

Clarity of Information and Consumer Consent in the Usage of Personal Data by E-Commerce Platform

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Abstract

The widespread use of e-commerce platforms in the era of the industrial revolution 4.0 cannot be separated from concerns about the use of personal data by these platforms without the consent of consumers. This can lead to misuse of consumers' personal data and causing losses. For this reason, regulations that protect consumer personal data from this are needed. In this regard, the existing legal instruments in Indonesia to protect personal data in general has been regulated in Law Number 27 of 2022 concerning Personal Data Protection and Government Regulation of the Republic of Indonesia Number 80 of 2019 concerning Trading Through Electronic Systems (PP 80/2019). The problem is, these regulations do not provide an affirmation regarding the terms and conditions of the format that must be made by e-commerce platforms, thus that they are often made with lengthy and complex legal language which results in the impression that consumers agree to the use of personal data, even though they do not know it. Regarding this problem, the authors provide recommendations for adding provisions to PP 80/2019 which contains a brief, clear, and simple format of terms and conditions that must be made by e-commerce platforms in relation to the use of personal data.

1. Introduction

It has long been known that transaction relationships involving consumers and business actors place consumers as weaker parties than business actors.¹ It has been traced that this has been happening since the Ancient Roman kingdom, where at that time there were not sufficient regulations to provide protection to consumers for the losses they suffered due to the behavior of business actors. This condition was caused by the application of the caveat emptor principle in the Ancient Roman kingdom at that time – this principle emphasized that buyers must be responsible for protecting their own interests and sellers are not responsible for losses suffered by consumers.² Caveat emptor principle or also known as “Let The Buyer Beware” is a rule in commercial law that states that the buyer buys at his own risk without an express assurance in the contract. The caveat emptor principle also acts as a warning to buyers that they have no recourse against the seller if the product does not fulfil their expectations.³

Indonesia has had a long journey in the struggle for consumer protection since the Dutch East Indies era. At that time, regulations for consumer protection were contained in several laws and regulations, thus they were not directly stated in one law. For example, in the Civil Code Book II concerning the seller's obligations in sales and purchase agreements, the Commercial Code, as well as in the Criminal Code concerning fraud, brand counterfeiting,

¹ Abdurrahman Mazli, “Urgensi Pembaharuan Undang-Undang Perlindungan Konsumen Indonesia Di Era E-Commerce,” *Lex Renaissance* 6, no. 2 (2021).

² Barry Nicholas, *An Introduction to Roman Law* (Jakarta: Kencana, 2013).

³ Atishay Agarwal, “Caveat Emptor and Its Exceptions,” *Jurisperitus The Law Journal* 5 5, no. 2 (2022).

and so on. The awareness and need for consumer protection at that time was marked by the formation of the Consumer Protection Institute Foundation (hereinafter referred to as CPIF) in the 1970s.⁴ Then in 1999, after the fall of the “*Orde Baru*” – a bright spot in consumer protection was seen with CPIF's success in getting the academic text of Law Number 8 of 1999 concerning Consumer Protection (hereinafter referred to as the CP Law) passed into law.⁵

Reformation era had a positive impact on Indonesian society, especially the press freedom, which was previously limited or even eliminated, was finally revived. One proof of this is the legality of the journalist profession of the non-unity of Indonesian journalists (Alliance of Independent Journalists), giving birth to a new press industry - both in the form of print media and electronic media.⁶ This period finally shed some light because not only was the success of the enactment of the CP Law, but press freedom also played a role in making the public aware of the importance of consumers.

The birth and enactment of the CP Law in Indonesia provides an important meaning for consumer protection, as regulated in Article 3 number 4 of the CP Law, one of the objectives of consumer protection is “*to create a consumer protection system that contains elements of legal certainty and information transparency as well as access to information.*” In an effort to achieve this goal, the CP Law in Article 7 emphasizes that one of the obligations of business actors is to “*have good faith in carrying out their business activities.*” The legislators intended this as a weapon to prevent arbitrary actions carried out by business actors.

Then, problems such as the difficulty of collecting information can now be overcome using information technology, in which case the internet plays a key role.⁷ The presence of the internet and the development of the increasingly modern industrial revolution 4.0 era have also had an impact on changes in transaction schemes between consumers and business actors. Efficient operations, automation, and effectiveness which have several characteristics such as Cyber-Physical Systems (CPS), the Internet of Services (IoS), Robotics, the internet of Thing (IoT), Cloud Manufacturing and Augmented Reality, Big Data can become a new paradigm that is increasingly developing. Manufacturing processes are developing smarter, namely in the form of machine devices, products that can independently exchange information, and production modules that trigger actions and mutual control thus that intelligent environmental organizations can be created.⁸ The birth and development of this era later became the forerunner to the development of the digital economy in the world today. The digital economy itself is defined by Hartman as the virtual arena in which business activity is

⁴ Johannes Gunawan and Bernadette M Waluyo, *Consumer Protection in Asia* (New York: Hart Publishing, 2022).

⁵ Johannes Gunawan and Bernadette M Waluyo.

⁶ Hasan, “Class Action Terhadap Perusahaan Pers Menurut Undang-Undang Perlindungan Konsumen,” *Pemikiran Dan Pembaharuan Hukum Islam* 22, no. 1 (2019).

⁷ Ardyanto and Denni, “Pengaruh Kemudahan Dan Kepercayaan Menggunakan E-Commerce Terhadap Keputusan Pembelian Online” 22, no. 1 (2015).

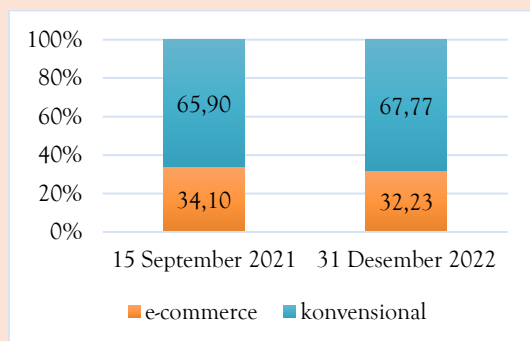
⁸ Judit Nagy et al., “The Role and Impact, Of Industry 4.0 And The Internet Of Things On The Business Strategy Of The Value Chain-The Case Of Hungary,” *Journal Sustainability*, 2018.

actually conducted, value is created and exchanged, transactions occur, and one-to-one relationships mature by using any internet initiative as a medium of exchange.⁹

In this new era and paradigm, consumers and business actors no longer meet physically to carry out transactions – but rather through platform media known as electronic commerce (hereinafter referred to as E-commerce). E-commerce is a sale and purchase transaction of goods and services that utilizes internet facilities, thus that transactions are carried out online.¹⁰

E-commerce eliminates the problem of distance and time for the parties involved, in carrying out transactions, both sellers and buyers no longer carry out transactions directly, but use internet media thus they do not need to meet physically.¹¹ This reason allows E-commerce to have an influence not only on a national scale, but also on global trade.¹² E-commerce here includes Tokopedia, Shopee, Lazada, Gojek, and many more. Global research shows that the main reasons on online purchasing are convenience and price. The internet offers the convenience of viewing items, comparing prices, and searching for reviews.¹³ The following is data information obtained based on a survey conducted by the Central Statistics Agency.

Diagram 1. Percentage of e-commerce and conventional businesses in Indonesia



Source: Central Statistics Agency¹⁴

This data shows that we are currently in a condition that is integrated with technology, as shown by the fact that more than a quarter of business activities in Indonesia are currently running their businesses online. This percentage has the consequence that there are abundant of consumers as E-commerce users in Indonesia. This is because the increase in internet users

⁹ Arief Iman Santoso, Anugrah Irfan Ismail, and Emi Widiyanti, "Kesiapan UMKM Industri Kreatif Kota Surakarta Dalam Menghadapi Masyarakat Ekonomi Digital (Digital Economy Ecosystem)," in *Seminar Nasional Pengabdian Kepada Masyarakat*, 2017.

¹⁰ Margarita Isoraite and Neringa Miniatiene, "Electronic Commerce: Theory and Practice," *IJBE: Integrated Journal of Business and Economics* 2, no. 2 (2018).

¹¹ Julian Iqbal, "Perlindungan Bagi Konsumen Online Marketplace Melalui Mekanisme Online Dispute Resolution (ODR)," *Jurist-Diction* 1, no. 2 (2018).

¹² Hetty Hassanah and Wahyudi, "Prinsip-Prinsip Yang Harus Dipertimbangkan Dalam Penyelesaian Sengketa Nama Domain Berdasarkan Undang-Undang Informasi Dan Transaksi Elektronik," *Negara Hukum* 12, no. 1 (2021).

¹³ Christine Riefa and Julie Hunter, *The Challenge of Protecting EU Consumers In Global Online Markets* (The European Consumer Organisation (BEUC) and The Federation of German Consumer Organisations, 2017).

¹⁴ Badan Pusat Statistik, *Statistik ECommerce 2022* (Jakarta: Badan Pusat Statistik, 2022).

will be directly proportional to the choice of business actors to open their shops online as a form of service that makes things easier and attracts consumer interest. Apart from that, with e-commerce services, consumers can easily access and order products from various places.¹⁵ Some benefits of e-commerce transactions for consumers are as follows¹⁶:

- a. Allows consumers to shop or make other transactions at any time and from any place.
- b. Providing customers with a greater choice of products and income.
- c. Enable consumers to get lower prices in purchasing goods and services, because consumers can shop in many places and make comparisons quickly.
- d. Enable customers to participate in virtual auctions.
- e. Facilitate competition that leads to substantial discounts for customers.
- f. Allows customers to interact with other customers in electronic communes and exchange ideas and experiences.

Furthermore, the results of a survey conducted by BPS show that 73.52% of¹⁷ e-commerce directly targets final consumers. The final consumers here are those who are protected by the CP Law – they are the parties who use or utilize the product/service directly or in other words not for re-trading.¹⁸

Behind the widespread use of e-commerce, it turns out that it does not always have a positive impact, the potential for disputes that may arise is quite big, especially if the transaction is cross-border.¹⁹ One of the negative contents that is brought is related to the personality of the user or in this case the consumer. What is meant here is personal data from consumers. Every individual has the right to privacy, where the sub-chapter in the right to privacy is the right to protection of personal data - both of which are one unit rooted in human rights.²⁰ Therefore, the state is obliged to guarantee the protection of consumers' personal rights.

The interest in personal data cannot be separated from the value of the personal data itself. In this case, e-commerce platforms play a role in the possibility of leakage or use of personal data. Consumer behavior²¹ when carrying out shopping activities on e-commerce

¹⁵ Ardyanto and Denni, "Pengaruh Kemudahan Dan Kepercayaan Menggunakan E-Commerce Terhadap Keputusan Pembelian Online."

¹⁶ Dedi Riswandi, "Transaksi On-Line (E-Commerce): Peluang Dan Tantangan Dalam Perspektif Ekonomi Islam," *Econetica* 1, no. 1 (2019).

¹⁷ Ardyanto and Denni, "Pengaruh Kemudahan Dan Kepercayaan Menggunakan E-Commerce Terhadap Keputusan Pembelian Online."

¹⁸ Article 1 point 2 of the CP Law emphasizes that: "A consumer is every person who uses goods and/or services available in society, whether for the benefit of themselves, their family, other people or other living creatures and not for trading."

¹⁹ Muhammad Faiz Aziz and Muhammad Arif Hidayah, "Perlunya Pengaturan Khusus Online Dispute Resolution (ODR) Di Indonesia Untuk Fasilitasi Penyelesaian Sengketa E-Commerce," *Rechtsvinding: Media Pembinaan Hukum Nasional* 9, no. 2 (2020).

²⁰ Ewa Kulesza, "The Protection of Customer Personal Data as an Element of Entrepreneurs," *Ethical Product, Annales. Ethics in Economic Life* 21, no. 7 (2018).

²¹ et.al. Siti Aldhawaty Syam, "Pengaruh Preferensi Konsumen Terhadap Keputusan Pembelian Produk Pada Marketplace," *Value Added: Majalah Ekonomi Dan Bisnis* 18, no. 2 (2022).

platforms will be left behind as information. This is collected and analyzed by e-commerce to adapt it to the products that will be distributed later - the purpose is to gain large of profits.²² Previously, research discussing consumer protection and electronic systems was carried out by: *First*, research entitled "Consumer Protection in Trade Transactions Through Electronic Systems" conducted by Sulasi Rongiyati. In his study, the author examines consumer protection in trade transactions through electronic systems and dispute resolution - the results of this research found that legislation to protect consumers in electronic systems is still scattered in several laws and regulations, the CP Law is still not sufficient to accommodate consumer protection in electronic transactions maximally, furthermore the dispute resolution can then be carried out inside or outside the court, and alternative dispute resolution mechanisms can be implemented fully online.²³ *Second*, research entitled "Legal Protection of Personal Data as a Privacy Right" conducted by Sekaring Ayumeida Kusnadi and Andy Usmina Wijaya in 2021. This research emphasizes that legal protection of personal data is a part of constitutional rights that is necessary to obtain protection. However, at the time this research was conducted, Indonesia did not yet have laws and regulations that could be the basis for protecting personal data.²⁴ *Third*, research with the title "Legal Protection of Personal Data As Privacy Rights Of E-Commerce Consumers Amid The Covid-19 Pandemic" conducted by Raphael Haganta, this research focuses on discussing the concept of personal data as a right to privacy and legal construction in Indonesia for protect consumer personal data in e-commerce.²⁵

The first, second and third studies with the study in this article have differences, namely *first*, the first study focuses on the CP Law which is still not sufficient to accommodate consumer protection in e-commerce. *Second*, the second and third studies focus on discussing personal data as a right to privacy and its relationship to constitutional rights. Meanwhile, this study focuses more on the use of personal data by e-commerce platforms and protection thus that the use made by e-commerce platforms is based on the consent of the data owner (consumer). Bearing in mind, massive use and abuse by e-commerce platforms without being accompanied by adequate regulations will certainly further erode the vulnerable position of consumers. The state, in this case, has a central role in ensuring consumer protection. This needs to be emphasized because by placing consumer protection as one of the priorities, it will have a linear impact if the country wants to increase national economic success.²⁶ Therefore, in this article we will discuss first, the use of personal data by e-commerce platforms in the digital economy. Second, the importance of protecting personal data and its formulation to protect consumers.

²² Guorong Zhong, "E-Commerce Consumer Privacy Protection Based on Differential Privacy," *IOP Conference Series: Journal of Physics*, 2019.

²³ Sulasi Rongiyati, "Perlindungan Konsumen Dalam Transaksi Dagang Melalui Sistem Elektronik," *Negara Hukum* 10, no. 1 (2019).

²⁴ Sekaring Ayumeida Kusnadi and Andy Usmina Wijaya, "Perlindungan Hukum Data Pribadi Sebagai Hak Privasi," *Al-Wasath*, no. 1 (2019).

²⁵ Raphael Haganta, "Investor Protection of Personal Data As Privacy Rights Of E-Commerce Consumer Amid The Covid-19 Pandemic," *Lex Scientia Law Review* 4, no. 2 (2020).

²⁶ Abd. Aziz Billah, "Peran Lembaga Alternatif Penyelesaian Sengketa Dalam Sektor Jasa Keuangan Guna Mendukung Pembangunan Ekonomi Nasional (The Role of Alternative Dispute Resolution Institutions In The Financial Services Sector To Support National Economic Development)," *Rechtsvinding: Media Pembinaan Hukum Nasional* 7, no. 1 (2018).

2. Methods

This research is a legal research study to find answers to legal issues by analyzing relevant legal rules, principles and concepts.²⁷ The approach method used is the statute approach and conceptual approach. The statute approach here means that the approach is taken to examine laws and regulations that are relevant to the issues under discussion - among them Law Number 8 of 1999 concerning Consumer Protection and Government Regulation Number 80 of 2019 concerning Trading via Electronic Systems. Next, conceptual approach is carried out by analyzing legal issues with concepts that are relevant to the discussion of the study—including the concepts of consentualism principle, personal data protection, transparency, use of personal data, and other concepts that are relevant to this research. Collecting legal materials by library research, then the legal material is analyzed using deductive reasoning, namely by drawing conclusions from general to specific matters thus that an appropriate and clear conclusion is found.

3. Results and Discussion

3.1 Digital Economy and Use of Personal Data by E-Commerce Platforms

As explained previously, the digital economy is interpreted as a virtual space where business activities, transactions or information exchange occur. From the definition presented by Hartman, an important idea can actually be drawn that there is no significant difference between the digital economy and the conventional economy, only that the digital economy acquires virtual space as a medium for transaction or business activities. This is certainly different from conventional economics which uses the real world as its medium.

Regarding data, basically, there has never been any research that explicitly discusses the direct correlation between the digital economy and the use of personal data. Famous authors such as Tapscott, with his 12 themes in the digital economy, do not directly highlight the role and position of personal data in the digital economy. However, several of the themes conveyed by Tapscott indirectly support the idea that there is indeed a significant correlation between the use of personal data and the development of the digital economy. These themes include the following:

1. Digitalisation.

Tapscott said that in conventional economics, information and all economic activities are carried out analogously or physically. In this economy, the parties involved move their physical presence to certain spaces such as meeting rooms, use of analog telephone lines, correspondence via post offices, and so on. On the other hand, the digital economy eliminates this—as a result, according to Tapscott, digital spaces as a medium for economic activities are created and emerge.²⁸ Tools or software that allow this to happen are developed, and at the same time, the existing information can then be squeezed and compressed very quickly. On this theme, Tapscott does not at all highlight the link between digitalization and the use of personal data, but, indirectly, the creation of spaces to facilitate the transfer of conventional economic activities to the virtual world requires user preferences in their creation. In simple terms, this can be analogous to consumers' preferences in purchasing an object from one shop

²⁷ Peter Mahmud Marzuki, *“Penelitian Hukum”* (Jakarta: Rencana Prenada Media Group, 2010).

²⁸ Don Tapscott, *The Digital Economy: Rethinking Promise and Peril in the Age of Networked Intelligence*, Anniversary Edition (New York: McGraw-Hill Education, 2015).

to another - and it cannot be denied, there are consumers who always have opposite preferences on the spectrum, such as those who choose to shop at traditional markets or minimarkets. This kind of argument is actually no different from the definition of the digital economy presented by Hartman previously, namely that there is no significant difference between the digital and conventional economy. In the context of digitalization, user preferences are very important in the creation of the medium of economic activity, and therefore, personal data containing these preferences is important, even though it is not highlighted.

2. Innovation.²⁹

According to Tapscott, the digital economy is an innovation-based economy. Innovation drives every aspect of economic and social life. In the field of art, new forms of art based on interactive multimedia have emerged. The multivolume encyclopedia was replaced by a single CD-ROM that could hold 360,000 pages of text. Not so long ago, music videos were a promotional add-on for a singer; now, they are necessary for success. Along with the perennial Academy Awards, there is now the Academy of Interactive Arts and Sciences; its first annual awards event was held in 1994. Innovation also begins to drive educational curricula. In the old economy, curriculum was good for years and careers. In the digital economy, to be relevant, education systems must constantly change content, teaching tools and approaches. In other words, it can be said that in the digital economy, human imagination is the main source of value. The critical challenge for every company in the digital economy is to create a climate where innovation is valued, rewarded and encouraged. Every country needs innovative workplaces and organizations that encourage creativity. Growth in the innovation economy comes from small and medium-sized businesses rather than large corporations or governments. What is needed is an education system that teaches and motivates students to learn and be creative, not to memorize information. Furthermore, because innovation is important, the preferences of potential consumers also become significant in the development of businesses in the digital economy. Once again, this is not highlighted by Tapscott, however, semiotically, we can sense this from his statements about innovation.

The author's two previous opinions regarding the relationship between personal data and digitalization and innovation seem at first glance to be just personal opinions. Surely, this cannot be separated from the fact that there is not much consumer protection literature that directly highlights the connection between personal data and the digital economy. However, this connection only becomes visible when personal data and the digital economy are linked to the market power of e-commerce platforms – things like this will not be found in consumer protection literature, but rather in business competition which highlights the link between personal data and market power that e-commerce platforms have in the digital economy. The Organization of Economic Co-operation and Development (hereinafter referred to as OECD) is one institution that highlights this connection – in its work entitled “the evolving concept of market power in the digital economy”³⁰, the OECD highlights the influence of personal data as an indicator and also a factor that influencing the power of e-commerce platforms in

²⁹ Don Tapscott.

³⁰ OECD, *The Evolving Concept of Market Power in the Digital Economy* (OECD Competition Policy Roundtable Background Note, 2022).

dominating the market. The OECD submits that the idea that exclusive access to scarce inputs confers market power is well established in competition law (even if the case for leveraging market power to shut out downstream competition remains a matter of debate).³¹

In digital markets, data is often identified by competition authorities as an input, and thus a contributor to market power. For example, the competition authorities of Australia, Canada, the European Commission, the UK and the US have all indicated in case decisions that the accumulation of data by established e-commerce platforms represents a significant barrier to entry, given the associated network effects and economies of scale. German competition law has also been amended to include data as a contributor to market power. Economic scope, and the potential for market power derived from data to be leveraged in new markets, has also been considered by the European Commission in large technology company merger decisions.³² For example, in the Google/Fitbit decision, the Commission noted the potential for Fitbit data to strengthen Google's dominance in online search advertising, stating: "...no Google competitor in online advertising has access to databases or data collection capabilities equivalent to Fitbit's and is likely to they will not acquire those assets without incurring significant and timely costs." The data exhibits several characteristics that differentiate it from some of the more traditional key inputs. Several things highlighted by the OECD also seem to agree with the connection between personal data and digitalization and innovation as stated in the previous discussion. For example, the importance of specific data sets to compete in the market and the importance of certain data sets objectively for a company's ability to compete. In relation to this data, the OECD even highlights data sets that can be purchased from third parties as owners of large personal data ³³ databases. Purchasing such data is indirectly the key for new e-commerce platforms to collect user preferences which is important in digitalization and innovation.

The function of personal data on e-commerce platforms was also highlighted by the German business competition supervisory commission or *bundeskartellamt*. In his research, he conveys the role of data in the digital economy which can help the development of e-commerce platforms, which is further explained as follows:³⁴

1. Product or service improvements

Data can help improve business products or services. On the one hand this can be achieved by studying the effects as in the case of search engines. It can be assumed that more searches along with the possibility to observe what results each user clicks on could help improve and refine search engines and their supporting algorithm implementation. This can improve the quality of search results, which can ultimately lead to more people using the search engine. Likewise, many software products installed on personal computers or smartphones collect detailed information about the use of those products. Prominent examples are web browsers and operating systems. In addition, many websites collect detailed information about users' journeys through their sites and use this information to identify areas that have been used intensively or to minimize technical problems. This information can be

³¹ OECD.

³² OECD.

³³ OECD.

³⁴ Bundeskartellamt, *Competition Law and Data* (Bonn: Bundeskartellamt, 2016).

used to expand the most frequently read parts of the website or to speed up the functions of the most frequently used software products to improve the product.

2. Exploit new business opportunities

Access to data can also enable companies to exploit new business opportunities. By reusing data collected in the context of one service for different purposes, businesses can provide new services based on this data. For example, mobility data generated by mobile network operators and cell phones is used by navigation service providers to better display traffic jams and route their users around them.

3. A more target-oriented business model

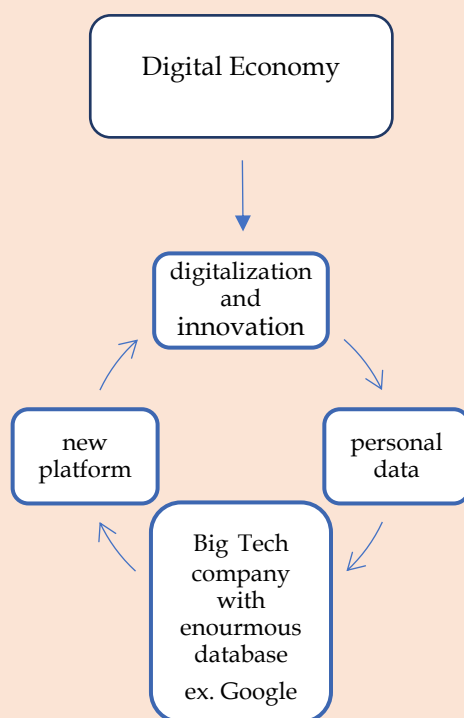
Data can also be used to better target potential customers and to provide them with individual advertising, services or products. Therefore, companies can reduce their advertising costs by getting closer to only addressing their true target audience. Companies can even set individual prices based on consumers' estimated spending capacity and price sensitivity. While individual pricing does not appear to be widespread in practice to date, it could become an issue in the future. Online advertising based on so-called "behavioral targeting" can serve as an example of a business model that is possible everywhere today simply by the technical developments described above. What is meant by "behavioral targeting" is the display of online advertisements to certain users based on a (comprehensive) user profile generated by observing their habits in browsing the internet. This business model would not exist without the mentioned developments for three reasons:

- a. First, without the comprehensive penetration of most if not all areas of life with digital information and communication technologies, it is impossible to record the behavior of large numbers of people in any detail. Just because most of the population started reading their news online, watching their movies and shows online, shopping online, listening to streaming music services and internet radio stations, commenting on public policies or celebrities' latest outfits online, presenting themselves on social networks and always carry devices that can record their geographic position, is it possible to record their actions in such a way that detailed and individualized conclusions about their receptivity to certain sales messages can be drawn.
- b. Second, to implement this on a very large scale, enormous computing power and data storage capacity are required.
- c. Third, today's ubiquitous and fast digital communications channels are required to actually distribute all these sales messages individually.

Furthermore, based on the previous explanations, it can be simply concluded that in the digital economy, personal data plays an important role for e-commerce platforms. This role relates to several aspects, first, for new e-commerce platforms, the use of personal data can help in the digitalization and innovation process by collecting personal data related to user preferences. Second, for established e-commerce platforms, the personal data they have collected can be traded to parties who will create new e-commerce platforms, or to the e-commerce platforms themselves in developing new e-commerce products or platforms. One problem is in the third aspect where personal data is sold between e-commerce platforms possible, that's why the protection of personal data and user consent is very important. The protection of personal data stems from the recognition of Article 28G paragraph (1) of the 1945

Constitution of the Republic of Indonesia reads “Every person shall have the right to the protection of his or her person, family, honour, dignity and property under his or her control, and shall have the right to security and protection from the threat of fear to do or not to do something which is a fundamental right”. It is further regulated in Article 1 point 1 of Law No. 27 of 2022 on Personal Data Protection that “Personal Data is data about an identified or identifiable individual individually or in combination with other information either directly or indirectly through electronic or non-electronic systems”. Therefore, it can be concluded that personal data is information related to the data subject, which is not only limited to common information such as name, identification number, location, and other identifiers, but also specific information that refers to the physical, physiological, genetic, mental, economic, cultural, and social identity of individuals.³⁵

Figure 1. The relationship between personal data and e-commerce platforms in the digital economy.



Source: image illustration from the author

Referring to this figure, the relationship between the use of personal data by e-commerce platforms in the digital economy is illustrated as a cycle that is interconnected with one another. To be able to compete by leveraging digitalization and innovation, new e-commerce platforms need personal data to grow their businesses, and as the OECD highlights the fact that trading in personal data is possible, established companies that control large amounts of personal data are becoming suppliers of that data. that person. The biggest problem with this kind of cycle is whether consent from users is obtained by established companies properly or not. For this reason, the protection of personal data and the formulation of legal instruments

³⁵ Muhammad Fikri and Shelvi Rusdiana, “Ruang Lingkup Perlindungan Data Pribadi: Kajian Hukum Positif Indonesia,” *Ganesha Law Review* 5, no. 1 (2023).

to cover this has become an important discussion in efforts to protect consumer personal data stored in e-commerce platform databases.

3.1 The Importance of Personal Data Protection and Its Formulation to Protect Consumers

The most surprising thing in the development of the digital economy is that along with this development, awareness has emerged to protect personal data. As is known, emerging e-commerce platforms are engaged in trading via electronic systems (e-commerce), and, along with the development of trading via electronic systems, the protection of personal data is also in the spotlight. For example, this is what the OECD has done through its guidelines, which it embodies in several main principles, namely:³⁶

- 1) Transparent and effective protection.
- 2) Fair business, Advertising and marketing practices.
- 3) Online discussions. (Information about the business, information about the goods or services, information about the transaction)
- 4) Confirmation Process.
- 5) Payment.
- 6) Dispute resolution and redress (international complaint handling, alternative dispute resolution, redress).
- 7) Privacy and security.
- 8) Education, awareness and digital competence.

In this regard, Indonesia itself has not prepared the protection of personal data, which has become a highlight with the development of trading via electronic systems. Through Government Regulation Number 80 of 2019 concerning Trading via Electronic Systems (hereinafter referred to as PP 80/2019), the provisions of Article 14 regulate that:

- (1) Electronic system operators are required to implement the principles of personal data protection in processing personal data, including:
 - a. Collection of personal data is carried out in a limited and specific manner, legally, fairly, with the knowledge and consent of the owner of the personal data;
 - b. The processing of personal data is carried out in accordance with its purpose;
 - c. Processing of personal data is carried out by guaranteeing the rights of the owner of the personal data;
 - d. Processing of personal data is carried out accurately, completely, not misleading, up to date, can be accounted for, and takes into account the purposes of processing personal data;
 - e. Processing of personal data is carried out by protecting the security of personal data from loss, misuse, unauthorized access and disclosure, as well as modification or destruction of personal data;
 - f. The processing of personal data is carried out by notifying the purpose of collection, processing activities and personal data protection failures; And

³⁶ OECD, *Digital Economy Policy Legal Instruments: Consumer Protection in E-Commerce* (OECD Recommendation, 2016).

- g. Processing personal data is destroyed and/or deleted unless it is still within the retention period in accordance with requirements based on statutory provisions.
- (2) Processing of personal data as intended in paragraph (1) includes:
- a. Earning and collecting;
 - b. Processing and analysis;
 - c. Storage;
 - d. Improvements and updates;
 - e. Appearance, announcement, transfer, distribution or disclosure; and/or
 - f. Removal or destruction.
- (3) Processing of personal data must comply with the provisions of valid consent from the owner of the personal data for 1 (one) or several specific purposes which have been conveyed to the owner of the personal data.
- (4) In addition to the consent as intended in paragraph (3), processing of personal data must comply with the conditions necessary to:
- a. Fulfillment of contractual obligations in the event that the owner of personal data is a party or to fulfill the request of the owner of personal data when entering into an agreement;
 - b. Fulfillment of the legal obligations of Personal data controllers in accordance with statutory provisions;
 - c. Fulfilling the protection of the legitimate interests (vital interests) of the owner of personal data;
 - d. Implementation of the authority of personal data controllers based on statutory provisions;
 - e. Fulfillment of the obligations of personal data controllers in public services in the public interest; and/or
 - f. Fulfillment of other legitimate interests of the personal data controller and/or personal data owner.
- (5) If there is a failure to protect the personal data they manage, the electronic system operator is obliged to notify the owner of the personal data in writing.
- (6) Provisions regarding the technical processing of personal data are regulated in accordance with statutory provisions.

Through these provisions, the protection of personal data has been given its own attention in relation to trading via electronic systems. Protection of personal data in general has been regulated in Law Number 27 of 2022 concerning Personal Data Protection. Article 65 of Law Number 27 Year 2022 on Personal Data Protection stipulates that:

- (1) Any Person is prohibited from unlawfully obtain or collect Personal Data that does not belong to him/her with the intention to benefit themselves or others which may result in harm to the Personal Data Subject.
- (2) Every Person is prohibited from unlawfully disclose Personal Data that does not belong to him/her.
- (3) every person is prohibited from unlawfully using personal data that does not belong to him/her.

It is then explained in Article 23 of Law Number 27 Year 2022 on Personal Data Protection that *"An agreement clause in which there is a request for the processing of Personal Data that does not contain the explicit legal consent of the Personal Data Subject is declared null and void"*. When it comes to the long and convoluted terms and conditions of e-commerce, most consumers do not understand and end up agreeing without reading each one. In the end, the purpose of personal data protection cannot be achieved. Terms and Conditions is one of the one of the features found on digital platforms and functions as a provision that regulates the rights and obligations as well as responsibilities and rules contained in the use of products or services accessed on a digital platform. Terms and Conditions also protect users from data leakage.³⁷

However, this does not mean that such regulations do not have shortcomings. The protection of personal data regulated in PP 80/2019 is clearly based on the consumer's agreement to approve or not the use of personal data by e-commerce platforms. Theoretically, Bouckaert said that this kind of method is called an opt-out method, in this method, the collection and use of personal data is permitted as long as it has been approved by the consumer and the consumer does not object to this at a later date.³⁸ The biggest problem with this kind of method was stated by Jacob Strahilevitz that often, consumers do not read or even understand the privacy policies presented by e-commerce platforms, and only agree to them without reading.³⁹

The problems stated by Jacob Strahilevitz can clearly result in the use of personal data by e-commerce platforms that appear to be approved by consumers who actually do not know what they have agreed to. Responding to this does not mean that there is never a solution offered. One of these solutions was formulated by Dararida, Emilda, and Lisa, in their work entitled "Consumer Protection System (CPS): a consumer personal data protection system through Collaboration Concept."⁴⁰ Through this work, to protect consumers' personal data, a consumer protection system concept is offered through a collaboration concept by optimizing relevant stakeholders in efforts to protect consumers' personal data. However, this concept is a repressive legal protection concept, meaning that it is carried out after a violation has occurred regarding personal data. The problem is that Article 7 of the CP Law regulates that business actors have an obligation to have good faith in carrying out their business activities. In the context of this research, business actors are e-commerce platforms that offer their services to consumers to use their platform as traders or buyers on the platform. For this reason, even though repressive protection solutions have been offered, preventive protection of personal data is necessary to ensure that business actors (e-commerce platforms) carry out

³⁷ Cecilia Vania Indrawan and Arman Tjoneng, "Analisis Term and Condition Dalam Akses Digital Platform Ditinjau Dari Hukum Positif," *Bhirawa Law Journal* 5, no. 1 (2024).

³⁸ Jan Bouckaert and Hans Degryse, "Opt In Versus Opt Out: A Free-Entry Analysis of Privacy Policies," *SSRN Electronic Journal*, no. 1831 (2006).

³⁹ Lior Jacob Strahilevitz and Matthew B. Kugler, "Is Privacy Policy Language Irrelevant To Consumers?," *Coase-Sandor Working Paper Series In Law and Economics, University of Chicago Law School* 774 (2016).

⁴⁰ Dararida Fandra Mahira, Emilda Yofita, and Lisa Nur Azizah, "Consumer Protection System (CPS): Sistem Perlindungan Dat Pribadi Konsumen Melalui Collaboration Concept," *Lembaga Penalaran Dan Penulisan Karya Ilmiah, Universitas Hasanudin*, 2020.

their activities in good faith. Black's Law Dictionary defines good faith (*bona fides*) as a state of mind that contains the following⁴¹:

- (1) Honesty regarding a particular thing or goal.
- (2) Compliance with certain duties or responsibilities.
- (3) The decision to respect and fulfill rational commercial standards regarding fair negotiations and agreements regarding a business activity.
- (4) The absence of bad intentions to commit fraud, or to make bad use of a particular thing.

This means that business actors, based on Black's Law Dictionary, can be deemed to have acted in good faith if:

1. Carrying out business activities honestly means not taking actions that could later cause the meaning of honesty to be degraded. In this regard, when it comes to terms and conditions, do not use ambiguous sentences - which could later result in losses for consumers.
2. Complying with the policies in the applicable laws and regulations, in this case means that business actors not only pay attention to the duties and responsibilities regulated in the PK Law, but also pay attention to other provisions in other laws and regulations. For example in Articles 1321-1328 *Burgelijk Wetboek* (BW).
3. The Terms and Conditions conveyed to consumers are stated in clear language, thus that agreements regarding the use of consumers' personal data are truly based on consent, carried out fairly, and not carried out in bad faith.
4. Business actors do not have bad intentions. The bad faith referred to in this context is that, in terms of collecting and utilizing personal data, business actors must not take advantage of consumers' negligence in understanding terms and conditions that are deliberately made long and difficult to understand. This is related to the third point stated previously, namely that terms and conditions must be made briefly and clearly.

Two sides are related to this article, apart from paying attention to the good intentions of business actors, the other side is related to the consumer side. Discussing this matter is related to the consent of the consumer himself. Primarily, the issue regarding the consent of the owner of personal data stored on the e-commerce platform is one of the important things in the use of personal data. According to Black's Law Dictionary, consent is defined as "agreement, approval, or permission as to some act or purpose, esp. Given voluntarily by a competent person; legally effective assent."⁴² This means that consent is a voluntary agreement or permission from someone who has the right/competence for a particular action. It is further emphasized that this agreement or permission is a valid agreement based on law.

The next fundamental thing is the meaning of the word voluntary - whether a person's ignorance can reduce the meaning of volunteering or not. If this is analyzed using existing legal rules in Indonesia, considering that the relationship between the two is a relationship originating from an agreement, then it can be referred to Articles 1321-1328 BW. These articles regulate defects in the will caused by oversight (*dwaling*), coercion (*dwang*), and fraud (*bedrog*). In its development in Indonesia through Jurisprudence Number 2356 K/Pdt/2010, there is

⁴¹ Black's Law Dictionary, *Ninth Edition* (United States of America, West: A Thomson Reuters Business, 2004).

⁴² Black's Law Dictionary.

one reason that can cause an agreement to become defective, namely due to abuse of circumstances (*misbruik van omstandigheden*).

Defect consent as a foreign term for defective will is a form of imperfection in the agreement contained in the agreement.⁴³ Agreements that occur with consumers in e-commerce tend to be difficult for consumers to understand, considering that they are often stated in terms and conditions that are not easily understood by the public. Thus this has an impact on the final scheme which leads to a take-it or leave-it conclusion. This means that from the beginning the consumer's consent to the use of e-commerce already contains elements that could cause the agreement in the consent to become flawed as regulated in Articles 1321-1328 BW.

One form of consent that is usually found in the digital era is informed consent, which is often equated with Autonomous Authorization (AA) as stated by Faden and Beauchamp. AA is a concept that is widely used for practical and policy reasons. Through AA it can be seen that AA itself is formed from autonomy and authorization. The meaning of autonomy contains several things, namely substantial understanding, non-control, and intentionality. Based on this substantial understanding, a person must understand the material as a whole, especially material that is considered important.⁴⁴ This will later influence a person's decision. Autonomy according to Kant's is a principle where "a person is obliged to follow the Categorical Imperative because of their use of reason, rather than any external influence".⁴⁵ If this is related to the relationship that occurs between consumers and the e-commerce platform, the information provided by the e-commerce platform becomes vital to convey clearly to consumers. Remembering that this will be directly related to consumer decisions themselves. Apart from that, this also aims to provide fulfillment of non-control.

Furthermore, consent is also very important because it is related to privacy. Fried said that privacy is the control we have over information about ourselves,⁴⁶ and consent is the simplest but most vital symbol of that privacy. In this regard, Culnan said that this control is based on two ideas, *first*, namely our own ability to limit the use of our personal data from other parties, and *second*, control to limit other parties' distribution.⁴⁷ For this reason, ensuring that consent is obtained correctly and clearly is important in protecting privacy (personal data), and transparency through clarity of information to obtain consent is an important thing to do.⁴⁸

⁴³ Utiyafina Mardhati Hazhin and Heru Saputra Lumban Gaol, "Penyalahgunaan Keadaan (Misbruik van Omstandigheden) Dalam Perjanjian Asuransi Melalui Telemarketing," *Jurnal Kertha Patrika* 41, no. 2 (2019).

⁴⁴ et.al. Gary Burkhardt, "Privacy Behaviour: A Model for Online Informed Consent," *Journal of Business Ethics, Springer* 186 (2022).

⁴⁵ White M.D., "Can Homo Economicus Follow Kant's Categorical Imperative?," *The Journal of Socio-Economics* 33, no. 1 (2004).

⁴⁶ Fried, *An Anatomy of Values: Problems of Personal and Social Choice* (Massachusetts: Havard University Press, 1970).

⁴⁷ M.J. Culnan, "How Did They Get My Name?: An Explanatory Investigation of Consumer Attitudes Toward Secondary Information Use," *MIS Quarterly: Management Information System* 17, no. 3 (1993).

⁴⁸ Johnston Birchall and Richard Simmons, *User Power, the Participation of Users in Public Services* (London: The National Consumer Council, 2004).

In this regard, Sackmann stated that transparency in data processing must be seen as an extension of the idea of responsible data-processing.⁴⁹ This is important because an organization (company/e-commerce platform) that carries out responsible data-processing, according to Milne, is more seen as a trustworthy organization because of its tendency to develop initiatives that promote transparency.⁵⁰ This trust is vital because according to Milne, the root of the problem in consumer privacy is that consumers tend to think that data processors have negative intentions, rather than neutral ones.⁵¹ For this reason, ensuring that business actors carry out their business in good faith is very important in this context.

Regarding preventive protection to ensure good faith, La Porta said that legal protection is carried out through prohibitions in regulations.⁵² Therefore, with reference to this, preventive personal data protection can be carried out by improving personal data protection regulations in Indonesia, thus that consumer negligence in agreeing to things they do not know about can be eliminated or at least minimized. In line with this, the European Union (EU) in its regulations states that regulations regarding privacy protection must at least fulfill the element that the data subject has unambiguously given his consent.⁵³ It is true that PP 80/2019 does not contain any ambiguous elements in the formulation of its articles, however, in line with a study conducted by the European Commission in 2016, it was revealed that less than 1 in 10 e-commerce platform consumers, when given the option to read the terms and conditions, stated that often the terms and conditions were written too long in complex legal language, and in order to transact on the platform, they had no choice but to agree to them.⁵⁴ Based on research studies, it was found that 70% -75% of users do not agree with the statement that the privacy policy is easy to understand and that they at least need more effort to understand it.⁵⁵ Consumers also often experience difficulties because statements are unclear (vague) and there are no explicit statements regarding how information is collected, its use, and with whom it is shared.⁵⁶

Therefore, PP 80/2019 should be improved thus that there are regulations that require e-commerce platforms to formulate terms and conditions and privacy policies briefly, in simple language, and are clearly needed. Hence, a short and clear formulation of terms and conditions as a reference for e-commerce platforms in formulating their terms and conditions for collecting and utilizing consumer personal data is needed. Terms and conditions specifically for the use and collection of personal data refer to the following:

⁴⁹ et.all. S. Sackmann, "Personalization in Privacy-Aware Highly Dynamic System," *Communications of The ACM* 49, no. 9 (2006).

⁵⁰ et.al. G.R. Milne, "Consumer Attitudes Toward Privacy and Direct Marketing in Argentina," *Journal of Direct Marketing* 10, no. 1 (1996).

⁵¹ G.R. Milne.

⁵² Rafael La Porta, "Investor Protection and Corporate Governance," *Journal of Finance Economics*, 1999.

⁵³ Carl Felsenfeld, "Unnecessary Privacy," *Suffolk Transnational Law Review*, Fordman University School of Law, 2001.

⁵⁴ "European Commission," n.d.

⁵⁵ Edgar A. Whitley and Roser Pujadas, "Report on a Study of How Consumers Currently Consent to Share Their Financial Data With a Third Party," Financial Services Consumer Panel: An Independent Voice For Consumers of Financial Services, 2018.

⁵⁶ Edgar A. Whitley and Roser Pujadas.

1. Expression that agrees to use of personal data, for example: User agrees that his data will be used for...
2. The expression for what the data is used for, for example: for the purposes of developing a system by exploiting user preferences and using the data as an advertising target.
3. Expression of user agreement, for example: that the user hereby agrees to the terms and conditions offered by... to use his personal data.
4. Add a user consent button in the form of a check mark or something else.

The improvements and limitations provided in the terms and conditions will further be a way to restore the initial foundation of the legal ratio⁵⁷ of the promulgation of the CP Law itself. In addition, the existence of these limitations will support the idea of establishing a special institution to oversee the protection of personal data.⁵⁸ As stated in the considerations contained in the CP Law, it is hoped that the existence of the CP Law is intended "to increase the dignity and worth of consumers, it is necessary to increase awareness, knowledge, concern, ability and independence of consumers to protect themselves and develop the attitude of responsible business actors".⁵⁹ There are two key components in this sentence, namely consumers who can protect themselves and business actors on the other hand who must carry out their business activities with full care and a sense of responsibility. Thus that the aspirations of the legislators to create a healthy economy can be achieved as they should be. This will also be in line with fulfilling welfare for the community, considering that consumers are the community itself.⁶⁰ Appropriate consumer protection will bring the country's success in improving the national economy, as well as improving the welfare of its people.

4. Conclusion

Based on the discussion outlined previously, it can be concluded that there is an interrelated relationship between the use of personal data by e-commerce platforms in the digital economy. The results of the OECD research, which highlights that the sale of personal data is possible and occurs, emphasizes the urgency of the need to protect the personal data of digital platform consumers. Indonesia through PP 80/2019 has actually provided protection against this, however, this regulation does not provide confirmation of how the terms of conditions in relation to the use of personal data should be made, and as a result, consumers appear to agree to the use of personal data when they actually do not agree. This is possible because the terms of conditions on e-commerce platforms are often written in very long terms and with complex language, and consumers do not have the option of not agreeing to them in order to use the platform. Bearing in mind that it not only requires good institutions, but to provide protection to consumers it must also be supported by adequate legal regulations.

Thus the solution offered through this article is that PP 80/2019 must at least be amended, a change by regulating the standard format of terms of conditions briefly, clearly

⁵⁷ et. al. Adam Dyrda, *Ratio Legis; Philosophical and Theoretical Perspectives* (Switzerland: Springer International Publishing, 2018).

⁵⁸ Denico Doly, "Pembentukan Lembaga Pengawas Perlindungan Data Pribadi Dalam Perspektif Pembentukan Lembaga Negara Baru," *Negara Hukum* 12, no. 2 (2021).

⁵⁹ Check the basis for consideration as outlined in the PK Law

⁶⁰ Kornelius Benuf, "Urgensi Kebijakan Perlindungan Hukum Terhadap Konsumen Fintech Peer to Peer Lending Akibat Penyebaran Covid-19," *Rechtsvinding: Media Pembinaan Hukum Nasional* 9, no. 2 (2020).

and in simple language, aimed at e-commerce platforms in creating terms of conditions in the use of personal data. It is hoped that such a format can prevent consumers from being careless in agreeing to things they do not know about in relation to the use of their personal data.

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