

# THE URGENCY OF REGULATING THE MISUSE OF PERSONAL DATA POSSESSION BY E-COMMERCE FROM THE PERSPECTIVE OF COMPETITION LAW

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Article	Abstract
<p><b>Article History:</b> Submitted: July 2023 Reviewed: March 2024 Accepted: April 2024 Published: April 2024</p> <p><b>Keywords:</b> <i>E-Commerce; Regulating; Data; Misuse; Market</i></p>	<p><i>The era of the digital economy has increased global trade transactions, giving rise to e-commerce companies that utilize the internet, websites, and applications to carry out trading activities in goods and services. This transformation has led to a change in viewing personal data as a commodity, so that e-commerce practices often take possession of personal data. Departing from this background, this study analyzes how the existing business competition law provisions anticipate the mastery of private data by e-commerce. This study uses a normative juridical method, with a legal-statutory approach and a conceptual approach. The results of the study show that mastery of personal data is indeed permitted in the Personal Data Protection Law, but it is necessary to pay attention to its impact on e-commerce business competition in Indonesia. The practice of controlling personal data has the potential to be misused and can result in monopolistic practices and/or unfair business competition. Current business competition legal instruments and the Business Competition Supervisory Commission (KPPU) are still limited in conducting investigations related to the practice of mastery of personal data by e-commerce which involves market advertising, definition of the e-commerce market, measuring market power, and reviewing mergers. It is necessary to formulate separate regulations regarding the prohibition of controlling personal data which can result in monopolistic practices and/or unfair business competition, both in the revision of the Business Competition Law and other related regulations.</i></p>

## A. Introduction

The digital economy era has encouraged an increase in the volume of global trade transactions. Digital technology which is developing very rapidly has changed the pattern of company policies in increasing trade transactions. Conventional business actors are starting to switch to the digital sector to continue to compete with business actors who have previously used internet media in trading practices. Business actors are competing to innovate, creating various kinds of digital-based websites and applications as a means of online shopping for the public without the process of face-to-face meetings with sellers and across borders (borderless). Business actors who carry out trading activities via the internet in the digital economy era are

known as e-commerce (electronic commerce).<sup>1</sup> E-commerce refers to the use of the internet, websites, and applications for digital business transactions between companies and individuals.

Transactions of buying and selling goods/services online are no longer just an alternative choice for consumers, but have become the main choice that practically makes it easier for consumers without having to pay money to go to the store by just looking at the online catalog to make a purchase transaction.<sup>2</sup>

The internet makes it easier for e-commerce consumers to get all the information related to the products they are looking for and want to buy. The technological landscape is increasingly sophisticated in the marketing process by e-commerce using Internet of Things and Big Data which continues to develop.<sup>3</sup> Internet of Things (IoT) is a cutting-edge technology that enables the development of networks connecting various items in the digital world, which can intelligently automatically sense their environment and take action on their own. Internet of Things (IoT) devices can connect to a network and exchange data via special protocols that have been developed and modified to transmit the collected data.<sup>4</sup> Big Data is a term used for collections of data with very large volumes. Big Data analyzes data in bulk so that it gets instant responses regarding certain trends, associations, consumer preferences, etc. that can be used by e-commerce companies.<sup>5</sup>

Big Data for business actors is utilized for huge benefits for e-commerce and traffic from e-commerce application behavior is visible. This traffic depends on the intensity of users in visiting websites and e-commerce applications. The number of visits by users in an application who spend time on websites and certain e-commerce applications are utilized by collecting cookies stored on the customer's device, including preferences for goods/services that are most preferred by the users, helping to advertise and provide better promotion.<sup>6</sup>

E-commerce is changing the way people design, produce, and deliver their products and services. Electronic commerce occurs almost all over the world, including in Asia not only in

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<sup>1</sup> Lathifah Hanim, "Perlindungan Hukum bagi Para Pihak dalam E-Commerce sebagai Akibat dari Globalisasi Ekonomi", *Jurnal Pembaharuan Hukum* 1, no. 2 (2014): 192, <http://dx.doi.org/10.26532/jph.v1i2.1476>.

<sup>2</sup> Ayunda Rahmi, "Personal Data Protection to E-Commerce Consumer: What Are the Legal Challenges and Certainties?", *Law Reform* 18, No. 2 (2022): 144-145, <https://doi.org/10.14710/lr.v18i2.43307>.

<sup>3</sup> Guorong Zhong & Zhaoqing Wang, "Consumer Privacy Protection of E-commerce", *Advances in Economics, Business and Management Research* 68, (2018): 198, <https://doi.org/10.2991/ssmi-18.2019.35>.

<sup>4</sup> Hamed Taherdoost, "Security and Internet of Things: Benefits, Challenges, and Future Perspectives", *Electronics* 12, no. 1901 (2023): 1-2, <https://doi.org/10.3390/electronics12081901>.

<sup>5</sup> Yuhao Gao, "Big Data Analysis on E-commerce Platform", *Advances in Economics, Business and Management Research*. 182, no. (2021): 191, <https://doi.org/10.2991/aebmr.k.210712.031>.

<sup>6</sup> H. Alsghaier, M. Akour, I. Shehabat, S. Aldiabat, "The Importance of Big Data Analytics in Business: A Case Study", *American Journal of Software Engineering and Applications* 6, no. 4 (2017): 112, <https://doi.org/10.11648/j.ajsea.20170604.12/>.

China, but also in India, Japan and South Korea, where they have the highest share of global e-commerce revenues. E-commerce is also growing rapidly in Southeast Asian countries, such as Singapore, Malaysia, Thailand, Vietnam and Indonesia. There is rapid growth of e-commerce, driven by digital payments, which are increasingly common in this area.<sup>7</sup> Annual e-commerce market growth in Indonesia is around \$7.62 billion, with 2.4% of total retail in Indonesia. This is influenced by the large majority of Indonesian people who use the internet, namely 202 million people or 72.3% of the total population of Indonesia<sup>8</sup>.

The level of economic growth is necessary and is the main source of improving the quality of life in a country. If economic growth is fast and high, then goods will be produced will also increase. Economic growth is quite critical for the growth of economic development as well as a process towards a better country.<sup>9</sup>

E-commerce companies in Indonesia continue to experience an increase in the number and intensity of competition to attract consumer interest in making transactions on their marketplace platforms. Large e-commerce companies in Indonesia such as Shopee, Tokopedia, Blibli, OLX, Bukalapak, and so on utilize Big Data in their operational processes to improve marketing strategies to these marketplace consumers. The use of Big Data by large e-commerce companies in Indonesia concerns important data that has great potential, namely user personal data. E-commerce platforms require users to allow companies to access the personal data of users who register as members. Personal data has become the main commodity in the digital economy sector, becoming the foundation of e-commerce business activities which lead to market power through data and network control, which then contributes greatly to the interaction of a product and consumer in the relevant market.<sup>10</sup>

Companies that have the capacity to collect customers' personal data have great power to dominate the market. Digital economy corporations often carry out practices that lead to unfair business competition regulated by law, namely prohibited agreements, prohibited activities, and prohibitions on dominant positions related to mastery and possession of personal

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<sup>7</sup> Fatty Rosyana Oktavia, "Indonesia E-Commerce and the Impact on The Economic Growth", *International Journal of Advance Research and Innovative Ideas in Education* 9, no. 1 (2023): 1505-1506. DOI:16.0415/IJARIE-19245

<sup>8</sup> Sal Arora, Fox Chu, Stanislav Melnikov & Lizzie Zhang, "E-commerce is Entering a New Phase in Southeast Asia. Are Logistics Players Prepared?", McKinsey & Company, <https://www.mckinsey.com>, accessed on 23 June 2023.

<sup>9</sup> Laura Rebeca Chandra, "Analysis of Increasing Online Business in Indonesia during the COVID-19 Pandemic", *Advances in Social Science, Education and Humanities Research* 655, no. 1 (2021): 1942, <https://doi.org/10.2991/assehr.k.220404.317>.

<sup>10</sup> Radi, Romansky "Social Media and Personal Data Protection", *International Journal on Information Technologies & Security*, no. 4 (2014): 72, <https://www.researchgate.net/publication/307570419>.

data, such as a transfer of company assets when a merger, consolidation or takeover occurs which includes the addition of consumer personal data assets by certain business actors. Corporations that control massive amounts of consumer personal data are able to “control” consumer behavior and “direct” consumers to buy certain products according to preferences derived from consumer personal data which is generally confidential such as residential address, date of birth, location data, identification number, and so forth.<sup>11</sup> Every detail of the consumer's personal information is controlled by the corporation as a resource for designing certain algorithms, so that the distribution process for new product offers will be faster and more effective.

Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition was formed to protect business actors from unfair actions by rival business actors. Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition is considered inadequate in dealing with the behavior of business actors who abuse their dominant position, hampering business competition in the digital economy era. Adis Nur Hayati revealed that the potential for anti-competitive actions in the Indonesian business sector indicates a need for special arrangements in competition law. Specifically, Law Number 5 of 1999 should not only aim to integrate multiple platforms but also address such actions. When a provider becomes dominant, it can control other providers, hindering competition and innovation among relevant digital platforms. Additionally, there is a potential for predatory pricing by companies through business relationships or the goods/services they offer. This potential arises because companies with data-centric models can control user data, impacting trade in both physical and electronic dimensions.<sup>12</sup>

Author agrees with Adis opinions that Business competition law in Indonesia requires reform, one of which concerns the aspect of prohibiting abuse of a dominant position regarding personal data which can result in monopolistic practices and/or unfair business competition. Personal data in Indonesia is protected by law through Law Number 27 of 2022 concerning Personal Data Protection (UU PDP). The Personal Data Protection Law is a legal requirement

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<sup>11</sup> Sinta Dewi Rosadi, “Protecting Privacy On Personal Data In Digital Economic Era: Legal Framework In Indonesia”, *Brawijaya Law Journal* 5, no. 1, (2018): 144, <https://doi.org/10.21776/ub.blj.2018.005.01.09>.

<sup>12</sup> 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): 114, <http://dx.doi.org/10.30641/dejure.2021.V21.109-122>.

for data controllers, data processors and other parties involved in data processing activities, to continue to provide personal data protection in every processing of such personal data.<sup>13</sup>

Researchers found several previous studies regarding the review of business competition law regarding possession of personal data. Research by Olga Batura entitled “Challenges of Personal Data for the Competition Law Analysis”, analyzes the impact of possession of personal data on business competition, there are restrictions on competitors in obtaining the availability of personal data, as well as preventing the entry of new competitors who are hindered by the dominance of companies that have been well established in knowing the market and customers through extraction of consumers’ personal data that they have.<sup>14</sup> Sukarmi, et al in their research entitled “Assessing the Merger of Online Platform Companies: Does it Lead to Monopoly or just Business Expansion? (Analysis of The Merged Company of GoTo)”, shows that one of the e-commerce business practices that has an impact on possession of personal data is the merger process of two companies, namely Gojek and Tokopedia, which formed one company together with the name GoTo. The merger process plays an important role in storing and processing extensive consumer personal data in Indonesia. Based on the official Gojek website, at least 190 million more users have downloaded and used the Gojek application. Even from Tokopedia, based on a survey conducted by a similar website, Tokopedia is the number one most accessed marketplace in Indonesia, reaching 126 million visitors. The large amount of data owned by GoTo makes it suspected that GoTo is monopolizing consumers’ personal data and has the potential for misuse of consumers’ personal data.<sup>15</sup> Sabirin and Herfian in their research entitled “Dampak Ekosistem Digital Terhadap Hukum Persaingan Usaha di Indonesia serta Optimalisasi Peran Komisi Pengawas Persaingan Usaha (KPPU) di Era Ekonomi Digital” (The Impact of the Digital Ecosystem on Business Competition Law in Indonesia and Optimizing the Role of the Business Competition Supervisory Commission (KPPU) in the Digital Economy Era), explained that the role of the KPPU in the digital economy era must be able to manage risks, provide an evaluation of e-commerce entities that will master and control personal data contained in other e-commerce,

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<sup>13</sup> Dewi Sulistianingsih, “Tata Kelola Perlindungan Data Pribadi di Era Metaverse (Telaah Yuridis Undang-Undang Perlindungan Data Pribadi)”, *Jurnal Masalah-Masalah Hukum* 52, no. 1 (2023): 103, <https://doi.org/10.14710/mmh.52.1.2023.97-106>.

<sup>14</sup> Olga Batura, “Challenges of Personal Data for the Competition Law Analysis”, *Network Industries Quarterly* 18, no. 1 (2016): 4, <https://www.researchgate.net/publication/308656679>.

<sup>15</sup> Sukarmi, *et al*, “Assessing the Merger of Online Platform Companies: Does it Lead to Monopoly or just Business Expansion? (Analysis of The Merged Company of GoTo)”, *Jurnal Cita Hukum* 9, no. 3 (2021): 555, <https://doi.org/10.15408/jch.v9i3.21667>.

so as to obtain an assessment of whether the action leads to monopolistic practices and/or unfair business competition.<sup>16</sup>

This research is unique compared to several of the studies above, the researcher focuses on the practice of possession of personal data in the e-commerce business and its impact on business competition in the digital economy era, reviewing Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition related to regulation of abuse of dominant position. This research question is: What is the formulation of regulation on the prohibition of misuse of personal data possession in the business competition law in Indonesia? This research aims to provide recommendations for regulations and other actions that can be carried out by the KPPU to be able to synergize with Personal Data Protection institution, so that they can obtain legal certainty regarding the process of transferring personal data by e-commerce companies in accordance with the principles of the Personal Data Protection Law and not leading to monopolistic practices and/or unfair business competition, to ensure that the transfer is also carried out in accordance with Personal Data Protection (PDP) principles and protects the rights of personal data subjects. Based on the above background, the Business Competition Law requires reforms regarding the regulation of competition in the digital economy sector, including prohibition on the possession of personal data which results in unfair business competition. This research will examine the regulation of business competition practices in Indonesia, and formulate updates regarding the prohibition on the possession of personal data in business competition law in Indonesia.

## **B. Method**

Methods are written descriptively and should provide a statement regarding the research methodology. The method at least contains the approach, research specifications, data collection techniques, and data analysis methods. Both Research and Article should explain the method. This type of research is normative legal research, namely examining secondary legal data in the form of studying applicable laws and regulations and analyzing them based on the legal issues being researched, in this case the possession of personal data in the legal review of business competition in Indonesia.<sup>17</sup> This research uses regulatory approach and conceptual

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<sup>16</sup> Ahmad Sabirin Herfian & H Raafid, "Dampak Ekosistem Digital Terhadap Hukum Persaingan Usaha di Indonesia serta Optimalisasi Peran Komisi Pengawas Persaingan Usaha (KPPU) di Era Ekonomi Digital", *Jurnal Persaingan Usaha* 1, no. 2 (2021): 79, <https://doi.org/10.55869/kppu.v2i.23>.

<sup>17</sup> Soerjono Soekanto & Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat* (Jakarta: Rajawali Press, 2015), 12.

approach.<sup>18</sup> The regulatory approach is carried out by examining secondary data, namely laws and regulations related to research issues, Law Number 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition, Law Number 27 of 2022 concerning Protection of Personal Data.

The data collection technique in this research was carried out by carefully collecting and tracing bibliographic works in the form of books, journals and research reports related to research problems that could support analysis and research results. The legal materials obtained are then arranged, grouped according to themes and topics related to the object of this research. Data analysis techniques are carried out in a qualitative way regarding business competition in the practice of possession of consumer personal data in the digital economy era starting from the analysis of primary legal materials and secondary legal materials that have been collected. Qualitative data analysis provides data analysis that has been organized, synthesized and patterned so that it can be written in paragraphs that show qualitative meaning, not quantitative calculation in the form of numbers. Drawing conclusion in a deductive manner Started from the general principles and concepts of personal data and business competition.

### **C. Analysis and Discussion**

#### **1. Implications of Personal Data Possession by E-Commerce on Business Competition Practice**

E-commerce platform heavily rely on user data for targeted advertising and personalized pricing strategies. The vast amount of data collected, often termed big data, particularly from users, tends to favor dominant online platforms, prompting the need for earlier and more aggressive antitrust actions. Data has been famously described as the new oil in the digital markets. Various businesses collect data during their operations, a process known as data monetization. To offer improved services, online platforms gather user data and utilize it in targeted advertising, allowing them to provide services to consumers at nearly no cost. This user data gives online platforms a competitive edge and also benefits consumers. The issue arises as to how current competition tools and concepts can address data-related competition concerns in digital markets. Big Data is increasingly becoming an essential input, and if a dominant online platform denies this data to other market players, it may lessen competitive pressure and invoke the 'essential facilities doctrine'. Potential competitors might

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<sup>18</sup> Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi* (Jakarta: Sinar Grafika, 2013), 93.

be denied access to the data either through an outright refusal to supply or by making the data available at prohibitively high prices, effectively a constructive refusal to supply.<sup>19</sup>

Misuse of Big Data by e-commerce platform emerges when dominant firms can negatively impact healthy market competition by refusing to share information with potential competitors or by offering the information at excessively high rates. This may hinder effective market competition, harming consumers by reducing innovation and the availability of higher quality products. Implications of big data on competition law show that special regulations are needed regarding misuse of control of personal data by e-commerce platforms in Indonesia. Indonesia government as a regulator start to regulate personal data protection since enactment of Law Number 27 of 2022 concerning Personal Data Protection.

Data is information that is collected and recorded in a form that can be processed through a device that automatically responds to instructions given for a specific purpose. The data containing this information has been stored or on a computer storage medium such as magnetic disks which form a database as a collection of computer data, for example a list of customer names and addresses or a list of company employees and the details about themselves that they have inputted when registering certain applications, which are stored in a company computer file. A database is usually operated by using a computer program to access and manipulate the data contained in it. In general, data is confidential (private) facts or details of events that are still raw and have not been processed. Data is the results we obtain in the field, without any prior processing.<sup>20</sup>

Data consisting of confidential (privacy) information relating to the lives of individuals who can be identified from other information in the possession of the data user, including any statements of opinion about the individual but does not include all indications about the wishes of data users relating to that individual. The subject of the data is a living individual who is referred to as personal data. Personal data itself is certain individual data that is stored, maintained, and kept as true and protected as confidential. Personal data is any identifiable personal data, whether true or not, regarding a person who can be identified from that data, or from other data and/or information held by an electronic system. Privacy issues in Indonesia are still not a big problem, in contrast to abroad, privacy issue has become a major concern. Often when filling out a form it asks for personal data (name, address, place and date

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<sup>19</sup> Greg Sivinski, Alex Okuliar & Lars Kjolbye, "Is Big Data a Big Deal? A Competition Law Approach to Big Data", *European Competition Journal* 13, No. 2-3 (2017): 201, <https://doi.org/10.1080/17441056.2017.1362866>.

<sup>20</sup> Muhamad Bayu Satrio & Meh Wih Widiatno, "Perlindungan Hukum Terhadap Data Pribadi dalam Media Elektronik (Analisis Kasus Kebocoran Data Pengguna Facebook di Indonesia)", *JCA of LAW* 1, no. 1 (2020): 51, <https://jca.esaunggul.ac.id/index.php/law/article/view/6>.



of birth, religion, status, etc.) without clear information regarding the use of this data. This can provide opportunities for criminals to hold onto this data to buy or sell it or use it irresponsibly. If this privacy is related to e-commerce activities whose scope is worldwide, then privacy policy becomes one of the obstacles to commerce between countries.

If business actors in Indonesia do not implement a privacy policy, business partners abroad will not be willing to carry out business transactions. They are obliged to protect the privacy of their clients or users. E-commerce companies in Indonesia carry out promotions by offering and marketing their goods to consumers depending on the personal data they have provided which is processed through a technology system called ad-targeting. This mechanism has been implemented in the e-commerce business industry to produce recommendations for offering goods/services to consumers according to the personal data they provide as potential consumers.<sup>21</sup>

Further provisions regarding Trade Through Electronic System (*Perdagangan Melalui Sistem Elektronik* or PMSE) transactions are regulated by or based on Government Regulation.<sup>22</sup> Article 58 of Government Regulation Number 80 of 2019 concerning Trading Through Electronic System (PMSE) states that “Every personal data is treated as the personal property of the person or business actor concerned; Every business actor who obtains personal data is obliged to act as a trustee in storing and possessing personal data in accordance with the provisions of laws and regulations.” Article 59 then regulates the protection rules that must be fulfilled or the prevalence of developing business practices, including: personal data must be obtained honestly and legally from the owner of the personal data in question, accompanied by options and guarantees for security measures and prevention of loss to the owner of the data; personal data must be held only for one or more specifically described and legitimate purposes and must not be further processed in a manner that is incompatible with those purposes; The personal data obtained must be appropriate, relevant and not too broad in relation to the purposes for which it is processed as previously communicated to the data owner; Personal data must be accurate and must always be up to date by giving the data owners the opportunity to update their personal data; Personal data may not be sent to other countries or regions outside Indonesia, unless the Minister declares that the country or region has the same standards and level of protection as Indonesia.

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<sup>21</sup> I. P. Bayu Mahendra & I. D. G. Dana Sugama, “Perlindungan Data Pribadi Konsumen Daring pada Saat Bertransaksi E-Commerce di Indonesia”, *Jurnal Kertha Desa* 8, no. 12 (2021): 40, <https://103.29.196.112/index.php/kerthadesa/article/view/69286>.

<sup>22</sup> Central Government Indonesia, “Article 66 Law Number 7 of 2014 Regarding Trade” (2014).

Law Number 27 of 2022 concerning Personal Data Protection differentiates the types of Personal Data regulated by Article 4 paragraph (1) consisting of specific Personal Data and general Personal Data. Paragraph (2) Specific Personal Data includes health data and information; biometric data; genetic data, child data; personal financial data; and/or other data in accordance with the provisions of laws and regulation. Paragraph (3) Personal Data of a general nature includes full name; gender; citizenship; religion; marital status; and/or Personal Data combined to identify an individual. Articles 5 to 15 are provisions governing the Rights of Personal Data Subjects as follows: Article 5 states that Personal Data Subjects have the right to obtain information regarding clarity of identity, the basis of legal interests, the purpose of requesting and using Personal Data, and the accountability of the party requesting Personal Data. Article 6 states that Personal Data Subjects have the right to complete, update and correct inaccuracies in Personal Data about themselves in accordance with the purposes of processing Personal Data.

Article 7 states that Personal Data Subjects have the right to access and obtain a copy of Personal Data about themselves in accordance with the provisions of laws and regulations. Article 8 states that Personal Data Subjects have the right to end processing, delete and/or destroy Personal Data about themselves in accordance with the provisions of laws and regulations. Article 9 states that Personal Data Subjects have the right to withdraw consent to the processing of Personal Data about themselves that has been given to the Personal Data controller. Article 10 paragraph (1) Personal Data Subjects have the right to submit objections to decision-making actions that are based solely on automatic processing, including profiling, which give rise to legal consequences or have a significant impact on Personal Data Subjects. Article 11 states that Personal Data Subjects have the right to delay or limit the processing of Personal Data proportionally according to the purpose of the Personal Data processing. Article 12 paragraph (1) that Personal Data Subjects have the right to sue and receive compensation for violations of the processing of Personal Data about themselves in accordance with laws and regulations.

Obligations of Personal Data Controllers and Personal Data Processors in processing Personal Data. Article 20 paragraph (1) states that Personal Data controllers are required to have a basis for processing Personal Data. Paragraph (2) regulates the basic provisions for the processing of Personal Data, which must obtain the explicit legal consent of the Personal Data subjects for one or several specific purposes which have been conveyed by the Personal Data Controller to the Personal Data Subjects; fulfillment of contractual obligations; fulfillment of the legal obligations of the Personal Data Controller; fulfilling the protection of the vital

interests of Personal Data Subjects; implementation of Personal Data Controller duties based on laws and regulations; and/or fulfillment of other legitimate interests by taking into account the objectives, needs and balance of interests of the Personal Data Controller and Rights of the Personal Data Subject. Article 27 states that the Personal Data Controller is obliged to carry out processing of Personal Data in a limited and specific, legally valid, and transparent manner. Article 31 states that the Personal Data Controller is obliged to record all Personal Data processing activities. Article 36 states that the Personal Data Controller is obliged to maintain the confidentiality of Personal Data. Article 37 The Personal Data Controller is obliged to supervise every party involved in the processing of Personal Data under the control of the Personal Data Controller. Article 38 Personal Data Controller is obliged to protect Personal Data from unlawful processing. Article 46 states that in the event of a failure to protect Personal Data, the Personal Data Controller is obliged to provide written notification no later than 3x24 hours to the Personal Data Subjects and institutions containing: Personal Data that is disclosed, when and how Personal Data is disclosed, as well as handling and recovery efforts carried out by the Personal Data Controller.

## **2. Potential Abuse of Control of Personal Data in Business Competition E-Commerce**

The practice of competition law analysis still lags behind theoretical development, and only a few elements of the presented harm theory are considered in the recent analysis of “data fusion” handled by the European Commission and the US Federal Trade Commission. For example, in the merger of Google/DoubleClick and Facebook/WhatsApp authorities consider the implications of the transaction for the availability of data in the markets for online advertising and communications services, for market power as well as the incentives of the merging entities to misuse (the availability of) aggregated data sets. However, the competition authorities failed to consider it. Privacy-based competition and the impact of transactions on consumer choices on the non-transaction side of multisided market.<sup>23</sup> Considerations regarding future use of the data and the level of data protection are not sufficiently examined or are rejected as not falling within the scope of competition law. In the DoubleClick acquisition, authorities failed to recognize a pre-emptive merger in which Google purchased a leading startup competitor that possessed superior data analytics

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<sup>23</sup> Stefano Lucchini, “Online Digital Services and Competition Law: Why Competition Authorities Should be More Concerned About Portability Rather than About Privacy”, *Journal of European Competition Law & Practice* 9, no. 9 (2018): 1-3, <https://doi.org/10.1093/jeclap/lpy052>.

algorithms for online ad serving. Google's development was in the beta testing stage at that time.<sup>24</sup>

Competition law is starting to give rise to strong calls that issues relating to personal data should also involve antitrust, with others voicing concerns over such inclusion. It is worth noting that there is increasing recognition that the non-price parameters that consumers value may be as important to competition as price. Non-price parameters such as customer service, innovation, quality and variety in market offerings are important factors in a company's success in winning the competition. Privacy protection, then, can be seen as a further dimension of quality aspects protection of consumer personal data. Business competition law protects business actors from potential misuse of personal data in big data in the digital economy era. Several forms of misuse of personal data control that lead to monopolistic practices and/or unfair business competition are as follows:

Market delineation and market power assessment in markets where Big Data plays an important role is one of the major challenges facing antitrust law, and this also applies to tracking third parties tasked with collecting personal data. On economic perspective, the impact of big data on business competition can be seen in the cost and demand side in the table below:

**Table 1.**  
**Big Data Impact on E-commerce Competition Policy**

Big Data Impact	
Cost	Demand
Provide better service with better information over time and processe more efficien.	Provide more target offerings, adjust better service to consumer.

**Source : “Is Big Data a Big Deal? A Competition Law Approach to Big Data”,  
European Competition Journal<sup>25</sup>**

Competition laws must apply to the relevant product and geographic markets, cases involving third party tracking need to answer the question of which relevant markets they refer to. In cases where data from third-party tracking is sold, these data brokers may be a relevant market that could be the focus of antitrust scrutiny. However, if user data collected through

<sup>24</sup> Olga Batura, *Op.Cit.*, 4.

<sup>25</sup> Greg Sivinski, Alex Okuliar & Lars Kjolbye, *Op.Cit.*, 200-201.

third-party tracking is exclusively used for internal purposes – such as targeted advertising or improving services based on traditional views, no antitrust product market for the data can be created. In the case of Facebook/WhatsApp, for example, the European Commission does not delineate a market for data, stating that these parties are not active in the (potential) market for the sale of stand-alone data products. Data collection and analysis in digital markets ultimately results in market power. The Organization for Economic Co-operation and Development (OECD) considers that market power in the digital realm enables dominant companies' to supply products or services of lower quality, to impose large amounts of advertising or even to collect, analyze or sell excessive data from consumers'. Market power in this digital economy cannot be described accurately by the methods traditionally relied on by competition law. Third-party tracking can play a decisive role in achieving market power in a platform-dominated digital environment. This is because in a digital environment, a company can gain market power from its ability to collect up-to-date personal information about users across platforms and devices, analyze this large amount of data, and then monetize it through targeted advertising and other means. Additionally, successful trackers benefit from a 'self-reinforcing data advantage' that ultimately increases their market power.<sup>26</sup>

Excessive control of personal data has an impact on increasing prices, because data is often considered the new currency in the digital era. The main pillar of excessive pricing is, of course, the existence of a monetary price. Economists may already be in a position to express the value of personal data in monetary terms, thereby allowing us to 'calculate' whether data collection is excessive. Where the collection of private user data can be ascribed market value through price, excessive collection of data can be treated like abuse excessive prices – even if the latter is not often used in European practice. By focusing on the monetary value of data, competitive economics can apply its established tools, developed for competition of price, for this type of abuse.<sup>27</sup>

The terms and conditions relied on by dominant service providers in dealing with users provide an important link to the analysis of competitive reliance on unfair trading conditions. Therefore, as a first step, addressing excessive data collection as an unfair condition of trade will require antitrust enforcers to comply with contractual provisions such as user or privacy policies agreed between platforms and users as conditions of trade, as these policies provide a basis for third parties to carry out processing of personal data. This qualification should not be

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<sup>26</sup> Victoria H. S. E Robertson, "Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data", *Common Market Law Review* 57, (2019): 6-9, <https://dx.doi.org/10.2139/ssrn.3408971>.

<sup>27</sup> *Ibid*, 10-11.

too controversial, as ‘personal data is an intrinsic part of prices and trading conditions in two-sided digital markets. Unfairness with respect to the collection of personal data may result from third party tracking that goes beyond users’ reasonable expectations at the time they consent to this practice, also considering the context of data collection. It should be emphasized that third-party tracking is not related to the data that online service providers collect from users’ online behavior on their own platforms, but only refers to monitoring user behavior on various websites or other platforms. Platforms usually offer digital products to users with payments in the form of goods through data, for example simply because they can monetize that data through targeted advertising.’<sup>28</sup>

### **3. Regulations on Prohibition of Abuse of Dominant Position in Possession of Personal Data in Business Competition Law in Indonesia**

Business competition law in Indonesia is aimed at optimizing fair competition by business actors, so that there is no abuse of dominant position by one or a group of business actors against other business actors.<sup>29</sup> Providing an adequate response regarding the potential for abuse of a dominant position in control of personal data is analyzed using Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition and its derivative regulations, namely Government Regulation Number 57 of 2010 concerning Consolidation of Business Entities and Companies Taking Over Shares which can result in Monopoly Practices and Unfair Business Competition. Business Actors are prohibited from carrying out Mergers of Business Entities, Consolidation of Business Entities, or Takeover of shares of other companies which could result in Monopoly Practices and/or Unfair Business Competition.<sup>30</sup> The Commission assesses Business Entity Merger, Business Entity Consolidation, or Takeover of company shares that have become legally effective and are suspected of resulting in Monopoly Practices and/or Unfair Business Competition using analysis: market concentration; market entry barriers; potential anti-competitive behavior; efficiency and/or; bankruptcy.<sup>31</sup>

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<sup>28</sup> *Ibid*, 13-14.

<sup>29</sup> Shidarta, *Aspek Hukum Ekonomi dan Bisnis* (Jakarta: Prenada Media, 2018), 157.

<sup>30</sup> Central Government Indonesia, "Article 2 paragraph (1) of Government Regulation No. 57 of 2010 Regarding Consolidation of Business Entities and Company Takeovers of Shares which can result in Monopoly Practices and Unfair Business Competition" (2010).

<sup>31</sup> Central Government Indonesia, "Article 3 of Government Regulation No. 57 of 2010 Regarding Consolidation of Business Entities and Company Takeovers of Shares which can result in Monopoly Practices and Unfair Business Competition" (2010).

The Commission for the Supervision of Business Competition (Komisi Pengawas Persaingan Usaha or KPPU), provides measures of monopolistic practices and unfair business competition in company merger and this includes market concentration, barriers to market entry, and potential anti-competitive behavior.<sup>32</sup> It is important to define “monopolistic practices”, “relevant markets” and products to determine the existence of monopolistic practices and unfair business competition in e-commerce merger. Article 1 number 2 of Law Number 5 of 1999 defines monopoly practice as “the concentration of economic power by one or more business actors which leads to control of the production and/or marketing of certain goods and services”. In addition, Article 1 number 10 of Law Number 5 of 1999 defines “relevant market” as a market related to a certain area or marketing reach with similar or substitute goods and services. The definition of “similar” or “substitute” goods/services needs to be defined differently in the e-commerce merger process which increases the power of control over consumers’ personal data, because the size of proof of this differentiation will depend greatly on consumer trends, which also influence the definition of “market relevant”. For example, in the case of the Gojek and Tokopedia (GoTo) merger, price increases or the expensiveness of certain products in the Tokopedia market requires analysis of consumer behavior in markets other than Tokopedia, so that when consumers “go” to Gojek for the same product means both are “relevant markets”. However, when consumers do not “run” to Gojek it means they are not in the same market.<sup>33</sup>

Another important concept related to direct consumer behavior is “substitute product”. Is Gojek a “replacement” for Tokopedia? The Commission for the Supervision of Business Competition (KPPU) Regulation Number 3 of 2009 defines substitute product as product with the same character and function without distinguishing between technical specification, brand and packaging form. It was found that when most consumers find a product too expensive on Tokopedia, they usually switch to buying a similar product on other marketplaces such as Shopee, Lazada, Bukalapak at a cheaper price. Therefore, this means all these businesses are in “relevant markets” while Gojek and Tokopedia have different markets. Additionally, Gojek is in the same market as online transportation and delivery companies such as Grab and this means consumers usually turn to Grab to get cheaper prices when they feel Gojek’s services are more expensive.

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<sup>32</sup> N. A. Rahman, I Madiha, & A Ghani, “E-Hailing Services: Antitrust Implications of Uber and Grab’s Merger in Southeast Asia”, *IJUM Law Journal*, no.28 (2020): 375, [https://doi.org/10.31436/iiumlj.v28i\(S1\).590](https://doi.org/10.31436/iiumlj.v28i(S1).590).

<sup>33</sup> Sukarmi, *et al.*, *Op.Cit.*, 557.

This shows that the merger of Gojek and Tokopedia to form GoTo was not based on the visible concentration of their market differences.<sup>34</sup> Misuse of possession of personal data, enforcement of which may be subject to several prohibitive provisions in Law Number 5 of 1999 as follows, vertical integration: business actors are prohibited from entering into agreements with other business actors with the aim of controlling the production of a number of products included in a series of production of certain goods and/or services where each series of production is the result of further processing, either in one direct or indirect series, which can result in unfair business competition and/or harm to society.<sup>35</sup> Conspiracy: Business actors are prohibited from conspiring with other parties to hamper the production and/or marketing of goods and/or services of their competing business actors with the intention that the goods and/or services offered or supplied in the relevant market are reduced in terms of quantity, quality or timeliness required.<sup>36</sup> Abuse of dominant position: business actors are prohibited from using dominant positions either directly or indirectly to: (a) determine trade conditions with the aim of preventing and/or blocking consumers from obtaining competitive goods and/or services, both in terms of price and quality; or (b) limiting market and technological development; or (c) inhibit other business actors who have the potential to become competitors from entering the relevant market. Business actors have a dominant position if: a. one business actor or one group of business actors controls 50% (fifty percent) or more of the market share of a particular type of goods or services; or b. two or three business actors or groups of business actors control 75% (seventy five percent) or more market share of one particular type of goods or services.<sup>37</sup>

Some of the provisions above have limitations regarding the evaluation that must be carried out to analyze misuse of control of personal data which can result in monopolistic practices and/or unfair business competition. The challenges for business competition authorities in Indonesia regarding control of personal data involve several things, determining the relevant market (identifying the relevant market for antitrust purposes) is carried out because there are many actors who have different roles at each level of production, so it is hoped that there will be regulations that anticipate a multi-sided platform structure, specifically for the use and possession of personal data in Big Data, business competition

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<sup>34</sup> *Ibid*, 558.

<sup>35</sup> Central Government Indonesia, "Article 14 Law Number 5 of 1999 Regarding Prohibition of Monopolistic Practices and Unfair Business Competition" (1999).

<sup>36</sup> Central Government Indonesia, "Article 24 Law Number 5 of 1999 Regarding Prohibition of Monopolistic Practices and Unfair Business Competition" (1999).

<sup>37</sup> Central Government Indonesia, "Article 25 Law Number 5 of 1999 Regarding Prohibition of Monopolistic Practices and Unfair Business Competition" (1999).



authorities in Indonesia can apply the modified Small but Significant and Non-Transitory Increase in Price Test and Hypothetical Monopoly Tests (SSNIP) model. Market definition in e-commerce platform, it is important to know the existence of substitutes in different platforms. Measuring Market Power, e-commerce companies often maximize profits from ownership of Big Data as a source of market power, it becomes very difficult when companies apply zero costs such as free registration fees and promotions as initial members to consumers in exchange for sending data to e-commerce, thus often causing confusion for authorities of business competition in analyzing the level of market power and evaluating that there are no competition problems in the market. Merger Review, the use of Big Data analysis by e-commerce companies must be evaluated regarding control of customers' personal data, preventing other companies from marketing their products, which could result in monopolistic practices and/or unfair competition.<sup>38</sup>

#### **D. Conclusion**

The era of the digital economy in Indonesia has brought about the practice of competition among the trading business actors through electronic systems by e-commerce. One of the important resources that e-commerce has is consumer personal data which is used to provide recommendations for product offers according to consumer preferences, thereby increasing the volume of transactions on the platform. The practice of controlling personal data occurs and this is permitted, with regard to the controller of personal data must provide protection of privacy rights in personal data protection. Possession of personal data is not only a matter of protection from misuse that is detrimental to consumers, but also misuse that can result in monopolistic practices and/or unfair business competition. Potential abuse can occur such as targeting ads, the practice of depicting and assessing market power, and abuse of a dominant position in the merger process of e-commerce companies which causes the concentration of market power, namely consumers' personal data. Business competition authority in Indonesia (KPPU) still have limitations in evaluating personal data control practices which can result in monopolistic practices and/or unfair business competition. A regulatory formulation is needed that highlights the control of personal data in Big Data regarding the relevant market aspects; market definition in the digital era; measuring market power; and merger review by e-commerce business actors.

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<sup>38</sup> Ningrum Natasya Sirait, *Tantangan Hukum dalam Era Analisis Big Data: Implikasi Pemanfaatan Analisis Big Data terhadap Hukum Persaingan* (Yogyakarta: Fakultas Hukum Universitas Gadjah Mada, 2018), 17.

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