



TELKOM GROUP'S BLOCKING OF NETFLIX AS A BASIS FOR IDENTIFYING INDICATIONS OF UNFAIR BUSINESS COMPETITION: A STUDY OF KPPU DECISION NO. 08/KPPU-I/2020

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Article Info

Keywords:

Unfair business competition,
Telecommunication sector,
OTT services

ABSTRACT

This study analyzes unfair business competition practices in the telecommunications sector in Indonesia, which analyzes in more depth the case study of blocking carried out by PT Telekomunikasi Selular and PT Telekomunikasi Indonesia under the auspices of the Telkom Group against the Over The Top (OTT) service Netflix. The author uses a normative method with a case and legislative approach, this study found that the unilateral blocking carried out by the Telkom Group has fulfilled the elements of discrimination regulated in Article 19 letter (d) of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition because the Telkom Group only blocked Netflix, while other OTT services that have done the same thing were not subjected to the same blocking, in this case the Telkom Group's policy as a dominant business actor in the telecommunications sector also has a negative impact on consumer internet access. However, despite the discovery of discriminatory acts that are strong indications, the KPPU decision in Case No. 08 / KPPU-I / 2020 stated that the Telkom Group was not indicated in unfair business competition practices, this indicates a legal weakness. This legal weakness is caused by the non-implementation of the Network Neutrality principle in regulations governing the flow of telecommunications services and the limitations of business competition test indicators that cannot analyze the long-term impact (Network Effects) in the digital telecommunications market. Therefore, this study concludes that regulators must harmonize by improving regulations on cooperation between telecommunications services and OTT services through fair and transparent Business to Business principles, as well as adding long-term impact (Network Effects) test criteria to the KPPU Commission Regulation to ensure healthy competition in the future.

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1. INTRODUCTION

The telecommunications sector is a key driver of Indonesia's economic development. It provides communication services that support social activities and the digital business market. Indonesia's telecommunications sector is characterized by an oligopoly, a market structure dominated by a few large companies. This fosters intense competition within the telecommunications sector [1]. explain that the

implementation of healthy competition among business actors in a market demonstrates that the law is operating in accordance with established legal norms. However, in practice, many business actors remain unable to implement healthy competition laws, resulting in violations of the principles of competition. To ensure healthy and fair competition, the government issued Presidential Decree Number 75 of 1999 concerning the Business Competition Supervisory Commission, which carries out its duties as a state agency through its authority, which has the right to regulate and supervise unfair business competition practices in all business activities in Indonesia, ensuring legal certainty for all business actors [2].

Regulations regarding business competition in Indonesia are stipulated in Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. This regulation encourages healthy competition in the Indonesian market. Competition law in Indonesia focuses on preventing unfair competition in the relevant market. Through healthy competition, efficiency is created for businesses. This can also have an indirect impact on consumers, as the resulting efficiency leads to competitive prices that tend to be lower for consumers (Sylvana, 2011). However, the Indonesian telecommunications sector is currently dominated by several large companies, namely the Telkom Group, which has a subsidiary, PT Telekomunikasi Selular (Telkomsel), which is a leading cellular service provider in Indonesia.

On January 27, 2016, the Telkom Group blocked Netflix, a subscription-based digital video streaming service (Subscription Video on Demand/SVOD). Netflix entered the Indonesian digital service since January 6, 2016, and then shortly after that, access was blocked by Telkom Group, causing consumers from Telkom Group to be unable to access Netflix or even have to use the VPN (Virtual Private Network) feature which is a service to access geographically restricted content. It was later discovered that Telkom Group blocked Netflix because it was deemed that the service did not meet the regulations as a digital service registered as an Electronic System Provider (PSE) by the Ministry of Digital Affairs, this is indeed regulated in Government Regulation Number 71 of 2019 concerning the Implementation of Electronic Systems and Transactions, and according to Telkom Group, the blocking step was a support for the government so that Netflix could immediately open communication for certainty of service registration in Indonesia. This was also reiterated by Telkom's Consumer Director that Telkom Group had communicated with Netflix regarding their ability to respond to complaints from the local community. However, even though Telkom Group provided the reasons for the blocking, this still cannot rule out the existence of discrimination that gives rise to indications of unfair business competition carried out by Telkom Group against Netflix services, because even though what Telkom Group did was solely to support the Indonesian government, this should be beyond the authority of Telkom Group as the dominant business actor in the Indonesian telecommunications market. The reason is that this blocking has been carried out for three years and even though currently the blocking of Netflix services has been lifted by Telkom Group, this still needs to be investigated further to minimize the existence of arbitrary rules applied by business actors in the telecommunications sector [3].

Due to the widespread public outcry over the blocking case, the Business Competition Supervisory Commission (KPPU) conducted an investigation and trial under case number 08/KPPU-I/2020 concerning Alleged Discriminatory Practices by PT Telekomunikasi Indonesia (Persero) Tbk and PT Telekomunikasi Seluler against Netflix in relation to the Provision of Internet Access Services. In its ruling, the Commission Panel found that there were indeed indications of differential treatment or discrimination against Netflix. However, this was inconsistent with the Commission Panel's ruling, which stated that the blocking did not result in unfair business competition [4].

The discrepancy between the facts and conclusions in the KPPU ruling under case number 08/KPPU-I/2020 is unclear. 08/KPPU-I/2020 concerning Alleged Discriminatory Practices of PT Telekomunikasi Indonesia (Persero) Tbk and PT Telekomunikasi Seluler against Netflix regarding the Provision of Internet Provider Access Services, where the KPPU stated that it was true that there had been indications of different treatment or discrimination against Netflix services, but the final decision of the KPPU stated that Telkom Group was proven not to have carried out business competition because there were still reasons to justify this, indicating that the legal aspects of business competition still have room and limitations in handling the issue of business competition discrimination which is clearly regulated in Law Number 5 of 1999 in Article 19 letter d which prohibits acts of discrimination against other business actors. Therefore, it can be seen that there has been a legal vacuum due to the lack of regulations governing service neutrality, especially in the telecommunications sector, especially in this case involving the relationship between telecommunications network providers and OTT services, according to Alma and Sharda (2022) this causes challenges to upholding the principles of justice, a healthy business competition climate in Indonesia, and limitations on consumer choice rights.

2. RESEARCH METHODS

The research method used in this paper is legal research with a normative method (judicial normative). Normative legal research is used to systematically and structurally analyze applicable legal rules. (Syahrum, 2022) In this study, the researcher conducted a case study analysis regarding the blocking of Netflix by Telkom Group.

Normative legal research aims to provide an understanding of legal phenomena in society. This includes an analysis of applicable legal norms, legislative processes, and the application of law in judicial practice. (Diantha, 2016) The research method used in this study is normative legal research or literature writing with a case approach (Case Approach) and a legislative approach (Statute Approach) by combining concrete case analysis and studies of applicable laws and regulations. The data collection method used in this study is the literature study method (Library Research), where data is obtained from research sources, namely laws and regulations, books, articles, or other documents related to the topic in this study. In addition, this study uses a data analysis technique in the form of descriptive analysis, namely by analyzing the data that has been obtained and drawing conclusions from the formulation of the problem discussed [5].

3. RESULT AND ANALYSIS

Indications of Unfair Business Competition Practices by Telkom Group Against Netflix OTT Service

Netflix, a Subscription Video on Demand (SVOD) service, began enabling access to its services in Indonesia on January 6. Telkom Group, the dominant telecommunications network provider in Indonesia, subsequently began blocking users of its telecommunications network from accessing Netflix. Indications of unfair business competition practices by Telkom Group can be seen in Telkom Group's statement regarding the reasons for the blocking. One of the reasons cited was that Telkom Group considered Netflix to not meet the standards of official Electronic System Provider (PSE) services established in Indonesia.

According to Telkom's Director of Consumer Service, Telkom Group initiated the blocking due to concerns about local communities' rejection of the distribution of pornographic or negative content, such as violence (Siti Choirina, 2016). However, this is the first time this has been done by the Telkom Group, and the blocking only applies to Netflix. Other SVOD service providers, such as VIU, We TV, and even Disney Plus, which collaborate with the Telkom Group, have no history of blocking. Furthermore, according to Netflix, the reason for the blocking was never officially announced, which is why the blocking lasted so long, three years before the Telkom Group finally opened access [6].

According to the Expert Opinion published in "Business Competition Law: Textbook" by Andi Fahmi Lubis et al., indications of the activities outlined in Article 19 letter d of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition include: 1. Preferential treatment by one business actor towards another; and 2. No reasonable justification for such special treatment. It can be concluded that the actions taken by the Telkom Group have met the elements of unfair business competition, namely the preferential treatment of telecommunications network service providers for SVOD services. Furthermore, although the Telkom Group has publicly stated the reasons for the blocking, the decision is not based on regulations and is solely based on the Group's own initiative and unilateral decision.

Telkom Group's legal counsel further stated that the blocking of Netflix is a measure to prevent discrimination against other SVOD services that comply with the filtering, censorship, and takedown policies and have signed contracts with such clauses. However, this is not in line with one of the cases of the Prime Video service by Amazon, Prime Video is an SVOD service that has been accessible by telecommunications networks in Indonesia since 2016, but Prime Video only started officially launching services in Indonesia on July 31, 2022, from the period of opening access in 2016 then only officially launched in 2022, it can be concluded that Prime Video also does the same thing as Netflix, but there is no indication of blocking carried out by Telkom Group against Prime Video, this adds to the fact that it is true that there are indications of discrimination carried out by Telkom Group against Netflix and of course if things like this continue to be normalized, it can lead to unfair business competition. Based on the facts that have been described, it can be concluded that the Telkom Group is suspected of violating Article 19 letter d of Law Number 5 of 1999, by fulfilling the elements of unfair business competition, namely the element of carrying out one or more activities, namely clearly the Telkom Group has blocked Netflix for three years, then the element of carrying out discriminatory practices, namely the Telkom Group has blocked only SVOD Netflix, while there are other SVOD services such as Prime Video which have similar cases but are not blocked by the Telkom Group, then according to the elements that result in unfair business competition in this decision, the Commission Panel is of the opinion that the Telkom Group does not cause unfair business competition, but the author is of the opinion that the elements of unfair business competition have been fulfilled because what the Telkom Group does is an act of carrying out production and/or marketing activities carried out by inhibiting competition. According to Rachmadi Usman (2013) the act of carrying out production and/or marketing activities carried out by inhibiting competition can be categorized as unfair business competition practices. The intended competitive barriers can arise from the many controversies that arise in the community regarding this blocking, as evidenced by the end of 2019 Netflix was widely discussed by Twitter users because Telkom group customers could not access Netflix which caused Twitter users to again issue opinions about Netflix being blocked by Telkom (Rizqa, 2020). Through this it can be assessed that the

blocking policy is not only detrimental to Netflix as a service provider but also detrimental to the community, especially because PT Telekomunikasi Selular is a dominant service provider of communication networks that are widely used by the community, of course, making this blocking felt by the dominant community, which means this certainly hinders Netflix's competition as an SVOD service that cannot be accessed by Telkomsel service card users and Indihome WiFi which are service products from the Telkom Group [7].

Legal Solutions to the Lack of OTT Service Regulation in the Indonesian Telecommunications Sector

In examining the PT Telkomsel vs. Netflix case, it is estimated that the KPPU (Commission for the Competition and Development of Indonesia) used the Rule of Reason approach to determine competition violations. The KPPU then further analyzed the implications of the Telkom Group's discriminatory practices, as not all monopolistic practices have negative effects. However, according to Andi Fahmi (2019), competition law has two substantive evidence-based approaches: the Per Se Illegal Approach and the Rule of Reason. The Rule of Reason approach assesses the actions of business actors as illegal without further evidence of the resulting impact (Arie, 2004) [6].

In case No. 08/KPPU-I/2020, it was determined that PT Telkomsel was not found to have violated Article 19 letter d of Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. In the KPPU's ruling, the decision regarding the absence of a violation was based on the failure to fulfill one of the elements of the article, namely, the element that could lead to unfair business competition. The author believes this occurred because the KPPU, in examining this case, applied the Rule of Reason approach, which analyzes the consequences and implications of the violations committed by business actors. The Telkom Group's actions against Netflix have been proven to contain elements of discrimination that harm Netflix as an OTT service provider, and also consumers themselves due to limited access. Therefore, it can be considered that the KPPU's application of the Rule of Reason in this case does not provide optimal protection against the dynamics of digital business competition, given the strong indications of discriminatory practices that have the potential to harm Netflix and disrupt the principles of fair business competition.

In this case, the decision was limited by only using one approach, the Rule of Reason. However, the author believes the KPPU's decision also occurred due to the lack of regulations governing OTT services in Indonesia. This aligns with the KPPU Commission Council's statement (2021) recommending the Commission provide advice and considerations to the Ministry of Communication and Information Technology to create regulations or rules regarding OTT, including Advertising-Based Video on Demand (AVOD), Transactional Video on Demand (TVOD), and Subscription-Based Video on Demand (SVOD). The case of Netflix's blocking by PT Telkomsel reflects the regulatory vacuum in Indonesian competition law and telecommunications law. This is illustrated by the reason for the Telkom Group's exemption from Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. One of the reasons is the legal vacuum that implies granting excessive authority to network operators to determine unilateral blocking, resulting in uncertainty for OTT investors and limited consumer access to choice. In facing this, regulations in Indonesia must begin to implement the Network Neutrality principle, this principle requires Telecommunication Service Providers or Internet Service Providers (ISPs) such as Telkom Group to provide non-discriminatory data service access, therefore ISPs are prohibited from discriminating against consumers based on the type of data accessed and including blocking access to internet content services (Backer, 2010). The Network Neutrality principle was put forward by Timothy Shiou-Ming Wu (2003) who also explained that the internet is a neutral network principle. The internet network itself is end-to-end, which means the internet network cannot select what content is in it. Then the initiative to control internet usage traffic comes from telecommunications service providers, from which ISPs gain the advantage of controlling internet access traffic and if this is not regulated through Network Neutrality, problems such as the blocking of Netflix by PT Telekomunikasi Selular will certainly recur in the future which will certainly harm OTT investors and will also create limitations for consumers to access. The implementation of regulations from the Network Neutrality principle can be considered by the Ministry of Communication and Digital (Kemendigi) by issuing regulations equivalent to Government Regulations or Ministerial Regulations, in implementing this principle, Kemendigi can require telecommunications providers such as PT Telekomunikasi Selular or Indosat to implement the Network Neutrality principle, namely making fair policies regarding consumer internet access and prohibiting blocking only for reasons of one party without clear reasons and implications for discriminatory actions. In addition, referring to the Telkom Group case study, the KPPU needs to add criteria tested in unfair business competition practices relevant to the digital world, namely the long-term network effect test, this is because Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition only focuses on the impacts that are immediately caused, while for business competition, especially competition that causes consumer limitations to choose, the long-term effects must be seen. Then because of this, if the KPPU only tests business competition with short-term effects, the results of the decision can be weak, therefore a network effect analysis is needed to test business competition practices so that the decisions issued can avoid serious threats to future business competition [8].

In addition to the principle of network neutrality, the Ministry of Digital Affairs can create regulations that encourage collaboration between telecommunications service providers and OTT services, particularly to promote the Business-to-Business (B2B) concept. Business-to-Business refers to electronic transactions between one business entity and another. In this case, the B2B concept was developed to encourage collaboration between telecommunications services and OTT services. This collaboration takes the form of commission sharing or other means that benefit both parties. In the case of the blocking of Netflix by Telkom Group, Telkom Group argued that Netflix had entered the Indonesian network without any financial contribution or compliance with existing laws. Therefore, the B2B concept encourages collaboration to prevent OTT services from entering without financial contribution, or free riding [9].

Rapid technological developments have led to rapid advancements. This requires regulators, particularly the Ministry of Communication and Digital as the initiator of telecommunications regulations, and the KPPU as the supervisor of business competition in Indonesia, to refine the regulatory framework related to competition indicators and the principles that need to be applied in regulations. Although the business competition sector already has Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition, it is felt that it still needs to be updated to keep up with the trend of digital business competition, especially with the rise of cross-border services that are starting to enter the Indonesian telecommunications network.

4. CONCLUSION

The telecommunications sector in Indonesia is one of the sectors included in the oligopoly market structure. Business competition in the telecommunications sector is regulated by Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. In the case study of the blocking of Netflix by Telkom Group, case number 08/KPPU-I/2020 concerning Alleged Discriminatory Practices by PT Telekomunikasi Indonesia (Persero) Tbk and PT Telekomunikasi Seluler against Netflix regarding the Provision of Internet Access Provider Services, it shows a legal failure that has implications for the KPPU's decision. This legal failure is evident in the decision-making that ignores the existence of discriminatory acts that are clearly a characteristic of unfair business competition. Telkom Group's action against Netflix is associated with the Telkom Group's unilateral reasons, namely indications that Netflix violates Electronic System Operator (PSE) regulations and applicable content ethics in Indonesia. However, based on a case study by Alma and Sharda (2022), there are OTT services that do similar things to Netflix, but Telkom Group does not carry out the same blocking. In this case, it can be proven that the Telkom Group engaged in discriminatory acts in violation of Article 19 letter (d) of Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. As a telecommunications service provider with numerous customers, the Telkom Group abused its dominant power to inhibit competition. KPPU Decision No. 08/KPPU-I/2020 concerning Alleged Discriminatory Practices by PT Telekomunikasi Indonesia (Persero) Tbk and PT Telekomunikasi Seluler against Netflix regarding the Provision of Internet Access Provider Services stated that the Telkom Group did not engage in unfair business competition practices despite the discriminatory treatment. This demonstrates weaknesses in the regulations. In this regard, regulators must refine existing regulations by adhering to the principle of Network Neutrality by establishing fair policies regarding consumer internet access and adding a long-term network effect test to assess unfair business competition through its long-term effects. Therefore, these legal weaknesses can be addressed through regulatory reform. The Ministry of Digital Affairs can implement network neutrality principles in the telecommunications sector to ensure fair internet access for consumers. It can also establish regulations to encourage collaboration between telecommunications providers and OTT services, ensuring that OTT services entering Indonesian networks contribute financially. Furthermore, the KPPU can also update its testing criteria to consider network effects, or the long-term impacts they may have.

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