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BUSINESS COMPETITION IN DIGITAL ERA BASED ON PERSPECTIVE OF COMPETITION LAW

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Abstract

How is business competition in digital era based on perspective of competition law and how is process of marketing goods and services in facing business competition in today's digital era, Type of research used in this study is normative law and used the approach of implementation of positive law according to Law Number 5 of 1999, context of Merger and Acquisition (M&A), an innovative start-up may enjoy this kind of economic situation This phenomenon is seen as an opportunity for the investors (*acquirer*), even though the turnover generated by these start-ups is relatively low, Trade transaction which happens on the internet is impossible to stop, meanwhile the legal protection and certainty for the internet users are not enough, based on the statement the efforts have to be made to ensure there is a in that condition.

INTRODUCTION

Competition law has been regulated in Law Number 5 of 1999 concerning the ban on monopolistic practices and unfair business competition which covers the regulation of antitrust with all its related aspects. Law is needed to organize the community-life in all of its aspects including social, political, and cultural life and no less important its function and role in the building of the economy. In this kind of economic activity where on one hand economic resources are limited and on the other hand there is an unlimited demand or necessity of the economic resources, so the law is very much needed in order to prevent conflicts between fellow citizens over competing those resources. ¹ Law Number 5 of 1999 about the ban on monopolistic practices and unfair business competition is an important instrument to promote economic efficiency and create a climate of equal opportunity for all business actors. Therefore,

¹ Nugraha, Susanti Adi. *Hukum Persaingan Usaha Di Indonesia*, (Jakarta:Penerbit Kencana), 1.

the existence of Law Number 5 of 1999 has to be encouraged in order to be able to realize the concept of Law as Tools to Encourage Economic Efficiency.² Unfair business competition is a competition between business actors in carrying out production activity or marketing their goods and services which are done in dishonest ways or by violating the laws and hindering the other business competitors.³ Every business actor should be in economic environment where all business competitions are done healthy and fair, so as not to create centralization of economic power in certain business actors, with aim to encourage the fair growth of market economy.⁴

A competitive atmosphere is an absolute requirement for developing countries like Indonesia to achieve its efficient economic growth including in its industrialization growth. In competitive market, startups will compete each other to get more consumers by selling their product with lowest price possible, increasing product quality and improving their service to the consumers. To succeed in a competitive market, these startups have to create a new product with an innovative design. For this to happen, these startups have to improve their technological capabilities, both their process technology and product technology. Therefore, this will encourage technological advancement and hopefully rapid economic growth.⁵

Term of 'new media' emerged at the late of 20th century, this term is used to call a new type of media which combines conventional media and internet. In the last few years, this 'new media' had been crowded out by the phenomenon of the emergence of social networking sites, these sites provide places in digital world to establish a community which can be accessed by people all over the world. The development of information technology creates what we called E-Commerce, which is a process of buying and selling products, services and information which all done electronically by gadgets (computer, laptop, smartphone) that can connect to internet.⁶ In this digital era, technological advancement creates an evolution on media

² Rajagukguk, Erman. "Hukum Ekonomi Indonesia Memperkuat Persatuan Nasional, mendorong pertumbuhan Ekonomi dan Memperluas Kesejahteraan Sosial", Paper presented at the VIII National law development seminar and workshop organized by BPHN, and Ministry of Justice and Human Rights, Denpasar, Bali, July 14th-18th, 2003

³ Fuady, Munir. *Hukum Anti Monopoli Menyongsong Era Persaingan Sehat*, (Bandung: PT Citra Aditya Bakti, 2003), 5.

⁴ Suhasril, and Mohammad Taufik Makarao, *Hukum Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat di Indonesia*, (Bogor: Ghalia Indonesia, 2010), 7.

⁵ Wie, Thee Kia. "Aspek-Aspek Ekonomi yang perlu diperhatikan dalam impleentasi UU no 5 Tahun 1999" *Jurnal Hukum Bisnis* 7, 1999, 60.

⁶ <http://eprints.ums.ac.id/40334/5/BAB%20I.pdf>, (accessed January 10th 2021 at 19.45 WIB)

technology, or as we know it now as online media. In developed countries, this new media had beaten other media that had been used as a source to obtain new information.

Table 1 Comparison of Business Activities Between Old Economic Era and New Economic Era ⁷

No	Activity	Old Economic Era	New Economic Era
1	Buying	Consumer came to the store	Consumer visits shopping website
2	Ordering Goods	Did ordering in the shop	Place an order through features provided by shopping website
3	Marketing	Through brochure, banner, leaflet, and mouth to mouth	Through social networking sites, search engine, and online ad sites
4	Provisioning of Physical facilities	There has to be a shop to display goods for sale	No need for shop because goods already advertised online
5	Marketing cost	Quite expensive, because have to print out brochures, banner, and leaflet.	Cheap, because utilizing social networking sites to advertise the goods
6	Consumer reach	Limited, just in the area of the shop	Wider, because internet has global reach

According to a survey done by CommerceNet, the buyer has few obstacles in using E-Commerce which are:⁸

- a. Losing financially due to fraud. Fraudster blocks every means to communicate with his/her victim after victim transferred money to his/her account.
- b. Theft of valuable confidential information. This can expose victim's information to third party and cause huge losses for the victim.
- c. Lost business opportunity due to error in the service. For example, a blackout.

⁷http://researchdashboard.binus.ac.id/uploads/paper/document/publication/Proceeding/ComTech/Vol%204%20No%202%20Desember%202013/11_SI_julisar_e-commerce%20untuk%20ukm_OK.pdf

⁸ *Jurnal Orasi Bisnis – ISSN: 2085-1375*, 6th edition, 2011.

- d. Unauthorized use of victim's information by third party. For example, hacker manages to break into a banking system and transfers money on victim's account to his/her.
- e. Lose the trust of consumer due to various factors like deliberate attempt made by party who wanted to tarnish the victim's reputation
- f. Unexpected losses due to deliberate disturbance, dishonesty, unfair business practices, human error and system error.

Based on background of the problem, researchers intend to do research with problem formulation is how is business competition in this digital era based on perspective of competition law and how is marketing process of goods and services in facing business competition in digital era today.

Type of research used in this study is normative law and used the approach of implementation of positive law based on Law Number 5 of 1999. Sources of data used in this study are primary data, which is Law Number 5 of 1999 and Law Number 19 of 2016 concerning amendments to Law Number 11 of 2008 on electronic information and transactions, and international scale law on electronic information and transactions, including law on electronic information and transactions from various countries; secondary data, which obtain from scientific journal, law literature, etc; and also tertiary data, which is data that used to support primary data and secondary data. Data collection technique used in this study is observations, interviews, library research. Data analysis technique used in this study is qualitative analysis and then concluded by deductive method.

HOW IS BUSINESS COMPETITION IN DIGITAL ERA BASED ON PERSPECTIVE OF COMPETITION LAW

Internet has changed economic activity globally, internet could also reduce time needed for consumers to search wanted goods and services and to top of all those, the usage of internet could also reduce transaction cost. Internet also gives huge contribution towards supply expansion as well as market growth dynamically. The main characteristic of digital economic platform is its ability to reach multi-sided market by using its network. In competition law

perspective, special character of this digital economy has its own challenges, especially for business competition authorities. Unlike in Indonesia, level of knowledge and concern on business competition authorities in developed countries such as in US, Japan, Germany, and European Union (EU) have touched digital market world. As an example, Bundeskartellamt which is a business competition authority in Germany, has long been known through its breakthroughs. On June 9th 2016, Bundeskartellamt had published working paper with title of “*The Market Power of Platform and Networks*”. This paper analyzes concept of business competition on how to describe a market and how to determine market power in context of digital and networks platform. Furthermore, this paper emphasizes the importance of competition law in era of digital economy.⁹

This paper was a follow-up of “*Competition Law and Data*” report which was compiled and published in collaboration between Bundeskartellamt with France business competition authorities (*Autorité de la concurrence*). This paper was also summary of “*Think Tank*” team which was established by Bundeskartellamt in early 2015, with purpose of developing an examination model which enables the agency to analyze cases in digital economy field quickly and effectively. “*Digital Economy has different nature from industrial sector in general. Huge companies that dominate this digital economy make huge fortunes thanks to network effects. These companies could utilize existing data (big data) to get competitive advantages over their competitors. On the other side, new entrant experiences difficulties to compete with them. To overcome that, protecting competition level in cyberspace becomes so important to ensure that there is an open market for business actors, new entrant and various new business models*”. The complexity of business model and its economic relation in digital industry are new challenges in the practice of competition law. Business strategy and behavior of huge internet companies like Google, Amazon and Facebook have created intense discussion about what are its negative effects on business competition, whether that could be called as legitimate activities and to what extent behavior of these huge companies have to be specially controlled. In terms of defining the market, This paper proposes two adjustments to conventional competition law perspective which related to digital economy which are: ¹⁰

⁹ <https://www.kompasiana.com/suryatama/57973fc8e5afbda20c8b4581/analisa-ekonomi-digital-dan-persaingan-usaha-dalam-pandangan-kppunya-jerman> (accessed October 29th at 15.50 WIB)

¹⁰ *ibid*

1. Removing general concept of “*no payment, no market*”, because cost of using these network and digital platforms are usually free. So, the concept of traditional economy which requires there have to be buying and selling activities in market becomes irrelevant to use.
2. In context of merger and acquisition (M&A), innovative *start-up* business model may enjoy a significant economic position. This is seen tempting by the acquirer, even though *turnover* generated from these start-ups is relatively low. In order to review this kind of M&A transaction, the obligation to notify merger to competition authorities should no longer need to refer to thresholds number, but to its high transaction value.

Given that digital market has high level of dynamic and innovation, then competition authorities should not just considering market share as most important factor in analyzing market power, but also focusing on other important factors, such as:¹¹

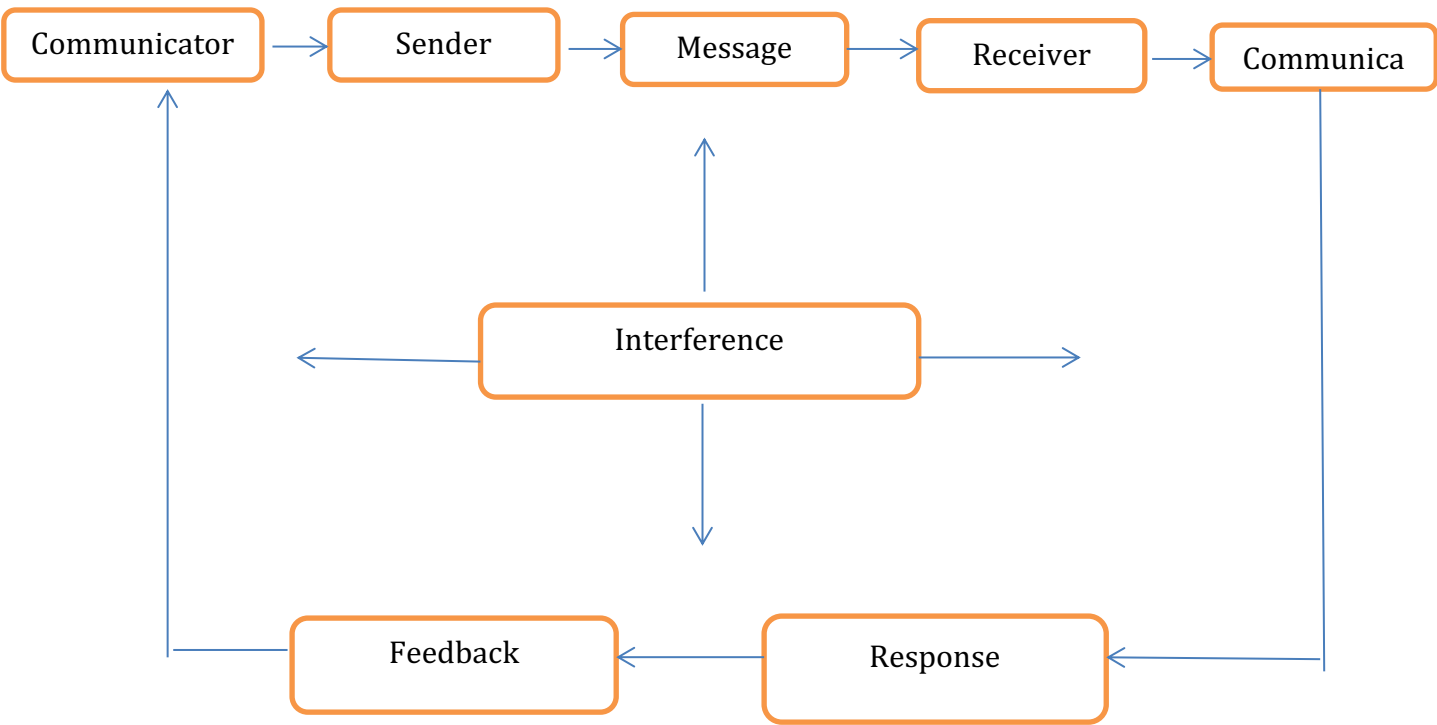
1. Network Effects (both on its direct and indirect effects).

- Network effects arise from increase of platform and network as numbers of users increases.
- *Indirect network effects* occur when value of goods and services for certain user group increases (positive network effects) or decreases (negative network effects) compared to numbers of users from another group. As examples are, hotel and ticket booking sites, online dating sites, real estate sites (bilateral indirect network effects / matching platforms), and Google (unilateral indirect network effects / advertising platforms).
- Direct network effects occur when user of a product received direct benefit from increase of numbers of users using same product (positive network effects), or even when there is a decrease (*negative network effects*). In other words, effect only occurs between different individuals in one group. For example, is social media and telecommunication network.

¹¹ *ibid*

- 2. Level of *return on scale*
- 3. Single-homing, multi-homing, as well as degree of differentiation
- 4. Ability to accessing data (customer, users, and third party)
- 5. Innovation potential in digital market

An overview of universal model of communication, on this model, there are various elements which are contained in an act of communication, whether it is intrapersonal communication, interpersonal communication, small speech group or mass communication. In summary, process of communication can be described as follows: ¹²



In the implementation of E-Commerce, there are lots of obstacles faced by related party in digital activities that can happen to anyone, such as:¹³

¹² Takada, H. Chattalas, C., Kramer, T. *International Marketing and Communication*, ed 10. trans. Hermawan (New York: The McGraw-Hill Companies, 2012), 5.

¹³ <http://www.kompasiana.com>, (accessed June 4th 2016 at 15.49 WIB)

1. Trust

Trust is most prominent obstacle in E-commerce because in Indonesia, people trust more in face-to-face transaction transaksi face to face or direct purchase

2. Security

There is a lot of news about cybercrime on internet, so not few people do not like these online transactions, even though its risks if compared to direct transaction more or less same

3. High cost

In online transaction, additional shipping cost is a common thing, which makes the full price of bought item becomes more expensive if we compared to face to face transaction

Consumer is every person or buyer on goods agreed upon, both on its price and how to pay it, but not including those who got goods for resale and commercial purpose for benefit of oneself, family, and others, and not to be traded. Furthermore, to emphasize meaning of intended goods and/or services, Consumer protection Law gives its own definition of goods which is any object tangible or insufficiently tangible, movable or immovable, consumable or inconsumable, which can be traded, used, consumed, or utilized by consumers. Meanwhile, service is any service in the form of work or performance traded in society to be used by consumers.¹⁴

And exacerbated by actions to develop E-commerce system as a support which is lacking to be used, which are:¹⁵

1. The need for system development

System development means acts of compiling, changing, or even replacing old system to new one to improve the existing system. A system needs to be replaced or updated due to things as follows:

- a. There are troubles arise from using old system
- b. To seize new opportunities and get maximum results

¹⁴ Febrina, Rezmia. *Jurnal Fikri Vol 2*, no 1, June 2017

¹⁵ Maulana, Shabur Miftah. *Jurnal Administrasi Bisnis (JAB)* 29, no. 1, December 2015.

- c. There are instructions for using new system

2. Principle of system development

There are few principles in system developments that can be forgotten, those few principles are:

- a. System developed for management
- b. The developed system is huge capital invest which will be the basis for future
- c. The developed system needs people that fully understand the system
- d. Stage of works and tasks that must be carried out in process of developing the system
- e. Process of developing system doesn't have to be sequential
- f. Do not afraid to cancel the project
- g. There have to be a documentation for guidance in system development

In online contract drafting is a suitable form of acceptance. Fact when e-mail was sent by ISP server to local server and then to recipient's computer terminal means that message's receipt time is not immediate or fixed. Message's recipient could be late in noticing the message because of numbers of reasons, one of which is the inability of recipient to read the message on time. As the final analysis, it is unsubstantiated to assume interaction of two parties will occur with their expectations or goals. Even if either party guarantees the message will arrive on time that cannot help or decide if a contract has been made as predicted by related party.¹⁶

HOW IS PROCESS OF MARKETING GOODS AND SERVICES IN FACING BUSINESS COMPETITION IN THIS TODAY'S DIGITAL ERA

Principles of technology neutrality in Law Number 19 of 2016 concerning amendment to Law Number 11 of 2008 on electronic information and transactions needs to be carefully understood, and parties that conduct electronic transaction should use electronic signature that has legal power and legal effects as regulated in article 11 paragraph 1 Law Number 19 of 2016 concerning amendment to Law Number 11 of 2008 on electronic information and transactions. Consumer's electronic signature has its own legal power and legal effects as long as it follows these following requirements:

¹⁶ Endeshaw, Assafa. *Hukum E-Commerce dan Internet dengan Fokus di Asia Pasifik*, (Pustaka Pelajar, 2007), 249

- a) Electronic signature creation data shall be associated only with the signers
- b) Electronic signature creation data at the time the electronic signing process shall be only in the power of the signers
- c) Any alterations in electronic signature that occur after the signing time is knowable
- d) Any alterations in electronic information associated with the electronic signature after the signing time is knowable
- e) There are certain methods adopted to identify the identity of the signer
- f) There are certain methods to demonstrate that the signers have given consent to the associated electronic information

Parties in electronic trade transaction via internet as same as parties that do traditional trade transactions in face to face, although in this electronic trading, parties involved do not meet each other directly, but they are connected via internet. In trade transaction via internet, the involved parties are:¹⁷

- a. Seller or entrepreneur who offers goods via internet is called as business actor;
- b. Buyer or consumer, that is every person who isn't prohibited by the law who accepts offers from sellers or business actors and wishes to conduct sale and purchase transactions of product offered by sellers or business actors;
- c. Banks as distributor of funds from buyer to seller because in this electronic trade transactions, sellers and buyers are not in direct line of sight, because they are not in the same location, so the purchase can be made only through intermediary, in this case is a Bank;
- d. Provider as providers of internet access service.

This sale and purchase transaction via internet is done without face to face presence between the parties, so trade deal that occurs between both parties is also carried out electronically, either by using e-mail or any other way. These electronic transactions are impossible to stop, meanwhile legal protection and certainty for those business actors and consumers are not enough. Therefore, efforts have to be made to ensure there is a legal stability in that condition. Legal connection which occurs in electronic trade transactions not only occur between entrepreneurs and consumers, but also occur to parties below:¹⁸

¹⁷ *Ibid*, 48.

¹⁸ *ibid*

- a. *Business to Business*, is a transaction that occurs between companies, in this case both buyer and seller are a company and not an individual consumer. Usually, this transaction occurs because both party have known each other and that trade transaction is carried out to establish a cooperation between companies;
- b. *Customer to Customer*, is a trade transaction which occurs between individuals who will sell and buy goods and services to each other;
- c. *Customer to Business*, is a trade transaction which occurs between an individual as the seller with a company as the buyer;
- d. *Customer to Government*, is a trade transaction which occurs between an individual and government, for example is a payment of taxes.

Type of electronic contract (*e-contract*) can be divided into two categories, which are:¹⁹

- 1) E-contract that has transaction object like physical or tangible goods/services, for goods example is book, or private tutoring service. In this type of contract, both parties (seller and buyer) communicate via internet network. If the deal has been made, seller will send goods/service that used as an object in the contract directly to buyer's address (*Physical delivery*). If private tutoring service is what agreed as the object in the contract, the private tutor will come to consumer's house to teach directly its consumers face to face not online or via internet
- 2) E-contract that has transaction objects in form of information or non-physical service. In this type of contract, both parties communicate via internet and then made a contract electronically. If the contract has been agreed upon, seller will send information/service that used as an object via internet network (*cyber delivery*). For example: contract to purchase electronic books (*e-book*), electronic newspaper (*e-newspaper*), electronic magazine (*e-magazine*), or contract to take private English lesson via internet network (*e-school*).

Electronic information and/or electronic document and/or its printout (which contains consumer's electronic signature) can be a valid legal evidence and shall be an expansion of lawful means of proof in accordance to the applicable procedural law in Indonesia, but only if the electronic information and/or electronic documents use electronic system in accordance with provisions as governed by Law Number 19 of 2016 concerning amendments to Law

¹⁹ Serfiani, Cita Yustisia. Et al, *Buku Pintar Bisnis Online dan Transaksi Elektronik*, (Jakarta: Gramedia Pustaka Utama, 2013), 101.

Number 11 of 2008 on electronic information and transactions. The promulgation of Law Number 19 of 2016 concerning amendments to Law Number 11 of 2008 on electronic information and transactions (hereinafter referred to as ITE law) is a concrete form of Indonesian government to be proactive and responsive on its national development as a continuous process and should always be responsive to various dynamics that occur on its society; especially to fill a law void on issues of development and advancement of information technology.

As it was previously mentioned that in Indonesia everything related to agreement should be in accordance with article 1320 of civil code, while the main principal of UNCITRAL through its convention is the principle of autonomy of parties as written in article 3 of UNCITRAL *Model Law on Electronic Commerce* that parties are free not to use the substance rule of the convention, this includes the freedom of parties to make different rules in their national regulation. This convention does not emphasize a specific formal requirement for validity of a contract, but to answer possibility that there is a specific formal requirement required by convention member countries, then the formal requirements are that the terms and conditions of contract should be written, there have to be a signature, and the original form of the contract.²⁰

Basically, trade transaction in e-commerce is almost the same as carried out traditionally. What distinguished them is in e-commerce the ordering and purchasing the goods or services is online. The following are the steps to do selling and purchasing transactions online:²¹

(1) Ordering online, ordering by using order form provided by seller electronically. Seller provides list or product catalog which usually comes with full description of a product and pictures of product. When filling out the order form, the buyer is asked to fill information for the purpose of billing and shipping. After filling out the form, next step is confirming the order, choosing payment method, and shipping option;

(2) Payment confirmation – if buyer/consumer has done the payment, seller will confirm the receiving payment;

²⁰*Ibid*, 45.

²¹http://research.dashboard.binus.ac.id/uploads/paper/document/publication/Proceeding/ComTech/Vol%204%20No%202%20December%202013/11_SI_julisar_e-commerce%20untuk%20ukm_OK.pdf, (accessed November 28th 2017 at 15.18 WIB)

- (3) Checking availability of goods – generally, seller has products that ready to sell, but to anticipate low inventory, it is better for seller to check the availability of ready to sell goods;
- (4) Shipping of goods – if available, the sold product will be sent to consumer. In e-commerce transaction, selling product can be in physical and digital form. If product has physical form, then the product will be packed and shipped to consumer, and if product is in digital form, for example a software, before sending it electronically, anticipation needs to be done to make sure whether the software has a new version or it is in its revision stage;
- (5) Returning goods – there is a possibility that goods delivered to customers do not meet their expectations. In this case, seller should be able to give guarantee that if goods sent to the consumer does not match its description, then the goods can be returned to the seller.

CONCLUSION

The removal of general concept of “*no payment, no market*”, because the use of digital and network platform is cost so low, it is almost free. So the traditional economic concept which requires buying and selling activities in traditional market, becomes irrelevant to use. In context of merger and acquisition (M&A), business model of innovative startup may enjoy a significant economic position. This is seen tempting by the acquirer, even though turnover generated by this startup is relatively low. In order to review this kind of M&A transaction, the obligation to notify merger to competition authorities should no longer need to refer to thresholds number, but to its high transaction value. This trade transaction via internet is carried out without the presence of both party, which means trade deal between both parties also carried out electronically, either by e-mail or any other way. Trade transaction which happens on the internet is impossible to stop, meanwhile the legal protection and certainty for the internet users are not enough, based on the statement the efforts have to be made to ensure there is a legal stability in that condition.

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