece et al., “Managing Multi-Sided Platforms: Platform Origins and Go-to-Market Strategy,” *California Management Review* 64, no. 4 (2022): 12.

31 James Alleman, Edmond Baranes, and Paul N. Rappoport, *Multisided Markets and Platform Dominance in Applied Economics in the Digital Era*, (Cham: Springer International Publishing, 2020), 21.

32 Shuya Hayashi and Koki Arai, *Competition in Multisided Markets in Digitalization and Competition Policy in Japan* (Singapore: Springer Nature Singapore, 2024), 19.

The concept of zero-price markets in the digital economy raises questions about how businesses can provide products without directly asking for payment from consumers, ultimately affecting product quality.<sup>33</sup> Another major challenge in defining markets in the digital market is the difficulty in determining the relevant market when platforms are involved in transactions with zero-price data exchanges. For example, a traditional platform like a newspaper operates in the news and advertising markets by setting prices for readers and advertisers. However, in zero-price market conditions, competition dimensions and market position become more crucial, as price is no longer the sole factor. Many Service Providers offer various free services such as search, translation, navigation, video uploading, and access to social networks. However, these services are not entirely “free”; Service Users unknowingly pay for these services with their data. Furthermore, Service Providers use this personal data to strengthen their position in the market.

### 3.2.2 Proof of Dominant Position of Service Providers

The Attachment to PKPPU 5/2010, on page 20, outlines the second stage in establishing the existence of a business actor’s dominant position. This stage requires a thorough examination of various factors determining market advantage, including market share, relative strength, supply control, and distribution access, among others. In this context, it is essential to use appropriate methodology and accurate data to objectively assess the market dominance held by specific business actors.

Proving a dominant position cannot be separated from market power. Market power refers to the ability of a firm to make decisions autonomously, without being significantly influenced by competitors, customers, or end consumers. Service Providers with significant market power may have the unilateral ability to raise prices above competitive levels, supply products or services with diminished quality, engage in collect, analyze, or sell user data. The market power of Service Providers can also be measured through direct indicators based on substitution assessments and indirect indicators such as barriers to entry for potential competitors in the relevant market. Market power can also arise from the lack of suitable alternatives in the market.<sup>34</sup> This occurs when service users need access to substitutes for service provider products, and there are no potential competitors who can quickly enter the market to constrain the dominant service providers. The impact of market power is also evident in the digital realm, where changes such as search algorithm modifications, driven by the exploitation of personal data behavior, underscore the influence wielded by service providers.

Thomas O. Barnett (“Antitrust Enforcement for the Modern Age”) and Herbert Hovenkamp (“The Antitrust Enterprise”) provide insights into the intricacies of proving a dominant position in the market. They emphasize that market power is an essential element of such proof, which is demonstrated by a firm’s ability to act with considerable independence from competitors, customers, and end consumers. Richard A. Posner (“Antitrust Law”) further elaborates that entities with significant market power can manipulate pricing, quality, advertising, and data practices to their advantage, often to the detriment of market competition. In “Market Power in Antitrust,” Eleanor M. Fox and Lawrence A. Sullivan examine the assessment of market power, noting that it can be identified through direct indicators such as substitution evaluations, where the focus lies on the availability of alternative products or services for consumers. Jonathan Baker (“Market Power in the U.S. Economy Today”) explores indirect indicators, which include profitability and market concentration analyses, to establish the extent of a firm’s market influence. Carl Shapiro (“The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years”) discusses the importance of these indicators in the context of merger guidelines, where the consolidation of firms can significantly alter market power dynamics. Luis Cabral (“Introduction to Industrial Organization”) also highlights the role of empirical methods in quantifying market power and its implications for anticompetitive behavior. These scholarly works collectively underscore that the proof of a firm’s dominant position is inextricably linked to its market power, reflecting its capacity to influence the market unilaterally in a manner that can hinder competition and harm consumer welfare.

Entry barriers in the market can also contribute to the dominant position of Service Providers. Service Providers with dominant positions may be shielded from competitive pressure because entry barriers prevent competitors from competing with them. Several types of barriers in the digital market affect entry. The first type

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33 Juan Manuel Sanchez-Cartas and Gonzalo León, “Multisided Platforms And Markets: A Survey Of The Theoretical Literature,” *Journal of Economic Surveys* 35, no. 2 (2021): 16.

34 Lisa Mays, “The Consequences of Search Bias: How Application of the Essential Facilities Doctrine Remedies Google’s Unrestricted Monopoly on Search in the United States and Europe”, HeinOnline *Geo. Wash. L. Rev.* 83, no. 3 (2014): 721.

is network effects, where the utility of technology or services increases with the number of users.<sup>35</sup> The strength of these effects and the extent to which they prevent entry will depend on the specific market. For example, if Service Users cannot easily switch from frequently used Service Providers due to high switching costs, limited data portability, habits, or the need to learn new systems. Therefore, network effects can act as a significant entry barrier.<sup>36</sup>

### 3.2.3 Proof of Abusive Behavior of Dominant Position

Page 20 of the Attachment to PKPPU 5/2010 delineates the third stage, which pertains to establishing the abusive conduct of a dominant business entity. This third stage necessitates demonstrating whether the business entity holding a dominant position has engaged in abusive behavior. During this stage, attention is directed towards the specific conduct of the business entity that may be deemed abusive, including discriminatory practices, unfair pricing, restrictions on market access, or other behaviors detrimental to competitors or consumers. It is imperative to apply pertinent legal frameworks and establish clear criteria to ascertain whether the actions undertaken meet the prescribed standards of abusive behavior. Consequently, the process of proving abusive behavior can be executed in a structured and objective manner, thereby ensuring equity in the enforcement of competition law. Instances of proven abuse of dominant position are evidenced by various decisions rendered by the Komisi Pengawas Persaingan Usaha (KPPU). Notably, in Case No. 21/KPPU-L/2005, the KPPU concluded that PT Pertamina misused its dominant market position by pressuring PT Igas Utama into executing the Mutual Agreement Letter Number (SKB) 925/D00000/2004-SI. PT Pertamina employed the threat of terminating the gas supply to compel acquiescence, a tactic that the KPPU deemed an abuse of power in violation of fair competition principles. Furthermore, the KPPU has addressed the legal implications of dominant position abuse in its interpretations of Articles 19 and 25 of Law No. 5/1999 through decisions such as Case No. 06/KPPU-L/2004 and No. 14/KPPU-L/2015. These cases elucidate the statutory framework for identifying and prosecuting anticompetitive conduct that leverages market dominance to the detriment of competition and consumer welfare. In addition, Case No. 06-KPPU-L-2020 provides an exploration into the evidentiary requirements for establishing the abuse of a dominant position under Law No. 5/1999. Specifically, this case delves into the sufficiency of proof regarding the elements necessary to demonstrate abusive conduct in the context of business negotiations. The examination of these KPPU decisions contributes to the legal discourse on the enforcement of competition law in Indonesia. It underscores the necessity for robust regulatory oversight to deter and rectify instances where market dominance is exercised to the disadvantage of market competition and consumer interests. The KPPU's rulings in these cases offer precedential value, guiding the application of Law No. 5/1999 and informing future deliberations on the boundaries of permissible conduct for dominant market players.

#### 3.2.3.1 Establishment of Trade Conditions

Article 25, paragraph (1), letter a of Law No. 5/1999 defines one form of abusive behavior of a dominant position as establishing trade conditions to prevent and/or hinder consumers from obtaining competing goods and/or services, both in terms of price and quality. Trade conditions executed by service providers concerning the exploitation of personal data include imposing a privacy policy and user preferences through non-negotiable and coercive means.<sup>37</sup> In Indonesia, this issue arose when several academics questioned the use of personal data through consent to the Standard Agreement regarding the Privacy Policy conducted by Tokopedia. Tokopedia compelled users to agree to the Privacy Policy through the Standard Agreement. Among them, Tokopedia was authorized to regulate users' personal data portability by disclosing it to its subsidiaries and affiliates, including third parties, for processing the data.

Tokopedia, as one of the dominant Service Providers in Indonesia, has come under scrutiny for allegations of personal data exploitation. This is reflected in the implementation of its Privacy Policy and User Preferences, which offers no room for negotiation to its users, thereby raising questions concerning the abuse of dominant position.<sup>38</sup> The Tokopedia case in Indonesia illustrates how a dominant Service Provider can exploit personal data through controversial Privacy Policies and User Preferences. These coercive and non-negotiable policies have

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35 Cassey Lee, "Competition Policy in the Age of Algorithms: Challenges for Indonesia," *Bulletin of Indonesian Economic Studies* 58, no. 3 (2022): 299.

36 Berkay Kurdoglu and Caglar Deniz Ata, "Data Economics and Competition Law," *Digital L. Rev.* 3 (2021): 23.

37 Nina Gerber, Paul Gerber, and Melanie Volkamer, "Explaining the privacy paradox: A systematic review of literature investigating privacy attitude and behavior", *Elsevier Computers & Security* 77, no. 1 (2018): 226.

38 Mohammad Bernie, *tirto.id*, <https://tirto.id/tokopedia-ubah-kebijakan-privasi-apa-dampaknya-ke-data-pribadi-gadU>, accessed at August 11, 2024.

drawn criticism for being considered detrimental to users' rights. Tokopedia's Privacy Policy, which mandates user consent without providing a space for negotiation, has been criticized for limiting users' control over their personal data. A particularly contentious point is Tokopedia's authority to share user data with subsidiaries, affiliates, and even third parties, without offering users the option to opt-out. Tokopedia's "take it or leave it" approach to privacy raises concerns about the potential for personal data misuse. Provisions that allow Tokopedia to share user data with third parties, including subsidiaries and affiliates, without explicit consent, create opportunities for data exploitation for commercial interests.<sup>39</sup> Tokopedia's Privacy Policy is comprehensively listed on the official Tokopedia page. The policy concerning personal data on this page is divided into two parts. First, the Privacy Notice, which is found at <https://www.tokopedia.com/privacy?lang=id>. Second, the Cookie Policy, which pertains to the methods by which Tokopedia personalizes the user experience, as detailed at <https://www.tokopedia.com/Cookies?lang=id>.

The ability of providers to collect personal data by compelling users to agree to non-negotiable agreements or consents regarding privacy policies in large quantities enables providers to exploit personal data, which leads to biases in user behavior. Consequently, users' preferences are discerned through the processing of personal data. This situation leaves Service Users with only two choices: either accept the non-negotiable agreements or consent regarding Privacy Policies provided by Service Providers or abandon them and use less preferred services. Ultimately, individual control over the availability of product choices in the market becomes an illusion.<sup>40</sup>

Furthermore, the inherent asymmetry of information and power in data-processing relationships is exacerbated. This necessitates more transparency in privacy policies regarding collecting and using personal data, which does not enable consumers to make informed decisions. These two failures are further supported by the "privacy paradox," a conflicting situation where consumers are highly concerned about their privacy protection, but their market behavior does not align with their privacy preferences. Privacy Policies and User Preferences, often made non-negotiable, are part of the relevant terms and conditions of the services provided by the platforms.<sup>41</sup>

### 3.2.3.2 Market Restriction and Technological Development

Article 25, paragraph (1), letter b of Law No. 5/1999 further delineates abusive behavior concerning dominant positions in the digital market as encompassing actions that curtail markets and hinder technological advancement. Page 20 of the Annex to PKPPU 5/2010 elucidates that unilateral control over production inputs is one manifestation of market restriction. This scenario arises when dominant businesses control crucial inputs and withhold their supply from competitors, making it difficult for competitors to obtain them, resulting in increased production costs. Such actions may be construed as unfairly burdening competitors with increased costs.

KPPU has adjudicated and issued rulings on matters involving market restriction activities, which have been deemed to foster an environment of unfair competition. Among these is the KPPU's decision in Case No. 15/KPPU-I/2022, which involves the market restriction on the sale of packaged cooking oil within Indonesia, establishing constraints on trade and distribution that potentially disrupt the competitive balance. Additionally, the KPPU's decision in Case No. 22/KPPU-I/2016 addresses similar concerns regarding market restriction in the sale of Packaged Drinking Water Products, which implicates practices that may limit consumer choice and hinder fair market conditions. In legal research, it is critical to examine such decisions for their legal rationale, the application of competition law principles, and the implications for market participants. The KPPU's decisions serve as precedents and regulatory guidance for the interpretation and enforcement of competition law in Indonesia, particularly in sectors where market dynamics are susceptible to manipulation by dominant players or collusive arrangements. The analysis of these decisions contributes to the broader discourse on how competition law is evolving to address market restrictions in various industries and the measures necessary to maintain market integrity and consumer welfare.

The exploitation of personal data as a means of input control designed to restrict the market can be conceptualized through the lens of personal data's potency as a leverage point in the digital market. This

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39 *Ibid.*

40 Faizal Kurniawan, Moch Marsa Taufiqurrohman, dan Xavier Nugraha, "Legal Protection of Trade Secrets Over the Potential Disposal of Trade Secrets Under the Re-Engineering Precautions," *Jurnal Ilmiah Kebijakan Hukum* 16, no. 2 (2022): 17.

41 Moch. Marsa Taufiqurrohman, Zaki Priambudi, and Avina Nakita Octavia, "Mengatur Petisi Di Dalam Peraturan Perundang-Undangan: Upaya Penguatan Posisi Masyarakat Terhadap Negara Dalam Kerangka Perlindungan Kebebasan Berpendapat," *Jurnal Legislasi Indonesia* 18, no. 1 (2021): 12.

perspective is based on the Essential Facility doctrine.<sup>42</sup> A dominant service provider equipped with personal data processed into Big Data enjoys an unrivaled position, rendering competitors unable to mount effective challenges. Consequently, this directly or indirectly impedes other competitors who wish to enter into competition in the online platform automatically, and even their attempts will fail because they cannot compete with dominant business entities.<sup>43</sup>

The ownership of inputs derived from personal data processed into Big Data is highly relevant when associated with the Essential Facility doctrine. In the legal competition literature in Germany and the European Union, the presence of data tends to be correlated with the application of “Essential Facility.” An essential facility refers to a scenario where a business entity has facilities superior to other business entities in the relevant market.<sup>44</sup> Diverse facilities advantage the business entity with superior facilities. Inherent in the Essential Facility concept is the notion that the owner of the Essential Facility possesses monopolistic power.<sup>45</sup> Issues arise when only one business entity utilizes a facility that should be accessible to all business entities. Meanwhile, the business entity utilizing the facility is required to afford space for other business competitors to use the same facility.<sup>46</sup> The objective is for users to select a business entity with superior facilities. This practice yields additional profits for the business entity and losses for other business competitors.<sup>47</sup>

Market restriction can also manifest in the form of price discrimination. If service providers exploit personal data, they automatically gain comprehensive insight into users’ consumption habits and purchasing capacity. Consequently, service providers can precisely implement price discrimination and pricing strategies tailored to users in a segmented manner (scalable price targeting). However, this necessitates market power ownership by the digital company, thereby making it difficult for users to easily transition to other business entities or products in the digital market.<sup>48</sup>

Regarding the utilization of technology, abuse of dominant positions emerges as a highly pertinent issue as entities with greater access and control over personal data can exploit it for their interests, often without explicit consent or understanding from the affected individuals. Firstly, it is essential to recognize that technology has facilitated data collection, storage, and analysis more efficiently and extensively than ever before. Innovations such as the Internet of Things (IoT), Artificial Intelligence (AI),<sup>49</sup> and cloud technology have significantly expanded data acquisition capabilities. However, while technology substantially enhances efficiency and access to information, the unethical or unlawful utilization of personal data has also become more feasible.<sup>50</sup>

### 3.2.3.3 Restricting Potential Competitors from Entering the Market

The third behavior considered a form of abuse of dominant position under Article 25 paragraph (1) letter c of Law No. 5/1999 involves restricting other businesses as potential competitors from entering the relevant market. The effect of service providers exploiting personal data ultimately creates barriers for potential competitors to enter the market. Exploitation of personal data has become a powerful tool for companies to gain a competitive advantage in the market, which can hinder potential competitors and abuse companies’ dominant position in several significant ways.

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42 Catherine Tucker, “Digital Data, Platforms and the Usual [Antitrust] Suspects: Network Effects, Switching Costs, Essential Facility”, *Review of Industrial Organization* 54, no. 4 (2019): 683.

43 Marsinta Simanjuntak, “Disgorgement Fund to Create Corrective Justice as a Legal Protection Measure for Investors in The Capital Market (Legal Protection of Investors Against Disgorgement Fund to Realize Corrective Justice),” *Jurnal Penelitian Hukum De Jure* 23, no. 4 (2023): 473–82.

44 Inge Graef, “EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility: Data as Essential Facility” (Zuid-Holland: Kluwer Law International BV, 2021), 90.

45 Dian Parluhutan, “Analisis Hukum Kompetisi terhadap “Big Data” dan Doktrin “Essential Facility” dalam Transaksi Merger di Indonesia”, *Jurnal Persaingan Usaha* 1, no. 1 (2021): 85.

46 Barry Doherty, “Just what are essential facilities?”, *Common Market Law Review* 38, no. 2 (2001): 16.

47 Brett Frischmann and Spencer Weber Waller, “Revitalizing essential facilities”, *HeinOnline AntitrUSLJ* 75, no.1 (2008): 17.

48 Marina Lao, “Search, Essential Facilities, and the Antitrust Duty to Deal”, *HeinOnline Nw. J. Tech. & Intell. Prop.* 11, no. 3 (2012): 275.

49 Moch. Marsa Taufiqurrohman, “OTOMATISASI DAN KECERDASAN BUATAN PADA PROFESI HUKUM: KERANGKA TEORITIS DAN NARASI IDEAL DI MASA DEPAN.” *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 13, no. 2 (2024): 223.

50 Zachary Abrahamson, “Essential data”, *HeinOnline Yale LJ* 124, no.2 (2014): 867.

Service Providers who have collected a large amount of personal data have a significant advantage in understanding customer behavior, preferences, and market needs. With this information, they can optimize marketing strategies, target advertising, and product development.<sup>51</sup> However, when such Service Providers refuse to share this data with potential competitors or impose high access costs, it can hinder fair competition. Potential competitors may need more resources to gather the same data or pay high costs to obtain it; thus, they are marginalized from the market.<sup>52</sup> Service Providers with exclusive access to extensive personal data can exploit their dominant position to monopolize the market. They can use this data to develop aggressive market penetration strategies, suppress competitors, or hinder competitors from entering the market.<sup>53</sup> With solid control over personal data and the market, these companies can control prices, reduce consumer choices, and inhibit competitor innovation, creating an unhealthy business environment.<sup>54</sup>

Service Providers who have gained a deep understanding of user data can manipulate user behavior for the benefit of the Service Provider. Service Providers can use precise advertising targeting or psychological manipulation to influence customer purchasing decisions.<sup>55</sup> This can hinder potential competitors with different access to personal data, as they cannot compete in marketing campaign effectiveness or influence on consumer behavior.

When service providers hold dominant positions in the market and control access to personal data, innovation and healthy competition may be impeded. Potential competitors will be hindered by high entry barriers or difficulties accessing the resources needed to compete in the market. This can reduce the competitive pressure to drive innovation and increase consumer choice.<sup>56</sup> Exploiting personal data can be a double-edged sword for service providers with dominant positions in the digital market.<sup>57</sup> While it can provide a significant competitive advantage, especially for dominant Service Providers, it can also hinder healthy competition and create inequality in the market.

#### 3.2.2.4 *Per Se Illegal* Approach

According to Page 31 of the Attachment of PKPPU 6/2010, violation of Article 25 of the Law No. 5/1999 is *per se illegal*. Consequently, once the necessary elements have been fulfilled, the Business Competition Supervisory Commission (KPPU) will declare that the alleged violation of the article in question has been proven valid and convincing. Calculating and presenting the impact of the abuse of the dominant position can be done to strengthen evidence of the violation and determine the amount of sanctions if proven.<sup>58</sup>

The *per se illegal* approach is a method that considers any agreement or specific business activity as illegal without further proof or investigation into the impact of such agreement or business activities on competition. This *per se illegal* approach can be inferred from clauses containing the word “prohibited” without the phrase “which may result in”, which stems from, among others, investigations into several agreements or business activities.

In principle, two requirements must be met in determining whether a business entity’s actions are considered violations of fair competition based on the *per se illegal* approach. First, it must be directed toward business conduct rather than market conditions. This is because unlawful decisions are made without further examination, such as regarding consequences and surrounding circumstances. Such illegal acts are deliberate actions by business entities that should be avoidable. Second, there must be quick or easy identification regarding the type

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51 Moch. Marsa Taufiqurrohman et al., “The Use of Necessitas Non Habet Legem and Wederspanningheid in Law Enforcement for Covid-19 Vaccination in Indonesia,” *Jurnal Penelitian Hukum De Jure* 21, no. 4 (2021): 473.

52 Edy Santoso and Andriana Andriana, “Insecurity to Consumer Data Protection in The eHealth Sector,” *Jurnal Penelitian Hukum De Jure* 23, no. 1 (2023): 115.

53 Inge Graef, “Rethinking the essential facilities doctrine for the EU digital economy,” *HeinOnline RJT ns* 53, no.1 (2019): 33.

54 Marulak Pardede, “Investment Regulatory Reform in Indonesia (an Effort to Increase the Competitiveness Climate of Investment),” *Jurnal Penelitian Hukum De Jure* 23, no. 2 (2023): 231.

55 Tasya Safiranita et al., “The Role of E-Commerce in Escalation of Digital Economy in The New Normal Era Based on Law Number 27 of 2022 Concerning Personal Data Protection,” *Jurnal Penelitian Hukum De Jure* 22, no. 4 (2022): 437.

56 Faiz Rahman and Dian Agung Wicaksono, “Researching References on Interpretation of Personal Data in the Indonesian Constitution,” *Jurnal Penelitian Hukum De Jure* 21, no. 2 (2021): 187.

57 Huta Disyon and Elisatris Gultom, “Critical Review of the Implementation of the Making of SOE as a Holding from Anti-Monopoly and Unfair Business Competition Perspective,” *Jurnal Penelitian Hukum De Jure* 22, no. 2 (2022): 191.

58 Andi Fahmi Lubis et al. *Hukum Persaingan Usaha: Buku Teks. Edisi Kedua* (Jakarta: KPPU, 2017), 66.

of prohibited practice or behavior limitation. This means that assessments of actions by business entities in the market or the judicial process must be easily determined.<sup>59</sup>

Exploiting personal data can be defined as abuse of a dominant position through the *per se illegal* approach for two reasons. *First*, the inherent nature of exploiting personal data. Practices of exploiting personal data such as collecting data without consent or selling data to third parties without user approval, violate privacy and individual rights. Therefore, it can be considered as a *per se* legal violation. *Second*, dependence on data. Dominant positions in the digital market often rely on control over data. In situations where companies effectively control access to personal data, they can abuse this power to impede competitors and monopolize the market. Third, there are detrimental social and economic impacts.<sup>60</sup> Exploiting personal data can harm society, including violating individual privacy, hindering innovation, and creating inequality in business competition.

### 3.3 Policy Recommendations to Address the Behavior of Personal Data Exploitation by Business Actors in the Digital Market

There is a pressing need for amendments and updates to be made to Law No. 5 of 1999, the principal statute governing antitrust matters in Indonesia. This necessity arises from the imperative that Indonesian Competition Law adapts to and encompasses the regulation of the digital market. The primary focus of these legislative reforms should be the prevention of abuse of dominant positions by Service Providers operating within the digital sphere.

The digital economy has dramatically transformed the landscape of commerce and competition, necessitating a reevaluation of existing legal frameworks to ensure they remain effective in safeguarding fair market practices. Law No. 5 of 1999 was enacted at a time when the digital marketplace was not as prevalent or influential as it is today; thus, it may not adequately address the unique challenges and dynamics presented by digital platforms. One of the critical concerns is the potential for dominant digital service providers to engage in anti-competitive behaviors that could stifle innovation, limit consumer choice, and unfairly disadvantage smaller or emerging competitors. Such behaviors could include but are not limited to, predatory pricing, exclusivity arrangements, and the leveraging of market power to create barriers to entry or expansion for other firms.<sup>61</sup> Revisions to the law should aim to define clearly and address the concept of market dominance in the context of the digital economy, where traditional metrics of market share may not be as indicative of actual market power.

Furthermore, the law should consider the role of data in establishing and maintaining dominance, as the control of vast amounts of user data can be a significant competitive advantage. The updated legal framework should also provide the Indonesian Competition Authority with the tools and authority necessary to investigate and penalize anti-competitive practices in the digital market effectively. This includes the capability to conduct digital forensics, understand complex algorithms that drive business decisions, and evaluate the competitive impact of mergers and acquisitions in the tech sector. In conclusion, a thorough revision of Law No. 5 of 1999 is crucial for the Indonesian Competition Law to remain relevant and capable of promoting healthy competition within the rapidly evolving digital market. Such reforms should be carefully crafted to balance the promotion of innovation and consumer welfare with the need to deter and penalize anti-competitive conduct by dominant digital service providers.

Several policy recommendations are proposed to ensure that competition continues to operate in the digital market. The theory of harm approach describes the methodology used by competition supervisory authorities to test behavior suspected of violating competition law, including elaborating on the (potential) impacts on competition and consumers. This article suggests three important roles or functions that must operate optimally. *First*, a Code of Conduct ensures competition and other principles, such as consumer protection. *Second*, data mobility and open standards ensure user freedom principles. Mobility will reduce switching costs for users while reducing transaction costs in aggregate. Open standards relate to technology specifications, ensuring universal standards so that technology providers do not encounter barriers to platform access. Besides ensuring technology provider freedom, open standards will reduce business unit dependence on specific companies with non-standard specifications. *Third*, data openness ensures that all platforms and big data providers can access essential data for

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59 Carl Kaysen dan Donald F. Turner. *Antitrust Policy: An Economic and Legal Analysis*. (Cambridge: Harvard University Press, 1972), 143.

60 Adis Nur Hayati, "Analisis Tantangan Dan Penegakan Hukum Persaingan Usaha Pada Sektor E-Commerce Di Indonesia," *Jurnal Penelitian Hukum De Jure* 21, no. 1 (2021): 109.

61 Moch. Marsa Taufiqurrohman, Helza Nova Lita, and Gress Gustia Adrian Pah. "Tech Giants' Non-Negotiable Privacy Policies Strategy Versus Indonesian Competition Law". *Jurnal Bina Mulia Hukum* 9, no. 1, (2024): 159.

business.<sup>62</sup>

This article recommends several points deemed capable of minimizing the potential for abuse of dominant positions by companies that control Big Data technology. *First*, maintaining multi-homing access for users maintains requirements exclusively related to user access. *Second*, opening the necessary access for complementary businesses. *Third*, prevention against defensive acquisition and entry for buyout practices.<sup>63</sup>

Based on the above explanation, KPPU must establish regulations regarding the ownership of Big Data and its impacts on competition effectiveness in the digital market, both direct and indirect impacts, such as provisions regarding Essential Facility, in particular. Direct impacts of abuses namely, first, exclusion of competitors. A dominant firm might refuse to share anonymized and aggregated data crucial for competitors to develop competing products or services. This can stifle innovation and limit consumer choice. Second, unequal playing field. Dominant firms can leverage their data advantage to offer personalized services or target advertising more effectively, putting competitors at a significant disadvantage. Third, higher prices and reduced quality. With limited competition, dominant firms might raise prices or reduce the quality of their offerings, harming consumers. Indirect impacts of abuses namely, first, privacy concerns. Dominant firms might exploit the personal data from users in exchange for access to essential services, impacting user privacy. Second, data security risks. The concentration of massive datasets with a single dominant firm increases the risk and potential impact of data breaches, affecting a larger pool of users. Third, stifled innovation. Abuses of dominance involving privacy data as essential facilities can have significant direct and indirect impacts on competition, innovation, and consumer welfare in the digital market. Navigating these challenges requires a nuanced understanding of both competition law and data privacy principles, ensuring a balance between fostering competition and protecting fundamental rights.

Uncertainty regarding access to essential data can discourage investment and innovation in data-driven sectors, hindering overall market development. In the context of digital competition regulation, there is a positive correlation between competition analysis and the increasing dominant position of business actors in the digital market. As such, the KPPU can make comprehensive prognoses as to whether a business actor will gradually acquire a dominant position or increase the intensity of such dominant positions. This proposition aligns with the mandate given to the KPPU based on Article 2 and Article 3 paragraph (a) of Commission Regulation No. 01 of 2014 concerning the Organization and Working Procedures of the KPPU and Presidential Decree No. 75 of 1999 concerning the Business Competition Supervisory Commission, which states that the KPPU has the function of overseeing and enforcing the law against monopoly practices and unhealthy business competition and preventing and monitoring the occurrence of monopoly practices and unhealthy business competition, in the context of maintaining effective competition in the digital market in Indonesia.

#### 4. Conclusion

While there's no direct link between exploiting personal data and having a dominant market position according to traditional definitions, the modern understanding of market dominance, which includes factors like technological innovation and barriers to entry, changes this. Companies that can exploit personal data, particularly by processing it into Big Data, gain a significant advantage in innovation and can create barriers to entry for competitors, potentially leading to a dominant position. This dominance is further reinforced by a feedback loop: user data helps companies improve services, attracting more users and generating more data, solidifying their position and making it difficult for competitors to compete without access to the same level of data. Data exploitation, considered under Article 25 of Law No. 5/1999 and PKPPU 5/2010, is challenging to define due to the diverse dimensions of digital markets and the prevalence of zero-price markets. The complexities include proving dominance and abuse, such as unfair trade terms and market restrictions, leading to market inequalities and hindering innovation. To maintain a fair and just digital market, it's crucial to regulate personal data access and use. The *per se* illegal approach can address personal data exploitation, given its inherent privacy and individual rights violations. To curb the potential for abuse of dominance by companies controlling Big Data in the digital market, several policy recommendations emerge. Primarily, a three-pronged approach focusing on a robust Code of Conduct, data mobility and open standards, and data openness is crucial. The Indonesian Competition Commission (KPPU) should establish regulations governing Big Data ownership, specifically

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62 Mosgan Situmorang, "Measuring the Effectiveness of Consumer Dispute Resolution on Small Value E-Commerce Transaction," *Jurnal Penelitian Hukum De Jure* 22, no. 4 (2022): 537.

63 Ayup Suran Ningsih, "Implikasi Undang-Undang Nomor 5 Tahun 1999 Tentang Larangan Praktek Monopoli Dan Persaingan Usaha Tidak Sehat Pada Pelaku Usaha Mikro Kecil Dan Menengah (UMKM)," *Jurnal Penelitian Hukum De Jure* 19, no. 2 (2019): 207.

addressing its impact on competition through provisions akin to the Essential Facility doctrine. These regulations must tackle direct abuses like competitor exclusion, unequal playing fields, and inflated prices, as well as indirect consequences such as privacy violations, data security risks, and stifled innovation. Proactive competition analysis by the KPPU is vital to predict and prevent the emergence or strengthening of dominant positions, aligning with its mandate to ensure effective competition within the Indonesian digital market. This research acknowledges its limitations and underscores the need for further investigation into strengthening Indonesian Competition Law. Specifically, future research should delve into the abuse of dominance within the digital market environment.

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