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SAFEGUARDING PUBLIC INTERESTS IN SELF-REGULATING PLATFORM: AN OPTION FOR ONLINE TRANSPORTATION NETWORK INDUSTRY IN INDONESIA?

Sih Yuliana Wahyuningtyas*
Atma Jaya Catholic University of Indonesia

1. Introduction

Indonesian Constitution of 1945 has established the first premise for the setup of public policy in economic matters in Indonesia mandating that everybody shall have equal opportunities to take part in all economic activities.[1] This premise is understood as the implementation of democracy in economic life. However, it also entangles other premises that anchor in the concept of state responsibility to achieve public welfare, such as the provision of employment and the protection of small companies. Competition policy in the country attempts to adopt the divergence of means of how public welfare could be achieved and the attempt results in the diverse objectives of competition policy from aiming at public welfare, protecting fair competition, achieving efficiency, safeguarding the interest of consumers, to protecting small companies. Despite the legitimacy of having a multipurpose competition policy, this policy model entails major difficulties, in the first instance, to balance between different competing policies in certain cases, and second, to adopt certain public policy that has not received sufficient room in the current competition policy consideration.

Among other matters, ensuring consumer welfare might conflict with other elements of economic welfare, such as securing the interest of small and medium-size enterprises (SMEs) to remain in the market and securing other non-competition interests, such as employment. While innovation serves the interest of consumer in terms of the provision of product choices, better technology and product quality, and

* Senior Researcher/Lecturer, Faculty of Law, Atma Jaya Catholic University of Indonesia, Jakarta–Indonesia. Email: yuliana.siswartono@atmajaya.ac.id or yuli.wahyuningtyas@googlemail.com.

1 Indonesian Constitution of 1945, 4th Amendment (2002), Article 33 par. (4): "The national economy is governed on the basis of economic democracy […]".

other traits that make life easier, it also requires research and development processes in many cases that SMEs might not be able to afford. Hence, shaping public policy that provides equal protection for different parts of and interests in the market in some cases could be a dreadful task.

To shed some light in weighing different public interests in the purview of competition policy, Indonesian competition authority (Commission for the Supervision of Business Competition, hereafter KPPU) has published check lists of regulations that require reviews on the basis of their compliance to competition policy and guidelines on how to use the check lists for reviewing purposes. The Guidelines are set forth in KPPU Regulation No. 04 of 2016 on Guidelines for the Review of Drafts of Regulation or Policy or for the Review of Regulations or Policies on Economic Sectors Based on Competition Policy Check List (hereafter, Policy Guidelines). The Policy Guidelines contain four categories of check list: (1) concerning regulations on economic sectors that are not exempted from the application of Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition (hereafter, Law No. 5 of 1999); (2) concerning regulations on economic sectors that are exempted from the application of Law No. 5 of 1999; (3) concerning regulations on economic sectors that grant monopoly rights; and (4) concerning regulations that provide protections for SMEs and for domestic enterprises against foreign enterprises.[2] Based on the Guidelines, KPPU shall undergo a process of policy review and provide a recommendation to the Government as to whether changes should be made in order to ensure the compliance of the regulation under scrutiny to competition policy. While the Guidelines could be useful, there might be a problem whether such recommendation would be effective in practice, because it might entail, to some extent, a sacrifice of certain interests in favor of some other interest. A balancing is again required, only this time it would be somewhere else, i.e. not by KPPU but by the regulator.

On another spectrum of consideration, while policy makers and regulators are struggling to reach a compromise about the most workable policy and regulation, markets might take initiatives to regulate themselves in order to shield the interests of the contracting parties. Although such initiative is guarded by the principle of the freedom of contract, questions remain in how far the interests of all parties are well balanced and how this mechanism could carry out the missions mandated by an established public policy.

The problem becomes more complex in cases of disruptive innovation where there has not been any regulation serving as a solid legal ground for the parties to base their contract and the existence of their transaction on yet, apart from consensus and certain fundamental principles such as the utmost good faith. Disruptive innovation has its trait of potentially not only creating a new market, but also exterminating the existing market that might mean a risk of people losing their jobs – a non-competition but important part of public interests. Hence, dealing with disruptive innovation is a

[2] KPPU Regulation No. 04 of 2016 Article 2 lit. a–d.

hard fact for the players of the existing market and this might call for public policy intervention when the existing market involves the living of many.

In the past at least a couple of years, new players have entered Indonesian market to offer an online platform to bring supply and demand of transportation services together throughout the country, such as Uber, GrabCar, and GoJek.[3] I refer to these types of services as the online transportation network.[4] The introduction of the new kind of door to door public transportation services in the market is not without controversies concerning numerous issues from the legality of its business license, the measures in place to ensure passenger safety and security, taxation, to competition concerns that are raised until today by conventional taxi providers.[5] Indonesia has a large market for both taxi and motorbike service (in Indonesian, the motorbike service is called *ojek*). With the entrance of automobile-based service, the market has witnessed the birth and development of online transportation network that challenges the existing conventional taxi and motorbike services.

Among the complex issues brought be the emerging of the online transportation network in the country is the question about safety and consumer protection. Also, the implementation of the sharing economy concept combined with the rise of market demand, the new business models and innovation that has produced easiness to offer and obtain door-to-door transportation services – have created a major resistance from conventional transportation service providers that suffer substantial losses of market share in a reasonably short period of time. Asymmetrical regulations applied for conventional door to door transportation providers and for online transportation network have been blamed as the major cause of the imbalance of competition capacity in the market. However, the short-term outcome for consumers is not to be undermined. Not only consumers have more choices available in the transportation market, they also benefit from taxis reducing their fares in order to make their pricing more competitive.

Online transportation network is one among new online business schemes developed in the digital market. Indonesian market also witnesses other schemes such as online shopping (e.g. Tokopedia.com, Lazada.com), non-banking loan (e.g. UangTeman.com), and online traveling agent for hotel, flight, and train reservation (e.g. Taveloka.com, Tiket.com). Focusing on online transportation network, GoJek – one of the major players in the market, has been expanding its business to differentiate its products ranging from offering motorbike or car ride, to courier services to carry documents and packages and delivery of services ranging from services to do

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[3] J. Russell: Uber Gains Government Approval to Operate Legally in Jakarta, Indonesia. *Techcrunch,* 2015. http://techcrunch.com/2015/12/08/uber-gains-government-approval-to-operate-legally-in-jakarta-indonesia.

[4] This term is a subset of the broader term transportation network – that includes conventional taxi providers.

[5] L. Cosseboom: The Jakarta Police's Uber Investigation Raises Many Questions, and Is Likely Just to Appease Taxi Firms. *Tech in Asia*, 2015. https://www.techinasia.com/talk/the-jakarta-polices-uber-investigation-raises-many-questions-and-is-likely-just-to-appease-local-taxi-firms.

shopping, food and medicine order and delivery, top up services for mobile phones, to massage services. The study takes the case of online transportation network as the focus of analysis and excludes other types of online businesses.

The paper is structured into five parts. After explaining the background and uttering the research questions in the first part, the second part of the paper discusses the challenges brought by the emerging of online transportation network to the existing competition policy. The third part analyses whether public policy could be integrated in the self-regulation of online transportation network. In the fourth part, the paper analyses whether self-regulation of online platform could serve as an alternative of balancing the existing regulation asymmetry by means of government regulation for the online transportation network industry. The fifth part concludes.

2. The Emerging of Online Transportation Network and Challenges to the Existing Competition Policy

2.1. The Role of Innovation in Indonesian Competition Policy

Innovation is mentioned as a new element included in competition policy considerations taking into account the current development in the market. Law No. 5 of 1999 does not mention innovation in its provisions. How innovation plays a role in Indonesian competition policy will be discussed below.

2.1.1. Competition Policy Framework

There are two main KPPU Regulations that refer to innovation as a key element in guiding how competition law should be implemented by the competition authority. First, innovation receives a place in competition policy consideration in the context of the interplay between competition law and intellectual property rights. Second, innovation is used as a reference when evaluating whether a certain policy or regulation results in the decreasing of consumer welfare when it lessens the incentive to compete.

2.1.1.1. Innovation and the Interplay between Competition Law and IPR

In KPPU Regulation No. 2 of 2009 concerning the Guidelines on the Exemption of the Agreements related to Intellectual Property Rights from the Application of Law No. 5 of 1999, KPPU clarifies that both intellectual property right (hereafter, IPR) protection and competition law share a common interest to encourage innovation and creativity. While IPR regime provides incentive and rewards for innovation, competition law plays its role in ensuring a level playing field that enables fair

competition in the market and thereby, opens the opportunities for innovation to take place.[6]

According to the Guidelines, although agreements related to IPR are exempted from the application of the competition law,[7] the Guidelines provide a basis to justify competition law intervention in cases where IPR is abused to foreclose a market. [8] In order to evaluate whether competition law intervention can be justified, the Guidelines rely on a test as the primary indicator whether an IPR license has a significant negative impact on the market.[9] While the test has a broad scope of interpretation, it also covers a specific reference to innovation in cases where license agreements involve limitations of production and distribution. Agreements that put restrictions as such that hinder a licensee to innovate are considered as infringing competition law. [10]

2.1.1.2. Innovation and the Policy Guidelines

The policy Guidelines place innovation as part of the testing element in the first check list concerning regulations on economic sectors that are not exempted from the application of Law No. 5 of 1999 when considering whether a regulation or policy or its draft has been in conflict with the interest to protect fair competition. The term regulation covers not only those imposed by the Government but also regulations that are imposed by private entities. The latter is further distinguished between self-regulation and co-regulation (such as those created and imposed by associations).[11] However, the discussions in this paper are limited to regulations imposed by private entities in the form of self-regulation.

To carry out the test, the evaluation process is grouped in four categories of regulations or policies (1) concerning the limitation of volume and scope of companies, (2) concerning the limitation of the capacity of companies, (3) reducing the incentives to compete, and (4) concerning the limitation of consumer choices of goods and/or services. The Guidelines use innovation as a reference to evaluate the third test concerning regulations or policies that reduce the incentives of market players to compete. However, it is also used in the examples of cases in other categories of the test.[12]

The Guidelines emphasize that a regulation or policy that reduces the incentives to compete would hinder innovation and in turn, it would reduce consumer welfare.[13] In order to evaluate whether a regulation or policy or its draft has such impact, the

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6 KPPU Regulation No. 2 of 2009, p.10.

7 Law No. 5 of 1999 Article 50 lit. a.

8 KPPU Regulation No. 2 of 2009, p. 16.

9 Ibid. 13–14.

10 Ibid. 20.

11 KPPU Regulation No. 04 of 2016, Attachment, p. 33.

12 Ibid. Article 2.

13 Ibid. 12.

Guidelines provide a catalogue of questions whether the regulation or policy consists of a provision that:

(1) grants a full authorization to regulate a sector of industry to a group of companies (such as associations);
(2) requires an agreement between a group of companies and the Government in order to enact a sector regulation;
(3) requires all companies to inform public or an association all data about their products, prices, distributions, and/or costs;
(4) exempts certain companies from the application of Law No. 5 of 1999.[14]

Further, to exemplify how a regulation or policy could harm innovation, the Guidelines provide three cases as discussed below.

2.1.1.2.1. Market Allocation Policy v. Innovation[15]

Innovation might be hindered in cases of a regulation or policy that limits distribution areas or imposes market allocation either for goods, raw materials, services, capital, or labour. The Guidelines clarify further that under this category are regulations or policies that facilitate companies to allocate market between them and it does not include local government regulations that by its nature are limited in terms of the scope of geographical jurisdiction. This clarification, nevertheless, makes the Guidelines unclear whether it would address only regulations or policies that facilitate distribution cartels or those that contain provisions that limit the distribution area or impose market allocation. The Guidelines use both terms, but then limit the scope to the first in the description while at the same time excluding local government regulations.

This category is the case, for instance, when a regulation or policy either in national of regional level attempts to protect new comers or infant industries. Such regulation is not uncommon in developing countries. However, it also has the downside that by limiting the area of distribution or allocating the market, it creates isolated market fractions and this could result in the limitation of innovation and product differentiation. To evaluate whether negative impacts of such type of regulation or policy occur, the competition authority should carry out an investigation whether: (1) there is a relation between the obstacle to innovate and the purpose of the regulation or policy; (2) the regulation or policy that results in the obstacle to innovate does not exceed what is necessary to attain the purpose; (3) rational arguments would support the use of the obstacles to reach the purpose of the regulation or policy; and (4) the restrictions are imposed for a certain period of time.[16]

[14] Ibid.

[15] Ibid. 28.

[16] Ibid.

The zoning policy for the food retail industry could become an example of this case, in which modern retailers are subject to the minimum proximity from traditional retailers.[17] The policy has been under debates since the enactment. However, it has not yet been investigated under the new Guidelines.

Although the Guidelines take a further steps from what have previous state of the art that left the justification of providing privileges for any activity or agreement that is carried our as an implementation of a regulation or policy merely as part of the block of exemption in Article 50 of Law No. 5 of 1999, it lacks of a critical question, namely the justification of the purpose of the regulation or policy under scrutiny as such. Hence, a contradiction between the purpose of competition policy and a regulation or policy in question remains unresolved.

2.1.1.2.2. Pricing Policy v. Innovation[18]

A regulation or policy that limits the freedom of companies to set prices might also harm innovation. The pricing policy referred to in the Guidelines includes policies for both the floor and ceiling prices. Both types of pricing are common in Indonesia. The first is for instance for agricultural products such as rice and chili. The second is common for goods that are in high demand to meet basic needs of the consumers, such as cement. While the first is imposed in order to protect small market players (SMEs) from unfair competition from strong players, the second is used to protect consumers from too high prices.[19]

There are two scenarios of how pricing policies might harm innovation. In the first scenario*,* when the floor price is imposed, although efficiency or innovation could result in the ability to offer low prices, companies are still not allowed to sell below the floor prices. Thus, companies would not have sufficient incentives to innovate. On the other hand, innovation does not always result in low prices. It could also entail high prices, for instance, because of the cost for the research and development (hereafter, R and D). Thus, in the second scenario, the enforcement of a ceiling price policy might dissuade companies from innovating, although the innovation might lead to better quality of products, if it results in a higher price level than the assigned ceiling price.[20]

The Guidelines do not elaborate further, how eliminate the negative impacts of the pricing policy to innovation or which grounds could be considered as justifications to keep the policy at the cost of innovation, or whether the Guidelines would not justify such policy at all.

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17 S. Y. Wahyuningtyas – A. Y. A. Nugroho: Retail Policy and Strategy in Indonesia. In: M. Mukherjee – R. Cuthbertson – E. Howard (eds.): *Retailing in Emerging Markets: A Policy and Strategy Perspective*. Oxford, Routledge, 71–72.

18 Ibid. 29.

19 Ibid.

20 Ibid. 29–30.

2.1.1.2.3. Self- and Co-Regulation v. Innovation[21]

Self- and co-regulation are also referred to by the Guidelines as types of regulation that potentially could impair innovation. The term self-regulation refers to a regulation made by a group of companies, i.e. association, based on an authorization granted by the Government on the matters relevant to competition, such as price fixing, new business permit, and selling quota. The term co-regulation is understood as a regulation that requires a policy related to the industry that has to be agreed upon by the group of companies, i.e. association, and the Government.[22]

Innovation might be at stake when a regulation or policy contains a reduction of incentives to compete. According to the Guidelines, this is the type of regulation or policy that potentially would facilitate a cartel. Self- and co-regulation are seen as belonging to this type. They are considered as being able to be used to secure the interests of companies to survive in the market. Because such regulations potentially do not leave a sufficient room for other parties to negotiate, it could be used to reinforce the market power of the companies. As such, by allowing self- or co-regulation, there would be a danger that companies would not have sufficient incentives to innovate any longer.[23] However, the statement in the Guidelines seems to be more of reflecting concerns about self- and co-regulation models and a traditional view that favors state regulation over the other regulation models than inducing a *per se* prohibition of using self- and co-regulation.

The Guidelines also do not elaborate further on how to evaluate such types of regulation and to what extent they could be justified or whether all regulations of those types would be considered as by design in conflict with competition policy and hence, when exist, shall be revoked.

2.1.2. Policy and Regulation Framework for Digital Market

The policy road map for Indonesian digital market is included in the 9th Package of Economic Policy aiming at becoming a major digital market player in South East Asia in 2020. According to the policy road map, to optimize the development of the digital market in the country, it would be based on the empowerment of local SMEs (startups). This leads to the policy to significantly reduce legal costs and administrative burdens for setting up businesses. This approach is taken based on the major contribution of SMEs to the product domestic brutto (PDB), which according to the data from the Ministry of SMEs in 2015, the total amount of 59.2 billion of SMEs in the country contributed to 61,41% of the PDB. To implement this Policy Package, the Government is preparing a Government Regulation that is expected to be released and to enter into force in 2017.

[21] Ibid. 32.

[22] Ibid. 32.

[23] Ibid. 33.

According to the Report by Indonesian Telecommunication Providers Association, in 2014, 91% of Indonesian population had access to cellular signal and in 2016, almost all the inhabited land area has signal coverage.[24] In 2016, the penetration of cellular phone in Indonesia was 126% and internet users reached 51.85% of the population (93.4 million users), among those, 71 million are smartphone users.

The responsibility for regulating activities on the internet in Indonesia is mandated to the Ministry of Communication and Information (hereinafter, Menkominfo) with one of the main tasks to support the Government to set policy for the industry.[25] The Ministry is also responsible for regulating the telecommunication industry that had been existent long prior to the use of internet. The placing of the responsibility to regulate activities on the internet on the Ministry is based on the reason that internet access is basically made available by internet network that becomes part of the telecommunication services.

The task as the regulator in the telecommunication market is further carried out by Indonesian Telecommunication Regulation Body (*Badan Regulasi Telekomunkasi Indonesia,* hereinafter, BRTI) that was established in 2008.[26] The strong intervention of the Government in the industry is justified under Law No. 36 of 1999 on Telecommunication (hereinafter, Indonesian Telecommunication Law). The Law sets out that telecommunication is controlled and fostered by the state in order to improve telecommunication operations, by means of setting policy, regulation, supervision, and monitoring.[27]

Although competition policy in the telecommunication industry uses *ex-ante* regulation approach, an *ex-post* approach is also used in the applicability of competition law. Under Law No. 36 of 1999, in providing services in the telecommunication industry, companies are prohibited from carrying out activities that could result in monopoly practices and unfair business competition,[28] i.e. Law No. 5 of 1999 concerning Prohibition of Monopoly Practices and Unfair Business Competition (hereinafter, Indonesian Competition Law). The provision is further implemented in the Decision of the Ministry of Communication No. 34 of 2004 concerning the Supervision of Fair Competition in the Fixed Network and the Provision of Basic Telephony Services. It mainly lays down the prohibition of dominance abuse, rules for the use of access code and interconnection, and obligation to meet demand in limited services.

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[24] Indonesian Telecommunication Providers Association: Building A Digital Indonesia: A Snapshot of the Indonesian Telecommunication Industry. *Summary Report*, 2015. 10.

[25] Ministry of Communication and Information Regulation No. 17/PER/M.KOMINFO/10/2010 concerning Organization and Working Procedure of the Ministry of Communication and Information.

[26] Ministry of Communication and Information Regulation No. 36/PER/M.KOMINFO/10/2008 concerning the Establishment of Indonesian Telecommunication Regulation Body as amended by Ministry of Communication and Information Regulation No. 31/PER/M.KOMINFO/8/2009.

[27] Law No, 36 of 1999 Art. 4 par. (1)–(2).

[28] Ibid. Art. 10 par. (1).

As regards the use of internet, a different regulation applies, namely Law No. 19 of 2016 (hereafter, EIT Law) that amends Law. No. 11 of 2008 on Electronic Information and Transaction. The provisions of the law are implemented further in the Government Regulation No. 82 of 2012 concerning the Provision of Electronic Transaction System (hereafter, PETS Regulation). Although the placing of the responsibility to regulate the use of internet on the Ministry of Telecommunication and Informatics seems to be logical, it is feared that the Ministry would treat the digital market industry the same way as it treats the telecommunication industry as such that the digital market would be heavily regulated as the telecommunication industry. This concern is, however, still to be closely observed.

2.1.3. The Ex Post and Ex Ante Approaches

2.1.3.1. Ex Post v. Ex Ante Approach

To complete its task to ensure fair and effective competition in the market, competition law commonly takes an ex post approach, according to which the evaluation on the occurrence of anticompetitive elements in a certain conduct is carried out on a case by case basis. By taking this approach, competition law provides sufficient rooms for the freedom of companies to engage in business activities and moreover, to innovate, without the companies being restricted to overly rigid rules. In Indonesia, Law No. 5 of 1999 is applied as a tool for ex post analysis of an allegation of an infringement of competition law.

Nevertheless, in certain cases, an ex ante approach is necessary. Such approach can be seen in several industries, especially those that are heavily regulated such as the telecommunications,[29] energy,[30] food retail,[31] and the transportation industry.[32]

The choice to use an ex ante approach is justified for instance when it involves public interests such as the interest to protect consumers and to safeguard public welfare by means of imposing tax regulation. In order to ensure that those interests are well shielded in the market, ex ante regulations are imposed. This is also the case in the transportation industry which becomes the focus of this study such as in Law No. 22/2009 on Traffic and Transportation, related specifically to taxi services.

The problem with taking ex ante approach is that it could be the case that a new development in the market has not yet been covered by the existing regulations,

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[29] C. Wattegama – J. Soeharjo – N. Kapugama: Telecom Regulatory and Policy Environment in Indonesia Results and Analysis of the 2008 TRE Survey. *Final Report,* 2008. 12.; E. Makarim: The Protection of Consumer' Rights and the Application of Criminal Law in the Unlawful Operation of Services and Content Service Applications. *Indonesia Law Review,* Vol. 2., N. 2., 2012. 231.

[30] OECD and ADB Development Centre Seminars Asia and Europe Services Liberalisation: Services Liberalisation. Paris, OECD/ADB, 2003. 12–13.

[31] Wahyuningtyas–Nugroho op. cit. 73.

[32] S. Wallsten: The Competitive Effect of the Sharing Economy: How Is Uber Changing Taxis? *Technology Policy Institute, Studying the Global Information Economy,* 2015. 2.

while regulations cannot always predict such development, especially those brought by disruptive innovation. Online transportation network is not included Law No. 22/2009 and hence, leaves a legal loophole as regards whether they are also subject to the obligation imposed by the Law and if so, whether it would be subject to the same obligation imposed to conventional taxi providers. However, there are difficulties to apply the Law to the online transportation network, mainly because by definition, they do not have the same characteristics as conventional taxi providers. This leads to asymmetrical regulations applicable to different market players, i.e. the incumbents and the new players that brought innovation that has not yet been recognized yet in the existing regulation. In order to deal with this development, the Transportation Ministry enacted a new regulation that includes provisions applicable to online transportation network, namely Transportation Ministry Regulation No. 32 of 2016 on the Provision of Transportation of Persons Using Motor Vehicle Not Based on Route (hereafter, Regulation No. 32/2016).

2.1.3.2. Online Transportation Network: Ex Ante Regulation and Asymmetrical Regulation Issue

The asymmetric regulation in the door to door transportation services apparently leads to advantageous circumstances for the new entrants.[33] It has given rooms for the online transportation network to enter the market with lower legal costs than those applicable to the conventional taxi providers. This advantage contributes to the ability of the new entrants to gain a foothold in the market by offering generally lower prices than the incumbents. However, low price is not the only benefit they offer to consumers. The innovation that makes it easier for consumers to order a transportation service from smartphones as well other relevant services such as the facility to track the car or motorbike being ordered or in transport and the review mechanisms has a significant role in enabling them gaining consumer trust.

With the new Transportation Ministry Regulation, the Government attempts to balance the regulation asymmetry in order to ensure that no market player is standing above the law, although it also seems to be reluctant to clarify the obligations imposed on the online transportation network. In the interests of protecting consumers, businesses should not be hindered from innovating, but they are also subject to a number of requirements such as minimum safety and security standards. Regulations are meant to afford protection for consumers, who are usually in a weaker bargaining position when dealing with business entities. In other words, the regulations have a role to restore the balance by means of imposing appropriate policies.

However, it still needs to be clear that certain characteristics of the online transportation network actually make it more prone to be amenable to regulations.[34]

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[33] D. E. Rauch – D. Schleicher: Like Uber, but for Local Governmental Policy: The Future of Local Regulation of the "Sharing Economy". *Working Paper*, 15-01, 2–3. http://ssrn.com/abstract=2549919.

[34] B. G. Edelman – D. Geradin: Efficiencies and Regulatory Shortcuts: How Should We Regulate Companies Like Airbnb and Uber? *Stanford Technology Law Review*, Vol. 19., 2016. 326.

Transparency of payments and traceability of location exemplify this. Another feature such as reliable user review mechanisms that provide a reputational mechanism to address asymmetric information for users prior to the ride is also a considerable mechanism that could be more effective than security measures imposed by a government regulation.[35]

2.2. Sharing Economy or Just Business As Usual?

2.2.1. Online Transportation Network and Sharing Economy

The use of the sharing economy concept can be seen in how the online transportation network works. It has been applied by other online businesses as well. Zervas and Proserpio have made an extensive study on the application of the sharing economy concept by Airbnb[36] in the accommodations market. Another example is UmbraCity, an umbrella sharing service.[37] Companies operating as online transportation network act as an intermediary between consumers and vehicle owners with the purpose of gaining "full utilization of available resources",[38] in this case, optimizing the functionality and utility of goods by making them available for consumers and of creating economic value for the owner.

With the use of the internet that has become easily accessible, it becomes easier than ever for the owners of the available vehicles to offer them to potential users and for consumers to find and order a ride service.[39] This creates new businesses providing direct, peer-to-peer platforms with ease of access and competitive price[40] to bring together the owners of the resources and the users, usually in the short term.[41] This is the underlying idea of online transportation network to offer an answer for urban transportation problems.[42]

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35 A. Thierer and Others: How the Internet, the Sharing Economy, and Reputational Feedback Mechanism Solve the 'Lemon Problems'. *Mercatus Working Paper*, 2015. 37.

36 G. Zervas – D. Proserpio: The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry. *Working Paper*, 2016. 2.

37 UmbraCity, Homepage. http://umbracity.com/.

38 A. T. Bond: An App for That: Local Governments and the Rise of the Sharing Economy. *Notre Dame Law Review Online,* Vol. 90., N. 2., (2015) 78.

39 Ibid.

40 R. H. Brescia: Regulating the Sharing Economy: New and Old Insights into an Oversight Regime for the Peer-to Peer Economy. *Nebraska Law Review,* Vol. 95., N. 1., (2016) 100.

41 Rauch–Schleicher op. cit. 2. See also T. Teubner: Thoughts on the Sharing Economy. In: P. Kommers et al. (eds.): *Proceedings of the International Conference ICT, Society and Human Beings 2014, Web Based Community and Social Media 2014, e-Commerce 2014, Information Systems-Post Implementation 2014, and e-Health 2014, Multi Conference on Computer Science and Information Systems.* July 15–19, 2014. Lisbon, Portugal, 323.

42 N. M. Davidson – J. J. Infrance: The Sharing Economy as an Urban Phenomenon. *Yale Law and Policy Review*, Vol. 34., N. 2., (2016) 219.

Online transportation network services are well-known for its competitive pricing[43] that is defined by calculating the distance and other relevant elements, for instance, the road traffic. However, price is not the only successful keys; online transportation network also offers a convenient process from ordering a vehicle to paying the service. In addition, a navigation system equips the vehicle to make it easier to pinpoint the exact location of the passengers and the destination. Prospective passengers can also track the location of the car being ordered and calculate how much time it will take for them to be picked up.[44] The navigation system does not only contribute to convenience, but it also offers security measure to ensure that the passenger will be safely taken to the destination as ordered.

Responding to whether or not the sharing economy shall be regulated or how to regulate it, Stephen R. Miller introduced the first principles for regulating the sharing economy[45] based on the consideration that the sharing economy due to its disruptive nature usually has not been addressed in existing regulations, which leads to perception that it is flouting of the existing rules. He uttered further that regulating the sharing economy requires a specific approach that involves a differentiated regulatory response. Hence, asymmetric regulation would remain in place, but this is merely a result of the different nature of the object of the regulation. It is not recommended to apply the same rule equally to all players despite their different natures.

2.2.2. New Business Scheme or An Escape from Rules?

A tempting question is whether the online transportation network in Indonesia is a pure implementation of the sharing economy that emphasizes on the full utilization of the available resources or they are merely a new business scheme used to avoid the existing rules. While the element of innovation and its role in attracting customers remain undeniable, the question focuses on understanding the nature of the business itself.

While the concept of the sharing economy centers in the optimization of resources, in practice, the resources used in the online transportation network are not always made available for customers not because they have already been existing, unused, and thus, available. Instead, people invest in buying vehicles, either cars or motorbikes, and paying drivers, then registering themselves by the online platforms such as Uber, GrabCar, GoJek or the likes. Hence, it is not the resources in terms of vehicles, but in terms of money that are optimized in the business. From this viewpoint, the scheme seems to escape from the original idea of the sharing economy

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[43] C. Dyal-Chand: Regulating Sharing: The Sharing Economy as an Alternative Capitalist System. *Tulane Law Review*, Vol. 90., N. 2., (2015) 256.

[44] M. Motala: The "Taxi Cab Problem" Revisited: Law and Ubernomics in the Sharing Economy. *Banking & Finance Law Review,* Vol. 31., 2016. 470–471.

[45] S. Miller: First Principles for Regulating the Sharing Economy. *Harvard Journal on Legislation*, Vol. 53., 2016. 151.

and move towards the usual business of car rental with a combination of the role of the online platforms as the intermediary or an agent to hook them up with potential customers. Rather, it looks more like a scheme to circumvent the existing laws.

From the above point of consideration, it seems that treating the online transportation network in Indonesia as an implementation of the sharing economy would not be entirely correct. A further study on the business scheme is therefore necessary, for which an intervention from economists would be highly valuable.

3. Public Policy and Self-Regulation of Online Transportation Network in Indonesia

3.1. Public Policy in Indonesian Transportation Industry for Taxi Services

Door to door transportation services in Indonesia, i.e. taxi services, are subject inter alia to the provisions of Law No. 22 of 2009 on Traffic and Transportation (hereafter, Law No. 22/2009) and further regulations, including Transportation Ministry Regulation No. 32 of 2016 on the Provision of Transportation of Persons Using Motor Vehicle Not Based on Route (hereafter, Regulation No. 32/2016). The policy in the industry opens the participation of private entities to operate in the market, although it obliges local governments to ensure the provision of public transportation within their respective region and between different regions operated by state-owned companies. This study is focusing on taxi services as the closest comparison to the online transportation network, because each type of public transportation is subject to different policy and rules.

Taxi services, according to the law, fall under the category of "public transportation" to carry passengers (this term is used to distinguish the services from freight cars) offering door to door services (to be distinguished from public buses, for instance),[46] specially marked, and equipped with a meter.[47] In addition, there are specific features that have to be assigned, such as the word "TAXI"[48] on the top of the car accompanied with a translucent light to indicate whether the taxi is vacant or occupied and the brand of the taxi company that has to be easily visible for potential passangers.[49] As a type of public transportation, taxis is also subject to the obligation to use a yellow shield number like other types of public vehicles in the country. There are two more types of shield number: red for state-owned cars and black for private cars. Taxi is allowed to operate only within a specific operating region so called the administrative district of regency.[50]

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46 Ibid. Art. 9, par. (1).

47 Regulation No. 32/2016, Art. 1, no. 15.

48 "TAKSI" in Indonesian.

49 Regulation No. 32/2016, Art. 9, par. (2).

50 Ibid. Art. 4. In Jakarta, for instance, it covers a larger area than a province (the Capital of Jakarta), it includes five areas covering also the suburbs, namely Jakarta, Bogor, Depok, Tangerang, and Bekasi. These areas are commonly known by their abbreviation *Jabodetabek*.

Prior to the operation, taxi businesses are subject to a mandatory requirement to obtain an operating license.[51] The licensing policy is based on the needs to supervise various aspects that are important first of all, for consumers. One of the major considerations is ensuring the quality of the vehicles and drivers, for which certain measurement and test have to be followed. For the eligibility of an entity that is capable of taking legal liability, a business entity that wishes to operate as taxi service providers is obliged to first establish a legal entity before it can apply for a license.[52]

Second, the licensing policy is based on the necessity to control the number of vehicles on the roads in the operating area concerned.[53] The basic idea of this policy is to maintain a balance between the market demand and the road capacity with the purpose of preventing excessive congestion on the roads.

The third aspect is ensuring the interest to protect public welfare by means of controlling the fulfillment of tax obligations by taxi companies.[54] The obligation to establish a legal entity as explained above also aims at covering this aspect of the policy.

Still in the spectrum of protecting the interests of consumers, taxi services are subject to the rate formula and price range (between the minimum charge and maximum cap) determined by the taxi company with the approval of an association of public transportation service providers (called *Organda*) and the government.[55] Based on this, the actual fare is calculated and shown on the meter. Local governments can also set the fares on the basis of the cost of living standard in the region.

While taxi service providers are subject to the rules above that also incur costs, in practice, online transportation network entered the market without having to meet the same requirements due to the absence of regulation applicable to them. In order to address the imbalance resulting from the asymmetric regulation, Regulation No. 32/2016 imposes the same obligations to online transportation network providers as those imposed to conventional taxi service providers. The Regulation clarifies further that the online transportation network are treated under the regulation as public transportation provision with an IT application basis,[56] as distinguished from taxi services, which are categorized as transportation for persons using motor vehicle not based on route.[57]

Regulation No. 32/2016 distinguishes between two different types of companies involved in the online transportation network business model: first, companies that provide IT applications that are used to bring together transportation service providers and their users; and second, companies that provide transportation services. Further,

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51 Ibid. Art. 21.

52 Ibid. Art. 22.

53 Ibid. Art. 5–7.

54 Law No. 22/2009, Art. 67.

55 This issue has been subject to discussions whether it would not qualify price cartel.

56 Law No. 22/2009, Art. 2, lit. c.

57 Ibid. Art. 3.

for the provision of online transportation network services, Regulation No. 32/2016 the first party to cooperate with the second party,[58] but it specifically prohibits the first party to also act as the second party.[59] Thus, the two parties will remain separate entities.

However, in the next step, Regulation No. 32/2016 also allows an exemption of the prohibition without clearly clarifying the ground for the exemption. It basically allows IT companies that provide applications and enter the online transportation network to operate businesses in the provision of transportation services for persons, under the condition that they are treated the same way as companies that operate in that particular industry, including conventional taxis.[60] Hence, they are also subject to the obligations applicable for conventional taxis: (1) mandatory requirement to obtain operating licenses,[61] (2) obligation to establish an Indonesian legal entity,[62] and (3) owning a car pool of at least five cars and a storefront, and employing only drivers with driver licenses, as pre-requisites to obtain an operating license.[63]

It seems that the regulation attempts to encourage IT companies operating as online platforms that provide applications for matching transportation service providers with users to limit their business strictly to providing such services. Once they expand their operation to provide the transportation services themselves, they will fall under the same regulations applicable for conventional taxis and this is something that they would not be fond of because it would incur costs that would not allow them to set their prices as low as before.

3.2. Integrating Public Policy in Self-Regulation of Online Transportation Network

Ensuring safe use of internet has become the interest of different stake holders and internet governance has been discussed from various perspectives. *Roy Balleste* argued that while there are numerous views on how to govern the internet, the most crucial concern in approaching internet governance should be human dignity.[64] Although the idea is sound and ideal, it has not been sufficiently discussed how it is defined and implemented. Nevertheless, there are a number of issues that become common concerns in the use of the internet, such as privacy and data protection, cyber security, the freedom to speech, dispute resolutions, and intellectual property rights protection. Moreover, there are also competition law concerns such as how to make sure that self-regulation is not abused by dominant market players to define terms and conditions in order to strengthen their market power or to facilitate

58 Ibid. Art. 41, par. (1).

59 Ibid. Art. 41, par. (2).

60 Ibid. Art. 42.

61 Ibid. Art. 21.

62 Ibid. Art. 22.

63 Ibid. Art. 23.

64 R. Balleste: *Internet Governance: Origins, Current Issues, and Future Possibilities.* Lanham–Boulder–New York–London, Rowman & Littlefield, 2015. 7.

cartel practices. The question is whether or how far self-regulation is capable of covering public interests or whether it would be better to leave those interests to state intervention in the form of government regulation.

The discussions could start from understanding the nature of internet governance. *Milton L. Mueller* observed that internet governance has two dimensions: technical management and regulatory control, and a fundamental issue when discussing about internet governance is to define the distinct scope of each dimension and where both intersect.[65] As *Laura DeNardis* put it, internet governance *'refers generally to policy and technical coordination issues related to the exchange of information over the Internet.'*[66] In the process of governing the internet, a question arises as to who governs the internet. *Rolf H. Weber* envisaged the multi-stakeholder of governing the internet as he stated that internet governance deals with questions, for instance, of *'who rules the internet, in whose interest, by which mechanisms and for which purposes'*.[67] Thus, there are various actors on the internet who have interests not only to have safe internet for their activities, but also take further steps, namely to design the rules of how to carry out activities on the internet.

Mueller argued that the control of the internet is exercised by institutions instead of by command. Parties interacting in the internet set rules to ensure reliable network equipped with monitoring and sanctions to safeguard the rules. However, the rules themselves are influenced by the bargaining power of the parties involved and thus, never entirely neutral in nature, because some parties are more powerful than the other. The way they are formulated and applied might favor certain interest over the other. In process, the rules will deal with pressures to adjust with the interest of various parties.[68] The exercise of bargaining power between parties is therefore part of the vital process in governing the internet. When discussing how the internet would challenge the nation-state, he argued that the internet will keep on creating institutional innovations in information and communication globally that both the volume of transactions and content on the internet might overcome the capacity of and transform traditional government processes. Also, the participation in the network as well as the authority over the network is decentralized as such that they are no longer closely aligned with political components.[69]

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65 M. L. Mueller: *Ruling the Root: Internet Governance and the Taming of Cyberspace*. Cambridge–Massachusetts–London, MIT Press, 2002. 8.

66 L. DeNardis: *Protocol Politics: The Globalization of Internet Governance*. Cambridge–Massachusetts–London, MIT Press, 2009. 14.

67 R. H. Weber: *Shaping Internet Governance: Regulatory Challenges*. Berlin–Heidelberg, Springer, 2010. 105. See also L. Pigoni: Internet Governance: Time for An Update. *CSS Analysis on Security Policy,* No. 163, November 2014. ETH Zurich, 2.

68 M. L. Mueller: *Ruling the Root: Internet Governance and the Taming of Cyberspace.* Cambridge–Massachusetts–London, MIT Press, 2002. 11.

69 M. L. Mueller: *Ruling the Root: Internet Governance and the Taming of Cyberspace.* Cambridge–Massachusetts–London, MIT Press, 2010. 4.

J. Mathiason categorized three types of governance functions in the internet, namely standardization, resource allocation and assignment, and public policy. While the first two are performed mostly by non-state actors that he classified further as engineers, entrepreneurs, and netizens (referring to avid internet users), the third function to formulate and enforce policy as well as dispute resolution function is exercised mostly by state.[70] Thus, he emphasized the role of state in governing the internet when it comes to public policy.

Self-regulation has been recognized as one way to regulate activities within the scope of a certain industry. In the context of internet governance, *Vey Mestdagh and Rudolf Rijgersberg* viewed self-regulation as an unsophisticated way to regulate the internet since the subjects of the regulation are at the same time also the creators and enforcers of the regulation.[71] *Virginia Haufler* explained that although the rules governing the behavior of the subjects are adopted voluntarily, they could also be backed up by a set of enforcement mechanisms that include agreements between companies or other groups.[72]

George Christou and Seamus Simpson argued that self-regulation from economic viewpoint implies both the freedom and the responsibility of market players to govern their own behavior in the market. Hence, a self-regulated market is a commercial construct of the most liberally ordered in the capitalist system.[73] This is also happening in online businesses in order to secure the interests of the parties involved in the transactions. Although the general rules that are mandatory in nature from the applicable laws or government regulations apply, certain activities are too complex to rely merely on the general rules, for which exhaustive discussions and interpretations are needed before the rules could be applied. Moreover, disruptive innovation might bring also new business models that have not yet been recognized in the existing laws or government regulations that applying the general rules to the transactions involved becomes more intricate. However, it could also be the case that self-regulation mechanism is chosen for the basic consideration that the online platforms wish to shield themselves from legal liability and sometimes they also limit their liability to an extent that it actually does not equally safeguard the interest of the users (or consumers). Moreover, it is could be the case that the rules in the self-regulation mechanism are not (at least easily) negotiable by applying standard clauses that do not leave sufficient rooms for users to negotiate otherwise.

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70 J. Mathiason: *Internet Governance: The New Frontier of Global Institutions*. London–New York, Routledge, 2009. 18.

71 C. Vey Mestdagh – R. Rijgersberg: Internet Governance and Global Self Regulation: Building locks for a General Theory of Self-Regulation. *The Theory and Practice of Legislation,* Vol. 4., N. 3., (2010) 385–404.

72 V. Haufler: *A Public Role for the Private Sector: Self-Regulation in A Global Economy.* Massachusetts, Carnegie Endowment for International Peace, 1957. 8.

73 G. Christou – S. Simpson: The Internet and Public-Private Governance in the European Union. *Journal of Public Policy*, Vol. 26., N. 1., (2006) 47–48.

Michael Hutter explained two guiding principles that lead to the creation of self-regulation. Both are complimentary. The first, and the dominant view, is the efficiency principle, in which private actors in the market, i.e. in the internet, among different alternatives concerning cost, effectiveness, and utility make a rational decision that results in new rules and organizational forms. Such result might emanate from an explicit choice or merely an unintended consequence of the sequence of choices. The second is the viable principle, according to which all regimes adopt and follow a set of rules and institute supporting regimes in order to maintain their continuity that results in evolutionary process of self-reproduction in which new regime will emerge and replace the old one.[74]

While extensive studies have been made to explain how internet stakeholders take responsibilities to design, follow, and enforce the rules on the internet, the question remains whether they would have either the will or the capacity to tackle public interests that might not or not directly fall under their own interests. The analysis on this issue focuses on the sector of online transportation network. I will start with discussing how self-regulation in online transportation network could be useful to protect the interests of parties involved in the transactions and how it could integrate public policy in the regulation. Afterwards, I will discuss the downsides of this type of regulation.

3.2.1. Public Policy and Self-Regulation

There are advantages and disadvantages of choosing self-regulation over state regulation as a way to design the rule of the game in the market. *Ian Bartle and Peter Vass* claimed that self-regulation has advantages over state regulation in certain aspects, such as the more effective use of knowledge and expertise of all parties, more commitment within the industry, less regulatory burden placed on business entities and less expenses for state to make regulation, and better functioning of the market. [75] Because it is of the parties' best interest to design the most suitable rules for their activities, they will optimize the use of their knowledge and expertise to draw the rules. Following the logic of the game theory, they also understand that by abiding by the rules they have made, they will be better off than otherwise.[76] Hence, the commitment to follow the rules is more inner-driven than having to be enforced by external powers such as from law enforcers or courts. It entails less regulatory

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[74] M. Hutter: Efficiency, Viability, and the New Rules of the Internet. *European Journal of Law and Economics*, Vol. 11., N. 1., (2001) 5–22., especially 17. See also, D. Graham – N. Woods: Making Corporate Self-Regulation Effective in Developing Countries. *World Development*, Vol. 34., N. 6., (2006) 869.

[75] I. Bartle – P. Vass: A Theory of Government Regulation and Self-Regulation: A Survey of Policy and Practice. In: *Research Report 17.* Centre for the Study of Regulated Industry, School of Management, University of Bath, 2005. 2.

[76] See B. Christiansen – M. Basilgan: *Economic Behavior, Game Theory, and Technology in Emerging Markets*. Hershey, Business Science Reference, 2013. 33.

burden for business entities, because they understand best how to effectively design a set rules that costs the least. For state, as argued by *A. Roßnagel and G. Hornung*, it means also less expense in economic and political terms for regulation making, while state can then focus on more essential matters.[77] In the end, it results in a market that functions better, because of less infringement and hence, less legal costs being spent to deal with legal infringements.

On the benefit or loss regarding the costs for regulation making, *Peter Grajzl and Peter Murell* argued that it is influenced by country-specific aspects. The benefit of delegating regulatory powers to private sectors, i.e. self-regulation, will be greater than the loss, when the uncertainty around the result of the regulation making is large or when the divergence between the interests of producers and consumers is small.[78]

Éric Brousseau uttered that the absence of control by state in self-regulation also contributes to the innovative way the internet could be regulated, although it does not make it a perfect model.[79] Further, the technical logic that governs the work of the internet allows it to expel infringers from the platform and thus, facilitate the enforcement by means of access control and use of subscribers list. However, this power is also problematic, because it can be exercised without having to take into account constitutional or ethical principles, merely because it can technically be done. [80]

Philip J. Weiser citing *Robert Pitofsky*, Chairman of the United States Federal Trade Commission, explained how self-regulation could play a role in supporting public policy as follows:[81]

From a public policy perspective, self-regulation can offer several advantages over government regulation or legislation. It often is more prompt, flexible, and effective than government regulation. Self-regulation can bring the accumulated judgment and experience of an industry to bear on issues that are sometimes difficult for the government to define with bright line rules. Finally, government resources are

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77 A. Rossnagel – G. Hornung: Self-Regulation of Internet Privacy in Germany and the European Union. *SungKyunKwan Journal of Science and Technology Law,* Vol. 55., 2007. 61. See also, S. Ranchordas: Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy. *Minnesota Journal of Law, Science and Technology*, Vol. 16., N. 1., (2015) 439.

78 P. Grajzl – P. Murrell: Allocating Law Making Powers: Self-Regulation vs Government Regulation. *Journal of Comparative Economics*, Vol. 35., 2007. 540.

79 É. Brousseau: *Internet Regulation: Does Self-Regulation Require an Institutional Framework?* Paper to be presented at the DRUID Summer Conference on "Industrial Dynamics of the New and Old Economy – Who Is Embracing Whom?" Copenhagen–Elsinore 6–8 June 2002. 2.

80 É. Brousseau: *Internet Regulation: Does Self-Regulation Require an Institutional Framework?* Paper to be presented at the DRUID Summer Conference on "Industrial Dynamics of the New and Old Economy – Who Is Embracing Whom?", Copenhagen–Elsinore 6–8 June 2002. 9–11.

81 P. J. Weiser: The Future of Internet Regulation. *UC Davis Law Review*,Vol. 43., 2009. 529–590, 557., fn. No. 106.; cited from R. Pitofsky: *Self Regulation and Antitrust*. Address at the D.C. Bar Association Symposium, February 18, 1998. See also C. T. Marsden: Beyond Europe: The Internet, Regulation, and Multistakeholder Governance – Representing the Consumer Interest? *Journal of Consumer Policy*, Vol. 31., 2008. 117.

limited and unlikely to grow in the future. Thus, many government agencies, like the FTC, have sought to leverage their limited resources by promoting and encouraging self-regulation.

Self-regulation can also be useful to gain user trust as pointed out by *Z. Tang, Y.D. Hu and M. D. Smith*.[82] This is why online feedback mechanisms through which businesses build their reputation is important. Users, or consumers, rely on producer's reputation more than on procedural laws or alternative dispute resolution mechanisms when deciding in split seconds whether they will buy the product or not. Trust via reputation is hence, seen as the basis of dispute prevention mechanism that gain more importance than dispute settlements either by or without court.

However, there are limitations in how public interests could be fully dealt with self-regulation by default in such a way that state intervention in the form of regulation is no longer needed. *Zoë Bird* criticized self-regulation as falling shorts certain expectations to protect public and consumer interests, such as privacy protection, security, and access to diverse content.[83] *Norman E. Bowie and Karim Jamal* also expressed privacy concerns in self-regulation of internet in the absence of government regulation.[84] *Ian Bartle and Peter Vass* in their study warned that self-regulation should be used with certain cautions. One of them is that self-regulation has to represent not only private but also public interests.[85] *John E. Savage and Bruce W. McConell* in their paper suggested that self-regulation of the multi-stakeholder internet has several disadvantages. It lacks of rules applicable for multi-stakeholder operation, suffers a perceived lack of accountability, many states consider it as having feeble legitimacy, and there is inequality of engagement from stakeholders who are not technology providers.[86]

All types of regulation have its scope of applicability. Even when territorial scope does not play a role due to a non-territorial nature of the activities, such as the internet or to be more specific, online businesses, it remains subject to other scope limitations, such as the platform itself. How to use *Google* is not applicable to *Bing* or *Ebay,* for instance. Hence, one of the limitation is that self-regulation within a specific market – relevant market borrowing the term used in competition law - cannot include rules

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82 Z. Tang – Y. D. Hu – M. D. Smith: Gaining Trust through Online Privacy Protection: Self-Regulation, Mandatory Standards, or Caveat Emptor. *Journal of Management Information Systems*, Vol. 24., N. 4., (2008) 153–173.

83 Z. Baird: Governing the Internet: Engaging Government, Business, and Nonprofits. *Foreign Affairs*, Vol. 81., N. 2., (2002) 16.

84 N. E. Bowie – K. Jamal: Privacy Rights on the Internet: Self-Regulation or Government Regulation? *Business Ethics Quarterly*, Vol. 16., N. 3., (2006) 331. See also M. J. Culnan: Protecting Privacy Online: Is Self-Regulation Working? *Journal of Public Policy & Marketing*, Vol. 19., N. 1., (2000) 22.; D. Hirsch: The Law and Policy of Online Privacy: Regulation, Self-Regulation, or Co-Regulation? *Seattle University Law Review*, Vol. 34., 2011. 443.

85 Bartle–Vass op. cit. 3.

86 J. E. Savage – B. W. McConell: *Exploring Multi-Stakeholder Internet Governance.* Report, East West Institute, 20 January 2015. https://www.eastwest.ngo/idea/exploring-multi-stakeholder-internet-governance.

applicable to other market. The rules governing online transportation network are not applicable to conventional taxis and cannot be expected to take into account interests of parties beyond their own platform. The problem is that public interests might occur beyond the platform, but are affected by activities within the platform. Thus, the ability of self-regulation to govern activities in their own specific sector or platform should not release stat from its task to shield public interests by means of state regulation or by means of supervision and regulatory reviews.

3.2.2. Self-Regulation and Anticompetitive Conducts

Self-regulation might raise competition law concerns when it is (mis)used to facilitate anticompetitive conducts, for instance if it is used to enable companies providing the services to exclude competitors or to exploit their market power in the market. Hence, self-regulation is rightly subject to competition authority supervision.

Exclusionary conducts might occur for instance when self-regulation contains a privacy policy that restricts users to provide the same personal data or the same quality of data to competitors or limiting the choice of users to use services provided by the online platform's competitors. It could also be an exclusionary policy when it hinders portability to allow them moving to or using the same services from competitors.

Exploitative conducts, on the other hand, might be the case when the freedom of user to negotiate a policy is restricted. Due to the online platform's dominance in the market, the user would be left only with the option to take the policy or leave it and use less preferable services provided by the online platform's competitors.

The Policy Guidelines[87] published by KPPU alert that competition authority shall consider self-regulation with cautions. Because the incentive to compete is an important element of encouraging innovation, the Guidelines find it necessary to carefully evaluate regulations having potentials to facilitate cartels. Here, innovation should play an important role as the main concern of the competition authority for evaluating such regulations, to which type self-regulation is considered to belong.[88]

As regards online transportation network, anticompetitive pricing concern arises due to the low prices offered in comparison to those of conventional taxi providers. The concern is now under the scrutiny of KPPU focusing on whether such pricing is part of predatory pricing in the early stage that aims at driving out competitors from the market.[89] KPPU might also need to look into another concern whether there is no abuse of power by squeezing suppliers, i.e. vehicle owners, in order to generate such competitive prices in the market.

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87 KPPU Regulation No. 04 of 2016.

88 KPPU Regulation No. 04 of 2016, Attachment, p. 33.

89 KPPU: Predatory Pricing, KPPU Awasi dan Selidiki Angkutan Online. http://www.kppu.go.id/id/blog/2016/10/predatory-pricing-kppu-awasi-dan-selidiki-angkutan-online/.

4. Self-Regulating Online Transportation Network or Government Regulation?

4.1. Balancing Asymmetrical Regulation Through Government Regulation

Asymmetrical regulation tends to result in at least perceived inequality before the law for market players. Although asymmetrical regulation could be a result from the difficulties to predict innovation and hence, first, certain innovative products are missing from the existing regulation, and second, either condemn the product as illegal or applying the regulation on the basis of one regulation fits all would not be fair, it creates tension to some extent in the market because of the absence of the legal cost for new comers could bring new comer advantages.

The enactment of the new Ministry Regulation, Regulation No. 32/2016, was a response of the Government in its attempt to balance the asymmetrical regulation resulting from the entrance of online transportation network in the market. The message to deliver with it is that the Government has taken action to restore justice. According to the Regulation, companies operating as online transportation network is given two options. First, they can operate merely as online application providers, or second, they can at the same time also operate as conventional taxi providers, e.g. operating their own cars, for which similar rules with those applicable for conventional taxi providers apply.

Although the new regulation might pragmatically solve the problem – which remains to be seen in the coming years -, the question remains: how fast the government would or should respond in similar ways whenever new innovation occurs in the market? It seems that changing regulations all the time would not only be costly, but also unpredicted. Bearing in mind that legal compliance would incur costs; unpredictable changes of regulation would be daunting for market players and tend to deter them from innovating.

4.2. Self-Regulation of Online Platform Instead of Government Regulation

M. Mueller, J. Mathiason, and H. Klein while proposing principles and norms for the foundation of global internet governance suggested that "governmental forms of supervision and oversight must be strategically placed but also carefully limited and lawful" and instead, to legitimate and maintain multi-stakeholders governance.[90] Although this view seems to be favoring limited governmental intervention in the internet governance, it should be understood in the context of the global nature, i.e. the non-territorial characteristic, of the internet that entails the necessity of detaching from the traditional approach of a top-down regulating mechanism based on territorial state(s) interests.

[90] M. Mueller – J. Mathiason – H. Klein: The Internet and Global Governance: Principles and Norms for a New Regime. *Global Governance*, Vol. 13., N. 2., (2007) 250.

There are matters that still require state involvement in the form of regulation. In utilizing self-regulation, *J. P. Kesan and A. A. Galo* proposed a mixed model of bottom-up and top-down regulation approach.[91] Certain issues such as tax compliance, security measures on the internet or in online transactions, and consumer protection still require state intervention at least in provision of the guiding principles and supervision, as well as law enforcement when self-regulation fails to enforce them on free will or voluntarily basis.

4.3. Regulating Innovation and Sharing Economy

Innovation is hard to regulate, especially disruptive innovation, because it is difficult to envisage. If at all, the role of regulations as regards innovation would be to encourage and provide incentives to innovate. On the other hand, leaving innovative products unregulated might also create legal uncertainty. Sharing economy, the underlying business idea of online transportation network, also elevates legal issues that might lead to uncertainty, because there are elements of the business operation that do not fall under the existing legal categories.[92] Certain issues such as tax, consumer protection, insurance, security measures, business licensing, and pricing mechanisms are among others that have been addressed in the debate of the legality of online transportation network.

As regards consumer protection, *C. Koopman, M. Mitchel, and A. Thierer* argued that traditional legal measures are not the only way to protect the interests of consumers. In the case of sharing economy, they specifically addressed the role of reputation established through the modern online feedback mechanisms.[93] Reputation has increasingly important roles for business players to build consumer trust[94] and consumers have a critical part in defining the reputation of business players they are dealing with. This mechanism is also used in sharing economy business model. Only reputable players will survive in the market. Hence, the compliance to what is necessary to serve the consumer interests is not enforced by law, but by understanding how the business works.

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[91] J. P. Kesan – A. A. Galo: Why Are the United States and the European Union Failing to Regulate the Internet Efficiently? Going Beyond the Bottom-Up and Top-Down Alternatives. *European Journal of Law and Economics*, Vol. 21., 2006. 262–263.

[92] V. Katz: Regulating the Sharing Economy. *Berkeley Technology Law Journal*, Vol. 30., N. 385., (2015) 1068.

[93] C. Koopman – M. Mitchel – A. Thierer: The Sharing Economy and Consumer Protection Regulation: The Case for Policy Change. *Mercatus Research,* George Mason University, 2014. 16.

[94] US Federal Trade Commission: The Sharing Economy: Issues Facing Platforms, Participants & Regulators. *Staff Report*, November 2016. 51.

5. Conclusion

The role of innovation in the emerging of the digital market becomes more prominent, but it also raises legal questions. While innovation has not been given a clear role in shaping suitable approaches, markets take their own way to respond to the new development as shown in the use of online transportation network. Along with this development, regulation asymmetry has been accused for not allowing a level playing field between conventional taxis and online transportation network and the concept of the sharing economy challenges current policy approach in the country that tends to prefer ex-ante regulation approach in transportation industry. This paper argues that self-regulation of online platform could be a better alternative than attempting to restore the balance of the existing regulation asymmetry by means of introducing a government regulation aiming at fitting all size. However, state intervention in the form of state regulation, supervision and regulatory reviews remain necessary to protect public interests that are not or difficult to be covered by self-regulation such as issues concerning tax compliance, security measures on the internet or in online transactions, intellectual property rights, consumer protection, and fair competition.