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Structure, Conduct, Performance (SCP) Approach & Fairness Principle in Business Competition Law in The Era of Digital Platforms

Rhido Jusmadi
Facultyof Law, Trunojoyo University of Madura, Indonesia
email: rhido.jusmadi@trunojoyo.ac.id

Aru Armando
Komisi Pengawas Persaingan Usaha, Indonesia
email: aruarmando_19@yahoo.com

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Abstract

The emergence of digital platforms has led to disruptions that affect not only technological and economic aspects, but also legal aspects, particularly business competition law. The discourse surrounding the development of digital platforms within the context of business competition has been influenced by two major schools of thought: the Chicago School, which adopts an effeiciency approach (also known as the consumer welfare approach) , and the Harvard School, which employs the structure, conduct, and performance (SCP) approach. This article aims to scrutinize the shortcomings of the efficiency approach advocated by the Chicago School in addressing the issues related to business competition in the digital platform market. Additionally, it seeks to demonstrate how the principle of fairness, based on the competitive process approach and market strcture, can serve as a more comprehensive analytical tool for evaluating the health of competition in the market. The results show that the efficiency approach is inadequate in addressing concerns of fairness in the digital market. Responding to the context, global business competition authorities have begun to promote a fairness approach to bolster SCP approach which serves as a moral underpinning for upholding the principles of healthy business competition in the digital platform era. This article applied normative legal research methods with a conceptual approach for analysis.

Keyword: Efficiency Approach, SCP Approach, Fairness Principle, Competition Law, Digital Platform

INTRODUCTION

Debates in the scientific knowledge of business competition law cannot be separated from the dynamics of the mutual influence of two major schools of thought, namely the Chicago School (Chicago School) and the Harvard School (Harvard School). The dynamics of the debate between these two ideas is currently increasingly "sharpening" along with the development and existence of digital platforms in the market. A digital platform is defined as a product or service that provides users with a variety of complementary products, services, or information (applications) -- devices (such as phones), software (such as operating systems and browsers), and services (such as search engines, social networks, and e-commerce sites) -- can interact with each other. Digital platforms serve to provide access between consumers and many diverse applications and serve to expand and combine functionality and to increase consumer access to applications. (Shelanski, 2012)

The development of digital platforms has provided many digital infrastructures capable of providing various services, including: marketplaces (Amazon, Alibaba, Shopee, Tokopedia), application stores (Apple, Android, Microsoft), social networking (Facebook, Instagram, Twitter), ride hailing (Uber, Gojek, Grab) and search engines (Google, Yahoo). The existence of these digital platforms has implications not only for the nature of economic transactions but also the ability of companies to develop their scale up quickly thus influence the structure of economy.(Shukor et al., 2023)

Just as conventional businesses that have existed before (such as: manufacturing, factories and the like, whose existence is based on the availability of physical infrastructure such as air and sea ports, trains and roads), digital platform-based businesses have very different structural consequences. When a digital platform becomes dominant, it will show more strength in both sides of the market by becoming a monopoly in *search engines* and a monopsony in e-commerce. Digital platforms are also moving away from product and service pricing models towards data-driven models, selling data or using it to charge advertisers for targeted users.(Heap & Kingsley, 2020)

In line with this, the OECD in its 2016 report explained that globally the development of digital platforms and their impact on business competition law policies and regulations also questioned the existence of the efficiency approach promoted by thinkers in the Chicago School. (Jusmadi et al., 2022) If you look at these goals, the existence of digital platforms has been able to achieve these goals. The World Economic Forum in its 2019 report proved that digital platforms have been able to generate massive efficiency process by simplifying and reducing the cost structure of production, logistics and payment processes, improving communication between suppliers and/or consumers and offering the possibility of advertising tailored to consumer interests. (Akman, 2019)

Apart from that, digital platforms have also realized what has been encouraged by global business competition policies and laws, namely economic democratization or also known as market democratization. Digital platforms can provide ample space for the presence of new companies (startup platforms) to be able to set up their companies online and generate income in the digital platform market that applies globally. Digital platforms can also provide networks and distribution channels between micro, small and medium enterprises (MSMEs) and large businesses, then digital platforms will create a level playing field between MSME players and large businesses and facilitate the potential to get the same customers between the two.

For consumers, the presence of digital platforms can also achieve consumer welfare goals by reducing search costs, facilitate price and product comparisons and enable more efficient and practical shopping distances. Similarly, digital platforms can also create new options for consumers that they had never imagined before, including various innovations in the form of co-working space, ride-hailing, food delivery, and local freelance work opportunities. The features available on digital platforms are also able to provide information, convenience, choice and competition.

However, the dynamics in the market show serious problems related to the existence of this digital platform. This can be seen from several cases of business competition involving digital platforms that occurred in various parts of the country. In the European Union, the competition authority *European Commission* penalized Google for several of its facilities and applications. In China, the local business competition authority in April 2021 punished Alibaba with a fine of $ 2.75 billion dollars for abusing its dominance in the e-commerce market in China. Furthermore, in September 2021, the South Korean business competition authority issued a corrective order and imposed a fine of KRW 207.4 billion (or the equivalent of $ 177 million dollars) against Google.

Therefore, a critical question will arise, if the existence of digital platforms has been able to serve the market efficiently, why in reality has it created negative excesses in the market in the context of the dynamics of business competition? Should not the efficiency approach, which is the main moral basis in the massive development of digital platforms, be able to provide justice in the market? However, in reality, based on cases that have occurred in various countries, it has shown other impacts of this efficiency approach.

METHODS

The type of research that will be used in this article is normative legal research using a conceptual approach.(Mahmud, 2016) In this article, the concepts that will be analyzed later are general concepts contained in business competition law, such as:

efficiency approach, structure-conduct-performance (SCP) approach, competition process, market structure, digital platforms, and fairness principles. These concepts will later become the main analytical tools in analyzing the problems in this article. The sources of legal materials that will be used in this research are primary legal materials and secondary legal materials.

Analysis of legal materials will be carried out systematically and logically with the following stages: (Hernoko, 2010) 1) conducting inventory and identification of sources of primary legal materials and secondary legal materials; 2) systematizing all existing legal materials and also carrying out the principles, theories, concepts and legal doctrines as well as other references; 3) analyzing legal materials deductively, meaning analysis that explains something of a general nature and then draws it into more specific conclusions, which the analysis process is carried out based on the rules of legal thinking that is systematic, logical and perscriptive; and 4) designing and writing, namely writing down all the processes that have been carried out based on a predetermined writing systemic.

DISCUSSION AND RESULT

The Chicago School focuses its view that the main objective of business competition policy and law is efficiency, which is built on the basis of price theory.(Posner, 1978) In the perspective of price theory, there are no barriers to entry into the market except due to price factors. If there is concentration in the market, then this is actually a reflection of the ability of economies of scale. Thus, inefficient businesses will automatically leave the market. High market concentration is not a bad indication of market mechanism. The market concentration index only shows the results of a competitive process, only capable companies will survive in the market.(Burgess, 1995) The goal of efficiency then becomes the most important moral foundation in determining business competition policy, which is based on the theoretical premise: "Rational economic actors operating within market boundaries strive to maximize profits by combining inputs in the most efficient way. Failure to act in this way will be punished by the forces of market competition."(Eisner, 2017)

The lessons learned from the dynamics in the current digital platform market have led business competition authorities to understand it with a more critical mindset than just relying on an efficiency approach, on the grounds that: *First*, in the digital platform market, it is very possible for concentration to occur from the advantages of being a pioneer in the market, data accumulation, network effects and exclusive behavior;(Katz & Shapiro, 1985) and *Second*, the accumulation of big data coupled with network effects can provide digital platform business actors the possibility of market power and then practice abusing the dominant position they have in the market. The parameters are that a digital platform that has a dominant position in the market will certainly have the highest position among its competing business actors, has financial capabilities, has the ability to access supply or sales, and has the ability to adjust the supply or demand for certain goods or services in the market, so that in under these conditions it can lead to unfair business competition practices.(Prananingtyas et al., 2017)

Based on this, the Chicago School, which is built on the theory of price and efficiency as its moral argument, is currently considered incapable of assessing how healthy business competition works in the digital platform market.(Hesse, 2016) Basically, speaking about efficiency and critical consumer interests not only include costs (price) but also product quality, variety and innovation. Therefore, business competition law which focuses only on efficiency or consumer welfare is considered misguided. Business competition policies and laws should encourage competitive market structures by refocusing attention on competitive processes and market structures, so that in the long term it will promote genuine competition in markets and monitor the concentration of power that risks hindering competition in digital platform market.(L. M. Khan, 2016)

Therefore, critical analysis that must be prioritized in assessing digital platform market conditions can be through the *structure, conduct & performance* (SCP) approach promoted by the Harvard School. The SCP approach analyzes the relationship and final evaluation between the concepts of *structure, conduct and performance*. (Geradin & Kerf, 2003)Based on this concept, to assess whether or not the market is healthy and fair must be assessed proportionally through the relationship and final evaluation between the three concepts in the SCP. (Jacquemin, 1999)

The structural approach concerns two things, market concentration and *entry barriers*,(Kaplow, 1987) which states that large companies that have the ability to control prices and markets will also dominate the market by making it difficult for new businesses to enter the market. Therefore, it is worth examining whether business actors become large due to competition, government protection, or technological superiority. If this is the case, then competition will never occur and will make businesses inefficient and make prices higher.(Weiss, 1978)

Next is the relationship between market structure and behavior, which is behavior-based strategies used to exploit the market and restrict new business actors from entering the market.(Sullivan et al., 2000) This is based on the assumption that business actors already in the market will certainly use all their abilities to increase barriers for new competitors, such as predatory pricing practices.(Hart, 2001) In other words, business actors will use their influence to limit competition by creating costs or prices which make competitors uninterested in entering the market and also by increasing the costs of entry into the market for competitors, such as high promotional costs.(Krattenmaker & Salop, 1986)

The Harvard School with the SCP approach wants to emphasize that market structure is the main influence on market performance. Therefore, unbalanced market power will lead to poor market performance. In other words, the emergence of monopolistic behavior comes from an unequal (concentrated) market structure. The large business actors, with their strategic behavior, try to prevent the entry of new business actors so that large businesses can obtain and maintain the power to regulate the prices of their products.

Furthermore, the SCP approach is considered to have a strong enough moral argumentation to explain fairness in a fairer digital platform market. Therefore, currently several global business competition authorities are currently trying to strengthen the SCP approach by providing a more comprehensive touch through the principle of fairness, because the essence of business competition is fairness with the main goal of protecting competition at all economic levels.(Lamadrid de Pablo & Bayón Fernández, 2021)

The decision to connect the principle of *fairness* in business competition law is an effort that aims not to separate the economic discipline from society but instead seeks to unite it with society and to show society that fairness can also contribute to the welfare of society. The principle of fairness in relation to business competition law rules must be chosen because it can have an effect on welfare so that the idea of fairness must be the main foundation in business competition law rules. Welfare is then defined as decision-making directed at improving individual welfare, encompassing both needs and desires as well as intangible benefits. Whereas fairness implies decision making that is not based exclusively on how it affects welfare, but rather combines several principles whose basis is morality.

The principle of fairness in political business competition law terms focuses on the moral intuition, that market power concentrated in a small number of companies, which is currently exhibited by a handful of global digital platform companies such as Google, Apple, Amazon, Facebook, is morally prohibited as it allows dominant business actors to gain unfair advantages at the expense of the welfare of the powerless. (Ezrachi & Stucke, 2018) From that perspective, and in a landscape where markets, morality and society are realistically inseparable, controls on market power should target inefficient behavior and unfair practices, as they are bound to occur and will exacerbate injustice more generally.(Gerbrandy, 2018)

The principle of fairness in business competition is also associated with efforts to encourage the creation of a level playing field in the market. An idea where all business actors must have the same initial opportunities in the market.(Motta, 2004) The level playing field approach in the market shows that the aim of the business competition system is not only to protect the interests of competing businesses or consumers, but also the market structure and thus competition itself.(Gerber, 1998)

From this perspective, the principle of fairness demands that potential market participants have equal access to enter and compete.(Dunne, 2020)

The strengthening of the principle of fairness in competition law is based on several things:

a. Business competition law is the main tool and a basic philosophical foundation for democratic market management. In this case, awareness and anticipation of the concentration of economic power which can help the concentration of political power must be increased which in itself weakens the government. Market-dominant businesses have enormous influence over political economy processes, whether through lobbying, financing elections, staffing government, funding research, or establishing systemic interests that they can leverage. They use these strategies to win favorable policies, further strengthening their dominance in the market.
b. In the context of business competition law, giant digital platform business actors are not defined as "big is bad". In this context, the answer is to design a regulatory system that prevents giant monopolistic digital platform businesses from exploiting their power.
c. Business competition law should focus on market structure and business competition processes, not on outcomes. Competition laws in various countries should be geared to protect against excessive market concentration and to protect market structures that distribute individual opportunity and prosperity.

There is no such thing as "market forces" as believed by the Chicago School which states that market structures emerge largely through "natural forces". On the other hand, the political economy of business competition is structured only through law and policy and rejects all forms of inevitable power. Technological advances as practiced by digital platform businesses may change the equilibrium in the market by facilitating consolidation (both vertically and horizontally), but the government can develop a political economic structure for business competition to encourage healthy business competition from digital platform businesses. Furthermore, the government must ensure that the technological power of digital platform companies will not be used to exercise control over the market or in a further context to monopolize. (L. Khan, 2018).

CONCLUSION

Digital platforms have very different market characteristics from conventional markets. This difference presents new challenges in the realm of business competition, both from the theoretical side of competition law and from the technical aspects of law enforcement. One of the main challenges is how the principles that have been used so far, such as the efficiency approach, are no longer adequate in answering fairness issues in the market, especially in the context of digital platforms that tend to give rise to new monopolistic practices or imbalances in market power.

On the other hand, while the debate on efficiency remains relevant, global competition authorities have realized the importance of adding a fairness dimension as a key principle. Fairness is not only about economic efficiency, but also about fairness and balance in the relationship between business actors in the market. This fairness approach is expected to strengthen the traditional Structure-Conduct-Performance (SCP) approach, which has been the cornerstone of competition analysis. By incorporating fairness values as a moral foundation, the authority can uphold the principles of fair competition and maintain sustainable and inclusive competition.

Ultimately, the main essence of competition law, which is to protect the sustainability of competition itself, must be maintained so that all business actors comply with existing rules and principles. This is important not only to maintain market dynamics, but also to prevent practices that harm consumers and small businesses, so that a fairer and more competitive market can be created in the ever-evolving digital era.

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