Disclosure Principle as Ex-Ante Rules for Combating Big Tech's Abuse of Dominance in Digital Market: A Comparative Analysis

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Abstract

This study discusses the weaknesses of Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition in handling the abuse of dominance by big tech in the digital market. This study also explores lessons from how the European Union (EU) and Japan implement the disclosure principle to prevent such abuse. This normative study employs statutory, conceptual, and comparative approaches. The findings are as follows: first, Law Number 5 of 1999 does not implement ex-ante measures such as the "disclosure principle," and prevention efforts are practically non-existent, particularly in handling dominance abuse. Second, a comparative study of the EU and Japan found that the EU has enacted the Digital Markets Act (DMA), which comprehensively regulates the abuse of dominance by big tech companies and categorizes them as gatekeepers. The DMA establishes the gatekeeper threshold and includes the duty to notify the European Commission voluntarily under Articles 5, 6, and 7 of the DMA. Japan has the Act on Improving Transparency and Fairness of Digital Platforms 2021, an ex-ante regulation that implements the disclosure principles on digital platforms. Based on these two comparisons, the main idea of such regulations is to implement the disclosure principle as an ex-ante rule for business actors who meet the threshold and to burden them with certain obligations. This approach allows authorities to perform supervision and prevent abuse of dominance by big tech optimally.

Keywords: abuse of dominance, comparative analysis, disclosure principle.

A. Introduction

The world is experiencing rapid technological development, resulting in the emergence of many large technology companies in various countries. These large companies are usually known as big tech or tech giants. Among these big tech companies are Alphabet (Google), Amazon, Apple, Facebook (Meta), and Microsoft.[1] Beyond the companies, there are other big tech companies, such as Tencent and Alibaba, that are based in China. The EU even has its category of big tech, calling

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1 Maria Luisa Chiarella, "Digital Markets Act (DMA) and Digital Services Act (DSA): New Rules for the EU Digital Environment," *Athens Journal of Law* 9, no. 1 (2023): 52, https://doi.org/10.30958/ajl.9-1-2.

them "gatekeepers," who must comply with the Digital Markets Act (DMA)[2] enacted in 2021.

Big tech companies usually have significant market shares, even dominating in many jurisdictions, including Indonesia. For example, Google controlled 91.86% of the global market share as of July 2022.[3] For its search engine alone, Google has constantly dominated the market for years, as shown by the data below.

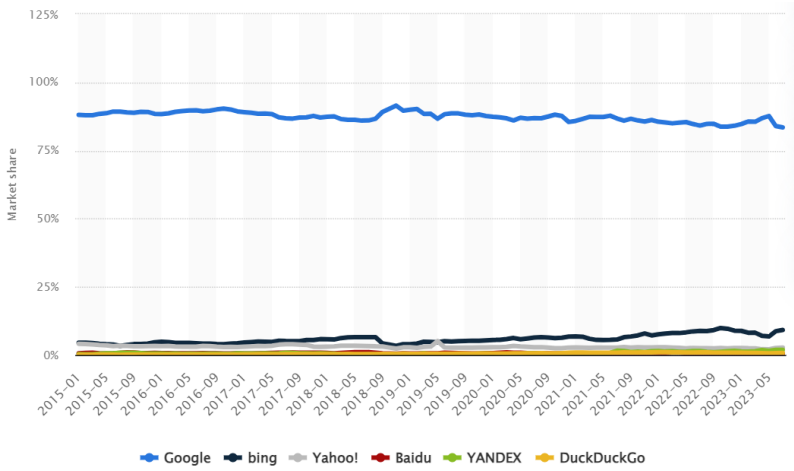

Figure 1. Global Search Engine Desktop Market Share 2023.[4]

Big tech companies with significant dominant market shares in specific markets often exhibit a proclivity for exploiting their position, thus violating competition laws. Several cases involving big tech companies, such as Google, in multiple jurisdictions show this pattern, where authorities have imposed fines as sanctions. For instance, the EU has imposed penalties on Google numerous times due to its abuse of dominance.[5] Dominant digital platforms employ various strategies to maximize their cross-network effects to attract a larger consumer base to their products and

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2 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022.

3 Dzulfiqar Fathur Rahman, "Ini Perbandingan Pangsa Pasar Google dan Mesin Pencarian Lainnya," accessed on October 6, 2023, https://databoks.katadata.co.id/datapublish/2022/08/16/ini-perbandingan-pangsa-pasar-google-dan-mesin-pencarian-lainnya.

4 Statista, "Market Share Of Leading Desktop Search Engines Worldwide From January 2015 to July 2023," accessed on July 7, 2023, https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/.

5 The Economic Times, "Europe's Battle with Big Tech: Billions in Fines and Tough Laws," accessed on September 14, 2022, https://economictimes.indiatimes.com/tech/technology/europes-battle-with-big-tech-billions-in-fines-and-tough-laws/articleshow/94190848.cms?from=mdr.

services. In this situation, network effects create obstacles or entry barriers, especially for newcomers.[6]

The advantages enjoyed by big tech companies include data collection on consumer behavior[7] and its utilization to develop new products, services, and apps that increase the company's valuation.[8] Customer data is not an asset that depreciates immediately.[9] Furthermore, these companies hold strong economic positions, strong intermediation roles, and an entrenched and durable market position. With these strengths, if big tech companies abuse their power to maximize their benefits, business users and consumers will be affected. This will also result in an unfair business environment in the market.

Several countries have taken serious steps to prevent big tech companies from abusing their dominant position in the digital market, considering the risk of substantial financial loss. Competition will be lessened due to the entry barriers created by big tech. The abuse of dominance by big tech also harms consumers' right to choose products at reasonable prices.[10] Moreover, the distinct characteristics of the digital market compared to the conventional market contribute to the need for a comprehensive legal framework in the digital market.

In 2018, Google was sanctioned to pay 4.3 billion euros for abusing its dominance through its Android operating system, which promoted Google as the search engine. Prior to that, in 2017,[11] Google was also fined 2.4 billion euros in 2018 and 1.49 billion euros in 2019 by the EU for abusing its dominance. Meanwhile, the EU fined Microsoft in 2013 for abusing its dominance by compelling its Windows 7 users to use Internet Explorer as a search engine.[12] In 2002, several jurisdictions, such as India and the European Union, fined Google for abusing its dominance once again. The Competition Commission of India (CCI) imposed a fine of 13.38 billion rupees (161.95 million US dollars) on October 20, 2022.[13] It was proven that Google had abused its

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6 Guy Rolnik and Asher Schechter, "Is the Digital Economy Much Less Competitive Than We Think It Is?" accessed on February 23, 2023, https://www.promarket.org/2016/09/23/digital-economy-much-less-competitive-think/.

7 Winston Ma, "Breaking the Big Tech Monopoly," *Horizons: Journal of International Relations and Sustainable Development*, no. 18 (2021): 170.

8 David J. Teece, "Reflections on Firm and Industry Dynamics," in Matthias Kipping, Takafumi Kurosawa, D. Eleanor Wetsney, *The Oxford Handbook of Industry Dynamics (forthcoming)* (Oxford: Oxford University Press: 2022), 23.

9 Kean Birch (et.al.), "Data as Asset? The Measurement, Governance, and Valuation of Digital Personal Data by Big Tech," *Big Data & Society* 8, no. 1 (2021): 9, https://doi.org/10.1177/20539517211017308.

10 Johannes Paha (ed.), *Competition Law Compliance Programs: An Interdisciplinary Approach* (Berlin: Springer International Publishing, 2016), 2.

11 European Commission, "Antitrust: Commission Fines Google €2.42 Billion For Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service – Factsheet," accessed on July 7, 2023, https://ec.europa.eu/commission/presscorner/detail/es/MEMO_17_1785.

12 Foo Yun Chee, "EU Fines Microsoft $731 Million for Broken Promise, Warns Others," accessed on March 7, 2013, https://www.reuters.com/article/us-eu-microsoft-idUSBRE92500520130307.

13 Aditya Kalra and Munsif Vengalti, "Google Fined $162 Mln by India Antitrust Watchdog for Abuse of Android Platform," accessed on October 21, 2022, https://www.reuters.com/world/india/india-competition-regulator-fines-google-16195-mln-anti-competitive-practices-2022-10-20/.

dominant position in the Android mobile device ecosystem, particularly by requiring the use of Google Play Billing. Based on this CCI decision, Google was required to change the Android ecosystem in India, impacting the settings of Android devices and their original equipment manufacturers (OEMs).[14]

The Indonesian Competition Commission (ICC) is investigating similar cases in Indonesia. This investigation against Google started in September 2022 under allegations that Google has violated Article 15 (conditional agreement), Article 19 point (d) (discriminatory practices), and Article 25 (abuse of dominance) of Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition. This case pertains to Google's policy, which mandates the usage of Google Play Billing (GBP) for certain applications in the Play Store.[15] The requirement to use only GPB limits application developers the freedom to choose and utilize other payment systems.[16] However, after one year of investigation, no developments have been observed. In contrast, Article 16 of ICC Regulation Number 1 of 2019 states that an investigation must be completed within a maximum of 60 days, even though extensions are allowed through a Coordination Meeting.

The law does not prohibit the dominance of business actors, but abusing such positions is a violation, resulting in sanctions.[17] Dominant companies should not abuse their power by preventing fair competition within or outside the relevant market share.[18] Otherwise, there are risks that the dominant company, even if its dominance is obtained from profitable competition, will use its power to strengthen and broaden its dominance or to leverage such a powerful position in other markets. Dominant companies have a proclivity or tendency to commit unfair business practices, such as self-preferencing their own products and services. Self-preferencing is an act of discrimination and must be strictly prohibited (per se illegal). It creates an entry barrier and inflicts financial losses or harm.[19]

The EU has enacted the Digital Market Act, a comprehensive regulation prohibiting the abuse of dominance by big tech companies in the digital market. This law is a part of their legislative package on digital services in the EU, which includes the Digital Services Act (DSA) and the DMA. The DMA prescribes that big tech companies meeting the predetermined threshold are categorized as gatekeepers.

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14 Rahul Verma, "Google Makes Changes to Android and Google Play Services in India After CCI Setback," accessed on January 27, 2023, https://www.businessinsider.in/tech/news/google-makes-changes-to-android-and-google-play-services-in-india-after-cci-setback/articleshow/97373147.cms.

15 Komisi Pengawasan Persaingan Usaha (KPPU), "KPPU Lakukan Penyelidikan atas Google untuk Dogan Praktik Monopoli dan Persaingan Usaha Tidak Sehat," accessed on February 23, 2023, https://kppu.go.id/blog/2022/09/kppu-lakukan-penyelidikan-atas-google-untuk-dugaan-praktik-monopoli-dan-persaingan-usaha-tidak-sehat/.

16 Intan Rakhmayanti Dewi, "Startup Pusing Tercekik Komisi Google, Bingung Ngadu ke Mana," accessed on October 12, 2022, https://www.cnbcindonesia.com/tech/20221012062322-37-378992/startup-pusing-tercekik-komisi-google-bingung-ngadu-ke-mana.

17 Artice 25 of Law Number 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition.

18 European Commission, "Antitrust: Commission Fines Google €2.42 Billion For Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service – Factsheet."

19 European Commission.

Gatekeepers must comply with Articles 5, 6, and 7 of the DMA. According to these articles, gatekeepers must notify the European Commission voluntarily.

Japan has the Act on Improving Transparency and Fairness of Digital Platforms, enacted in February 2021.[20] This act requires digital platforms to disclose the terms and conditions and other relevant information related to their transactions and to provide early notification if any adjustments are made. They must also establish appropriate internal procedures to ensure fair transactions or to resolve disputes with platform users and report annual independent reviews about transaction and dispute status to the Japanese Minister of Economy, Trade, and Industry. If a digital platform fails to comply with the obligation to notify, a fine will be imposed. If there are allegations or indications of unfair competition, the Japan Fair Trade Commission will handle them.

The Digital Market Act (DMA) in the EU and the Act on Improving Transparency and Fairness of Digital Platforms (TFDPA) in Japan share a common element in preventing the abuse of dominance in the digital market, namely the disclosure principle. This discourse principle is reflected in the obligation for certain digital platforms that meet the criteria determined by the authority to submit relevant information. They must also comply with certain obligations under the law. They are not allowed to use their strong economic position to engage in unfair practices towards business users and customers who are highly dependent on them.

The disclosure principle helps authorities to supervise the operations of big tech companies. Big tech companies, due to their market dominance, can impose terms and conditions unilaterally, harming business users and consumers. Implementing the disclosure principle for big tech companies has several advantages: it creates a fairer business environment for dependent business users, offers newcomers greater opportunities to enter the market, allows consumers to choose or switch their providers if they wish, and encourages big tech companies to continue innovating and offering new services.[21]

A comprehensive and specific regulation of the digital market ecosystem is not available under Indonesian law. Law Number 5 of 1999 is not sufficient to address the abuse of dominance in the digital market, as it differs from the conventional market. The current regulations cannot keep pace with rapidly evolving technology. Big tech companies can engage in practices such as hindering access to markets, preferencing their own services, using data to hamper access, or making interoperability or data portability more difficult. Addressing this potential abuse of dominance in the digital market requires more than just ex-post measures; it requires ex-ante rules, as implemented in the EU and Japan.

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[20] Arab Competition Forum, "Abuse of Dominance in Digital Markets," accessed on May 23, 2023, https://web-archive.oecd.org/2022-03-22/561561-abuse-of-dominance-in-digital-markets.htm.

[21] European Commission, "The Digital Markets Act: Ensuring Fair and Open Digital Markets," accessed on May 9, 2024, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

The Indonesian Competition Commission (ICC) has issued the Head of ICC Regulation Number 4 of 2022 on Relevant Market Determination. This regulation determines relevant markets in the digital market. However, the scope of this regulation is limited to serving as a guideline for the ICC and is confined to the determination of relevant markets. Hence, it is unable to address broader issues.

Previous research concerning the implementation of the disclosure principle within the competition law framework has yet to be found. The earlier research[22] focused on identifying and analyzing regulations concerning unfair business competition in Indonesia's digital market and analyzing the role of the ICC in supervising unfair business competition in the digital market. The research findings stated that business competition regulation in the digital market in Indonesia still refers to Law Number 5 of 1999 as well as Government Regulation Number 80 of 2019 on Commerce through Electronic Systems. The ICC received criticism for its lack of supervision, particularly over business actors domiciled outside Indonesian territory.

Meanwhile, the main issue of the present research is whether the disclosure principle exists within Law Number 5 of 1999 in relation to the abuse of dominance by big tech companies in the digital market, and how regulations in the EU and Japan, which implicitly apply the disclosure principle, work to prevent abuse of dominance by big tech companies in the digital market. This normative research analyzes the topic using conceptual, statutory, and comparative approaches.

B. The Weaknesses of Law Number 5 of 1999 in Handling Abuse of Dominance by Big Tech in Digital Market

Abuse of dominance prohibition is set under Article 25 of Law Number 5 of 1999. Observing market share is a method to determine whether a business actor has dominant power. A business actor is considered to be dominant if its market share reaches 50% or more. Meanwhile, a group of business actors must reach 75% of the market share. The observation of market share can be used as an initial basis to determine whether a business actor abuses its dominance.

Traditional competition law, including Law Number 5 of 1999, uses an-ex post measures to assess abuse of dominance. This means that the authority will intervene when the effects of such conduct harm the market. Ex-ante post measures are considered insufficient to keep up with the rapid development of technology.[23] Therefore, countries must adopt ex-ante measures to prevent the abuse of dominance by big tech companies and simultaneously accommodate the rapid development of technology.

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[22] Rohmat, "Undang-Undang Pasar Digital Sebagai Instrumen Pengawasan Persaingan Usaha di Era Digital," *Jurnal Persaingan Usaha* 2, no. 2 (2022):118-19, https://doi.org/10.55869/kppu.v2i2.76.

[23] EDRi Network, "Competition Law: What to do Against Big Tech's Abuse?" accessed on May 10, 2024, https://edri.org/our-work/competition-law-what-to-do-against-big-tech-abuse/.

Due to significant network effects, big tech dominance in the digital market is more harmful. By implementing the disclosure principle, the supervisory role of competition authorities will be maximized. Big tech companies that meet the criteria need to submit relevant information to the authorities and are subject to certain obligations. They will also not be allowed to unilaterally impose their terms and conditions or prevent consumers from switching to other companies that offer better services.

The disclosure principle may be less popular in competition law enforcement. This principle is better known in capital market practices, which require public companies to disclose all relevant or material information to the public.[24] Openness and transparency are parts of Good Corporate Governance, making this principle fundamental and applicable in competition law.[25] In the capital market, the disclosure principle helps investors make informed choices and serves as a control tool for the public over companies. Under competition law, the disclosure principle would help keep the market fairer.

Indonesian competition law does not explicitly or implicitly include the disclosure principle, which requires dominant business actors to submit relevant information to the authority. The principles and objectives of Law Number 5 of 1999 do not mention openness and transparency. Article 2 of Law Number 5 of 1999 states that business actors should follow the principle of economic democracy in running their business by considering the balance between business interests and public interests. The explanatory section of the article does not provide further details.

As regulated in the DMA, mandatory notification practice is regulated within the merger and acquisition rule. Article 29 of Law Number 5 of 1999 requires that the merger or acquisition of a company, or the acquisition of shares exceeding the pre-determined asset value and/or sales value threshold, must be notified to the ICC no later than 30 days after the transaction.[26] Again, the duty to notify is limited to the context of mergers and acquisitions. Consequently, this duty does not apply in cases of dominance abuse, especially in the digital market. The notification system is a supervisory and prevention effort to mitigate the effects of unfair business competition in such transactions.

The ICC has attempted to prevent violations of Law Number 5 of 1999 through its compliance program, regulated in ICC Regulation Number 1 of 2022 on the Business Competition Compliance Program. According to Article 6 paragraph (1) of this regulation, Number 1 of 2022, the compliance program includes a code of conduct, compliance guidelines, the compliance program includes a code of conduct, compliance guidelines, socialization, counseling, training, and/or other activities

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[24] Budi Praptio, "Implementation of the Principle of Disclosure in Share Trading in Primary Market and Secondary Market," *Journal of Law Science* 2, no. 4 (2020): 161.

[25] Efrizal Sofyan, *Good Corporate Governance (GCG)* (Malang: Unisma Press, 2021), 120.

[26] KPPU Regulation Number 6 of 2010 on the Implementation Guideline of Article 25 of Law Number 5 of 1999.

concerning the compliance program in a company. If a company applies for the program, it will receive a lighter sanction if proven to have violated the law.

From the author's point of view, ICC Regulation Number 1 of 2022 is inadequate to resolve cases of dominance abuse in the digital market, considering its legal substance and binding power. The nature of this compliance program is voluntary. Thus, it is deemed ineffective, especially when there is no sanction.[27]

The regulations issued by the ICC have received some criticism from Jimly Asshidiqie, mainly about the legislative role of the ICC. Jimly argued that Article 35 point (f) of Law Number 5 of 1999 only mandates the ICC with authority to formulate guidelines and/or publications related to this regulation.[28] There is also no further explanation of Article 35 point (f) of Law Number 5 of 1999 in its explanatory section ("self-explanatory"). This article should not be interpreted as granting the ICC the authority to make legally binding rules as it goes against the checks and balances theory. In other words, there is a problem with whether the regulations issued by the ICC have binding power and, therefore, can be enforced on business actors, including in cases of dominance abuse in the digital market.

It is unassailable to say that Law Number 5 of 1999 uses a more repressive approach in handling cases by enforcing sanctions, and the most common form of sanction used by the ICC is fines. This act is known as structural remedies, which require the business actor to remove or take over its own certain tangible or intangible assets.[29] Additionally, Indonesian competition law also, at the same time, implements behavioral remedies as regulated in Article 49 of Law Number 5 of 1999.

Several reports from expert panels recommend that countries encourage the creation of fair business competition in the digital market.[30] The adopted means and approaches may differ from the conventional market. The authority has to take ex-ante steps to prevent abuse of dominance in the digital market. Such steps can be in the form of a specific regulation governing the dominant digital platform (or bottlenecks or gatekeepers), which the EU is already practicing through the DMA, or by implementing the principle of openness and justice like Japan.

This specific regulation can be based on revenue or user amount criteria.[31] Determining an abuse of a dominant position is highly associated with economic reasoning: market power.[32] Market power is the ability of a company or business

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27 Novalia Pertiwi and Annisa Azzahrah Burhan, "Efektifitas Penerapan Program Kepatuhan Persaingan Usaha dalam Pencegahan Persaingan Usaha Tidak Sehat," *Jurnal Studia Legalia: Jurnal Ilmu Hukum* 4, no. 1 (2023): 85-86, https://doi.org/10.61084/jsl.v4i01.66.

28 Novalia Pertiwi and Annisa Azzahrah Burhan.

29 Assimakis Komninos Damien Gerard (ed.), *Remedies in EU Competition Law* (Netherlands: Kluwer Law International BV, 2020), chap 5.

30 OECD, "Abuse of Dominance in Digital Market," accessed on October 6, 2023, www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf.

31 Jacques Crémer (et.al.), "Competition Policy for the Digital Era," accessed on September 5, 2023, https://euagenda.eu/upload/publications/untitled-257961-ea.pdf.

32 OECD.

actor to raise and reduce prices arbitrarily or to decrease quality and maintain such conditions in their favor.[33]

In order to have a more favorable or dominant position, two situations may contribute to it: business actors should be in the business for a considerable amount of time and relatively have no significant competition, whether actual or potential competition, including its customers.[34] Therefore, a business actor can be considered to be abusing its dominant position only if it has significant and durable market power.[35] This is because the business actor in question can use its dominant position in the market to create entry barriers, eliminate competition, or use trading preconditions exploitative to the customers or less powerful business actors.[36] In contrast, a company without a dominant market power will not significantly impact its competition and customers if it had the same strategy as its stronger or dominant competition with larger market power.[37]

The subsequent problem is defining "market" in the digital market context, given the different characteristics between the digital and conventional markets. The authority must decide whether a different side of a market participates in a connected market (cross-network effects).[38] This is because most digital platforms usually diversify their products and services. For example, Google has various services such as Google Play Store and Google Maps. If the authority decides to define these markets separately from each other, its ability to prove the existence of a violation would be more restricted.[39]

Generally, a market is determined based on product type or geographic area.[40] However, a digital platform is different as it has the characteristics or features of being a multi-sided market and has a cross-network effect.[41] The multi-sided market is a condition where the business actor involves different groups of customers, which may or may not be attributed to distinct (but interdependent) markets. Thus, the

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33 Louis Kaplow, "On the Relevance of Market Power," *Harvard Law Review* 130, no. 5 (2017): 1336.

34 Niamh Dunne, "Potential Competition in EU Law," (Law, Society and Economy Studies Working Paper, no. 8, 2021), 2-3.

35 Noga Blickstein Shchory and Michal S. Gal, "Market Power Parasites: Abusing the Power of Digital Intermediaries to Harm Competition," *Harvard Journal of Law & Technology 35*, no. 1 (2021): 96.

36 Ana-Maria Iulia Şanta, "Market Power in the Context of Globalization," *Encyclopedia* 2, no. 4 (2022): 1692, https://doi.org/10.3390/encyclopedia2040115.

37 OECD.

38 Pinar Akman, "The Theory of Abuse in Google Search: A Positive and Normative Assessment Under EU Competition Law," *Journal of Law, Technology, and Policy 2017*, no. 2 (2016): 316, https://dx.doi.org/10.2139/ssrn.2811789. See also Atle Haugen, "Technology Licensing and Digital Platform Competition: Cross-Licensing Under Cross-Side Network Effects," *BI Norwegian Business School - Department of Economics* (2023): 4-5.

39 OECD, "Abuse of Dominance in Digital Markets – Contribution from Korea," accessed on December 8, 2020, https://one.oecd.org/document/DAF/COMP/GF/WD(2020)54/en/pdf.

40 Walter Frenz, *Handbook of EU Competition Law* (Berlin: Springer Berlin Heidelberg, 2016), 324.

41 Bruni Jullien (et.al.), "Two-Sided Markets, Pricing, and Network Effects," (CEPR Discussion Paper, No. DP16480, 2021), 485-592.

role of market definition becomes even more important.[42] Meanwhile, if a digital market has cross-network effects, it can be observed from its users who highly depend on the digital platform.

The more users a digital platform has, the more attractive the digital platform becomes to potential customers. In other words, customers benefit from a product with significant users.[43] Customers will be incentivized to use it, consequently strengthening its dominant position.[44]

There are differences between digital and conventional markets, as follows:[45]

1. Size of the company: seven out of the ten largest companies in the world provide digital products.[46]
2. Multi-sided market: digital platforms put various customers into one interlinked platform, such as hardware and software, which are products that complement one another.
3. Pricing model: digital companies tend to offer many products at zero or subsidized prices, using revenue from a different side of the market (for example, by using advertisement or data sale) or together with a premium offer (also known as the freemium business model).
4. Network effects: customers enjoy benefits from a product when more people use that product.

Naturally, these characteristics significantly impact cases of dominance abuse in the digital market. The market will be more concentrated, meaning more companies will have a dominant position.[47] Thus, according to this evaluation, the author believes that the insufficiency of Law Number 5 of 1999, especially on dominance abuse by big tech in the digital market, should be addressed by adopting ex-ante measures such as the disclosure principle, considering the rapid development of the digital market.

C. Comparative Study of the European Union and Japan Regulation on Implementing the Disclosure Principle to Prevent Abuse of Dominance in the Digital Market.

1. The Digital Market Act of the European Union

Prior to the enactment of the Digital Market Act (DMA) by the European Union (EU) in 2022, South Korea passed the Anti-Google Law through the amendment of its Telecommunication Business Act. However, such norms can only be found in Article

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42 Jens-Uwe Franck and Martin Peitz, *Market Definition and Market Power in the Platform Economy* (Brussels: Centre on Regulation in Europe Asbl (CERRE), 2019), 22.

43 Payal Malik (et.al.), "Legal Treatment of Abuse of Dominance in Indian Competition Law," *Review of Industrial Organization* 54, no. 2 (2019): 441, https://doi.org/10.1007/s11151-018-9651-y.

44 OECD.

45 OECD.

46 Price Water Cooper, "Global Top 100 Companies by Market Capitalization," accessed on October 7, 2023, https://www.pwc.com/gx/en/audit-services/publications/assets/global-top-100-companies-june-2020-update.pdf.

47 OECD, "Abuse of Dominance in Digital Markets – Contribution from Korea."

50, paragraph (1) of the Telecommunication Act. This regulation focuses on three types of prohibitions for digital market business actors: coercing mobile content providers to use certain payment methods, illegally using their bargaining position within the applications market business when acting as an intermediary in a mobile content transaction, illegally delaying a mobile content review, as well as illegally removing mobile content, and so on.[48]

Other jurisdictions like the EU and Japan have issued more comprehensive regulations. This action was taken in response to the rapid development of the tech market, including cases of unfair competition or dominance abuse. The DMA aims to ensure a level playing field in the digital market, to set clear rights and rules for big tech companies qualified as gatekeepers,[49] and to ensure that there is no abuse of dominance committed by gatekeepers.[50] This regulation also aims to ensure the digital market ecosystem is fair and competitive, eliminating entry barriers[51] so business actors and customers may benefit from digital opportunities by balancing the freedom of each core platform services provider[52] and their customers.[53]

The DMA intends to encourage the creation of new or alternative digital platforms that can provide innovative and high-quality products and services at affordable prices. A fair and equal condition for all business actors in the digital sector will enable potential competitors (alternative platform providers) to seize larger economic growth opportunities.

The practical benefits of implementing the Digital Market Act (DMA) include providing customers with a variety of service options, better access to switch providers, and improved benefits from more affordable prices and high-quality services. Moreover, this regulation ensures that innovative companies do not face entry barriers when reaching new customers. The aim of the DMA aligns with the goal of competition law, which is to protect consumers and both incumbent and potential business actors.

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48 Jipyong News, "Amendment of Korea's Telecommunications Business Act – a Digital Shot Heard Around the World?" accessed on November 15, 2021, https://www.jipyong.com/en/board/jipyongNews_post.php?seq=5255.

49 'Gatekeepers' according to Article 2 paragraph 2 of the Digital Market Act is defined as a business actor who provides core platform services as set by Article 3 of The Digital Market Act.

50 European Commission, "The Digital Markets Act: Ensuring Fair and Open Digital Markets," accessed on August 8, 2023, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en#who-are-the-gatekeepers.

51 European Commission, "Remarks by Commissioner Breton: Here are the First 7 Potential "Gatekeepers" under the EU Digital Markets Act," accessed on July 4, 2023, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_23_3674.

52 Article 2 paragraph 2 of the Digital Market Act core platform services business actor which is a company that provides these services: online intermediation services; online search engines; online social networking services; video-sharing platform services; number-independent interpersonal communications services; operating systems; web browsers; virtual assistants; cloud computing services; online advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, provided by an undertaking that provides any of the core platform services listed in points (a) to (i).

53 Article 16 Charter of Fundamental Rights of the European Union.

However, the DMA only binds service providers (big tech) who meet the criteria of "gatekeepers".[54] These criteria include:[55]

1. The company's significant impact within the European Union internal market;
2. The company provides core platform services,[56] which are important for business users to reach their end consumers; and
3. The company has a long-standing presence in the market or is expected to soon achieve such a position.[57]

Details of determining gatekeepers are as follows. First, in determining gatekeepers based on their impact within the internal market of the European Union, it must be based on the company's annual turnover at the European Union level, equivalent to or exceeding 7.5 billion EUR every year for the last three financial years, or where the average market capitalization or its market value is equivalent to or at least 75 billion EUR in the last financial year, and provides the same core platform service in at least three member states. Second, concerning gatekeepers as core platform service providers, the determination must be based on the total amount of users in the last financial year, which is 45 million monthly active users located within the European Union territory and at least 10.000 annual active business users in the European Union, identified and calculated according to the methodology and indicators determined in the attachment. Third, according to Article 3 paragraph (1) point (c), gatekeepers are determined if the threshold in point (b) has been met in the last three fiscal years.

Big tech companies that meet the threshold must submit a notification to the European Commission immediately and in any circumstances, within two months after the threshold has been met, providing all relevant information about the company. Even if the company fails to submit a notification, the European Commission still has the right to determine the company as a gatekeeper. Thus, the company must still provide relevant information.[58]

Another circumstance where the European Commission will determine a business actor as a gatekeeper, according to the procedure set by Article 17, is when the core platform service provider fits the preconditions set in Article 3 paragraph (1) but has not met the threshold in paragraph (2). The considerations are:

1. the size of the company, including its turnover, market capitalization, operation, and dominant position;

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54 Article 1 paragraph 2 of The Digital Market Act stated that "This Regulation shall apply to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service."

55 Article 2 of the Digital Market Act.

56 Core platform service according to Article 2 paragraph 2 of the Digital Market Act are: online intermediation services; online search engines; online social networking services; video-sharing platform services; number-independent interpersonal communications services; operating systems; web browsers; virtual assistants; cloud computing services; online advertising services.

57 Article 3 paragraph 1 of The Digital Market Act.

58 Article 3 paragraph 3 sub 2 of the Digital Market Act.

2. the total amount of business users who use the core platform service to reach their end users and the total amount of end users;
3. the benefits gained from the network effects and data-driven;
4. every scale and scope that benefits the company, including those related to data and, if relevant, its activities beyond the European Union.

Gatekeepers are given obligations that must be fulfilled to ensure they do not restrain competition or commit unfair actions. The obligations of gatekeepers are regulated within Articles 5, 6, and 7 of the DMA. Some of these obligations include: prohibiting the use of customers' private data without consent; preventing other business users from offering the same products and services to the end-users; acting non-discriminatively, including avoiding self-preferencing, and; allowing customers to uninstall or move to other service providers. In conclusion, gatekeepers must act fairly and properly, avoiding discriminatory behavior and not obstructing competition.

Compliance with these obligations, as regulated in Articles 5, 6, and 7, must be reported in detail and transparently to the European Commission within six months after being determined as a gatekeeper. This concept is similar to that of a public company in a capital market where the disclosure principle applies. Gatekeepers are also prohibited from making efforts to avoid their obligations (anti-circumvention). In case of an extraordinary situation beyond their responsibility, gatekeepers may file a suspension request over their duty to comply, whether in part or as a whole. The DMA provides two exceptions: medical reasons and public order.[59]

If the gatekeeper does not carry out this commitment, the European Commission can impose sanctions against it, which may include behavioral or structural actions. The fine imposed on the gatekeeper for non-compliance can amount to 20% of the total worldwide gross income in the previous fiscal year when the offence was committed. The DMA also regulates the consent decree that the gatekeeper can file to ensure its compliance with its duties as set by Articles 5, 6, and 7.[60]

2. The Act on Improving Transparency and Fairness of Digital Platforms (TFDPA) in Japan

The digital economy has been very active recently, including in Japan. Japan's authorities recognize that the digital economy, specifically in digital platforms, has changed business models and consumer behavior.[61] This requires the Japan Fair Trade Commission (JFTC) to carefully apply the Act on Prohibition of Private Monopolization and Maintenance or Fair Trade (Act Number 54 of 1947).

In February 2021, Japan enacted the Act on Improving Transparency and Fairness of Digital Platforms (TFDPA) to increase transparency and fairness in digital platform

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59 Article 10 of the Digital Market Act.

60 Article 25 of the Digital Market Act.

61 Steven Van Uystel (ed.), *The Digital Economy and Competition Law in Asia* (Singapore: Springer Nature Singapore, 2021), 46.

activities. The TFDPA serves as a form of supervision by the Japanese government, through its Ministry of Economy, Trade, and Industry (METI) so digital platform developers can avoid violating the Act on Prohibition of Private Monopolization and Maintenance or Fair Trade (Act Number 54 of 1947).

This law regulates actions necessary in the digital market, including requiring digital platforms to disclose their terms and conditions and other information, to act fairly in their business, to submit an annual report about their business condition, and to conduct a self-assessment. The Minister of Economy, Trade, and Industry of Japan has the authority to assess the business activities of digital platforms based on their annual report and other information, involving business users, consumers, and academicians, and to publish the assessment.[62]

This regulation only applies to online mall operators, operators of application stores, and certain operators that fall into the specified digital platforms provider category (similar to "gatekeepers" in the EU).[63] According to Article 3 on the TFDPA, the determination of a specified digital platform provider is based on the business scale set by the Cabinet Order observed from its product sales, the total amount of users, and other indicators necessary for increasing transparency and fairness for digital platforms.

Japan employs a co-regulation approach in handling business in the digital market.[64] This means that the rules in the TFDPA are based on each operator's autonomy. The approach ensures that the TFDPA does not hinder digital platform innovation, which develops rapidly if there are uniform and strict regulations. Article 1 of the TFDPA emphasizes this approach, stating the regulation providers' autonomy and independence. The main highlight of this regulation is the creation of transparency and fairness for specified digital platform providers. Digital platforms that meet the conditions to be categorized as specified digital platform providers have obligations or duties regulated in Articles 5, 7, and 9 on the TFDPA.

Article 5 of the TFDPA states the obligation of specified digital platforms to disclose Provision Conditions (terms and conditions) to their users, per the procedures determined based on the Ministry of Economy, Trade, and Industry Decision. The goal is to create an understanding of the provision condition. The subsequent obligation is to prepare procedures to ensure fairness in their business.

Article 6 of the TFDPA states that if the minister discovers that the specified digital platform provider did not comply with the law set by Article 5, the minister may recommend that the selected digital platform provider disclose matters

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62 Article 9 paragraph (2) of the Act on Improving Transparency and Fairness of Digital Platforms.

63 Natsuko Sugihara, "Japan's Digital Platform Regulations," accessed on August 31, 2021, https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2021/08/japan-s-digital-platform-regulations.html.

64 Japan Ministry of Economy, Trade, and Industry, "Key Points of the Act on Improving Transparency and Fairness of Digital Platforms (TFDPA)," accessed on September 3, 2023, https://www.meti.go.jp/english/policy/mono_info_service/information_economy/digital_platforms/tfdpa.html.

specified in Article 5 immediately or take other necessary actions. Article 7 on the TFDPA, among others, obligates the specified digital platform provider to take actions required to encourage mutual understanding in transactional relations between the specified digital platform provider and the user provider of goods.

Subsequently, Article 9 of the TFDPA regulates the duty of specified digital platform providers to submit annual reports to the Ministry of Economy, Trade, and Industry associated with:

a. Matters associated with the general picture of the specified digital platform's business;
b. Matters related to the handling of complaints and dispute settlement about the specified digital platform;
c. Matters related to the action that must be taken under Article 7 paragraph (1) (mutual understanding); and
d. Matters linked to the self-assessment conducted by the specified digital platform provider in relation to its other obligations.

Even though there is a categorization of digital platforms that meet certain criteria as regulated in the TFDPA, transparency and openness in the digital platform are voluntary and prioritize the digital platform's independence. However, the Minister of Economy, Trade, and Industry monitors these digital platforms.

During this monitoring process, according to Article 13 of the TFDPA, if there is a violation of the Act on Prohibition of Private Monopolization and Maintenance or Fair Trade (Act Number 54 of 1947), the Minister of Economy, Trade, and Industry may request the Fair Trade Commission to take necessary action. Further, a sanction in the form of fines will be given following the Act on Prohibition of Private Monopolization and Maintenance or Fair Trade.

D. Lessons from Comparative Studies in the European Union and Japan for the Future of Digital Markets Regulation in Indonesia

For decades, the evaluation of competition law violation cases has been based on the consumer welfare standard, which focuses on pricing power.[65] Implementing this evaluation may have a different effect in the digital market, especially on digital product and service development businesses, which have built monopolistic positions by spending billions of dollars to attract consumers to use their platforms through discounts and promos. This strategy practiced by digital platform developers is called "cash burn".

Big tech companies control consumer data and access to essential parties on both sides of the platform, which is otherwise unreachable. In this case, consumer data is considered an essential facility.[66] They can set the algorithms to favor their

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[65] Andi Fahmi Lubis (et.al.), *Buku Teks Hukum Persaingan Usaha 2nd Edition* (Jakarta: Komisi Pengawas Persaingan Usaha, 2017), 48.

[66] Inge Graef*, EU Competition Law, Data Protection, and Online Platforms: Data as Essential Facility* (Netherlands: Wolters Kluwer, 2016), 5.

positions and easily practice self-preferencing.[67] Thus, this creates entry barriers and harms competition. As a result, they may implement rules that competitors and consumers cannot avoid.[68]

There are two indicators of potential domination in the digital market: the direct indicator (based on substitution assessment) and the indirect indicator (based on identifying entry barriers, profitability, and market share).[69] Thus, the authority's broad-mindedness in considering new types of violations becomes very important in the digital market, considering the development of new business models and strategies. A clear loss or harm assessment, supported with economic evidence and specific facts from a case, is critical in resolving abuse of dominance cases in the digital market.

Large platforms play a protagonist role in the current digital economy, acting as intermediaries between businesses and end users for most big transactions. This is why big tech companies meeting the DMA criteria are categorized as gatekeepers.[70] The gatekeeper's economic power comes from their platform's ecosystem, giving them significant power over access to the digital market, causing many business users to depend on them.[71]

The implementation of the DMA and TFDPA is likely to resolve those problems, such as inefficiency in the digital sector, leading to higher prices, lower quality, and less selection and innovation, which harm consumers. Gatekeepers under the DMA or specified digital platforms under TFDPA must create fair, reasonable, and non-discriminatory conditions in the digital market.

DMA and TFDPA constitute a form of the ex-ante rule in enforcing competition law, especially in the digital market. The difference between the two lies in determining digital platforms, their obligations, duties, and prohibitions, and their authority in enforcing the law. The DMA provides more detailed and strict regulations regarding duties and sanctions than the TFDPA.[72] The TFDPA is more flexible, giving power to the authority to adjust its regulations based on the autonomy and independence of a specified digital platform provider. TFDPA only determines the general category related to the preconditions and duties of the

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67 Giorgio Monti, Marco Botta and Pier Luigi Parcu (ed.), *Abuse of Dominance in EU Competition Law: Emerging Trends* (United Kingdom: Edward Elgar Publishing Limited, 2017), 106.

68 OECD, "Gatekeeper Power in the Digital Economy: An Emerging Concept in EU Law – Note by Alexandre de Streel," accessed on June 22, 2022, https://one.oecd.org/document/DAF/COMP/WD(2022)57/en/pdf.

69 OECD Competition Policy Roundtable Background Note, 2022, "The Evolving Concept of Market Power in the Digital Economy," accessed on October 6, 2023, https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf.

70 Maria Luisa Chiarella, "Digital Markets Act (DMA) and Digital Services Act (DSA): New Rules for the EU Digital Environment," 38.

71 Maria Luisa Chiarella.

72 United Kingdom Parliament, "Digital Markets, Competition and Consumers Bill," accessed on September 7, 2023, https://publications.parliament.uk/pa/cm5803/cmpublic/DigitalMarketsCompetitionConsumers/memo/DMCCB03.htm.

specified digital platform provider, allowing the authority to adjust the obligations on a case-by-case basis.

Law Number 5 of 1999 uses the market share aspect to determine dominant abuse. This differs greatly from the DMA and TFDPA, which consider other aspects and implement the disclosure principle as an ex-ante rule. This gap emphasizes that Law Number. 5 of 1999 is outdated because it still implements the traditional ex-post measures in dealing with abuse of dominance. Further, in handling abuse of dominance, Law Number 5 of 1999 uses a rule of reason approach. This means that the authorities should prove whether the alleged action undermined fair competition.

The DMA considers the company's impact within the internal market of the European Union as one of the considerations. This consideration aligns with the effect doctrine in the competition law regime.[73] Meanwhile, the TFDPA determines a specified digital platform provider based on product sales, total users, and other business scale indicators as a digital platform. Decisions related to prohibitions in competition law generally emphasize two subjects: the existence of a violation and the consequence received by the perpetrator. The consequence can include orders to stop the violation, impose fines, apply structural or behavioral remedies, or both.[74]

It is deemed necessary to have a regulation that is definite in terms of its legal hierarchy, applicable to all, and legally binding to digital platforms that establish or run their businesses or impact the Indonesian market. Based on the author's point of view, several lessons can be taken from the DMA and the TFDPA:

1. There is a need to determine a digital platform and categorize it based on criteria to give them obligations that must be fulfilled to protect the digital market by acting fairly, reasonably, and non-discriminatively.
2. The disclosure principle is implemented through the duty to notify and provide relevant information to maximize the authority's supervisory role.
3. The types of obligations that will be given to the digital platform.
4. The actions that the authority can take in case of systematic non-compliance.
5. Commitments that can be filed for compliance.
6. Sanctions that can be imposed.[75]
7. The nature of the regulation, whether it is a strict rule like the DMa (rules-based) or principle-based regulation like TFDPA.

Strengthening the law to face the domination of big tech is an urgent need. Indonesia should appropriately take lessons from the DMA and the TFDPA implementations.

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[73] Sukarmi (et.al.), "The Qualified Effects Doctrine in the Extraterritorial of Competition Law Application: An Indonesia Perspective," *Sriwijaya Law Review* 5, no. 2 (2021): 197, http://dx.doi.org/10.28946/slrev.Vol5.Iss2.1050.pp192-204.

[74] Godefroy De Moncuit, "Relevance and Shortcomings of Behavioral Economics in Antitrust Deterrence," *Journal of European Competition Law & Practice* 11, no. 5-6 (2020): 1-2, https://doi.org/10.1093/jeclap/lpaa010.

[75] Andreea Cosnita-Langlais and Jean-Philippe Tropeano, "Learning by Litigating: An application to Antitrust Commitments," *International Journal of Industrial Organization* 80 (2022): 20.

Considering the digital market dynamics,[76] the OECD emphasized that the competition authority's methodology should shift its focus from static to dynamic competition without undermining its commitment to evidence-based legal enforcement.[77] This statement from OECD becomes relevant as many regulations use the ex-ante regulation approach to prevent competition law violations and encourage business actors to innovate.

E. Conclusion

The digital market is proliferating, bringing convenience to every aspect of human life and potentially harming fair competition. There is no way to guarantee that big tech companies will not create entry barriers or act unfairly against their competitors and customers in the digital market.

Law Number 5 of 1999 and the guidelines issued by the Indonesian Competition Commission (ICC) have yet to effectively respond to the dynamic development of the digital market. Even more so, Article 25 of Law Number 5 of 1999 uses ex-post measures and rule of reason analysis in handling abuse of dominance. ICC's guidelines have sparked debates about the authority in issuing guidelines and their binding power. The status quo rule is considered insufficient given the rapid growth of technology.

The European Union has issued the Digital Market Act (DMA), which uses the rules-based approach. This approach is evident in the DMA's detailed and strict rules for determining gatekeepers, including the obligations that must be fulfilled and the sanctions imposed. Japan, on the other hand, has the Act on Improving Transparency and Fairness of Digital Platforms (TFDPA), which uses the principle-based approach. This approach is reflected in TFDPA's flexible rules based on the digital platforms' autonomy and independence.

Both DMA and TFDPA are ex-ante rules that implement disclosure principles towards big tech in the digital market. The disclosure principle maximizes the supervision role of the ICC and prevents abuse of dominance by big tech companies since they are given certain obligations. Indonesia should reformulate its regulations and increase the relevant authorities' awareness of the digital market. Things that need to be determined by the Indonesian government are the criteria for digital platforms that must be given obligations, what sort of obligations they are, and the authority's power.

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