Self-preferencing: Practices and Characteristics of Abuse of Dominant Position in Digital Markets

Fajar Bima Alfian¹
fajarbalfian33@gmail.com
Rilda Murniati²
rilda_murniati@ymail.com

Faculty of Law Universitas Lampung¹,²

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ABSTRACT

Self-preferencing is a new form of anti-competitive practice used to maintain a dominant position in the digital market. Platforms are suspected of playing a dual role as service providers while competing with third parties. This is manifested through preferential treatment towards their goods and services, potentially erecting entry barriers and impeding consumer substitution rights. The research method used is normative research with a statutory and case approach. The results show that the practices and characteristics of self-preferencing in several countries have certain behavioural similarities with those in Indonesia: providing discounts, market coverage, or limited facilities. This practice forms an entry barrier while eliminating consumers’ rights to choose and compare with substitute products. The regulation that is used as a reference for the existence of prohibited behaviour as an abuse of dominant position is regulated in Article 25. The absence of explicit regulations addressing these behaviours creates challenges for competition authorities, particularly in AI-driven markets. Advanced economies have already begun enacting specialized laws and enforcement actions against platforms engaging in self-preferencing and other digital market transgressions. Indonesia’s regulatory landscape must evolve to encompass these developments and technological advancements in the digital sphere.

Keywords: Artificial-Intelligence, Digital, Self-Preferencing, Platforms.

ABSTRAK


Kata Kunci: Artificial-Intelligence, Digital, Self-Preferencing, Platforms.
INTRODUCTION

Digitalization, new technologies, and scientific breakthroughs occur in various sectors, including the economy and business competition. [1] This progress has a positive impact that can encourage economic growth, but on the other side, it can also raise concerns about competition and create the requirement for new regulations. [2] Thanks to its impact on society extending beyond digital technology, it is increasingly relevant to policymakers and stakeholders.[1] The impact of digitalization and data-driven innovation on competition has been recognized by the Organisation for Economic Co-operation and Development (OECD) as conveyed in the forum G7 Joint Competition Policy Makers and Enforcers Summit, which covers a wide range of policy issues, including big data, algorithms, and collusion.[3] From 2016 to 2017, The OECD chose the digital economy as the focal point for its Going Digital project, which seeks to formulate a comprehensive competition policy strategy addressing the effects of digital transformation and open markets.[4]

The ability of digital service providers (platforms) to reach or collect data on consumers and their competitors is a fundamental distinction between platforms and business actors with traditional business models.[5] For example, in today's digital age, international consumers find it challenging to move away from reliance on Amazon due to its position as a cross-border selling (e-commerce) platform capable of maintaining an extensive international delivery network.[6] Using new anti-competitive practices, platforms can maintain a dominant position in the relevant market. The dominant position owned is not necessarily used to create business innovations for consumers through low prices and quality goods but can be misused to create entry barriers while increasing market sharing.[7]

How the implementation of business models by platforms and similar technology companies, to the emergence of the concept of business competition in the digital market (winner takes all, competition for the market, and others) also brings the position of competition authorities to rebuild the concept of thought and substance of competition law in order to precisely redefine the relevant market, dominant position, vertical or horizontal restrictions, and others.[8] An exciting issue currently developing is the practice of preferential treatment (self-preferencing), which is positioned as a symbol of anti-competition in the digital market.[9] From a competition law perspective, the issue has the potential to trigger unfair competition because it is feared that large platforms may abuse their dominant position to exclude competitors by providing preferential treatment to consumers for the goods and services offered.[10]

Self-preferencing refers to the behaviour of a platform that gives preferential treatment of their goods and or services (first-party goods/1P) to consumers. This occurs when a platform analyzes the market using data collected from sales of third-party goods (third-party goods/3P) to design and prepare 1P to fulfil and customize consumer needs.[11] Such self-preferencing is done when the platform plays a dual role, a condition when the platform as a digital marketplace service provider company (e-commerce) competes with third parties.[12] This practice is supported by the role of artificial intelligence and algorithmic systems in analyzing consumer habits and interests in certain goods and or services.[4] Intuitively, algorithms are associated with the sequence of steps a computer or system must perform to accomplish a task.[13] The definition adopted by the UK competition authorities states that ‘an algorithm is any well-defined computational procedure that takes some value, or set of values, as input and produces some value, or set of values as output.’[14] The critical point is that self-preferencing occurs without being followed by an agreement or concerted action and without a direct relationship between them.[15] The concern that self-preferencing using an algorithmic system may facilitate tacit collusion is essential and novel in competition law enforcement.[16] This challenges competition authorities as self-preferencing is conducted in a digital market with artificial intelligence capabilities and cutting-edge technology. With this, finding indirect evidence through direct or indirect communication becomes challenging.[16]

From a competition law perspective, one central question arises: Does self-preferencing trigger abuse of dominant position to monopolize the relevant market, or is it merely a form of business innovation amidst technological development?

To answer this question, this study will refer to previous studies that describe the practices and characteristics of self-preferencing carried out by technology giant companies in the European Union (EU) and the United States (US), including how the relevant competition authorities have responded. Some self-preferencing characteristics ranged from eliminating competitors' goods to deliberately putting their goods at the top. It can be viewed from several cases, including:[17] The Google platform was sanctioned by the EU Competition Authority or the European Commission for abuse of dominant position in the market concerned search engines. In this case, Google displays
search results with a high-order position for its product, namely Google Shopping. For this violation, Google was sanctioned with 2.42 billion Euros. Secondly, Google forced manufacturers of mobile devices, such as Androids, to install Google’s browser application, Google Chrome, by default. It has brought Google into a dominant position in the relevant market. Third, the company Apple, Inc. sets rules on its proprietary application, the Appstore, which is designed in such a way as to prioritize its applications. Apple requires third-party developers to use payment methods through Apple’s apps. Lastly, the Italian Competition Authority (AGCM) dealt with Amazon’s infringement in November 2021, which fined Amazon.[18]

Based on the reference of several cases, this paper will analyze issues related to self-preferencing in Indonesia from 2023 to 2024. First, Shopee’s single delivery service is through PT Nusantara Ekspres Kilat (SPX Xpress). This occurs when Shopee applies a single delivery service policy to consumers so that consumers can no longer choose a service provider or compare different prices. This differs from its closest competitor, Tokopedia, which still provides price comparisons and options for consumers when determining the shipping service used.

Second, about the social media platform TikTok. This problem was initially triggered by the number of Micro, Small, and Medium Enterprises (MSMEs/UMKM) traders who experienced a drastic decrease in turnover caused by their inability to compete with imported products that were sold very cheaply and how TikTok ran its flagship feature, TikTok Shop, which was proven to be incompatible with related licenses as well as allegedly leading to anti-competitive practices in the digital market.[18]

In view of these issues, there are several reasons for researching the practices and characteristics of self-preferencing in the digital market. First, people often use the services of several companies suspected of engaging in this practice. For this reason, this paper is expected to provide a description of the study to readers in order to know and provide an understanding of the perspective of competition law on problems that occur in the digital market; Second, abuse of dominant position or monopolistic practices is the most controversial form of violation in competition policy, with very different enforcement standards in EU and the US including different views among practitioners regarding the rationale behind the prohibition of self-preferencing practices in digital markets, which are characterized by specific features (which tend to benefit consumers and a significant level of innovation), making some parties skeptical about the possibility of harm to consumers; Third, the EU has implemented a particular regulation, namely the Digital Market Act (DMA) which was substantially born from several cases of abuse of dominant position in the digital market, so it can be a policy reference for Indonesia to take a stance on the practice of self-preferencing.[20]

Based on the background that has been described, it is appropriate and attractive to conduct research with the formulation of the problem of how the practice and characteristics of self-preferencing that occurs in the digital market and how the substance of the regulation of self-preferencing as an act that is considered to violate Law Number 5 of 1999. This study aims to obtain a complete, detailed, clear, and systematic description of the practices and characteristics of self-preferencing in the digital market and the regulation of self-preferencing as an act considered to violate Law Number 5 of 1999. This paper uses a normative research method with a statutory approach to a judicial case study. The analysis used is descriptive qualitative analysis. Namely, qualitative data collected related to the problem will be analyzed deductively and presented descriptively.

DISCUSSION
Practices and Characteristics of Self-Preferencing in the Digital Market

This article will focus on self-preferencing by digital market service providers or e-commerce platforms. This behaviour occurs when the platform is in a dual-role position, i.e., conducting self-preferencing practices when the platform provider provides sales services while competing with third parties.[12] Based on the substance of the arrangements in the DMA, what is meant by self-preferencing is the more favourable treatment of first-party goods or services (first-party goods/1P), such as pricing policies. Article 6 (5) DMA stipulates that “The gatekeeper shall not treat more favourably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair, and non-discriminatory conditions to such ranking and related indexing and crawling”. This happens when platforms identified as gatekeepers impose varying charges or employ non-price tactics to differentiate their treatment of third-party goods and or services (third-party goods/3Ps). Even though the exact charges are applied, it still creates an unequal position in the relevant market owing to 1P being part of the same company. Hence, a company’s policy of charging lower fees for 1P’s products or
services can, in principle, be viewed as directing consumers to choose 1P's offerings.[17]

According to previous studies, self-preferencing has various impacts depending on anti-competitive impacts.[12] This behaviour impacts competition in the digital market and can give birth to unfair competition concerns because the platform has a vertically integrated dominant position in its goods and or services, so it can trigger conflicts of interest in the future, directly harming consumers.[9] From a business perspective, there is an opinion that self-preferencing is part of innovation that benefits consumers.[21] Accordingly, the debate then arises as to how to distinguish between self-preferencing, which is considered an abuse of dominant position, and business innovation, which is considered reasonable, and it is necessary to discuss in depth the dividing line between both of them.

a. Self-preferencing reviewed from the point of view of abuse of the dominant position

This article will refer to the practices and characteristics of self-preferencing stipulated in the DMA as the new regulatory standard of competition law in the digital economy sector in the EU and present some of the responses of each jurisdiction to it. This paper will also summarise several cases of self-preferencing from several countries to compare their behaviour in Indonesia. From the cases, self-preferencing by platform can be recognized by several characteristics: First, manipulation of search orders and rankings; Second, exploitative use of third-party data.[12] The EU Competition Commission against Google case in 2017 addressed self-preferencing similarly. Google's search engine conducts self-preferencing towards its service (Google Shopping) over competitors offering similar services (such as Amazon and eBay). The search results of search engines can direct consumers to one of the provider companies after observing their preferences through algorithms.[12]

This case began in the EU in 2004 when Google entered the relevant market through a price comparison service called 'Froogle' with several competitors in the relevant market. The EU Competition Commission alleged that in 2008, Google had made significant changes to its business strategy and began manipulating search results, thereby lowering the rating or ranking of its competitors. Google was fined 2.42 million Euros for violating the provisions of Article 102 in the Treaty on the Functioning of the European Union (TFEU) on the prohibition of abuse of a dominant position. Google appealed the decision to the General Court of the EU, but in November 2021, the court upheld the previous decision. The second case is about Google's app market. Since 2011, Google has forced Android mobile device manufacturers to default to Google's browser application, Google Chrome. This has successfully brought Google into a dominant position in the relevant market.[22]

The third case is the company Apple, Inc. Several third-party developers of mobile applications, including Spotify, complained to the EU Commission for alleged violations committed by Apple in terms of implementing policies in its application, namely the Appstore, which is designed in such a way as to prioritize its applications. This happens when Apple asks third-party developers to use payment methods through Apple's apps. [12]

The most recent case and the primary reference to existing behaviour in Indonesia were handled by the Italian Competition Authority (AGCM) in November 2021, which imposed a fine on Amazon. This practice, in particular, is alleged to Amazon for abusing its dominant position to support the application of the Fulfillment by Amazon feature (Amazon's delivery or logistics service) to sellers. In this case, AGCM considers that Amazon's strategy harms third-party companies or parties that provide the same logistics services and puts them at a disadvantage because Amazon incentivizes sellers to use their features.[9]

Although Amazon gives 3P sellers the freedom to choose a third-party logistics service provider or Merchant Fulfillment Network (MFN) to manage the delivery of their goods, Amazon is considered to be indirectly coercive because it provides the advantage of getting limited facilities (Prime Label). Prime Label can increase sales for sellers who use Fulfillment by Amazon because they can automatically participate in Amazon's event promotions, such as Black Friday,
Cyber Monday, and Prime Day. The Prime Label program enhances the chances for sellers to be chosen as featured offers in search recommendation listings. This becomes very important for sellers because it can affect sales figures. Search recommendations clearly show one seller’s offer for a selected product on Amazon and make up a large portion of all sales, while Amazon also provides free and fast shipping benefits to sellers.

Based on the case conducted by Amazon and the actions taken by AGCM, this paper will next present the behaviour of platforms in Indonesia that leads to the abuse of dominant position in the form of self-preferencing by implementing a single delivery service. This is done by eliminating the option of choosing an expedition service and price to consumers by PT Nusantara Ekspres Kilat (SPX Xpress). SPX Express is a subsidiary of Shopee International Indonesia, which is engaged in specialized logistics services that serve product shipments from Shopee e-commerce.[23] Data taken directly from Shopee's website and its closest competitor, Tokopedia, shows differences in the selection of package delivery expeditions. From the data below, Shopee only provides two shipping categories that consumers can choose from: regular and economical. These two categories automatically prevent consumers from choosing third-party expedition services. Shopee automatically determines which expedition company will send consumer packages and tends to prioritize Shopee’s expedition, SPX Xpress. In contrast to Tokopedia, which also provides two shipping categories, namely economy and saving, Tokopedia provides sub-categories in the form of expedition company preferences that consumers can choose from, for example, JNE, JNT, Wahana, and others.

Previously, consumers could choose different shipping providers from Shopee's platform. However, starting in 2021, Shopee slowly began implementing a policy restricting consumers from choosing third-party shipping providers or knowing different shipping prices.[19] Shopee also has an intensive program that is being carried out, namely expansion by opening new warehouses throughout Indonesia.[24] Looking further into the design of Shopee’s single delivery service, we see that it has been vertically integrated since sellers were directed to choose Shopee’s expedition service. This happens when Shopee has a particular program called Shopee Gratis Ongkir, which allows sellers to offer free shipping specifically for their buyers with terms and conditions that Shopee have determined. This program indirectly directs sellers to choose the program because other features or facilities can only be obtained if sellers agree to join the Shoppe Gratis Ongkir program. Some facilities obtained if participating in this program are tags or free shipping labels and search result filters on displayed products to increase consumer reach (exposure), attract buyers, and free shipping search filters on Shopee's platform.[25] From the sellers' side, this program is certainly not always beneficial or a win-win solution because Shopee indirectly forces sellers to join this program. At the same time, sellers are still subject to fees (service and administration), and there is even a provision that Shopee can change the terms and conditions without prior notice.[26] Moreover, this can be detrimental to both consumers and sellers because in addition to consumers not being able to choose and compare other expedition services, also if there are complaints or poor service, consumers are limited by the limitation of liability/exoneration clause applied by Shopee (Shopee is not responsible for products damage or complaints, but consumers are directed to contact the sellers directly). This should be the responsibility of SPX Xpress as the expedition and Shopee as the platform.[27]

**Figure 1. Shipping Providers from Shopee’s Platform**
In this regard, these market conditions make consumers think they will not be disadvantaged because they do not pay. After all, there are subsidized shipping costs close to zero or free shipping services. Interestingly, having low or no fees does not necessarily mean it is always good for consumers. As existing research has shown, this statement is false:

1. Potent network effects;

Consumers are not paying in nominal money but will pay in reduced goods and or services quality, poor complaint handling, or even misuse of their data.

Furthermore, this paper will describe the behaviour of the platform TikTok. TikTok is a digital social media platform with 113 million users as of April 2023.[29] TikTok, a social media application, also provides a shopping feature, ‘Tiktok Shop’, which sellers can use to sell live-streaming products and check out products directly in the same application. Through this feature, sellers quickly increase their exposure as consumers recognize them as having great discounts and an affiliate business model.[30] The problem is that TikTok should not run social media business activities simultaneously with e-commerce. Absolutely, it will also create an unequal position in the relevant market besides not fulfilling the relevant licenses. Because TikTok efficiently utilizes algorithms and directs consumers (social media users) to buy certain products offered. TikTok was also previously known to sell products at low prices. Teten Masduki conveyed this to the Minister of Cooperatives and SMEs, who revealed that many sellers in TikTok Shop have reached millions of Followers. Some have even reached 2.8 million followers and are forced to sell products from China. If they refuse and still sell local products, they will experience shadow banning, which results in their products not appearing in the display and recommendations.[31]

The Government issued Regulation of the Minister of Trade (Permendag) Number 31 of 2023 on Business Licensing, Advertising, Guidance, and Supervision of Business Actors in E-Commerce to address this issue. This regulation stipulates that social media platforms such as TikTok can no longer run e-commerce and social media business activities simultaneously in one application. In addition, TikTok is not allowed to sell its products or imported products below a minimum price of US$100 to prevent predatory pricing.[32] Its regulations may temporarily secure the situation, as it only focuses on one form of monopolistic practice and is limited to one industry in the digital economy.

To formulate a comprehensive long-term solution, it is necessary to understand the core of the problem. Admittedly, digital platforms that carry new services and technologies can indeed, under certain conditions, provide consumers with more product choices with lower prices and better quality. We also have higher shopping convenience due to reduced search costs. Another point is that businesses benefit significantly as digital platforms provide a broad consumer reach. However, there is no guarantee that all these positive impacts will last forever, especially if business competition in the digital economy is unfair. Conversely, technological innovation and goods quality will decline while prices will soar if our digital economy is monopolized.

[28] Based on previous research, there are certain characteristics in the market structure of digital platforms that tend to lead to a form of monopoly by one large company, namely:

1. Potent network effects;
2. Robust economies of scale and scope;
3. Minimal marginal costs close to zero;
4. Heightened and escalating returns from data utilization; and
5. Minimal distribution expenses facilitating global outreach.

Such market characteristics are prone to a form of ‘tipping’, which is when a relevant market reaches a point of tending towards one platform or player called ‘winner-takes-all.’ [28] New competitors are less likely to be able to enter the relevant market because it is difficult to cross the high entry barrier in a fast and cost-effective manner.[28] Such a platform’s capabilities can be used to invest more and acquire existing and potential competitors. Platforms with hugely dominant positions have the opportunity to obstruct innovation competitors that can disrupt, and they are even able to control according to the innovation path or business plan that has been prepared in advance. For instance, it is also believed that this is why Facebook acquired Instagram and WhatsApp.[33]

The winner-takes-all dynamic is one of the central problems in the context of e-commerce. Digital platforms have various ways to monopolize the market. One is done by eliminating competitors through self-preferencing behaviour. In addition, platforms can also monopolize the market by binding sellers through exclusivity clauses, which prohibit sellers from selling their products on other platforms. Once competitors have been eliminated, consumers and sellers become dependent on the platform, and the dominant platform can charge a high ‘service fee’ for sellers and automatically increase the price of products or services for consumers.

b. Self-preferencing from a business innovation point of view

Digital platforms facilitate existing transactions between business users (sellers or third-party companies) and end users/consumers and enable new interactions without platforms. These interactions are related to the production of new types of data that further contribute to the innovation of the platform ecosystem.[34] In agreement with the article titled “Digital Platforms Regulation: An Innovation-Centric View of The EU’s Digital Marketing Act,” the practice of self-preferencing, if viewed from the perspective of DMA, will be connoted as a dangerous behaviour because the platform provider is considered to have a dual role.[34] From this perspective, self-preferencing can potentially lead to abuse of a dominant position when it leads to market dominance and prevents competitors from developing and giving birth to business innovation. For instance, Amazon’s platform prioritizes its products (which are shipped directly by Amazon) with minimum quality over products sold by sellers on Amazon. This practice can have a negative impact on competition and consumer welfare. When analyzed from different perspectives of business and consumers, self-preferencing some circumstances may provide a direct benefit, e.g., if a vertically integrated product offering (such as Amazon direct delivery) can provide fast delivery, better packaging, or the product delivered matches what is offered online, consumers may prefer such an integrated service for convenience and quality.[21] These two conditions show that self-preferencing can have both positive and negative impacts, and to determine this, it is necessary to consider consumer interests, competition, and evolving market dynamics. Self-preferencing from the side of the platform provider or first party can have a negative or positive impact, depending on whether the practice replaces (replacement effect), maintains (sustaining effect), or generates new interactions (trigger effect).[34]

1. Replacement Effect: This condition is where the platform provider replaces the current commercial relationship between business users and end-users, which involves exploring alternative transactions between the platform provider and end-users. An instance of this occurs when e-commerce entities like Amazon offer alternative products to business users.[35]

2. Sustaining effect: The sustaining effect involves enhancing current interactions by amplifying benefits for end-users or reducing costs.
for business users involved in transactions. This could occur, for instance, when the platform provider introduces supplementary ‘ancillary services’ such as payment processing, delivery options, communication tools, and other digital features that are optional additions to transactions. An example is Amazon Prime, where existing interactions are bolstered by reducing costs for “Prime” business users who utilize the Fulfillment by Amazon Service. Additionally, it heightens benefits for end-users, who may enjoy reduced transaction costs when dealing with Amazon Prime business users compared to those outside the program. Consequently, promoting offers from Amazon Prime business users in search rankings can spark positive innovation effects by amplifying the value of current interactions through these supplementary services. This, in turn, makes new combinations more cost-effective to produce (by lowering production costs and technological barriers to entry) or more valuable as they are consumed within a broader ecosystem (increasing returns on investments in innovation).[36]

3. Trigger Effect: Self-preferencing creates entirely new interactions. This happens when the platform provider invests in new market domains that provide new products and services and open new market categories. For example, in the case of social media (the integration of Facebook with Instagram into Meta).[37] Such cases can open up new interaction opportunities such as: a) Innovation Spillovers, i.e., the resulting business innovation attracts developers to be able to create similar applications or other innovations;[38] b) Attention Spillovers, i.e., the creation of a new trend that will attract the attention of users to be able to engage and experience the resulting innovation directly (for example Threads generated by Instagram to compete with Twitter).[37] The result of such integration is that consumers get added value from Instagram after its closer integration with Facebook, leading to drastically higher demand for Instagram.[37]
(2) Business actors shall have a dominant position as intended in paragraph (1) in the following events:

a. one business actor or a group of business actors controls more than 50% (fifty percent) of the market share of a certain type of goods or services; or

b. two or three business actors or a group of business actors control more than 75% (seventy-five percent) of the market share of a certain type of goods or services.

ICC has handled several cases, especially in this context, involving business actors in the digital sector. ICC uses a dominant position analysis of the reported parties using Article 25 of Law Number 5 of 1999. In every case handled by ICC, the main concern is the dominant position of a business actor in the relevant market. The dominant position allows a company to carry out actions or strategies without being influenced by its competitors.[41] For example, in case Number 13/KPPU-I/2019, ICC used a dominant position analysis on the 1st Respondent PT Solusi Transportasi Indonesia (Grab) and PT Teknologi Pengangkutan Indonesia.[31] Furthermore, Case Number 08/KPPU-I/2020 ICC assessed the dominant position of the Reported Parties, PT Telekomunikasi Indonesia and PT Telekomunikasi Seluler, which allegedly discriminated against Netflix.

Self-preferencing is commonly practised in digital markets due to the presence of witnesses or evidence.[11] Because the behaviour differs from conventional practices, it needs to be supported by regulations that adjust these developments. The starting point to enhance competition law enforcement in the digital market is that Indonesia needs to catch up in the supervision and enforcement of competition law in the digital economy sector and at least prepare mitigation measures to anticipate monopolistic practices in the digital economy sector. This aligns with Indonesia's position, which technology giant companies dominate.[42] Adequate regulations do not match the rapid development of business actors and existing technology, and changing policies are an obstacle faced. Moreover, in the context of the digital economy, Law Number 5 of 1999 and PerKPPU Number 2 of 2023 have limitations and scope of anti-competitive practices in the digital market that are different from conventional business models.[2] The complexity of business competition in the digital economy sector directly forces the government and competition authorities to respond to this change because the complexity of competition in the digital sector is very different from what has happened traditionally.[43]

In the previous discussion, this article discussed specific regulations passed by the EU authorities as comparison material on the importance of digital market laws in a country. In order to build the proper rules, plans, and strategies to face the digital market era, policymakers and the ICC should be able to look at the laws and regulations of countries that already have regulations related to digital markets. If referring to several cases that have been handled, the following are some practices and policies that can be categorized as prohibitions of self-preferencing. Certain anti-competitive practices by platforms often stop due to public or regulatory scrutiny.[22] Before causing more harm or examining these practices on a case-by-case basis, below are some examples of regulatory schemes that can be referenced based on what has been addressed in the EU and the US.[1]

1. Manipulated search results

    Search platforms competing with the 3Ps are prohibited from overriding the search engine results by abusing the algorithm to place their products at the top. If the platform wants to position its product at the top, it must provide a tag or label in the search results with the following description: ‘sponsored’ or ‘advertised content.’

2. Non-compete and Copycat Policies

    As we know, Copycat is a term used to describe someone or something that intentionally imitates another person or another person's work. Digital social media platforms, such as Threads (Meta group), have been seriously accused by Twitter. Meta's recently launched Threads app is considered an infringement for using Twitter's trade secrets and intellectual property. According to Twitter, many former workers still have access to Twitter's trade secrets and other confidential information. Twitter argues that Meta took advantage of this and assigned these employees to develop copycat applications violating US and federal laws. These non-compete and Copycat Policies could stop innovation for new or existing potential competitors to benefit consumers. [44]

    Furthermore, in Article 3 (2) of the DMA, a company providing a platform is categorized as a gatekeeper. It must comply with stricter regulations when it meets the criteria of 45 million monthly active users and a market value of 75 billion Euros. As
of September 6, 2023, the EU Commission has, for the first time, designated six companies as gatekeepers and under DMA supervision, including Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft, which covers the scope of the platform provided by each gatekeeper namely social network, intermediation, ads, N-IICS, video sharing, browser, operating system, and search. After being categorized as a gatekeeper, the platform will be closely monitored and must comply with DMA rules, including the prohibition of practising self-preferencing. Although some existing studies have criticized how bias may arise regarding the setting of self-preferencing in DMA, it can still be corrected by economic analysis to determine the extent to which self-preferencing harms consumers. It is a central question when consumers feel that the self-preferencing practices of platform providers are superior to those of third parties for goods and or services offered. To evaluate whether a specific offer from a gatekeeper falls under Article 6 (5), the following specific questions may help: 1) Does the offer have a specific platform it is directed towards, like an app? 2) Are other providers offering similar services independently (either currently or historically, or possibly in the future)? To determine if an alternative offer is similar, evaluating whether its user experience can be comparable to that of alternative offerings is essential. Therefore, Indonesia can take the concept or substance of the existing arrangements in the DMA and how competition authorities and relevant policymakers address the shortcomings, which can be applied in specific regulations in Indonesia to regulate anti-competitive behaviour in the digital market.

CONCLUSION

Based on the results of the research and discussion, several conclusions can be given regarding the practice and characteristics of self-preferencing that occurs in the digital market and the regulation of self-preferencing as an act that is considered to violate Law Number 5 of 1999 as follows:

a. The relevant competition authorities have prosecuted the practices and characteristics of self-preferencing that occur in several countries concerning self-preferencing behaviour, which is a symbol of anti-competition in the digital market and shows certain similarities in behaviour and patterns. In Indonesia, platform e-commerce shows the existence of self-preferencing behaviour, similar to that in Italy, namely that carried out by the Amazon platform by abusing its dominant position to prioritize its logistics delivery services. Self-preferencing impacts consumers through loss of choice of substitute products or services and price increases. This is influenced and depends on the behaviour and conditions of market concentration, so the competition authority needs to analyze casuistically and be carried out economically.

b. The regulation of self-preferencing based on Law Number 5 of 1999 has not explicitly regulated the form of violations in the digital market, thus limiting the movement of competition authorities to take action. This differs from some countries with particular regulations regarding business competition in the digital market, such as the DMA, which has been implemented in the EU. Indonesia should be able to make case-by-case cases handled by other countries as a reference to form special regulations, considering that technological developments are increasingly developing and it is urgent to reform the competition law to respond to existing developments.

REFERENCES


