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The Doctrine of Essential Facilities in Competition Law: Balancing Monopoly Power and Fair Competition

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Abstract

This study examines the application of the Doctrine of Essential Facilities in business competition law in the Indonesian port sector. Despite the implementation of a demonopolization policy, PELINDO, as a State-Owned Enterprise, still controls essential facilities, potentially leading to monopolistic practices and unfair business competition. This issue is reflected in ICC-I Decision 12/2014 and ICC-L 15/2018, where the ICC identified indications of violations of several provisions of Law No. 5/1999 on the Prohibition of Monopoly Practices and Unfair Business Competition, particularly regarding monopoly practices, market domination, and tying/bundling actions. This study analyzes the limitations and application of the Essential Facilities Doctrine in business competition law and assesses how the ICC determines violations related to the control of essential facilities in the port sector. It employs normative legal research, utilizing a legal and regulatory framework, court decisions, and case studies. The findings indicate that even though the Shipping Law has revoked PELINDO's monopoly rights, the market structure and nature of essential facilities in the port sector continue to confer a competitive advantage on PELINDO. The ICC determined that PELINDO violated the principle of fair business competition by restricting competitors' access to essential facilities. To address this issue, regulatory harmonization is needed between SOE monopoly policies and the principle of business competition, along with strengthened ICC oversight and explicit incorporation of the Essential Facilities Doctrine into Indonesia's competition regulations. These measures would ensure fairer access for other businesses in the port sector.

1. Introduction

The state plays a role in business development, as mandated by Article 33, paragraph (2) of the 1945 Constitution of the Republic of Indonesia.[1] State-established business entities are granted special rights, including control over monopoly activities.[2] Key sectors essential to public needs are managed through State-Owned Enterprises (hereinafter referred to as SOEs).[3] As mandated by Law of the Republic of Indonesia Number 19 of 2003 on State-Owned Enterprises Law Number 19 of 2003 (hereinafter referred to as Law No. 19/2003). The legal basis for these monopolies ensures that SOEs contribute positively to the national economy, provided such activities are legally recognized and protected.

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[1] Akadiyan Aliffia Husdanah et al., "A Dominant Position in Bussiness Partnership Agreement: How Is Legalprotection for Less Dominant Entities?," 2021, https://doi.org/10.2991/assehr.k.211014.037.
[2] Susanti Adi Nugroho, *Hukum Persaingan Usaha Di Indonesia* (Prenada Media, 2014).
[3] H Sudiarto and M SH, *Pengantar Hukum Persaingan Usaha Di Indonesia* (Prenada Media, 2021).

Monopoly activities require oversight to prevent the abuse of monopoly rights granted.[4] Such supervision must be legally enforced to serve as a reference and basis for practical implementation. To this end, the state enacted Law No. 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Competition (hereinafter referred to as Law No. 5 of 1999). This law mandates the establishment of the Business Competition Supervisory Commission (hereinafter referred to as ICC) as an independent body to oversee the implementation of Law No. 5 of 1999.[5] One of the state-dominated business sectors is the port sector, managed by PT. Pelabuhan Indonesia I–IV (Persero) (hereinafter referred to as PELINDO). The state established these entities to develop essential port facilities and provide related services.[6] PELINDO, a SOE in the port sector, operates under Law No. 17 of 2008 on Shipping (hereinafter referred to as Law No. 17 of 2008) and its amendments.[7] Before the enactment of Law No. 17 of 2008, business entities seeking to operate in the port sector were required to have Indonesian Legal Entity status and collaborate with PELINDO within its designated port areas.[8] This obligation was previously regulated under Law No. 21 of 1992 on Shipping before its revocation.

Before the repeal of Law No. 21/1992, PELINDO had the authority to monopolize the port sector.[9] With its repeal and the enactment of Law No. 17 of 2008, PELINDO's monopoly authority was revoked. However, PELINDO remains an operator responsible for managing terminals and facilities.[10] Given that the port sector constitutes essential facilities, strict oversight of PELINDO is necessary. This can be seen from the ICC's initiative to investigate and identify violations of essential facilities regulations by PELINDO II and PT. Multi Terminal Indonesia (hereinafter referred to as MTI). This case involved alleged violations of Article 17 and Article 15 Paragraph (2) of Law No. 5 of 1999, as stated in Case Decision Number 12/KPPU-I/2014 (ICC-I Decision 12/2014). The case centered on the mandatory use of a Gantry Luffing Crane (hereinafter referred to as GLC) for loading and unloading at Tanjung Priok Port.[11] However, the verdict confirmed a violation of Article 15, Paragraph (2), but found no evidence supporting the alleged violation of Article 17. On its initiative, the ICC conducted an investigation and identified violations of essential facilities in the port sector by PELINDO III. The alleged violations pertain to Article 17, paragraph (1) and paragraph (2)(b), and/or

[4] Anna Maria Tri Anggraini, Ahmad Sabirin, and Yoel Nixon A Rumahorbo, "The Form and Pattern of Business Actors Requirements in Exclusive Dealing: A Rule of Reason Approach," *Yustisia Jurnal Hukum* 12, no. 2 (August 1, 2023): 107, https://doi.org/10.20961/yustisia.v12i2.73316.
[5] Law No. 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, Article 30.
[6] Anna Maria Tri Anggraini et al., "Ensuring Justice And Utility: Addressing Alleged Monopolistic Practices in Ibu Kota Nusantara," *Jurisdictie: Jurnal Hukum Dan Syariah* 15, no. 2 (January 3, 2025): 274–308, https://doi.org/10.18860/j.v15i2.28765.
[7] Law No. 17 of 2008 concerning Shipping. Article 344 Paragraph (1).
[8] Kahfiarsyad Julyan Elevenday, "Kegiatan Monopoli Pada Bumn Kepelabuhanan: Studi Terhadap Pelaksanaan Perjanjian Tertutup (Tying Agreement) Oleh Pt Pelabuhan Indonesia Ii (Persero) Pada Area Konsesi Pelabuhan Dalam Perspektif Hukum Persaingan Usaha," *" Dharmasisya" Jurnal Program Magister Hukum FHUI* 2, no. 2 (2022): 28, https://scholarhub.ui.ac.id/dharmasisya/vol2/iss2/28/.
[9] Andi Fahmi Lubis et al., "Hukum Persaingan Usaha: Buku Teks," 2017.
[10] Law No. 17 of 2008 concerning Shipping. Article 92.
[11] Article No. 12/KPPU-I/2014. p.1.

Article 19, letters (a) and (b) of the Law No. 5 of 1999, as stated in Case Decision No. 15/KPPU-L/2018 (ICC-L Decision 15/2018).[12] The decision concerns container loading and unloading services at the Multipurpose/Common/General Terminal at L. Say Maumere Port in Sikka Regency, East Nusa Tenggara Province (Sikka Port). In its decision, the ICC concluded that PELINDO III had violated Article 17, paragraphs (1) and (2)(b) of Law No. 5/1999 but had not violated Article 19, letters (a) and (b).

The previous two studies examined the challenges and opportunities faced by SOEs that monopolistically control the market. The first study, conducted by Wardhana, found an urgent need to update regulations related to essential facility obligations. This aims to reduce the dominance of powerful business entities in certain markets, particularly those involving SOEs. The study highlights the need for stronger legal protection to ensure fair and healthy competition.[13] Additionally, the second study, conducted by Anisah, examines the legal implications of applying the essential facilities doctrine to SOEs. The researchers analyzed various ICC decisions on market dominance by SOEs. The findings indicate that the essential facilities doctrine can serve as an effective tool to mitigate monopoly practices by SOEs. However, its implementation continues to face legal and policy challenges.[14]

These two studies offer new insights into the application of the essential facilities doctrine in Indonesia, particularly in addressing SOE dominance in strategic sectors. Unlike these studies, the present study adopts a broader and more in-depth approach. The research primarily focuses on balancing monopoly and competition by examining how the essential facilities doctrine can be optimally applied to foster a more competitive business environment. This study not only analyzes the juridical aspects of the doctrine but also explores its adaptability in an evolving market at both the national and international levels. Consequently, it offers a new perspective that integrates legal theory with business practice.

This research aims to make a unique contribution through a comprehensive approach that includes case analysis, international comparisons, and concrete policy recommendations. It seeks to provide strategic guidance for policymakers in updating Indonesia's legal framework for business competition. This research is highly relevant given the growing dominance of SOEs in strategic sectors and emerging challenges in the global market. In this context, the essential facilities doctrine plays a crucial role in ensuring fair market access for small and medium-sized enterprises while protecting consumers from monopolistic practices. Additionally, this study addresses monopoly practices in essential facilities.

2. Methods

This study employs a normative legal research method, focusing on the analysis of library materials as secondary data sources. The data includes primary legal materials, such as laws, regulations, jurisprudence, and international documents, as well as secondary legal

[12] Case Decision No. 15/KPPU-L/2018. p. 1.
[13] Nandi Wardhana, "Yuridical Analysis Of Theory Of Theory Of Ethical Facilities Duties Law Competition Competition In Indonesia," *Diponegoro Law Review* 3, no. 2 (October 30, 2018): 257, https://doi.org/10.14710/dilrev.3.2.2018.257-263.
[14] Siti Anisah, "Essential Facilities Doctrines Pada Penguasaan Pasar Oleh Badan Usaha Milik Negara," *Refleksi Hukum: Jurnal Ilmu Hukum* 7, no. 1 (November 15, 2022): 37–62, https://doi.org/10.24246/jrh.2022.v7.i1.p37-62.

materials, including relevant scholarly books and journals.[15] This study employs both a legal principle approach and a case approach to analyze the application of the essential facilities doctrine in Indonesia's business competition law. Methodologically, this research is descriptive, aiming to provide a comprehensive overview of the essential facilities doctrine and its application in the port sector. Utilizing secondary data, this study examines how the ICC determines violations of business competition law and assesses their impact on the port industry. Additionally, it seeks to bridge theory and practice to enhance understanding of the essential EFD. This study employs a qualitative method for data analysis, allowing for an in-depth exploration of the data to derive objective conclusions.[16] The conclusions are drawn using deductive reasoning, beginning with a general examination of the essential facilities concept and subsequently narrowing the focus to its application in business competition law within the port sector. Accordingly, this research is expected to contribute to the development of more effective business competition policies aligned with the principles of economic justice.

3. Results and Discussion

3.1. Concept and Understanding of the Essential Facilities Doctrine

The concept of essential facilities in business competition law refers to the infrastructure or important resources controlled by the dominant business actors in a market.[17] These facilities, such as transportation terminals, telecommunications networks, or software access rights, are a key prerequisite for competitors to compete effectively in the relevant market. If access to these facilities is denied, other business actors will find it difficult to compete, creating inequality and the potential for abuse of dominant positions. However, the discussion of essential facilities is not enough to stop at the descriptive aspect. Philosophically, this doctrine has a strong foundation in the theory of distributive justice, as put forward by John Rawls.[18]

According to Rawls, justice demands that every individual has an equal opportunity to access economic resources. When essential facilities are only controlled by a handful of business actors, economic opportunities become uneven, and healthy competition is hampered.[19] In this context, regulations that require owners of essential facilities to open access to their competitors are an effort to realize market fairness and ensure that every business

[15] Ahmad Sabirin and Raafid Haidar Herfian, "Keterlambatan Pelaporan Pengambilalihan Saham Perusahaan Dalam Sistem Post Merger Notification Menurut Undang-Undang Persaingan Usaha Di Indonesia," *Jurnal Persaingan Usaha* 1, no. 2 (December 31, 2021): 55–63, https://doi.org/10.55869/kppu.v2i.25.

[16] Setiyono Setiyono et al., "Has Indonesia Safeguarded Traditional Cultural Expressions?," *Jambura Law Review* 6, no. 2 (July 22, 2024): 206–39, https://doi.org/10.33756/jlr.v6i2.24106.

[17] Tessana Pridia Paramitha, "Essential Facilities Doctrine in Limiting Market Domination: (Analysis of Decision No. 02/ICCU-I/2013)," *Culture: Journal of Law, Social, and Humanities* 2, no. 4 (2024): 204–11, https://jurnal.kolibi.org/index.php/kultura/article/view/1250.

[18] Rok Dacar, "The" Objective Test" and the Downstream Market Presence Requirement in Big Data Access Cases under the Essential Facilities Doctrine-A Critical Assessment," *Masaryk UJL & Tech.* 18 (2024): 63, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/mujlt18&section=7.

[19] Luis Cabral et al., "The EU Digital Markets Act: A Report from a Panel of Economic Experts," *Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., and Van Alstyne, M., The EU Digital Markets Act, Publications Office of the European Union, Luxembourg*, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3783436.

actor, including small and new ones, has an equal opportunity to grow.[20] From an economic point of view, the implementation of EFD must also consider market efficiency. Facility sharing obligations can improve Pareto efficiency if such access encourages competition and innovation without significantly harming facility owners.

However, keep in mind that overly strict regulations can also reduce incentives for dominant business actors to invest in new infrastructure development. Therefore, the EFD principle should be applied proportionately, taking into account the economic feasibility and long-term interests of the market.[21] In practice, the implementation of EFD requires the existence of two separate markets, namely the upstream market (where essential facilities are located) and the downstream market (where products or services are marketed). The facility must also be completely unreasonably duplicable by competitors for technical, cost, or regulatory reasons.[22] In addition, the access provided must be on reasonable and transparent terms, so as not to create a disproportionate burden on facility owners.

A facility can be considered 'essential' if it is crucial for sustaining competition in the same market but is controlled by dominant business actors with monopoly power. Essential facilities are closely related to monopolistic entities that own resources vital for other businesses to operate. Competitors often depend on these facilities due to the lack of viable alternatives and the prohibitive costs of developing equivalent facilities.[23] According to Abbott B. Lipsky Jr. and J. Gregory Sidak, the EFD consists of two key elements.[24] *First*, "essential" refers to the level of uniqueness and market dominance it grants, as well as the inability of competitors to replicate it. EFD applies only to facilities without viable alternatives. *Second*, the term "facility" means a physical structure integrated with large capital assets or its uniqueness that provides monopoly power and certain market control.

The EFD was established through the United States (hereinafter referred to as US) Supreme Court decision addressing cases where dominant business actors refused competitors access to critical market facilities.[25] These rulings affirmed that monopolists cannot deny competitors access to essential infrastructure necessary for competition. While

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[20] Dian Parluhutan, Satya Arinanto, and Velentina Napitupulu, "The Green Economy and Decentralization of Natural Resources Management (DNRM) Policy in Indonesia under the International Law Framework: Quo Vadis?," *IOP Conference Series: Earth and Environmental Science* 1111, no. 1 (December 1, 2022): 012087, https://doi.org/10.1088/1755-1315/1111/1/012087.

[21] Brian A Facey and Dany H Assaf, "Monopolization and Abuse of Dominance in Canada, the United States, and the European Union: A Survey," in *Dominance and Monopolization* (Routledge, 2017), 3–82, https://www.taylorfrancis.com/chapters/edit/10.4324/9781315257433-1/monopolization-abuse-dominance-canada-united-states-european-union-brian-facey-dany-assaf.

[22] Andi Fahmi Lubis, "The Law of Business Competition Between Text and Context," 2009.

[23] Inge Graef, *EU Competition Law, Data Protection and Online Platforms: Data as Essential Facility: Data as Essential Facility* (Kluwer Law International BV, 2016), https://books.google.com/books?hl=id&lr=&id=aIyWDwAAQBAJ&oi=fnd&pg=PP13&dq=+Inge+Graef,+EU+Competition+Law,+Data+Protection+and+Online+Platforms:+Data+as+Essential+Facility:+Data+as+Essential+Facility+(Kluwer+Law+International+BV,+2016).&ots=HXwt-xdqPd&si.

[24] Carmelo Cennamo, "Competing in Digital Markets: A Platform-Based Perspective," *Academy of Management Perspectives* 35, no. 2 (May 2021): 265–91, https://doi.org/10.5465/amp.2016.0048.

[25] Kurnia et al., "The Concept of Essential Facilities in the Efficiency of Industrial Natural Resources," ed. D. Chalil et al., *E3S Web of Conferences* 52 (August 27, 2018): 00022, https://doi.org/10.1051/e3sconf/20185200022.

the Supreme Court initially provided no clear and detailed opinion on EFD, precedents from similar cases shaped its legal interpretation. A notable example is MCI Communications Corp vs. American Telephone & Telegraph Co. (AT&T) in 1983, where AT&T, a leading provider of local telecommunications networks, denied MCI access to its facilities, restricting market entry. The US court ruled that 1) AT&T had full control over the local telecommunications network services required by MCI; 2) Based on the existing technology, local telecommunication network services were considered a natural monopoly, and MCI lacked both the financial capacity and government authorization to duplicate such services; 3) Jury evidence confirmed that AT&T denied MCI access to these critical facilities; 4) Both technically and economically, AT&T should have provided network services with local telephone companies to MCI. AT&T's refusal was deemed monopolistic under Section 2 of the Sherman Act.[26]

The potential for dominant business actors who have monopoly rights to exploit their profits by restricting competitors' access to essential facilities is a central issue in business competition law. Denying access to these essential facilities is considered a violation of the law when used to maintain market control. In this context, the doctrine of essential facilities (EFD) becomes very relevant. This doctrine requires dominant business actors to provide access to facilities that cannot be reasonably replicated by competitors and are indispensable for the creation of effective competition in the relevant market. Based on the case in the United States, particularly the Seventh Circuit Court decision, there are four main elements to determine liability under EFD, namely: (1) control of essential facilities by monopolistic business actors; (2) the inability of competitors to practically or reasonably duplicate such facilities; (3) denial of access by dominant business actors; and (4) the feasibility for dominant business actors to provide access to competitors.

The assessment of the control of essential facilities by monopolistic business actors was first tested in the case of the Railroad Terminal Association vs. United States in 1912. In this case, the U.S. Supreme Court ruled that an agreement between the fourteen railroad companies that made up the Saint Louis Railway Terminal Association, which aimed to combine railroad terminals to build an integrated rail system across the Mississippi River, was a violation of antitrust laws because it closed competitors' access to facilities that were critical to competition in the transportation market. Thus, the doctrine of essential facilities serves as a legal instrument to prevent the abuse of dominant positions that can hinder competition and innovation, as well as to ensure fair access to critical infrastructure in the market.[27]

In the case of the Terminal Railroad Association of St. Louis, the agreement made by the association was detrimental to competing railroad companies that did not participate, as they were prohibited from accessing railroad bridges in Saint Louis.[28] This ban prevented competitors from offering rail service across the Mississippi River, while geographical

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[26] David M Podell, "The Evolution of the Essential Facilities Doctrine and Its Application to the Deregulation of the Natural Gas Industry," *Tulsa LJ* 24 (1988): 605.
[27] Geoffrey H Doughty, Jeffrey T Darbee, and Eugene E Harmon, *Amtrak, America's Railroad: Transportation's Orphan and Its Struggle for Survival* (Indiana University Press, 2021).
[28] Joel P Rhodes, *A Missouri Railroad Pioneer: The Life of Louis Houck*, vol. 1 (University of Missouri Press, 2017).

constraints made the construction of an integrated alternative rail system in the region impractical. The United States Supreme Court ruled that the Terminal Railroad Association had exclusive control of the essential facilities of the railroad bridge and terminal in Saint Louis, which was the only railroad line across the Mississippi River. This control was considered to violate Article 1 of the Sherman Act because the association refused to provide access to competitors, thereby hindering healthy competition.[29]

Therefore, the law requires associations to provide access at a reasonable price in order to maintain fair competition in rail services. Legally, control of these essential facilities encompasses three dimensions: juridical control (legal ownership and licensing rights over facilities), economic control (the ability to regulate access and set prices), and physical control (physical control over infrastructure that cannot be replaced). The first element in the EFD doctrine emphasizes that control over such facilities must be significant and exclusive so that competitors cannot access them without the owner's permission. The second element has to do with the absence of viable alternatives.[30]

In this context, competitors cannot afford to duplicate facilities due to very high costs or limited market resources. An objective assessment of the absence of these alternatives must take into account technical and economic factors, such as the magnitude of marginal costs and investment barriers. In the case of Saint Louis, building an alternative bridge was considered uneconomical and technically impossible, so access to existing facilities became the only way to enter the market. The third element is denial of access which can take various forms, ranging from changes in service conditions, price manipulation, to outright denial. This rejection not only harms competitors economically but also creates market inefficiencies and consumer losses.[31]

From a competition law perspective, an unwarranted denial of access is an abuse of a prohibited dominant position. The fourth element questions the technical and economic feasibility of providing access. Although monopolistic companies have the freedom to choose their business partners, the obligation to provide access is not absolute if it interferes with the company's ability to serve consumers effectively. The principles of allocative efficiency and marginal cost are important parameters in determining whether access can be mandated without causing disproportionate harm to facility owners.

In other words, regulations must strike a balance between the interests of encouraging competition and maintaining investment incentives for facility owners. The four elements of EFD are not just factual criteria, but legal norms that must be interpreted contextually based on the principles of justice, market efficiency, and consumer protection. This approach ensures

[29] Dominik Vuletić, "Excessive Pricing In European Union Competition Law And Comparative Context: Towards Stronger Regulation Or Abandonment?," *SSRN Electronic Journal*, 2024, https://doi.org/10.2139/ssrn.4883366.
[30] Sebastian Krakowski, Johannes Luger, and Sebastian Raisch, "Artificial Intelligence and the Changing Sources of Competitive Advantage," *Strategic Management Journal* 44, no. 6 (June 16, 2023): 1425–52, https://doi.org/10.1002/smj.3387.
[31] Lucas Liang Wang and Yan Gao, "Competition Network as a Source of Competitive Advantage: The Dynamic Capability Perspective and Evidence from China," *Long Range Planning* 54, no. 2 (April 2021): 102052, https://doi.org/10.1016/j.lrp.2020.102052.

that the regulation of essential facilities not only prevents the abuse of market power but also considers the long-term economic impact on innovation and investment.

Initially implemented in the U.S., the Antitrust Law (AM) and the EFD have since been adopted in various jurisdictions, including the European Union (hereinafter referred to as EU). The Court of Justice of the EU has ruled that denying a competitor access to essential facilities constitutes an abuse of a dominant position under Article 82 of the Treaty Establishing the European Community (EC Treaty). The development of EFD is also reflected in Article 102 of the Treaty on the Functioning of the European Union (hereinafter referred to as TFEU**)** regarding the abuse of market dominance, including unfair pricing.[32]

The EU's approach to EFD focuses on promoting healthy business competition by emphasizing the obligation of dominant market players to provide access to essential facilities rather than solely considering ownership. The EU suggests that this interconnection responsibility should apply to businesses with significant market influence, typically those holding more than 25% of the market share.[33] The application of EFD in the EU is evident in several cases, including:

1. Commercial Solvents Corporation (CSC) vs Zoja

This case occurred in 1974 and became the initial development of EFD. Commercial Solvents was a dominant business actor in the chemical exports industry, while Zoja had been sourcing chemicals from CSC since 1966. In the early 1970s, a dispute arose when Zoja canceled a huge amount of chemical raw materials. The cancellation was unilateral and made without mutual agreement, causing losses to CSC. At the end of 1970, Zoja attempted to place another order, but CSC refused to supply the required chemical raw materials. This case became the first instance of refusal to export reviewed by the European Court of Justice. Although the ruling did not explicitly explain EFD, it established a key principle: denying access to essential raw materials, such as the chemicals controlled by CSC, can lead to unfair business competition.

2. Sea Containers vs Stena Sealink

This case occurred in 1993 for the first time in an EU court decision to use the term 'essential facilities.' Stena Sealink is a business actor that owns and operates a Port in Holyhead, Wales. The problem in this case is Stena Sealink's rejection of the Sea Containers development plan and the closure of port access for the project. Sea Containers sued him to the Court of Justice of the EU because, according to him, Stena Sealink owns and operates an important 'essential' facility, namely the port, so the denial of Stena Sealink's access is unfair and results in losses due to the squeeze of business competition in the ferry service market. The Commission at the Court of Justice of the EU ruled that a dominant business actor controlling essential infrastructure must provide competitors with access to offer their services. Consequently, the Commission ordered Stena Sealink to provide access to its

[32] Kristen O'Shaughnessy et al., "Big Data, Little Chance of Success: Why Precedent Does Not Support Anti-Data Theories of Harm," *Competition Policy International, July* 1 (2022): 22–30, https://ssrn.com/abstract=4166078.

[33] A E Rodriguez and Ashok Menon, "The Causes of Competition Agency Ineffectiveness in Developing Countries," *Law & Contemp. Probs.* 79 (2016): 37, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/lcp79&section=47.

competitor, Sea Containers. The Commission emphasized that if business actors controlling essential facilities deny competitors access without objective justification or impose less favorable conditions than those applied to their services, it violates Article 86 of the Treaty Establishing the European Community (TEC) on the abuse of a dominant position. In this case, the application of EFD assesses the behavior of business actors controlling essential facilities.

3. Oscar Bronner GmbH&co vs. Mediaprint Zeitungs-undZeitschriftenverlag GmbH&co

In 1998, the Court of Justice of the EU clarified the application of EFD in this case. Mediaprint, a major Austrian newspaper publisher with a 46.8% market share, had established an extensive and cost-effective distribution network. However, it refused to grant access to its competitor, Oscar Bronner, a small Austrian daily newspaper publisher, for distributing the national morning newspaper. Mediaprint has facilities to build a distribution network for customers on a large scale and make it affordable. The problem is that Mediaprint refuses to give its competitor, Oscar Bronner, access to the distribution network to deliver the national morning newspaper. Mediaprint justified its refusal by stating that its distribution network was developed through significant investment. For this refusal, Oscar Bronner filed a lawsuit with the Court of Justice of the EU. He stated that Mediaprint must provide access to its distribution network due to its large market share and that denying access includes abuse of a dominant position in the newspaper distribution market, violating Article 102 of the TFEU. According to him, Mediaprint should provide access to competitors in the downstream market unless denying access can be objectively justified. Furthermore, Oscar Bronner emphasized that Mediaprint's distribution network constituted an essential facility, making access crucial for his business. He argued that financial constraints and the limited circulation of his newspapers prevented him from establishing his distribution network or delivery service, leaving no alternative to get access from Mediaprint to enter the newspaper distribution market.[34]

The Court of Justice of the EU ruled that a facility can be considered essential only if it is necessary and cannot be replicated and/or duplicated by competitors. Additionally, the denial of access to such a facility can be considered essential; it will result in a loss of competition in the market in question. The court rejected Oscar Bronner's argument, as the commission's observation indicated that Mediaprint was not the only provider of newspaper distribution facilities.[35] With a market share of 46.8%, Mediaprint was not the most dominant business actor, meaning alternative distribution providers were available. Based on these observations, the Court of Justice of the EU ruled that Mediaprint's services were not the only distribution option and that no technical or economic barriers prevented competitors from entering the market. Therefore, Mediaprint's actions did not constitute an abuse of a dominant position.[36]

Based on the case, it can be concluded that Oscar Bronner misunderstood the application of EFD. He limited its scope to the ownership of facilities, assuming that possession alone

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[34] Suwinto Johan, "Independent Commissioners: How Independent?," *Jhbbc*, June 12, 2024, 135–42, https://doi.org/10.30996/jhbbc.v7i2.10895.

[35] Abdul Risal, "Legal Protection for Debtors in Online Transactions: Evaluating Safeguards in E-Commerce," *Jhbbc*, August 23, 2024, 176–87, https://doi.org/10.30996/jhbbc.v7i2.11656.

[36] James Turney, "Defining the Limits of the EU Essential Facilities Doctrine on Intellectual Property Rights: The Primacy of Securing Optimal Innovation," *Nw. J. Tech. & Intell. Prop.* 3 (2004): 179, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/nwteintp3&section=15.

conferred a higher level of dominance. This misinterpretation serves as a lesson for the Commission to resolve the next cases, as the denial of access to certain facilities does not automatically constitute an abuse of dominant position. Instead, it must be observed first whether other business actors provide similar essential facilities and whether competitors face insurmountable barriers to duplicating them.

The above cases contributed to the development of the doctrine of essential facilities in the EU, as recognized by the Court of Justice of the EU. According to OECD records, the impact of EFD on competition in the EU depends on three factors: (1) whether consumers have alternative sources for the goods or services; (2) whether competitors exist in other downstream markets; and (3) the overall importance of the goods or services to consumers. These three factors determine whether regulatory intervention is necessary. If consumers have adequate alternatives, the goods or services obtained are not important, or the presence of an additional competitor does not significantly increase competition, antitrust law does not obligate dominant business actors to provide access to certain facilities. On the other hand, if denying access to essential facilities by dominant actors harms competition, forcing competitors out of the market, then the AM law requires these actors to provide access to ensure fair and healthy competition. In the EU, the implementation of EFD considers access to certain facilities as 'essential.' Denying such access can weaken business competition, reduce the number of competitors, and hinder business operations within the same market. Therefore, ensuring access to essential facilities is crucial for maintaining a competitive and balanced market environment.

In Indonesia, the concept of the EFD began to be known and regulated implicitly in Article 19 of Law Number 5/1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, which prohibits market domination that creates barriers to entry and limits competition. The development of the implementation of EFD in Indonesia can be seen from several decisions by the Business Competition Supervisory Commission (ICC), which uses this doctrine to limit market control by SOEs and other business actors who control important facilities.[37]

For example, in ICC Decision No. 02/ICC-I/2013, ICC emphasized that PT Pelabuhan Indonesia II, which controls loading and unloading services at Teluk Bayur Port, is obliged to provide access to competitors so that business competition remains healthy. However, there are dynamics and ambiguities in the implementation of EFD, especially related to the role of SOEs. In some cases, ICC does not justify monopolistic market dominance based on EFD, while in other cases, the justification for dominance is based on Article 33 of the 1945 Constitution, which regulates monopoly by the state (monopoly based on law).[38]

This condition gives rise to a duality of legal logic that is interesting to criticize: on the one hand, there is a prohibition on the abuse of dominant positions in business competition, but on the other hand, there is the legitimacy of the monopoly given to SOEs through

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[37]Anna Maria Tri Anggraini, "The Use of Economic Evidence in Cartels Based on Business Competition Law," *Journal of Prioris Law* 3, no. 3 (2013): 1–25.

[38]Anna Maria Tri Anggraini, "The Application of a Post-Merger Notification System for the Takeover of Company Shares Based on Business Competition Law," *Law Pro Justitia* 1, no. 1 (2015), https://doi.org/https://ejournal-medan.uph.edu/index.php/LPJ/article/view/227/0.

constitutional foundations. The important question that arises is whether the use of Article 33 of the 1945 Constitution as the basis for justifying monopoly practices by SOEs can legally exempt the entity from the obligation to comply with the principles of healthy and fair business competition. Furthermore, although EFD has not been explicitly listed in Law No. 5/1999, this doctrine is implicitly related to the actions of business actors who have monopoly power, which allows them to limit or eliminate competition through price control and market access.[39]

The abuse of monopoly power is prohibited under Article 17 of the Law, which regulates the prohibition of monopolies and monopolistic practices that are detrimental to business competition. Cases involving essential facilities show that ownership of critical facilities is not only limited to the private sector, but is also often under state control through state-owned enterprises, which in fact have monopoly power and have the potential to create barriers to entry for competitors seeking to access those facilities. These barriers usually arise from two main factors: exclusive control over facilities that cannot be easily duplicated, and non-transparent or unreasonable access terms.[40] These barriers typically arise from two factors:

1. Technical Barriers

Business actors who possess monopoly power due to their capabilities are considered natural monopolists. Essential facilities pertain to infrastructure, particularly public utilities, which fall under natural monopolies. Economically, the development of such infrastructure entails substantial costs, making it inefficient and challenging for competitors to replicate. Business actors capable of building infrastructure are considered natural monopolies, granting them control over essential facilities.

2. Juridical Obstacles

Business actors may acquire monopoly power through regulatory mandates. The classification of infrastructure as an essential facility is determined by government involvement, either as an owner or a regulator of the industry. Regulatory directives grant business actors the right to control and manage specific industries.

3.2. SOE Monopoly According to the Provisions of Article 51 of Law No. 5/1999 and Commission Regulation No. 3/2010

1. Provisions of Article 51 of the Law No. 5/1999

Article 51 of Law Number 5 of 1999 provides an exception to the prohibition of monopolistic practices and/or concentration of economic activities if carried out by SOEs or institutions formed and/or appointed by the government, as long as the activities are "regulated by law", "controlled by the state", and "related to the livelihood of the people". However, this provision cannot be interpreted as granting absolute immunity, but must be interpreted strictly and narrowly, so as to remain in line with the principles of economic democracy as mandated in Article 33 of the 1945 Constitution.[41]

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[39]Commission Regulation of ICC No. 11 of 2011 concerning Guidelines for Article 17 (Monopoly Practices) Law No. 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, p. 10.

[40]Suyud Margono, *Anti-Monopoly Law* (Jakarta: Sinar Grafika, 2018), p. 107.

[41]Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, Article 51.

From the perspective of textual and systematic analysis, each element in Article 51 needs to be interpreted carefully. First, the phrase "regulated in law" requires that monopolies by SOEs are only valid if they have a legal basis in the form of a law, not just an implementing regulation or administrative decree. Second, the phrase "controlled by the state" as affirmed in the Constitutional Court Decision Number 001-021-022/PUU-I/2003, does not necessarily mean direct ownership, but also includes the functions of regulation, supervision, and public policy by the state. Third, the criterion "related to the livelihood of the people" must be tested proportionately, namely only sectors that are truly strategic, irreplaceable, and concern the basic needs of the public can be justified in a limited manner.

The potential for abuse of Article 51 is very real if these elements are not strictly applied. This can be seen in ICC Decision No. 12/ICC-I/2014 and No. 15/ICC-L/2018, where PT Pelindo, as a state-owned enterprise, is proven to limit the access of other business actors to port facilities, which are essential facilities. In Decision No. 15/ICC-L/2018, ICC stated that Pelindo III violated Article 17 paragraphs (1) and (2) because the terminal service restructuring policy had an impact on increasing costs and limited market access, which led to unfair business competition. This case shows that the monopoly authority given to SOEs must still be supervised and subject to the principle of healthy competition.[42]

The principle of economic democracy in Article 33 of the 1945 Constitution also cannot be used as an absolute justification for monopoly by SOEs. Instead, this principle serves as a constitutional boundary. In the Constitutional Court Decision No. 001-021-022/PUU-I/2003, the Court emphasized that state control of important branches of production must be carried out for the greatest possible prosperity of the people, while upholding efficiency, social justice, and transparency. Therefore, any form of state monopoly must be tested based on the principles of economic efficiency and distributive justice. The statement that "delegated authority should not be monopolized entirely by other parties" is not just a normative conclusion of the author, but refers to the doctrine of administrative law, especially the principle of limitation in the delegation of public authority. Within the framework of the general principles of good governance, any delegation of power by the state to SOEs must be limited, supervised, and accountable. This is important to prevent regulatory capture and ensure that SOEs do not abuse their legal status to hinder other business actors.

2. Provisions of Commission Regulation No. 3/2010

The ICC has formulated guidelines for Article 51 of Law No. 5/1999, as outlined in Commission Regulation No. 3 of 2010 on Guidelines for the Implementation of Article 51 of Law No. 5/1999. This regulation specifies the elements contained in Article 51, as follows:[43]

a. Monopoly and/or concentration of activities

The definition of monopoly is provided in Article 1, Clause 1 of Law No. 5/1999, which states: "Monopoly refers to the control over the production and/or marketing of specific goods and/or the provision of certain services by a single business actor or a group of business

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[42] Ahmad Sabirin; Anna Mari Tri Anggaini, "Quo Vadis Tokopedia Acquisition by Gojek in the Digital Economy Era?," *Amicus Curiae Journal* 1, no. 2 (2024), https://doi.org/https://doi.org/10.25105/amicus.v1i2.19818.

[43]Commission Regulation No. 3 of 2010 concerning Guidelines for the Implementation of the Provisions of Article 51 of Law No. 5 of 1999, Chapter II.

actors."[44] Based on this definition, monopoly activities essentially reflect a situation in which business actors control specific goods and/or services. This control can occur without necessarily engaging in monopoly practices or restricting business competition. The definition of concentration of activities is provided in Article 1, Clause 3 of Law No. 5/1999, which states: "The concentration of economic activities refers to the actual control of a given market by one or more business actors, enabling them to determine the price of goods and/or services." Based on this definition, the concentration of economic activities reflects a situation in which one or more business actors exert significant control over a given market. This control is demonstrated by their ability to determine market prices without necessarily engaging in monopolistic practices or unfair business competition.

b. Production and/or Marketing of Goods and/or Services

From a legal and systematic interpretative perspective, goods and/or services that significantly impact public life possess three key functions, including (1) Allocation—referring to goods or services derived from state-controlled natural resources, which are optimized to promote public welfare. (2) Distribution—ensuring the availability of essential goods and/or services to meet basic community needs, particularly when market mechanisms fail to provide them at specific times or periods. (3) Stabilization—obligating the provision of goods and/or services related to public interests. In sectors such as defense, security, monetary, and fiscal affairs, the provision of these goods and/or services requires specialized regulation and oversight.

c. Branches of Production Important to the State

The production or provision of goods and/or services is characterized by two key aspects: (1) Strategic referring to branches of production that directly safeguard national defense and security interests; and (2) Financial pertaining to continuous production processes aimed at ensuring monetary stability, tax guarantees, and the stability of the financial services sector, all of which serve the public interest.

d. Regulated by law

Monopoly and/or concentration of activities by the state must first be regulated through legislation. This legal requirement must be fulfilled before any monopolization occurs.

e. Organized by SOEs and/or bodies or institutions established or appointed by the Government

SOEs possess monopoly power and/or concentration of activities only if explicitly regulated by law, which must outline the objectives of such monopoly or concentration, as well as the mechanisms for control and supervision to ensure fair business competition. If SOEs are unable to exercise monopoly control as stipulated in Article 51 of Law No. 5/1999, such control may be delegated to a government-established or appointed body or institution to serve the public interest.

The risk of regulatory capture by SOEs is a serious concern in the context of regulating business competition. Regulatory capture occurs when regulated entities (in this case, SOEs) actually succeed in influencing or dominating regulators so that the policies that are born no longer reflect the public interest, but benefit the already dominant parties. However, to make

[44]Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition, Article 1 number 1.

this argument sharper and not just a normative assumption, it is important to include empirical data or case studies.

One concrete example is ICC Decision No. 15/KPPU-L/2018, where PT Pelindo III, as a state-owned enterprise authorized in port management, restructured terminal services at Maumere Port. This policy increases the cost burden for other business actors and makes it difficult to enter the loading and unloading services market. Although Pelindo formally acts based on a legal mandate, the substance of the policy taken reflects the phenomenon of regulatory capture, which is when the management authority is used to strengthen its dominant position and limit competitors, instead of encouraging efficiency and public services.

In the framework of law and economics, the dual role of SOEs as development agents as well as market participants raises potential conflicts of interest that can disrupt market efficiency. Institutional economic theory explains that when an entity has an incentive to maintain market power without adequate external control, there is allocative inefficiency and an unequal distribution of resources. Therefore, the development function of SOEs cannot be separated from the obligation to submit to the principle of healthy business competition.[45]

Legal and economic approaches encourage the use of cost-benefit analysis instruments as well as Pareto and Kaldor-Hicks efficiency evaluations in assessing SOE policies. For example, infrastructure development by SOEs in the port sector must be assessed not only in terms of achieving development targets, but also in terms of its impact on market structure, barriers to entry, and the ability of small business actors to compete. That way, the state's alignment with SOEs does not mean ignoring the principle of competition, but rather seeking a balance between economic efficiency, social justice, and equal market access. Therefore, in regulating monopolies run by SOEs, the state needs to apply the principles of proportionality and least distortion, which is intervention that minimally disrupts the market mechanism, while still ensuring the protection of the public interest. This mechanism must be supported by independent supervision by ICC, as well as transparency in policy-making related to strategic sectors managed by SOEs.[46]

3.3. The Relevance of the Doctrine of Essential Facilities in Article 33 of the 1945 Constitution of the Republic of Indonesia

The phrase "branches of production that are important for the state and that control the lives of the people are controlled by the state" in Article 33 paragraph (2) of the 1945 Constitution is the constitutional basis for the role of the state in managing strategic sectors. However, this provision cannot be interpreted as an absolute justification for SOEs to monopolize access to essential facilities without supervision. The EFD, which is rooted in competition law, emphasizes that dominant business actors, both private and state, must not be denied reasonable access to infrastructure that is essential for the sustainability of competition.

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[45] Dandan Ning and Hongyang Zhao, “The Influence of Monopoly Capitalism on Economic Globalization,” *Highlights in Business, Economics and Management* 23 (December 29, 2023): 674–80, https://doi.org/10.54097/2q2vt209.

[46] Shenqin Leng, Yue He, and Zuoyi Kang, “The Impact of Corporate Digitalization on Cross-Border Mergers and Acquisitions Performance in Chinese Listed Companies,” ed. J. Xu et al., *E3S Web of Conferences* 409 (August 1, 2023): 05011, https://doi.org/10.1051/e3sconf/202340905011.

The comparison between the phrase "controlling the lives of the people" and the concept of essential facilities is indeed conceptually interesting, but its argumentative power will increase if supported by references to authoritative legal sources. In this regard, instruments such as the Port Services Regulation (EU) 2017/352, the OECD Competition Assessment Toolkit, and the UNCTAD Model Law on Competition need to be explicitly cited. These instruments affirm that the control of essential facilities by the state must still be accompanied by the principles of proportionality, transparency, and protection of business competition.[47]

The constitutional justification for SOE monopolies also needs to be tested through the principle of least restrictive means. This means that state control does not necessarily have to be realized through exclusive operation if there are alternative regulations or access models that can achieve public goals without damaging the competition mechanism. For example, the open access model implemented in Singapore's port sector, which remains under state supervision but provides open access to other operators, can be used as a concrete benchmark for policy reform in Indonesia.[48]

However, it is important to understand that state ownership does not necessarily mean direct state ownership. Constitutional Court rulings, such as Decision No. 001-021-022/PUU-I/2003, affirm that state control includes regulatory, supervisory, and policy functions, without having to have direct ownership of these facilities. Thus, essential facilities can remain in the hands of the private sector, but remain within the framework of state control to ensure fair access and fulfillment of public interests.[49] In this perspective, the management of essential facilities must be tested based on the principle of proportionality and the principle of least restrictive means. This means that state intervention in the control or management of essential facilities must be carried out in the most effective way and minimize limiting market freedom, while ensuring that the goal of meeting public needs is achieved without creating unnecessary monopolies or harming business competition. This principle is important so that state control does not become a monopoly tool that harms the market and consumers. Philosophically and theoretically, the concept of essential facilities can be analyzed through various frameworks of thought. The theory of public service obligation emphasizes that the infrastructure that supports the basic needs of the community must be managed with a service orientation, not purely commercial profit.

Natural monopoly theory explains that some facilities, due to their technical and economic characteristics, are indeed more efficient if they are managed by a single entity to avoid wasting resources due to duplication of infrastructure.[50] However, this monopoly must be balanced with strict regulations so that it is not abused. In the context of constitutional economics, Amartya Sen's thoughts on justice and welfare, as well as Joseph Stiglitz's on

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[47] Antonio Capobianco, "Theories of Harm for Digital Mergers," *Directorate For Financial And Enterprise Affairs Competition CommitteE*, 2023, https://www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm%0D.

[48]The Constitution of the Republic of Indonesia in 1945. Article 33 paragraph (2).

[49] Bagus Hermanto, I Gede Yusa, and Nyoman Mas Aryani, "Constitutional Court of the Republic of Indonesia: Does the Ultra Petita Principle Reflect the Truth of Law?," *Fiat Justisia: Jurnal Ilmu Hukum* 14, no. 3 (May 15, 2020): 261–86, https://doi.org/10.25041/fiatjustisia.v14no3.1902.

[50] Claire S. H. Lim and Ali Yurukoglu, "Dynamic Natural Monopoly Regulation: Time Inconsistency, Moral Hazard, and Political Environments," *Journal of Political Economy* 126, no. 1 (February 2018): 263–312, https://doi.org/10.1086/695474.

market failures, reinforce the argument that the management of essential facilities must uphold the principles of distributive justice and economic efficiency. Lawrence Lessig also highlighted the importance of transparent and accountable infrastructure governance in maintaining a balance between public and private interests.[51] The similarities and distinctions between the concept of essential facilities and the phrase "the life of the people" are outlined in the following table:

Table 1: Similarities and Differences in the Concept of EFD: The Phrase The Wish of the Many.

EQUATION	
1) It is an important need needed by the community to support daily activities and the sustainability of running business activities. 2) It must be available and accessible to the public because its existence is urgently needed 3) As a result, denial of access can harm many people and hinder the country's economic activities.	
DIFFERENCE	
Essential Facility Concept	"Mastering the lives of the people"
It lies like the need	
It requires infrastructure development that is needed by many people.	It does not require development because it includes the fulfillment of basic needs that are directly consumed by the community.
It lies in the aspect of mastery	
It can be controlled by the state or private parties, depending on the business actors who build and provide essential facilities.	Fully controlled by the state under the mandate of Article 33 of the 1945 Constitution of the Republic of Indonesia

Source: *OECD Competition Assessment Toolkit, UNCTAD Model Law on Competition, and Article 33 of the 1945 Constitution of the Republic of Indonesia*.

The description above illustrates that essential facilities are integral to strategic production sectors and directly contribute to meeting the community's basic needs. The branches of production vital to the state not only support the national economy but also ensure the fulfillment of people's livelihoods. Essential facilities are integral to strategic production sectors, as they remain essential to the community regardless of changing times. These production branches include highways, railways, electricity, ports, telecommunications, and irrigation networks, as essential facilities serve as the primary connectors and support systems for community activities.

Limited access to essential facilities not only disrupts the industrial sector but also directly affects the community as the end consumer. Denying such access creates significant barriers that can harm multiple parties, including competing businesses and the public. Essential facilities serve the needs of many people due to the community's reliance on them for accessibility. For example, trains serve as a vital mode of transportation, connecting

[51] Wahiduddin Mahmud, *Markets, Morals and Development: Rethinking Economics from a Developing Country Perspective* (Routledge India, 2021).

regions, facilitating mobility, and supporting the efficient distribution of essential goods. Railway infrastructure plays a crucial role in ensuring timely and efficient delivery, particularly to areas that are difficult to access by other means of transportation. The strategic role of railways is exemplified in Terminal Railroad Ass'n v. US, which underscores the importance of equitable management of transportation infrastructure and ensuring equal access for all stakeholders.

The existence and accessibility of essential facilities serve as key indicators of a strategic production branch that significantly impacts public life. Proper management of these facilities requires the development of high-quality infrastructure, sustainable maintenance, and guaranteed public access. Proper management of essential facilities requires careful technical planning and policies that prioritize the public interest.

State involvement is crucial in ensuring that essential facilities meet community needs, aligning with the phrase "controlled by the state" as affirmed in Article 33, paragraph (2) of the 1945 Constitution of the Republic of Indonesia. The phrase's meaning remains intact if essential facilities are recognized as a crucial branch of state production, directly linked to fulfilling public needs. These facilities must be state-controlled in both ownership and management to ensure the community's interests are safeguarded.

State control mandates full authority to regulate, supervise, maintain, and utilize essential facilities for public benefit. Regulation entails the state's role in formulating policies to ensure essential facilities are managed efficiently, fairly, and equitably, allowing universal access and utilization. Supervision involves the state's active role in monitoring and preventing potential harms to the community, ensuring essential facilities remain under state control. The state is responsible for maintaining essential facilities to ensure their functional sustainability in both the short and long term. Their use must maximize public welfare by ensuring affordable service rates, equal access to remote areas, and improved service quality. The state plays a crucial role in managing essential facilities to safeguard community interests.

3.4. The Doctrine of Essential Facilities from the Perspective of Law No. 5/1999

Although the EFD has strong relevance in the context of the control of strategic infrastructure by dominant business actors, until now, Indonesia has not had an explicit regulation regarding EFD in Law No. 5/1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition. The absence of such regulation raises a number of legal implications that deserve critical attention.[52][53] First, the legal loophole due to the absence of explicit recognition of EFD in Law No. 5/1999 opens up space for the phenomenon of regulatory arbitration. In this situation, dominant business actors, especially SOEs, can take advantage of the indecisiveness of legal norms to deny competitors access to important facilities under the pretext of internal efficiency or ownership rights, without any clear standard to assess the reasonableness of such refusals. As a result, the potential for abuse of

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[52] Douglas J Whaley and Christopher G Bradley, *Problems and Materials on Debtor and Creditor Law* (Aspen Publishing, 2021), https://books.google.com/books?hl=id&lr=&id=m_1TEAAAQBAJ&oi=fnd&pg=PR19&dq=,2021++the+Creditor+must+give+60+days+to+the+Debtor+to+seek+to+repay+the+debt,+while+in+the+current+bankruptcy+law,+such+a+thing+does+not+happen+again&ots=trHIIk17ME&sig=gBw2xQlB7Z.

[53] Gregory Day, "The Necessity in Antitrust Law," *Wash. & Lee L. Rev.* 78 (2021): 1289, https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/waslee78&section=36.

dominant positions is increasing, and the effectiveness of law enforcement by the Business ICC has become weak due to the absence of a definite legal basis.[54]

Second, the potential for the implementation of EFD is closely related to Article 25 paragraph (1) letters a and b of Law No. 5/1999, which prohibits dominant business actors from engaging in practices that are detrimental to competitors, such as refusing or inhibiting certain business actors from carrying out the same business activities. Unfortunately, this normative relationship has not been studied in depth in Indonesian legal discourse. The practice of refusal to deal and the imposition of unreasonable conditions on access to critical facilities are classic forms of abuse of dominant positions, which in international practice are regulated within the framework of the EFD.[55]

The potential for the implementation of EFD is closely related to Article 25 paragraph (1) letters a and b of Law No. 5/1999, which prohibits dominant business actors from engaging in practices that are detrimental to competitors, such as refusing or inhibiting certain business actors to carrying out the same business activities. But unfortunately, this normative relationship has not been studied in depth in Indonesian legal discourse. The practice of refusal to deal and the imposition of unreasonable conditions on access to critical facilities are classic forms of abuse of dominant positions, which in international practice are regulated within the framework of the EFD. Third, in the context of strategic industries such as energy, telecommunications, and transportation, the urgency of EFD is increasingly evident. For example, the mobile telecommunications sector was once dominated by large operators who controlled access to network infrastructure and towers, while small competitors struggled to get in because they were not given equal access. In the energy sector, large companies that control electricity transmission networks or gas terminals often withhold access to third parties. Similarly, in the port transportation sector, the PELINDO case in ICC Decision No. 15/ICC-L/2018 shows how service restructuring by SOEs can increase entry costs and limit competitors systemically. Fourth, from an institutional perspective, ICC's role in implementing EFD without an explicit legal basis has also not been comprehensively discussed.

This raises serious questions about the feasibility and enforceability of the doctrine. Without explicit legitimacy in the law, ICC's implementation of EFD can be debated in judicial forums, including the Supreme Court. Therefore, strengthening the legal basis of EFD through the revision or progressive interpretation of Article 25 is crucial to support the legitimacy of the ICC's actions in dealing with dominant business actors. In some ICC rulings, the principles of EFD have actually begun to be adopted implicitly. For example, in ICC Decision No. 02/ICC-I/2013, ICC emphasized that PT Pelabuhan Indonesia II is obliged to provide access to loading and unloading services to other business actors.

Although it does not explicitly mention EFD, its arguments and rulings are consistent with the key elements of this doctrine, namely control over essential facilities, competitor dependence, and the obligation to provide reasonable access. Therefore, Indonesia's business

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[54] OCDE Competition Committee, "The Essential Facilities Concept," *OCDE Policy*, 1996.

[55] Łucja Biel, Agnieszka Biernacka, and Anna Jopek-Bosiacka, "The Glossary of EU English Competition Collocations and Terms," *Language and Law: The Role of Language and Translation in EU Competition Law*, 2018, 275–324, https://link.springer.com/chapter/10.1007/978-3-319-90905-9_15.

competition law reform needs to explicitly adopt EFD as an enforceable legal norm. This is not only important to clarify ICC's legal position, but also to prevent excesses of monopoly that are detrimental to the public, especially in sectors with characteristics of high barriers to entry and irreplaceable infrastructure. Thus, EFD is not only a normative tool to guarantee access, but also an instrument of economic justice in the context of a fair market democracy.[56]

3.5. Limitations of the Doctrine of Essential Facilities in Business Competition Law

The EFD is closely related to the concept of natural monopoly, where business actors can manage the industry more efficiently to ensure business sustainability. Business actors who control essential facilities hold a dominant position in the market structure, allowing both private and state entities to manage those facilities. However, this control must be subject to the limits set by the EFD to prevent abuse of dominant positions.[57] In Indonesia, EFD is closely related to monopoly management carried out by SOEs. This doctrine requires SOEs as owners of essential facilities to provide access to competitors, including private business actors and other parties who need these facilities. As discussed, EFD has an important role in ensuring public welfare through the management of essential facilities that are exclusively controlled by SOEs as an extension of the state. This doctrine aims to ensure that people have access to services and facilities at affordable prices.

The management of essential facilities by SOEs reflects a legally granted monopoly, which aims to oversee strategic resources and vital infrastructure that have a direct impact on public welfare. The monopoly power owned by SOEs is not only based on Article 33 paragraph (2) of the 1945 Constitution, but is also regulated in various laws and regulations that regulate the management of essential facilities, including sectoral regulations. Law Number 5/1999, as the main legal framework that regulates business competition and monopoly practices in Indonesia, also recognizes the exclusion of state monopolies through SOEs in the control of the strategic industrial sector. This is explicitly stated in Article 51 of Law No. 5/1999, which states that the monopoly and/or concentration of activities related to the production and/or marketing of goods and/or services that affect the lives of the public and the strategic production sector is regulated by law and managed by SOEs and/or government-appointed bodies.[58]

However, a critical analysis is needed to assess the extent to which Article 51 of Law No. 5/1999 is in line with the principles of justice in the free market and its constitutionality within the framework of Article 33 of the 1945 Constitution after the amendment. In the context of competition law, the rule of reason approach is more appropriately applied than the per se illegality approach to assess the monopoly granted by the state. This means that SOE monopolies must be evaluated based on economic impact and fair competition, not automatically considered legitimate without testing. Constitutional harmonization requires

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[56]Law No. 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition. Article 2.

[57] Dandi Jayusman and Reni Budi Setianingrum, "Group Company Problematics: The Form and Potential of Monopolistic Practices and Unfair Business Competition," *Media of Law and Sharia* 4, no. 2 (March 17, 2023): 130–52, https://doi.org/10.18196/mls.v4i2.7.

[58] Anna Ernst and Doris Fuchs, "Power Dynamics, Shifting Roles, and Learning: Exploring Key Actors in Participation Processes in the German Energy Transformation (Energiewende)," *Energy Research & Social Science* 85 (March 2022): 102420, https://doi.org/10.1016/j.erss.2021.102420.

that competition laws do not conflict with the constitutional mandate, but rather are interpreted as an instrument to realize public welfare through healthy competition.

Even though SOEs are given a legal monopoly, this does not mean that they are free from the obligation not to abuse dominant positions. The principle of fair access in the doctrine of essential facilities requires an objective justification for refusal to deal. In practice, the assessment of "reasonable terms" includes testing rates, calculating fair profit margins, and evaluating facility capacity. For example, the ICC in several of its rulings has tried to set limits on access to essential facilities to prevent the abuse of monopolies by SOEs and other dominant business actors. This approach reflects efforts to adopt the principles of EFD into the Indonesian competition law system in a contextual manner.

There is a normative tension between the legal monopoly owned by SOEs and the prohibition of anti-competitive practices in Law No. 5/1999. The key question is the extent to which such legal monopolies can be excluded from ICC's supervision. The constitutional protection in Article 33 of the 1945 Constitution should not automatically be a justification for unlimited monopolies, but rather be the basis for developing a framework for healthy and fair competition for the welfare of the community. The doctrine of proportionality in constitutional law can be a tool to balance the interests of the state in managing strategic sectors with the need to maintain healthy business competition. From a legal and economic perspective, monopoly practices by SOEs also have macroeconomic and distributive justice implications. Denying access to essential facilities can cause social costs in the form of restrictions on consumer choices, higher prices, and barriers to innovation. This is contrary to the purpose of Article 33 of the 1945 Constitution, which places social justice as the foundation of national resource management.[59]

The role of SOEs is implemented through business activities across nearly all economic sectors, including agriculture, fisheries, plantations, forestry, manufacturing, mining, finance, postal and telecommunications services, transportation, electricity, industry and trade, and construction. This provision is reinforced in Article 73 letter b, number 1 of Law No. 19/2003, which states: “Restructuring of companies/corporations includes: Increasing the intensity of business competition, particularly in sectors where monopolies exist, whether regulated or natural monopolies."[60] Based on the explanation above, SOEs, as the sole owners of essential facilities, have the authority to operate a monopoly, either naturally or as mandated by laws and regulations. This authority is based on two main factors:

1. Natural monopolies arise due to the characteristics of essential facilities, which require substantial investments and are associated with critical industries. The complexity of infrastructure development makes duplication by competitors, particularly private business actors, highly challenging. For example, the development of port infrastructure requires substantial funding, making it difficult for competitors to duplicate. As ports are classified as public utilities, SOEs hold exclusive monopoly rights over their management, as the investment originates from the state. Consequently, SOEs play a crucial role in

[59] Ahmad Sabirin et al., “Civil and Political Rights in Constitutionality of Accommodation of Individual Candidates and Elimination of Presidential Thresholds from the Perspective of the 1945 Constitution,” *International Journal of Law and Public Policy (IJLAPP)* 5, no. 2 (2023): 48–58.
[60]Law No. 19 of 2003 concerning SOEs. Article 73 letter b number 1.

granting access to other business actors through regulations and partnerships, ensuring business activities operate while maintaining fair competition.

2. Monopoly based on the Law arises because SOEs possess monopoly authority as mandated by the 1945 Constitution of the Republic of Indonesia, particularly Article 33 paragraph (2), which states: "The branches of production that are important to the state and that control the lives of the people are controlled by the state."[61] SOEs, as implementers of the state constitution, function as managers of essential facilities related to strategic production branches.

Although SOEs have the right to conduct monopoly activities in certain market structures as mandated by law, including managing essential facilities, this authority does not exempt them from the obligation to adhere to the principles of fair business competition. SOEs must comply with the provisions stipulated in Law No. 5/1999. In managing essential facilities, SOEs are permitted to collaborate with private business actors to enhance efficiency, expand market reach, and strengthen operational capacity. The monopoly rights granted to SOEs must comply with the provisions of Law No. 5/1999, including Article 1, number 2, which defines monopoly practices as: "The concentration of economic power by one or more business actors, resulting in the control of production and/or marketing of certain goods and/or services, leading to unfair business competition and potential harm to the public interest:"[62]

Article 1, number 6, of Law No. 5/1999 defines unfair business competition as: "Competition between business actors in conducting production and/or marketing activities of goods or services in a dishonest, unlawful manner, or in a way that hinders business competition." Thus, although Law No. 5/1999 does not explicitly regulate the doctrine of essential facilities, SOEs must also consider the limitations of this doctrine. These limitations can be interpreted through the approach of activities prohibited by Law No. 5/1999, as follows:

1. Monopolistic Practices (Article 17)
   EFD applies to business actors who hold monopoly power over facilities essential for other business actors to conduct their business activities. This monopoly power may arise naturally or be established by legal mandate. Law No. 5 of 1999 stipulates that a monopoly is not considered an unlawful act, as there are objective justifications for its occurrence, such as the superiority of certain business actors over others. Business actors possessing monopoly power will be deemed to have committed unlawful acts if they misuse their monopoly rights, resulting in harm. This occurs when the owner of essential facilities abuses their authority by imposing unreasonable conditions for access, which adversely affects other business actors and ultimately, consumers.
2. Market Domination (Article 19)
   EFD relates to the control of facilities by one business actor. Article 19 of Law No. 5 of 1999 outlines a prohibited form of market control, which researchers associate with EFD, particularly refusal to deal. Control over essential facilities can enable dominant business

[61]The Constitution of the Republic of Indonesia in 1945. Article 33 paragraph (2)
[62]Law No. 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition Article 1 number 2.

actors to deny competitors access. According to the OECD, such refusal may take the form of a direct denial of access or the imposition of unreasonable pricing terms for competitors.

3. Abuse of dominant position (Article 25)

   Article 25 of Law No. 5 of 1999 focuses on market structure, especially the percentage of market share, to determine violations related to the abuse of dominant positions. When associated with EFD violation occurs when a business actor controls essential facilities that cannot be easily replaced or duplicated by competitors. This article provides a basis for action against business actors who exploit their control over essential facilities to restrict competitors from conducting business. Meanwhile, EFD mandates that the owners of essential facilities provide access on reasonable terms to create fair and healthy business competition.

3.6. ICC's Determination on the Violation of Article 17 of Law Number 5/1999 on Essential Facilities that Result in Monopoly Practices and Unfair Business Competition in the Port Sector

The port is an essential facility operated by BUP, which is authorized to manage ports in line with its business activities. These activities include the provision of port services and related operations.[63] The authority to operate ports is granted to business entities, including SOEs, as mandated by Law. One such SOE is PELINDO, which specializes in port operations and manages essential facilities, thereby classifying it as a BUP.

PELINDO operates under the provisions of Law No. 17/2008 and its amendments, which serve as the legal foundation for port management and regulation. The enactment of Law No. 17/2008 revoked PELINDO's monopoly rights in the port sector, eliminating its dominant position as the sole manager of the port. This law mandates the separation of functions between regulators and operators, as stated in the Explanation of the General Provisions of the Law No. 17/2008 letter: "It stipulates provisions for eliminating monopolies in port operations, distinguishing between regulators and operators, and ensuring proportional participation of local and private entities in port management."[64]

Law No. 17/2008 regulates the separation of functions between regulators and operators. The regulatory function is held by the government through the Ministry of Transportation and the Port Authority, while the operational functions are carried out by the BUPs, including PELINDO. As a BUP, PELINDO now operates on par with private business entities, focusing on managing port facilities and terminals. The emergence of PELINDO's de-monopolization of policy has not eliminated its monopoly authority. PELINDO retains its dominant position due to natural barriers in the port sector. Ports are essential facilities that require large investments for construction, making duplication by private entities challenging. In addition, ports play an important role in supporting economic activities and have no viable

[63]Law No. 6 of 2023 concerning the Stipulation of Government Regulations in Lieu of Law No. 2 of 2022 concerning Job Creation into Law. Article 90 paragraph (1).

[64]Law No. 17 of 2008 concerning Shipping. Explanation of letter b.

alternative. As a result, PELINDO continues to dominate port services as a state-owned enterprise.[65]

PELINDO holds a strategic role as both the administrator and controller of ports, including essential facilities, due to its natural monopoly power. As the primary port operator in Indonesia, PELINDO is responsible for ensuring efficient port services that support economic activities. In exercising its authority, PELINDO remains subject to oversight by the ICC, which monitors business competition in Indonesia under Law No. 5/1999.

The ICC often identifies indications of PELINDO violating provisions of Law No. 5/1999. Several cases brought before the ICC have resulted in sanctions against PELINDO for engaging in monopolistic practices. The violations have created barriers to competition, especially in the port infrastructure sector, which constitutes an essential facility. Article 17 of Law No. 5/1999 regulates monopoly with the Rule of Reason approach, meaning that a monopoly is prohibited if it results in monopolistic practices and unfair competition.[66] The assessment of monopolistic practices focuses on their impact on market competition. Business actors holding monopoly rights are not automatically considered in violation of Article 17 of Law No. 5/1999; however, those who abuse these rights to maintain or strengthen their monopoly position engage in prohibited monopolistic practices (abuse of monopoly).[67]

To determine whether PELINDO's conduct constitutes monopolistic practices, the ICC must apply the Rule of Reason approach when evaluating alleged violations of Article 17 of Law No. 5/1999. This includes the following steps: The first step is defining relevant markets. According to Law No. 5/1999, the market refers to the geographical area where business actors operate, including goods and/or services that are identical, similar, or substitutable.[68] In competition law, the relevant market consists of geographical and product market aspects. The geographical market refers to the area where business actors have control over pricing for goods and/or services offered. Its determination is based on several factors related to the availability of the analyzed product. These factors include: 1) business strategies for market reach, 2) transportation costs and delivery time, and 3) applicable tariffs and regulations that govern or restrict interregional trade.[69]

The product market includes identical, similar, and substitute goods or services available in the market. Its determination is based on several indicators: 1) price indicators, which reflect the presence or absence of fair competition, and 2) non-price indicators, including product characteristics and functions that either resemble competitor products or serve as viable substitutes. In this initial step, ICC determines the relevant market of PELINDO within the port sector. The product market includes port services, while the geographical

[65] Muhammad Insa Ansari, "Stateowned Enterprise And Public Service Obligation In The Sector Of Oil And Gas," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 29, no. 3 (January 12, 2018): 515, https://doi.org/10.22146/jmh.23643.

[66] Yurniawati Djakaria, "Legal Protection Of Business Activities In Monopoly Practices And Unfair Competition Through Eletronic Transactions," *Estudiante Law Journal* 1, no. 2 (May 19, 2019): 474–89, https://doi.org/10.33756/eslaj.v1i2.13260.

[67] Commission Regulation of ICC No. 11 of 2011 concerning Guidelines for Article 17 of Law No. 5 of 1999. p. 11.

[68] Law No. 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition. Article 1 number 10.

[69] ICC Guidelines Number 03 of 2009 concerning the Application of Article 1 number 10.h 16 -17.

market aspect encompasses the port areas managed by each PELINDO entity: 1) PELINDO I manages ports in Aceh, North Sumatra, Riau, and Riau Islands; 2) PELINDO II manages ports in West Sumatra, Jambi, South Sumatra, Bengkulu, Lampung, Bangka Belitung, Banten, DKI Jakarta, West Java, and West Kalimantan. 3) PELINDO III manages ports in East Java, Central Java, South Kalimantan, Central Kalimantan, Bali, NTB, and NTT. 4) PELINDO IV manages ports in East Kalimantan, North Kalimantan, Sulawesi (South, Central, and Southeast), Maluku, North Maluku, Papua, and West Papua.

The second step in determining PELINDO's behavior, including monopoly practices, is to establish the existence of a monopoly position. ICC Regulation No. 11/2011, which provides guidelines for Article 17 of Law No. 5/1999, excludes monopoly positions that fall under the exemptions in Article 51. Although PELINDO has undergone demonopolization under Law No. 17/2008, it retains its monopoly as a state-owned enterprise with a public function. Additionally, PELINDO exercises the state's right to control, as stipulated in Article 33 of the 1945 Constitution of the Republic of Indonesia, aligning with the provisions provided in Article 51 of Law No. 5/1999.

Ports are essential facilities, namely important facilities that concern the public interest as referred to in Article 33 of the 1945 Constitution of the Republic of Indonesia. PELINDO can still exercise its monopoly authority as a state-owned enterprise under the law (monopoly by law) even though it has been demoted by the police in carrying out its business activities under Law No. 17 of 2008. The monopoly right is also based on natural obstacles such as the high investment costs required for private business actors to enter the port sector, so that through PELINDO, as a BUP that carries out its business activities, it gets the delegation of authority obtained through the Regulator.[70]

The third step in determining PELINDO's behavior, including monopoly practices, is identifying the emergence of such practices as monopoly position holders. The guidelines of Article 17 of Law No. 5/1999 distinguish different aspects of monopolistic practices. Based on these guidelines, ICC evaluates PELINDO's behavior and action by: 1) stipulates provisions for eliminating monopolies in port operations, distinguishing between regulators and operators, and ensuring proportional participation of local and private entities in port management.[71]

The fourth step in determining PELINDO's behavior, including monopoly practices, is identifying and gathering evidence of such practices. These four steps serve as ICC's benchmark in determining whether PELINDO has engaged in prohibited monopoly practice. If all four criteria are met, PELINDO is suspected of violating Article 17 of Law No. 5/1999. PELINDO's as reviewed in ICC-I Decision 12/2014 and ICC-L Decision 15/2018, has been found to contravene Article 17. An analysis of these decisions reveals several similarities, including:

1. Related to essential facilities in the port sector
   ICC investigates indications of violations of monopolistic practices and unfair business competition in the port sector that are inconsistent with the provisions of Law No. 5/1999. The port is one of the essential facilities that includes public utilities controlled by dominant

[70]Law No. 17 of 2008 concerning Shipping. General Explanation.
[71]Comission Regulation ICC No.11 of 2011. Guidelines for Article 17 of Law No. 5 of 1999. pp. 15–16.

market players. Given their direct connection to certain goods and/or services, competitors must obtain access from these dominant business actors to use these facilities. Essential facilities are attached to public utilities, meaning they serve the public interest under state control, with management authority delegated to SOEs. The concept of essential facilities aligns with the state's right to control, as outlined in Article 33, paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

2. The targeted business actor is PELINDO, a state-owned enterprise
   Ports are essential facilities related to the right to control the state, with their management entrusted to state-owned enterprises (SOEs), specifically PELINDO, as stated in ICC-I Decision 12/2014 involving PELINDO II and ICC-L Decision 15/2018 involving PELINDO III. Considering that ports are essential facilities that are difficult for other business actors to duplicate, PELINDO inherently has natural monopoly power. The power of this monopoly will hinder healthy business competition if it engages in monopolistic practices. Consequently, the ICC closely monitors the port sector, particularly PELINDO, as a port operator under Law No. 17/2008.
3. Violation of Article 17 of Law No. 5/1999
   Law No. 17 of 2008 grants PELINDO, a state-owned enterprise, the authority to manage the port sector as a BUP. However, the ICC often finds alleged monopolistic practices in port management, given that ports are essential facilities. The ICC closely monitors these violations, primarily because the Reported Parties in the two decisions are SOEs entrusted with port management as BUPs. Although Law No. 17/2008 has revoked SOEs' monopoly rights in business activities, concerns over monopolistic practices persist. The revocation of monopoly rights through laws and regulations is known as demonopolization. However, this does not automatically eliminate the monopoly power of the Reporting Party. Due to the natural monopoly power characteristics of port essential facilities, monopoly power remains inherent. The ICC also examines the element of control in the Reported Party's activities, particularly where it leads to monopolistic practices and/or unfair business competition.

Table 2: Differences between ICC-I Decision 12/2014 and ICC-L Decision 15/2018

KPPU-I 12/2014	**KPPU-L 15/2018**
Parties	
Reported Person I is PELINDO II, a state-owned enterprise engaged in the port sector; Reported Party II is MTI, a subsidiary of PELINDO II.	The reported party is PELINDO III, a state-owned enterprise engaged in the port sector.
Alleged Violations	
ICC suspects violations: 1. "Monopoly Practice" based on Article 17 of Law No. 5 of 1999; and 2. "Closed Agreement" based on Article 15 paragraph (2) of Law No. 5 of 1999.	ICC suspects violations: 1. "Monopoly Practice" based on Article 17 paragraphs (1) and (2) letter of Law No. 5 of 1999; and/or

	2. "Market Control" based on Article 19 letter a dan b UU LPM-PUTS
"Monopoly Practices"	
Not Proven to Violate Monopolistic Practices	Proven to Violate Monopoly Practices
Article 17 UU LPM-PUTS	Precisely in Article 17 paragraphs (1) and (2) of Law No. 5 of 1999
Differences in Alleged Violations and Fulfillment of Elements	
"Closed Agreements"	**"Market Dominance"**
ICC stated that the Reported Parties **had engaged in** a closed agreement, violating Article 15, paragraph (2) of Law No. 5 of 1999. Although each Reported Party operated in a different relevant market, they were legally and convincingly proven to have breached Article 15 paragraph (2) of Law No. 5 of 1999.	The ICC determined that the Reported Party **was not proven** to have exercised market control under Article 19 letters (a) and (b) of Law No. 5 of 1999, as the Constitutional Court found no Reported Party satisfied the elements of this Article.

Source: *Decision Number 12/KPPU-I/2014 and Decision Number 15/KPPU-L/2018.*

Based on the analyzed decision, violations related to essential facilities may not only fall under Article 17 of Law No. 5 of 1999 but also can be subject to other provisions within the law, including:

1. Article 15 of Law No. 5/1999 on Closed Agreements
   The decision, precisely in paragraph (2), regarding the tying agreement, which occurs when business actors require the buyer of one product to purchase an additional product from the same supplier. Violations of essential facilities under this provision arise when such agreements restrict consumer or service user access to alternative options. This practice is enabled by monopoly power, as seen in the case of PELINDO, a state-owned enterprise that leveraged its dominant position to force the use of certain products unfairly. Tying agreements allow business actors to expand their monopoly power, further distorting market competition.
2. Article 19 of the Law on Market Dominance
   Essential facilities are closely related to the control of a facility by certain business actors, potentially causing an abuse of market control. This article prohibits business actors from practicing monopoly and/or unfair business competition, including 1) refusal and/or obstruction of certain business actors; 2) preventing consumers from conducting business relationships with other business actors in essential facilities; 3) restrictions on product circulation; 4) discriminatory practices that harm other business actors, including competitors. These four provisions outlined in Article 19 of Law No. 5/1999 can be applied to violations related to essential facilities. For example, exclusive control over port infrastructure can be used to deny or prevent new competitors from entering the market.

This occurs because the actions taken by the operators of essential facilities vary widely. As an example, the difference between the two business behaviors discussed above is as follows: First, in ICC-I Decision 12/2014, the Constitutional Court did not find a violation of monopoly practices but instead ruled on a closed agreement, especially a tying agreement. Initially, the ICC suspected monopolistic practices, as Reported Party I was a state-owned enterprise whose monopoly rights were exempt under Article 51 of Law No. 5 of 1999. Additionally, Party II, a subsidiary of Reported Party, held similar authority to Party I, further reinforcing concerns over market control. The monopoly right of SOEs has been abolished in Law No. 17 of 2008, which serves as a guideline for the implementation of business activities in the port sector. However, monopoly rights remain inherent to PELINDO II, as ports are classified as essential facilities with natural monopoly characteristics. Based on this natural monopoly status, the ICC initially directed allegations of monopolistic practices toward PELINDO II and its subsidiary, MTI. Contrary to these allegations, the Constitutional Court ruled that Reported Party I and Reported Party II were not proven to have violated Article 17 of Law No. 5/1999.[72]

The Reported Parties were not declared to have violated monopoly practices because one of the elements of Article 17 of Law No. 5/1999 was not fulfilled. The services they offered had substitutes; however, service users unable to use them were compelled to use the GLC provided by the Reporting Parties through the Notification Letter. This obligation fulfills the elements of Article 15, paragraph (2) of Law No. 5/1999.

The obligation imposed by the Reported Parties for service users to utilize the special GLC land crane loading and unloading equipment with the BBC load constitutes a tying agreement. This agreement compels service users to purchase and/or use certain services (tying product) alongside other services (tied product) provided by the Reporting Parties. As a result, service users at the status dock lost the option to choose alternative services, and the tariffs applied by the Reporting Parties are inconsistent. These actions violate the prohibition against tying agreements as stipulated in Article 15, paragraph (2) of Law No. 5/1999, leading to unfair business competition in the port sector. Second, in ICC-L Decision 15/2018, the Constitutional Court found that the Reported Party violated monopoly practices, as all elements of Article 17 paragraphs (1) and (2) of Law No. 5/1999 were fulfilled. The reported party's implementation of policy restructuring the service pattern of the container terminal at Sikka Port, designated solely as a multipurpose terminal, led to increased costs above the normal price, which must be borne by service users and/or consumers.

The Reported Party not only harms the public as consumers but also contravenes the fundamental principles enshrined in Article 33(2) of the 1945 Constitution of the Republic of Indonesia. Ports, as essential facilities managed by the state through SOEs like PELINDO, are entrusted with providing quality services without imposing unreasonable costs on the public. However, the Reported Party's actions have led to increased costs above normal levels, thereby hindering public access to port services, which should be for all citizens.

The issue of the dominance of SOEs in the port sector is not only a phenomenon in Indonesia. When compared to other jurisdictions such as Singapore, Malaysia, or the European Union, similar issues are also a major concern.[73]. In the European Union, for example, the

[72]The No 12/KPPU-I/2014 KPPU case. b. 174.

[73] Carl Grundy-Warr, Karen Peachey, and Martin Perry, "Fragmented Integration in the Singapore-Indonesian Border Zone: Southeast Asia's 'Growth Triangle' Against the Global Economy," *International*

Essential Facilities Doctrine and the principle of "open access" have been adopted to prevent the abuse of dominant positions by port operators, both state-owned and private. Regulations such as the Port Services Regulation (EU) 2017/352 explicitly require ports to provide open and non-discriminatory access to other port service operators.[74]

Based on the above discussion, the authors analyze that monopoly practices in the port sector often emphasize the characteristics of natural monopoly and the legal status of PT Pelindo as a state-owned enterprise. Although important as an initial context, repetition of this narrative needs to be avoided so as not to obscure the focus of legal analysis. In contrast, a systematic approach that emphasizes a logical transition from normative foundations to case studies, as well as rule-based judgment, will provide sharper analytical power.

ICC Decision No. 12/ICC-I/2014 and No. 15/ICC-L/2018 represent two important cases related to the application of the essential facilities doctrine.[75] However, the transition from norm to practice has not been adequately articulated, so the flow of thought seems to be interrupted. Therefore, this section emphasizes the interconnectedness between legal doctrine and its application in practice. In principle, Article 17 of Law No. 5/1999 prohibits business actors from carrying out monopolistic practices, including through the control of important facilities used to get rid of competitors. In the two rulings, ICC found that Pelindo had restricted third-party access to loading and unloading services and container terminal services, which were actually essential facilities. This denial of access creates barriers to entry and distortions of competition.

In Decision No. 12/2014, ICC stated that Pelindo II does not provide access to qualified loading and unloading service business actors. Although Pelindo argued based on port efficiency and security, ICC considered that the excuse was not proportionately proven and did not consider the principle of non-discrimination. Meanwhile, in Decision No. 15/2018, Pelindo III implemented a service restructuring policy that resulted in higher costs and decreased competitiveness of service actors. In both cases, ICC applies a rule of reason approach, but arguments regarding economic justification, such as systemic efficiency or national logistics goals, are not balanced in a balanced manner.[76] In fact, in a more mature approach, it is necessary to conduct a cost-benefit analysis of the access restrictions carried out.[77]

Article 51 of Law No. 5/1999 provides an exception to monopolistic actions if they are carried out by actors appointed by the government and implement government policies. However, this article poses interpretive challenges. Does the status of SOEs as public legal

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Journal of Urban and Regional Research 23, no. 2 (June 16, 1999): 304–28, https://doi.org/10.1111/1468-2427.00197.

[74] Laima Gerlitz and Christopher Meyer, "Small and Medium-Sized Ports in the TEN-T Network and Nexus of Europe's Twin Transition: The Way towards Sustainable and Digital Port Service Ecosystems," *Sustainability* 13, no. 8 (April 14, 2021): 4386, https://doi.org/10.3390/su13084386.

[75] Udin Silalahi, *Perusahaan Saling Mematikan & Bersekongkol: Bagaimana Cara Memenangkan?* (Elex Media Komputindo, 2007).

[76] Tariq Hidayat Pangestu, "Analisis Yuridis Praktik Diskriminasi Dalam Penjualan Kargo Angkutan Udara (Studi Kasus Putusan KPPU Nomor 7/KPPU-I/2020)," *Jurnal Persaingan Usaha* 1, no. 2 (December 31, 2021): 15–26, https://doi.org/10.55869/kppu.v2i.20.

[77] Ryan D, "Big Data and the Essential Facilities Doctrine: A Law and Economics Approach to Fostering Competition and Innovation in Creative Industries," *UCLJLJ* 10 (2021).

entities automatically exempt them from the principle of competition? This argument creates a conflict of norms between the function of SOEs as an extension of the state and the obligation to comply with the principle of free competition in the market. The jurisprudential approach, as developed in the Constitutional Court Decision No. 85/PUU-XI/2013, states that state control of important sectors must still meet the principles of efficiency, justice, and accountable supervision. Therefore, Pelindo's role as a state-owned enterprise cannot be used as an absolute excuse to exclude its obligations to open and non-discriminatory access. Comparisons can also be drawn from the jurisprudence of the Supreme Court, which in a number of rulings affirmed that the implementation of policies by SOEs must be subject to the principle of propriety and must not be detrimental to market interests. As an international illustration, **the** ECJ in the case of Bronner (C-7/97) strictly required that denial of access can only be justified when there is no realistic alternative and that the opening of access imposes a disproportionate burden.

The implications of these cases are very relevant for business actors and regulators. For business actors, legal certainty on access to essential infrastructure is a prerequisite to ensure sustainability and investment. For policymakers, the weakness in EFD regulations opens up space for SOEs to act exclusively without accountability, even in the name of public services. Concrete steps are needed, including: 1) Strengthening ICC's role as an ex-post supervisor of the policy of access to important facilities. 2) Progressive interpretation of Article 17 and Article 25 as a normative basis to accommodate the principle of EFD. 3) Revision or insertion of explicit norms in the Business Competition Law regarding the obligation of open access to *essential facilities* by dominant business actors.

4. Conclusions

This research provides new insights into the application of the EFD within Indonesia's competition law, particularly concerning the role of SOEs in managing essential facilities in strategic sectors. Key findings indicate that, despite the implementation of demonopolization policies, challenges persist in creating healthy business competition, especially in the port sector controlled by PELINDO. The study highlights how EFD can be used to ensure fairer market access for other businesses and avoid monopolistic practices that may harm consumers. An analysis of several ICC rulings shows that violations of essential facilities can be categorized as violations of Article 17 of Law No. 5/1999 and be associated with other provisions, such as Article 15 on closed agreements and Article 19 on market control. In certain cases, PELINDO has been proven to practice tying agreements that limit consumer choices and hinder business competition in the port sector. This underscores the need for more explicit adjustments in the application of the EFD within competition regulations to prevent the abuse of dominant positions. This study highlights a significant challenge in applying the EFD within Indonesia's competition law: balancing the legally permitted monopoly rights of SOEs with their obligation to avoid abusing dominant positions. The analysis reveals that current regulations may not sufficiently protect small and medium-sized enterprises that need access to essential facilities to compete effectively in the market. This lack of protection can hinder SMEs' ability to operate on a level playing field, thereby affecting overall market competitiveness.

This study recommends harmonizing policy between monopoly rights granted to SOEs and the principle of business competition. A key step in this direction is to strengthen the role of the ICC in overseeing the control of essential facilities by SOEs. This includes ensuring that relevant regulations clearly define mechanisms obligating SOEs to provide access to these facilities for other business actors in need. Thus, this research contributes to developing more effective and equitable competition policies aligned with the principles of economic justice. Enhancing the application of EFD within Indonesia's competition regulations is crucial to balancing the interests of the state in managing essential facilities with market demands, thereby fostering a more competitive and non-discriminatory business environment.

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