THE LEGAL STANDING OF BUSINESS ACTORS IN A DIGITAL MARKET ACCORDING TO LAW NO. 5 OF YEAR 1999 ON THE PROHIBITION OF MONOPOLISTIC AND UNHEALTHY BUSINESS COMPETITION PRACTICES

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Abstract

Through a Digital Market, the commercial activities of business actors are conducted virtually and can have a global reach. Commercial activities that no longer require face-to-face meetings in conducting transactional activities and that involve cashless payment methods have made it possible for business actors to transgress the jurisdictional boundaries of a state as they conduct their business activities. Digital Market becomes an inevitability as well as a legal matter in the application of Law No. 5 of Year 1999, particularly in relation to the legal standing of business actors. The consideration is that in the context of a virtual market, geographical boundaries no longer firmly limit the jurisdictional territory of a state. Therefore, the discussion regarding the characteristics of a Digital Market and the legal standing of business actors in a Digital Market becomes an urgent need. Through juridical normative research, this article intends to analyze the characteristics of a Digital Market and the legal standing of business actors in a Digital Market according to Law No. 5 of Year 1999.

Keywords: Legal Standing; Business Actors, Digital Market.

Abstrak


Kata kunci: Kedudukan Hukum; Pelaku Usaha; Pasar Digital.
Background

The rapid advancements in various sectors in the globalization era in the past several decades have resulted in quite significant and positive impacts for the global economic condition. This opens up major opportunities for business actors to conduct expansion of their business activities at both the national scale and the international scale. Through globalization, it also becomes possible to increase investment, both directly and indirectly, which in the end drives economic growth and employment expansion.¹

A competitive environment in the progression of several economic sectors is an absolute requirement for developing countries such as Indonesia to achieve efficient economic growth, including for its industrialization process. This is realized by the development of the sector that is called the Digital Market.

Digitalization and online platforms offer many benefits for companies and consumers; among these are increased choices and economic opportunities. However, they may also increase market concentration and concerns of competition. With the advent of digitalization, there is the need for the appropriate re-evaluation of competition policies. This matter also becomes the basis for debates regarding the role of the state in the economy of the digitalization as well as the distribution of profits from that digitalization.²

Business competition becomes the economic instrument in the development of the economic system in Indonesia, particularly for the Digital Market. This is indicated with the enactment of Law No. 5 of Year 1999 on the Prohibition of Monopolistic and Unhealthy Business Competition Practices. Competition occurs when there are several business actors who deal with the same or similar enterprises, and together run companies in the same operational (marketing) area, with each of them attempting as much as possible to outpace the others to obtain the greatest profit possible.³

For the matter of evaluating the behaviors of business actors who are suspected to commit actions of monopoly and unhealthy business competition, the KPPU (Business Competition Supervisory Agency) has utilized various approaches to analyze business actors as subjects of suspected violators of Law No. 5 of Year 1999, by utilizing the juridical approach and the economic approach. In relation to the two approaches, the KPPU

in 2007 utilized the Single Economic Entity (SEE) Doctrine in their approach.

The SEE Doctrine is one of the doctrines in the best practice of business competition law that is utilized by several other countries, including Singapore, Malaysia, and European Union countries. The SEE Doctrine regards the relationship between subsidiaries and their parent company. In such a relationship, the subsidiaries do not possess independence to determine company policies and their direction as a singular and united economic entity.

As a result, with the SEE Doctrine being applied, business actors may be demanded for responsibility regarding actions conducted by other business actors in a single economic entity. This can even apply to the operations of the first business actor outside the legal jurisdiction of the business competition law of a state; in this way, business competition law may have the property of being extraterritorial.

The first time that the KPPU utilized the Single Economic Entity Doctrine approach was through KPPU Ruling Number 07/KPPU-L/2007 on the case of cross-ownership by the holdings of Temasek Group. This was followed by KPPU Ruling Number 3/KPPU-L/2008 on the monopoly on English Premier League broadcasting by Astro Group and KPPU Ruling Number 17/KPPU-I/2010 on the cartel that was instituted by the pharmacy industry on therapy-class amlodipine. The background for the usage of the SEE Doctrine in the resolution of cases of competition law in Indonesia is the presence of business actors who conduct their activities in Indonesian territory, but these business actors are not established in the legal territory of the state of Indonesia itself, nor are they located within it.

According to the stipulations of Article 1 Number 5 of Law No. 5 of Year 1999, business actors have the following definition:

Business actors shall be any individual or business entity, either incorporated or not incorporated as a legal entity, established and domiciled or conducting activities within the jurisdiction of the state of the Republic of Indonesia, either individually or jointly based on agreement, conducting various business activities in the field of economy.

The above definition is often interpreted that only business actors who establish themselves and conduct business activities in the field of economy in the territory of the state of the Republic of Indonesia may have Law No. 5 of Year 1999 applied unto them.

In practice, these Foreign Nationals or Business Actors are able to conduct their activities in Indonesian territory, although
they do not establish themselves and do not possess legal standing in the territory of the state of the Republic of Indonesia (as Foreign Business Actors). Meanwhile, their actions have been able to be proven significantly to have resulted in an impact toward healthy business competition in the market in the territory of the state of the Republic of Indonesia. Therefore, limiting the definition of “Business Actors” only toward business actors who establish and conduct business activities in the field of economy in the territory of the state of the Republic of Indonesia may be said to be a simplification.

With the development of the Digital Market sector, commercial activities of business actors that are conducted virtually can have a global reach. Commercial activities no longer require face-to-face meetings in transactional activities, and they have implemented cashless payment methods; this very much allows business actors in conducting business activities to transgress the limits of jurisdiction of a state. Based on a report by Google and Temasek in the e-Conomy SEA 2020 Report, the value of digital economy in Indonesia reached USD 44 billion in 2020, an increase of 11% compared to 2019. It was also predicted that in 2025, the valuation of digital economy in Indonesia would reach USD 124 billion, becoming the country with the largest digital economy valuation in Southeast Asia.\(^7\) Indonesia is even situated in the path of becoming the largest market in Southeast Asia.

Digital Market becomes an inevitability and at the same time a legal problem in the application of Law No. 5 of Year 1999, specifically regarding the legal standing of business actors. It is considered that in the context of a virtual market, geographical boundaries that firmly limit the jurisdicitional territory of a state no longer exist. As such, the discussion regarding the concept of the legal standing of Business Actors in a Digital Market becomes urgently needed.

Based on the above background, this research intends to analyze two formulated problems: (1) what are the characteristics of a Digital Market and (2) what is the legal standing of business actors in a Digital Market according to Law No. 5 of Year 1999?

This research is a normative juridical research that utilized several approaches. They include the Statute Approach that involves the analysis of several regulations in the form of Laws and Government Regulations that are linked to the research theme; the Case Approach with the analysis of the application of legal norms or principles that are implemented in legal practice, particularly regarding cases that have been decided for situations in line with the research theme, in the form of KPPU rulings and verdicts from State Courts and the

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Supreme Court;\(^9\) and the Conceptual Approach that involves doctrines or views that develop in legal science. Next, these legal materials were analyzed within a systematic context for the relationship among articles that are contained in the laws themselves, as well as in other legal regulations and in KPPU Rulings, as a single, united whole for explaining meanings and intents.\(^10\)

Through a juridical normative approach, this research has the following objectives: (1) to analyze the characteristics of a Digital Market and (2) to analyze the legal standing of business actors in a Digital Market according to Law No. 5 of Year 1999.

**Discussion**

**A. Characteristics of a Digital Market**

Regarding trade, Indonesia has possessed Law No. 7 of Year 2014 on Trade. According to Article 1 Number 1, Trade is a structure of activities that are related to transactions of goods and/or services within the country and across national boundaries with the objective of transferring rights of goods and/or services to obtain reward or compensation.

Next, in relation to trade through electronic systems (PMSE), the government had issued Government Regulation No. 8 of Year 2019 on Trade through Electronic Systems. In Article 1 Number 2, it is stated that PMSE is Trade for which its transactions are conducted through a series of electronic devices and procedures that utilize Electronic Systems\(^11\) and Electronic Communications\(^12\), and are regulated in Electronic Contracts.\(^13\)

PMSE is also often called “e-commerce”. According to UNCITRAL, e-commerce comprises:

*The term ‘commercial’ should be given [an] interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: ... for the supply or exchange of goods or services; ... commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; ... [and] carriage of goods or passenger by air, sea, rail or road.*\(^14\)

In e-commerce, a business actor may promote brands or goods with usage of digital

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11 Article 1 Number 3 of Government Regulation No. 8 of Year 2019: “An Electronic System is a series of electronic devices and procedures that functions to prepare, collect, process, analyze, store, display, announce, transmit, and/or distribute electronic information.”
12 Article 1 Number 5 of Government Regulation No. 8 of Year 2019: Electronic Communications are every kind of communication that is utilized in PMSE in the form of statements, declarations, requests, notifications or requests, confirmations, or offers or acceptances of offers that contain the agreement of parties for the formation or execution of a contract.
13 Article 1 Number 4 of Government Regulation No. 8 of Year 2019: “Electronic Contracts are agreements among parties that are created through Electronic Systems.”
media in order to reach consumers in a timely manner. In general, transactions in a digital market utilize features of the Internet and websites. This container for promotion utilizing digital media is what is called a Digital Market.\(^\text{15}\)

Next, digital business may be understood as trade that is conducted online with usage of electronic trading systems that cover the processes of purchasing, sales, transfer, or exchange of products, services, or information through Internet networks.\(^\text{16}\)

**B. Business Actors in a Digital Market**

1. **Definition and Scope of Business Actors**

As has been stated in the previous section, the definition of Business Actors is regulated and mentioned in the stipulations of Article 1 Number 5 of Law Number 5 of Year 1999. According to the definition, the following elements are to be fulfilled by a Business Actor as it conducts its enterprise in Indonesian territory:\(^\text{17}\)

1. **Subject:**
   a. Individuals, or;
   b. Business Entities formed as Legal Entities, or;
   c. Business Entities not formed as Legal Entities.
2. **Location:**
   a. Established and located in the legal territory of the state of the Republic of Indonesia, or;
   b. Conducting activities in the legal territory of the state of the Republic of Indonesia.
3. **Ownership:**
   a. Individual, or;
   b. Joint.
4. **Enterprise:** Business activities in the field of economy.

In reviewing the definition in Article 1 Number (5) of Law No. 5 of Year 1999, Business Actors as stated above only turn out to be stated to cover all activities that are carried out in the territory of the state of the Republic of Indonesia.

As such, the related lawmakers did not consider the globalization aspect, by which it becomes very much possible for business actors to cross the territorial boundaries of a state.\(^\text{18}\) The territorial boundaries of a state will become a crucial problem, considering that in a Digital Market platform, business actors can virtually and easily transgress the territorial boundaries of the state of the Republic of Indonesia.

The next matter related to the definitions

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in the stipulations of Article 1 Number 5 concerns the element of the business location:
1. Established and located in the legal territory of the state of the Republic of Indonesia, or;
2. Conducting activities in the legal territory of the state of the Republic of Indonesia.

The above has provided sufficient legal reasoning for the KPPU. Thus, in addition to being authorized to evaluate the actions of business actors established and located in the legal territory of the state of the Republic of Indonesia, the KPPU also judges that it is authorized to evaluate the actions of Business Actors who do conduct activities in the legal territory of the state of the Republic of Indonesia, although they are not established and located in the legal territory of the state of the Republic of Indonesia. They are then called as Foreign Business Actors.

Several rulings and cases of the KPPU are related to the concept of Foreign Business Actors, including the following:
1. Ruling No. 07/KPPU-L/2004 on the Case of the Sales of Very Large Crude Carrier (VLCC) Tankers;
2. Case No. 07/KPPU-L/2007 on the suspected violations by Temasek Group;

As explained in the introduction section, in the conceptual framework of Foreign Business Actors, the KPPU utilizes the Single Economic Entity doctrine, particularly in Case Ruling No. 07/KPPU-L/2004 on the suspected violations by Temasek Group, and Case Ruling No. 03/KPPU-L/2008 on the Broadcasting Rights for Barclays Premier League for the 2007-2010 Seasons.

1. Case Ruling No. 07/KPPU-L/2004

   This case involved two foreign companies that were charged by Law No. 5 of Year 1999, being Goldman Sachs (Singapore) and Frontlite, Ltd. (Bermuda). These two foreign companies were not established according to Indonesian law. Goldman Sachs had been established based on the legal regulations of the Republic of Singapore, and Frontlite, Ltd. (Bermuda), originally named Frontlite AB, had been established in 1985 and listed on the Stockholm Stock Exchange from 1989 to 1997.

   In the ruling, the KPPU declared that the two foreign companies above have fulfilled the elements of Business Actors as regulated in Article 1 Number 5 of Law No. 5 of Year 1999. According to the KPPU, the two foreign companies are conceptually included as Business Actors who are not located and established in Indonesia yet conduct business activities in Indonesia.

2. Case Ruling No. 07/KPPU-L/2007

   In this case, the KPPU for the first time explicitly applied the SEE Doctrine. This case regarded nine Foreign Business Actors who had been reported for committing suspected violations of Law
No. 5 of Year 1999, as the following companies:

1. Temasek Holdings, Pte. Ltd. (Singapore);
2. Singapore Technologies Telemedia Pte. Ltd. (Singapore);
3. STT Communications Ltd. (Singapore);
4. Asia Mobile Holdings Company Pte. Ltd. (Singapore);
5. Asia Mobile Holdings Pte. Ltd. (Singapore);
6. Indonesia Communications Ltd. (Mauritius),
7. Indonesia Communications Pte. Ltd. (Singapore);
8. Singapore Telecommunications Pte. Ltd. (Singapore); and

In the case, the parent company of Temasek Holdings is the possessor of majority shares of two companies that conduct business activities in the same field as well as Relevant Market. This then becomes a violation of Article 27 Letter a of Law No. 5 of Year 1999:

Business actors shall be prohibited from owning majority shares in several companies of the same type conducting business activities in the same field in the same relevant market, or from establishing several companies with the same business activities in the same relevant market, if such ownership causes:

a. one business actor or a group of business actors to control more than 50% (fifty per cent) of the market share of a certain type of goods or services;
b. two or three business actors or a group of business actors to control more than 75% (seventy-five per cent) of the market share of a certain type of goods or services.

In the ruling, the KPPU declared that Temasek Holdings legally and convincingly possess shares of PT. Indosat Tbk. and PT. Telkomsel in a state of cross-ownership.

3. Case Ruling No. 03/KPPU-L/2008

In this case, the KPPU declared that Astro All Asia Networks, Plc (Malaysia); ESPN STAR Sports (Singapore); and All Asia Multimedia Network, FZ-LLC (United Arab Emirates) become defined categorically as Business Actors according to Article 1 Number 5 of Law No. 5 of Year 1999 as foreign companies that, although are not established and located in Indonesia, do conduct business activities in Indonesia.

Then, based on the results of the investigation, ESPN STAR Sports (Singapore) and All Asia Multimedia Network, FZ-LLC (United Arab Emirates) were proven legally and convincingly to violate Article 16 of Law No. 5 of Year 1999. Meanwhile, PT Direct Vision (PTDV) and Astro All Asia Networks, Plc (AAAN) were not proven to violate Article 16 and Article 19 letters (a) and

19 Article 16, Law No. 5 of Year 1999: Business actors shall be prohibited from creating agreements with other
of Law No. 5 of Year 1999.  

4. KPPU Ruling Number 17/KPPU-I/2010  
This ruling had examined suspected agreements of price fixing and regulation of production and/or marketing of drugs branded as Norvask and Tensivask that resulted in the excessive pricing of the drugs, to the detriment of consumers. In the ruling, the KPPU utilized the SEE Doctrine against four foreign actors:

a. Pfizer Inc (USA);
b. Pfizer Overseas LLC (USA);
c. Pfizer Global Trading (Ireland);
d. Pfizer Corporation Panama (Panama).

They fit into the definition of Business Actors, as although they are not established and located in Indonesia, they still conduct business activities in Indonesia.

Many debates have arisen among experts regarding the continued usage of the Single Economic Entity (SEE) Doctrine. These debates are particularly centered on the reason that the SEE Doctrine is not explicitly regulated in business competition law nor in corporation law in Indonesia. The usage of the SEE Doctrine in several KPPU rulings as above has been affirmed and validated through Supreme Court of the Republic of Indonesia Verdict Number 497K/PDTSUS/2008 and Verdict Number 03/KPPU/2008/PN.Jkt.Pst.


Next, in Verdict Number 03/KPPU/2008/PN.Jkt.Pst., the Council of Judges considered that the KPPU had appropriately applied legal justice and Law No. 5 of Year 1999 in Case Ruling No. 03/KPPU-L/2008 to protect consumers as a part of the effort for creating a healthy climate for business competition in the sector of paid TV content provision.

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20 Article 19, Law No. 5 of Year 1999: Business actors shall be prohibited from conducting one or several activities, whether on their own or with other business actors, that may result in the occurrence of practices of monopoly and/or unhealthy business competition, in the form of:

a. rejecting and/or obstructing certain business actors to conduct the same business activities in the relevant market; or
b. obstructing consumers or users of their competing business actors from creating business relationships with those competing business actors; or

c. limiting the distribution and/or sales of goods and/or services in the relevant market; or
d. conducting practices of discrimination against certain business actors.
Then, according to the Council of Judges of the Supreme Court, although having the status of a foreign company that is not located and established in Indonesia, Astro All Asia Networks, Plc (Malaysia); ESPN STAR Sports (Singapore); and All Asia Multimedia Network, FZ-LLC (United Arab Emirates) clearly conduct business activities in Indonesia. Therefore, they must still comply with applicable Indonesian laws, including Law No. 5 of Year 1999. The Council of Judges also rejected the argument of the claimant that broadcasting rights for the English Premier League are related to intellectual property (IP) rights; although broadcasting rights are related to IP, they must still be compliant with Law No. 5 of Year 1999.21

From the two Cassation Verdicts above, it may be understood indirectly that the Council of Judges of the Supreme Court did not take issue with the usage of the SEE Doctrine in interpreting the legal standing of Foreign Business Actors (Cassation Claimant) and thus they are considered to meet the elements in the stipulations of Article 1 Number 5.

Next, in letter c of the Preamble of Law No. 5 of Year 1999, it is stated that: “...every person who does business in Indonesia must be present in a situation of business competition that is healthy and reasonable and thus does not cause any centralization of economic powers on certain business actors...”. According to Knud Hasen, what is meant as a group of business actors is:22

“Several independent enterprises that join into a single, independent economic entity. These independent enterprises are present under a single and the same leadership that demonstrates outwardly that the holding company creates plans uniformly for all its subsidiaries.

As such, the phrase “conducting business activities” in the stipulations of Article 1 Number 5 of Law No. 5 of Year 1999 very clearly indicates that for business actors, although they do not possess establishment or domicile in the legal territory of Indonesia, as long as they conduct business activities in the territory of the state of the Republic of Indonesia, they are also included in the scope of the term of Business Actors.

Then, based on KPPU Ruling Number 17/KPPU-I/2010, foreign business actors as holding companies or their affiliates who conduct business activities (including conducting Acquisitions, Mergers, and Takeovers of companies that are established and/or conduct business activities in the territory of the state of the Republic of Indonesia) are also included within the scope of the term...
of Business Actors by the stipulations of Article 1 Number 5 of Law No. 5 of Year 1999.

Interpretation of the “Business Actors” term in the perspective of Law No. 5 of Year 1999 underscores the place of business activities in the legal territory of Indonesia. Such a term becomes a vital requirement in the application of, and proof of suspected violations toward, Law No. 5 of Year 1999. This means that the usage of the SEE Doctrine in the KPPU Ruling has become legally binding (inkracht van gewijsde).

2. Business Actors in a Digital Market

Industrial Revolution 4.0 has brought about an extremely incredible acceleration of the development of Information, Education, and Communication (IEC) technologies. The development of IEC technologies has further increased the intensity of interactions among countries and nations in the world. It has also increased the intensity of interactions that affect the potential of Indonesian economic, political, social, and cultural activities with outside parties. In its development, the economy develops along with the progression of time. Economic development also does not regard territorial boundaries, which has led to the emergence of business actors who start their businesses online or on Internet networks.

The developmental progression of IEC technologies has also brought about extraordinary changes regarding the market concept, from being a conventional market to becoming a Digital Market. Digital Market is the primary concept of e-commerce. E-commerce is a container or platform that brings together sellers and buyers to conduct transactions, as with the exchange of information between sellers and buyers, and to make sales transactions through Internet networks, which allows business actors to develop their enterprises in a borderless manner (without borders).

Competition in the digital economy sector in actuality occurs dynamically, for as long as innovation is not hindered. However, there are several anticompetitive behaviors, such as abuse of dominant position, predatory pricing, and vertical and horizontal integration that occurs later on in the usage of online platforms. The process of proving the suspicions of practices of monopoly and unhealthy business competition, such as predatory pricing in online industries, is not an easy one.

Aside from starting with determining the relevant market as the indicator of competition from the standpoints of product and geographical area, the definition of the Business Actor concept as the subject of a perpetrator of suspected anticompetitive actions also becomes a vital matter for determining the possibility of applying Law

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24 Article 1 Number 10 of Law No. 5 of Year 1999: A relevant market is a market that is related to certain marketing reaches or areas for business actors regarding goods and/or services that are the same or similar, or substitutes of those goods and/or services.
No. 5 of Year 1999 as well as possession of authority by the KPPU to evaluate whether Law No. 5 of Year 1999 has been violated.\textsuperscript{25}

In line with the mandate given by the enactment of Law No. 5 of Year 1999, business competition in a Digital Market thus emphasizes the points of prevention and company behavior in conducting business practices. This matter requires, among others, limitation of dominant platforms to operate in other lines of business that possess conflicts of interests, prohibition of suspicion toward planned mergers and acquisitions by dominant platforms, affirmation of the prohibition on monopoly through practices of predatory pricing and predatory buying, and prohibition of abuse of dominant positions in partnerships. Healthy business competition provides an equal opportunity of competing for all Business Actors (merchants) and thus allows for offerings of efficient prices and the availability of innovative goods and/or services if the market is kept away from all distortions or barriers in trade. Unfortunately, however, to this day the market in Indonesia has not been fully supported by sufficient regulations related to business competition in a Digital Market.

The Understanding of Business Actors in Trade through Electronic Systems (PMSE)

In relation to legal subjects who conduct PMSE, Government Regulation No. 8 of Year 2019 utilizes several terms, covering Business Actor in Trade, Domestic Business Actor, Business Actor Located in Foreign Countries, Individual, Merchant, PMSE Organizer, Mediating Facility Organizer, and Consumer, as seen in the following table:

\begin{table}
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\begin{tabular}{|l|p{10cm}|p{10cm}|}
\hline
\textbf{No.} & \textbf{Legal Subjects who conduct PMSE} & \textbf{Definition} & \textbf{Remarks} \\
\hline
1. & Business Actor in Trade (Business Actor) & Every individual person or business entity constituting a legal entity or a non-legal entity that may comprise Domestic Business Actors and Foreign Business Actors and conduct business activities in the field of PMSE. & (Article 1 Number 6) \\
\hline
2. & Domestic Business Actor & Indonesian Nationals or business entities that are established and located in the legal territory of the Unitary State of the Republic of Indonesia that conduct business activities in the field of PMSE. & (Article 1 Number 7) \\
\hline
\end{tabular}
\caption{Several Legal Subjects Who Conduct Trade through Electronic Systems (PMSE)}
\end{table}

\textsuperscript{25}This KPPU authority is regulated in Article 36 of Law No. 5 of Year 1999, from receiving reports from the people and/or business actors on suspected occurrences of practices of monopoly and/or unhealthy business competition, conducting research on suspicions of business activities and/or actions of business actors that may result in occurrences of practices of monopoly and/or unhealthy business competition, conducting investigation and/or examination and concluding the results of the investigation and/or examination on whether practices of monopoly and/or unhealthy business competition had occurred, up to imposing sanctions in the form of administrative actions to business actors who violate the stipulations of this Law.
### Continue Table 1: Several Legal Subjects Who Conduct Trade through Electronic Systems (PMSE)

<table>
<thead>
<tr>
<th>No.</th>
<th>Legal Subjects who conduct PMSE</th>
<th>Definition</th>
<th>Remarks</th>
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<tbody>
<tr>
<td>3.</td>
<td>Business Actor Located in Foreign Countries (Foreign Business Actor)</td>
<td>Foreign Nationals or business entities that are established and located outside the legal territory of the Unitary State of the Republic of Indonesia who conduct business activities in the field of PMSE in the territory of the state of the Republic of Indonesia.</td>
<td>(Article 1 Number 8)</td>
</tr>
<tr>
<td>4.</td>
<td>Individual</td>
<td>Persons on their own who sell goods and/or services in a temporal manner and not for commercial objectives.</td>
<td>(Article 1 Number 9)</td>
</tr>
<tr>
<td>5.</td>
<td>Merchant</td>
<td>Business Actor who conducts PMSE whether with facilities that are self-created and self-managed directly or through facilities belonging to a PPMSE, or other Electronic Systems that provide PMSE facilities.</td>
<td>(Article 1 Number 10)</td>
</tr>
<tr>
<td>6.</td>
<td>PMSE Organizer</td>
<td>Business Actor who provides Electronic Communication facilities that are utilized for transactions of Trade.</td>
<td>(Article 1 Number 11)</td>
</tr>
<tr>
<td>7.</td>
<td>Mediating Organizer Facility</td>
<td>Domestic Business Actor or Foreign Business Actor who provides facilities of Electronic Communication other than telecommunications organizers who only function as mediators in Electronic Communication between sender and recipient.</td>
<td>(Article 1 Number 12)</td>
</tr>
<tr>
<td>8.</td>
<td>Consumer</td>
<td>Every person who is a user of goods and/or services that are present in society for the interests of oneself, family, other people, or living creatures, and not for trade.</td>
<td>(Article 1 Number 17)</td>
</tr>
</tbody>
</table>

**Source:** Primary Legal Materials, 2021, processed

From the above table, Government Regulation No. 8 of Year 2019 firmly establishes that the scope of Business Actors cover individual people or business entities in the form of legal entities or non-legal entities:

1. that are established and located in the legal territory of the Unitary State of the Republic of Indonesia;
2. that are established and located outside the legal territory of the Unitary State of the Republic of Indonesia.

The scope above is not based on the place of legal standing, but rather on whether or not the clause of “conducting business activities in the field of PMSE” is fulfilled. Therefore, the concept of Business Actors in Trade through Electronic Systems (PMSE) according to Government Regulation No. 8 of Year 2019 is the continuation of the term for Business Actors in the stipulations of Article 1 Number 5 of Law No. 5 of Year 1999 as has been explained in the previous section. It
no longer emphasizes where business actors are present in establishment or possess legal standing, but further underscores where the business actors conduct activities of economy or trade.

C. The Legal Standing of Business Actors in a Digital Market According to Law No. 5 of Year 1999

In the previous discussion, it has been established that the KPPU had broadly interpreted the definition of Business Actors in the stipulations of Article 1 Number 5 of Law No. 5 of Year 1999, particularly the elements related to business location. As well, business location has the scope of a place of domicile and/or place for conducting activities. Thus, these are what are meant as Business Actors:

1. Individuals, or;
2. Business Entities comprising Legal Entities, or; Business Entities comprising non-Legal Entities, that:
   a. are established and located in the legal territory of the state of the Republic of Indonesia, or;
   b. conduct activities in the legal territory of the state of the Republic of Indonesia, yet are not established and located in the legal territory of the state of the Republic of Indonesia.

Based on the scope expansion as above, in several of its rulings, the KPPU utilized the SEE Doctrine as the foundation for its juridical and economic arguments. With such a scope for Business Actors in a different wording, it can then be said that in the application of business competition law, the KPPU follows the principle of extraterritoriality. As such, Business Actors may be held for accountability for their anticompetitive actions that they conduct within the jurisdictional territory of the state of the Republic of Indonesia, even if they do not possess a legal force in Indonesia.

In the context of a Digital Market, transactions of trade are conducted through a series of electronic devices and procedures, as the usage of Electronic Systems and Electronic Communications as well as organization in an Electronic Contract, and thus the parties do not need to conduct direct meetings; in other words, transactions are conducted virtually through Internet media.

In the above context, time and place thus does not become a barrier for the parties to conduct transactions. When conducting transactions, those parties do not need to hold meetings in order to do so. This matter certainly has the consequence of ambiguity in territorial boundaries of trade transactions, whether being in the jurisdiction of a certain state or having transgressed the territorial boundaries of a state.

Hence, there is the problem: where are transactions of electronic trade conducted? What benchmarks are used to determine the places where transactions of electronic trade are conducted?

If the concept of Business Actors in the perspective of Law No. 5 of Year 1999 is based on the argument of “conducting activities in
the legal territory of the state of the Republic of Indonesia”, then in the context of a Digital Market, according to the stipulations of Article 7 of Government Regulation No. 8 of Year 2019, they are the following:

1. Foreign Business Actors who actively make offerings of and/or conduct PMSE with Consumers who are domiciled in the legal territory of the Unitary State of the Republic of Indonesia who fulfill specific criteria are considered to fulfill physical presence in Indonesia and conduct business activities regularly in the legal territory of the Unitary State of the Republic of Indonesia;

2. The specific criteria as stated in paragraph (1) may comprise:
   a. number of transactions;
   b. value of transactions;
   c. number of packages sent; and/or
   d. amount of traffic or visitors.

3. Foreign PPMSE who fulfill the criteria as stated in paragraph (2) are required to appoint a representative who is located in the legal territory of the Unitary State of the Republic of Indonesia who may act as and on behalf of the Business Actor.

4. The stipulations for the appointment of a representative are implemented according to the stipulations of legal regulations.

5. Further stipulations regarding specific criteria as stated in paragraph (1) are regulated by a Minister Regulation.

Based on the stipulations of Article 7 above, several points can be made, among others:

1. A Foreign Business Actor will be considered to be actively conducting economic activities in the legal territory of the Unitary State of the Republic of Indonesia if they make offerings of and/or conduct PMSE with Consumers who are located in the legal territory of the Unitary State of the Republic of Indonesia. Thus, the benchmark of “conducting activities in the legal territory of the state of the Republic of Indonesia” is the legal standing of a Consumer.

2. Offerings and/or execution of PMSE with Consumers must fulfill several criteria, among others:
   a. number of transactions;
   b. value of transactions;
   c. number of packages sent; and/or
   d. amount of traffic or visitors.

   Both criteria above are intertwined with the stipulations of Article 8: “Toward the business activities of PMSE are applied the stipulations and mechanisms of taxation according to the stipulations of legal regulations.” In other words, the four criteria above comprise the basis for the applicability of stipulations and mechanisms of taxation that exist in Indonesia. Thus, the benchmark of “conducting activities in the legal territory of the state of the Republic of Indonesia” is the applicability of stipulations and mechanisms of taxation in Indonesia based on the fulfillment of
the four criteria above.

3. PMSE Business Actors (PPMSE) who possess legal domicile in foreign countries are required to appoint representatives who possess legal domicile in the legal territory of the Unitary State of the Republic of Indonesia who can act as and on behalf of the respective Business Actor. This point is related to the execution of trade through electronic systems (PMSE) through cooperation with PMSE Organizers (Article 1 Number 11) and Mediating Facility Organizers (Article 1 Number 12), or what is commonly known as an electronic marketplace (e-marketplace).

According to Rainer and Cegielski, E-marketplace is a central, virtual market space on the web where many buyers and sellers can conduct electronic commerce and electronic business activities.”

An e-marketplace is a platform or information system between organizations in which buyers and sellers in the market communicate information regarding prices and products, and are able to complete transactions through channels of electronic communication.”

Through the Internet, it becomes easy for sellers to promote and market their products to a broader reach. E-marketplace or online marketplace is an electronic marketing container for products that brings together many sellers and buyers for mutual transactions assisted by payment methods, delivery estimations, selection of products by category, and other features.

As such, the intent of the stipulations of Article 7 is specifically for PPMSE who possess legal domicile in a foreign country to be required to appoint an e-marketplace that is located in the legal territory of the Unitary State of the Republic of Indonesia. In other words, the benchmark of “conducting activities in the legal territory of the state of the Republic of Indonesia” for PPMSE who possess legal domicile in a foreign country is an e-marketplace that is appointed for and possesses domicile in the legal territory of the Unitary State of the Republic of Indonesia.

Then, What Is the Actual Legal Standing of Business Actors in a Digital Market According to Law No. 5 of Year 1999?

In the context of a Digital Market, transactions of trade are conducted virtually through Internet media, and therefore the parties do not need to meet in person. According to the stipulations stated in Government Regulation No. 8 of Year 2019 on the territorial limits of trade transactions,
whether PPMSE, particularly Business Actors Located in Foreign Countries (Foreign Business Actors) as stated in Article 1 Number 8, are considered “to conduct activities in the legal territory of the state of the Republic of Indonesia” is evaluated by the following benchmarks:

1. The execution of offerings and/or PMSE by the PPMSE to Consumers who are located in the legal territory of the Unitary State of the Republic of Indonesia;
2. The applicability of stipulations and mechanisms of taxation in Indonesia based on the fulfillment of four criteria: number of transactions; value of transactions; number of packages sent; and/or amount of traffic or visitors;
3. Specifically for PPMSE who possess legal domiciles in foreign countries, an appointed e-marketplace that has legal domicile in the legal territory of the Unitary State of the Republic of Indonesia.

As such, the scope of the “place” where transactions occur in a Digital Market is not a barrier in determining the transaction location, because it is no longer merely evaluated from a “place” in the conventional sense.

Legal science recognizes a preference principle, which is the principle of *lex specialis derogat legi generali* (special law derogates general laws). Regarding the principle, Purnadi Purbacaraka and Soerjono Soekanto stated that:

The point of this principle is that for a special event, it is required to apply laws that regard the event, even if for the special event it may still be possible to apply laws regarding events that are broader or more general that may cover the special event.29

Regarding the principle of *lex specialis derogat legi generali*, Prof. Bagir Manan has stated that a misunderstanding often occurs in making sense of the relationship between general laws or legal regulations and those that are specific. It would seem that special stipulations must or will surely cast aside all general ones, yet this is not the case. General stipulations continue to apply on the condition that they remain specially unregulated in certain special regulations.

Further, Prof. Bagir Manan explained that the several matters that follow may be considered as parameters for being able to apply the principle of *lex specialis derogat legi generali*:

1. Stipulations that are found in regulations of general law continue to apply, except those that are specially regulated in the special law;
2. Stipulations of *lex specialis* must be of the same level with the stipulations of *lex generalis* (for example, laws with laws); and
3. Stipulations of *lex specialis* must be present in the legal environment (regime) that is the same as the *lex generalis*.

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For example, the Code of Trade Law (KUH Dagang) is the lex specialis of the Code of Civil Law (KUH Perdata) because they are present in the same regime, which is the regime of civil law. Consider the wording of Article 1 of the KUH Dagang: “Stipulations of the KUH Perdata, for as long as they are not specially regulated in this Code of Law (that is, the KUH Dagang), continue to apply (be applied).

The application of laws of a special nature toward laws of a general nature must always be conducted in partial, allowing the general legal norms to be able to continue to apply as a supporting aspect that suggests the direction of legal interpretation for the special legal norms. Legal norms that are special in nature are the exceptions of legal norms that are general in nature. Those special legal norms allow for the creation of “legal loopholes” in legal regulations or norms that are general in nature, because those special legal norms possess a regulatory scope that is more concrete and specific, and thus may partially derogate the legal stipulations that are general in nature.

Therefore, the understanding is that the relationship between general and special regulations is one that is complementary and supplementary. Stipulations of general regulations that pertain to the objects of special regulations continue to apply, given that they are not otherwise regulated in special regulations; yet, special regulations complement and supplement regulations that general regulations are not able to cover.

The above matters may be regarded as one of the methods to check that a certain regulation is a special regulation, which is by examining whether an object of regulation in a special regulation is also bound to regulations of a general nature within general regulations.

In the context of regulation regarding business competition in a Digital Market, Law Number 7 of Year 2014 on Trade and Law No. 5 of Year 1999 on the Prohibition of Monopolistic and Unhealthy Business Competition Practices are thus regulations that are general in nature. They regard healthy business competition in the structure of activities that are related to the transaction of goods and/or services within the country and across national borders with the objective of transferring rights on goods and/or services to obtain reward or compensation. Meanwhile, Government Regulation No. 80 of Year 2019 on Trade through Electronic Systems (PMSE) is a regulation that is special in nature.

When special regulations regarding competition in a Digital Market are not yet existent, in order to possess several terms

33 See the stipulations of Article 1 Number 1 of Law Number 7 of Year 2014 on Trade.
and definitions for that purpose, Government Regulation No. 80 of Year 2019 becomes the special regulation that is complementary and supplementary for the general regulation of Law No. 5 of Year 1999.

Conclusion

Based on the results of the discussion, the following are the characteristics of a digital market:

1. Usage of electronic systems, which cover processes of purchase, sale, transfer, or exchange of products, services, or information through Internet networks. These processes may be conducted directly between business actors and consumers, or through an electronic marketplace (e-marketplace) as a mediator;

2. Execution of electronic communications, in which parties do not need to meet face-to-face directly, or in other words conducted virtually through Internet media; and

3. Regulation of the legal relationships of the parties in electronic contracts.

4. Next, the legal standing of Business Actors in a digital market, regarding the concept of competition among Business Actors in a Digital Market, the definition of Business Actors in Article 1 Number 5 in Law No. 5 of Year 1999 is to be supplemented by several definitions of Business Actors in PMSE according to Government Regulation No. 80 of Year 2019.

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