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Control of Essential Facilities by State-Owned Enterprises as an Abuse of Dominant Position: An Indonesian Competition Law Perspective

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ABSTRACT

State-owned enterprises (SOEs) occupy a constitutionally significant position in Indonesia because they are entrusted with managing sectors of production that are important to the state and affect the livelihood of the public. In many network industries, however, SOEs also control facilities that are technically, economically, or legally indispensable for competitors to enter and operate in adjacent or downstream markets. This article examines whether and under what conditions the control of essential facilities by SOEs may constitute an abuse of dominant position under Indonesian competition law. Using normative legal research, this study combines statutory, conceptual, comparative, and case approaches. It analyses Article 33 of the 1945 Constitution, Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, the SOE legal framework, the Essential Facilities Doctrine, and the Indonesian Competition Commission Decision No. 02/KPPU-I/2013 concerning PT Pelabuhan Indonesia II (Persero). The article argues that SOE control over strategic infrastructure is not unlawful per se where it is grounded in a public mandate and implemented for public-interest objectives. Nevertheless, refusal of access, discriminatory access conditions, tying access to the use of affiliated services, disproportionate access fees, and self-preferencing may transform lawful control into an exclusionary abuse where such conduct forecloses competitors or raises their operating costs without objective justification. The article proposes a five-factor analytical test: essentiality of the facility, dominance of the facility controller, exclusionary or discriminatory conduct, demonstrable anticompetitive effect, and absence of objective justification. It concludes that Indonesian law should explicitly incorporate clearer essential-facility standards and that KPPU should issue specific guidelines to reconcile SOE public mandates with competition neutrality.

Keywords: access regulation; market foreclosure; public-service mandate; non-discrimination; network industries; competition enforcement

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INTRODUCTION

Modern competition is shaped not only by price, product quality, and innovation, but also by the ability of firms to obtain access to strategic infrastructure. In network industries such as ports, airports, energy transmission, railways, telecommunications, payment systems, and digital infrastructure, a single facility may operate as the gateway through which market participation becomes possible. Where such a facility cannot be duplicated within a reasonable time and at a reasonable cost, control over it may confer substantial market power on the firm that owns or operates it (OECD, 1996; Whish & Bailey, 2021).

The legal problem becomes more complex in Indonesia because many strategic facilities are controlled by State-Owned Enterprises (SOEs). This institutional design is not accidental. Article 33 of the 1945 Constitution provides that branches of production that are important to the state and affect the livelihood of the public shall be controlled by the state. SOEs are therefore used as instruments through which the state manages public-interest sectors, public services, and strategic assets. In this respect, SOE control over ports, electricity networks, airports, railways, and other infrastructure is constitutionally and economically intelligible (Republic of Indonesia, 1945; Republic of Indonesia, 2003).

At the same time, SOEs may also act as commercial undertakings in markets that are open to competition. The problem arises when an SOE controls an upstream or bottleneck facility while simultaneously competing in a downstream market that depends on that facility. In that setting, the SOE may have incentives to favour its own downstream unit, subsidiary, or affiliated company, while imposing restrictive conditions on independent competitors. Such conduct may take the form of refusal to deal, discriminatory access, tying access to the use of affiliated services, charging disproportionate access fees, or self-preferencing. These practices can create entry barriers, raise rivals' costs, reduce consumer choice, and distort the competitive process.

Indonesian competition law recognises market control and abuse of dominant position through Articles 19 and 25 of Law No. 5 of 1999. Article 19 prohibits conduct that rejects or impedes other business actors from conducting business in the relevant market, restrains distribution or sales, or discriminates against certain business actors. Article 25 prohibits business actors from using a dominant position to impose trading conditions that impede consumers from obtaining competitive products, restrain market and technological development, or hamper potential competitors from entering the relevant market (Republic of Indonesia, 1999). However, Law No. 5 of 1999 does not expressly codify the Essential Facilities Doctrine. This creates uncertainty in cases where a dominant SOE refuses or limits access to a facility that competitors cannot practically duplicate (Anisah, 2022; Wardhana, 2018).

The Indonesian Competition Commission Decision No. 02/KPPU-I/2013 concerning PT Pelabuhan Indonesia II (Persero) illustrates the issue. In that case, PT Pelindo II, as operator of Teluk Bayur Port, required land tenants within the port area to use stevedoring services provided by Pelindo II. KPPU considered that the port and its supporting infrastructure constituted an essential facility and that the policy restricted opportunities for other stevedoring companies to compete effectively (KPPU, 2013). The case demonstrates that a facility lawfully controlled by an SOE may become the basis for anticompetitive foreclosure when access is conditioned in favour of the SOE's own services.

This article addresses two research questions. First, how should the control of essential facilities by SOEs be understood as a source of dominant position under Indonesian competition law? Second, what legal parameters should be used to distinguish lawful state-mandated control from abusive conduct that restricts competition? The article contributes to Indonesian competition law scholarship by developing a structured test that integrates the Essential Facilities Doctrine, the constitutional mandate of SOEs, and the statutory framework of Law No. 5 of 1999.

Literature Review and Conceptual Framework

1. The Essential Facilities Doctrine in Comparative Competition Law

The Essential Facilities Doctrine developed from antitrust cases in the United States and later influenced European competition law. Its core proposition is that a dominant undertaking controlling a facility indispensable for competition may, in exceptional circumstances, be required to provide access to competitors on fair, reasonable, and non-discriminatory terms. The doctrine was classically associated with infrastructural bottlenecks, including rail terminals, transmission systems, port facilities, and other assets that could not be replicated without prohibitive cost or legal constraints (OECD, 1996).

In United States v. Terminal Railroad Association of St. Louis (1912), control over railway terminal facilities that were necessary for railway access into St. Louis was treated as a source of exclusionary power. Later cases such as Associated Press v. United States (1945), MCI Communications Corp. v. AT&T Co. (1983), and Aspen Skiing Co. v. Aspen Highlands Skiing Corp. (1985) developed principles concerning denial of access, refusal to deal, and exclusionary conduct by firms with market power. However, United States doctrine became more cautious after Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP (2004), where the Supreme Court warned against excessive judicial intervention that might reduce incentives to invest and innovate.

European Union law has generally treated essential-facility issues within the broader framework of abuse of dominance under Article 102 TFEU. The Court of Justice in Oscar Bronner GmbH & Co KG v. Mediaprint (1998) articulated a restrictive test for compulsory access: the facility or input must be indispensable, refusal must be likely to eliminate competition in the downstream market, and refusal must lack objective justification. This approach reflects a balancing exercise between preserving competition and respecting the property rights, freedom of contract, and investment incentives of the dominant undertaking (O'Donoghue & Padilla, 2020; Whish & Bailey, 2021).

The comparative experience therefore reveals two important limitations. First, not every facility that is useful to competitors is essential. Essentiality requires indispensability, non-duplicability, and the absence of realistic substitutes. Second, not every refusal or restriction is abusive. Access restrictions may be objectively justified by capacity constraints, safety, security, technical integrity, public service obligations, or legitimate efficiency considerations. These limitations are particularly important in the SOE context because SOEs may operate under public mandates that differ from ordinary private commercial incentives.

2. Indonesian Competition Law and the Absence of an Explicit Essential-Facility Rule

Law No. 5 of 1999 contains no express provision titled Essential Facilities Doctrine. Nevertheless, the substance of the doctrine can be interpreted through several provisions. Article 19 prohibits business actors from rejecting or impeding other business actors from conducting the same business activities in the relevant market, impeding customers of competitors from dealing with competitors, restraining distribution or sales, and engaging in discriminatory practices. Article 25 prohibits the use of dominant position to impose trade conditions that restrict consumers, restrain market or technological development, or hamper new entrants (Republic of Indonesia, 1999).

The doctrine is therefore not alien to Indonesian law, but its doctrinal status remains underdeveloped. Wardhana (2018) argues that Indonesian competition law requires clearer renewal regarding essential facilities because the doctrine is only implied within Law No. 5 of 1999. Anisah (2022) similarly notes that KPPU has applied inconsistent reasoning in SOE market-control cases, sometimes evaluating SOE control through competition-law concepts and sometimes treating it mainly as a constitutionally authorised monopoly. This inconsistency increases legal uncertainty for both SOEs and private competitors.

The absence of an explicit rule matters because essential-facility cases involve a delicate trade-off. If access duties are imposed too broadly, they may undermine the incentive to invest in expensive infrastructure. If access duties are imposed too narrowly, vertically integrated facility owners may use bottleneck assets to exclude rivals. Indonesian law must therefore formulate a standard that is sufficiently precise to guide enforcement, while sufficiently flexible to account for public-interest obligations and sector-specific regulation.

3. SOEs, Article 33 of the Constitution, and Competition Neutrality

SOEs occupy a distinctive position in Indonesia. They are not merely ordinary corporations owned by the state; they are also instruments for implementing economic democracy, public service, and the constitutional mandate of state control over strategic sectors. Law No. 19 of 2003 defines SOEs as enterprises whose capital is wholly or mostly owned by the state through direct participation derived from separated state assets. The SOE governance framework remains anchored in Law No. 19 of 2003, subject to later amendments, including Law No. 1 of 2025 and Law No. 16 of 2025 (OECD, 2026).

Constitutional legitimacy, however, should not be confused with immunity from competition law. Indonesian competition law provides exceptions for certain monopolies authorised by statute and conducted by the state, but when an SOE engages in commercial activity in a market, it should remain subject to the basic prohibition against anticompetitive conduct. This distinction is essential. Lawful state control over strategic resources explains why an SOE may control a facility; it does not automatically justify every restrictive access policy adopted by that SOE.

The concept of competition neutrality is useful here. Competition neutrality does not require that SOEs be privatised or stripped of public mandates. Rather, it requires that SOEs not receive or exercise advantages in a way that unnecessarily distorts competition in markets where private firms are legally allowed to operate. Applied to essential facilities, competition neutrality requires transparent, objective, proportionate, and non-discriminatory access conditions, particularly where the SOE is vertically integrated into the downstream market.

METHOD

This study uses normative legal research, also known as doctrinal legal research. The object of analysis is not empirical measurement of market outcomes but legal norms, legal concepts, doctrinal arguments, and adjudicatory reasoning concerning SOE control of essential facilities. This method is appropriate because the research problem concerns the interpretation and development of competition-law standards under Indonesian law.

The study applies four approaches. The statutory approach examines the 1945 Constitution, Law No. 5 of 1999, the SOE legal framework, and relevant competition-law provisions on market control and dominant position. The conceptual approach analyses the concepts of dominance, abuse of dominance, market foreclosure, essential facilities, refusal to deal, non-discrimination, and self-preferencing. The comparative approach draws from United States and European Union competition law to clarify the doctrine's function and limits. The case approach analyses KPPU Decision No. 02/KPPU-I/2013 concerning PT Pelabuhan Indonesia II (Persero) as a concrete example of SOE control over port infrastructure.

The legal materials consist of primary legal materials, secondary legal materials, and tertiary legal materials. Primary materials include legislation, constitutional provisions, KPPU decisions, and landmark foreign cases. Secondary materials include books, peer-reviewed journal articles, competition-agency materials, and scholarly commentary on the Essential Facilities Doctrine and abuse of dominance. Tertiary materials include legal dictionaries and other supporting sources. The materials are analysed descriptively and analytically to formulate a coherent legal framework for assessing when SOE control of essential facilities becomes abusive.

RESULTS AND DISCUSSION

1. Essential Facilities as a Source of Dominant Position

Dominant position is not prohibited in itself. Dominance may arise from efficiency, innovation, superior management, investment, or a legal mandate. Competition law is concerned not with being dominant but with abusing dominance. This distinction is central to the assessment of SOEs. A port authority, electricity transmission operator, airport operator, or railway infrastructure manager may legitimately possess a dominant position because duplication of the relevant facility is economically inefficient, technically impractical, environmentally burdensome, or legally restricted.

A facility should be treated as essential only if it satisfies demanding criteria. First, the facility must be controlled by an undertaking with significant market power. Second, competitors must need access to the facility to compete in a relevant market. Third, duplication of the facility must be impossible, unreasonable, or economically inefficient within a reasonable period. Fourth, there must be no practical alternative that can perform the same competitive function. Fifth, granting access must be technically feasible and must not undermine safety, security, capacity allocation, or legitimate public service obligations.

In the Indonesian SOE context, ports, railway tracks, electricity transmission networks, and certain telecommunications infrastructure may often satisfy these criteria. They typically require large sunk costs, land access, public licensing, regulatory permission, and long development periods. Because such facilities cannot easily be replicated, their operators may determine the practical conditions under which downstream competitors can enter or remain in the market. This ability creates market power even if the SOE does not directly charge monopoly prices.

2. Lawful SOE Control versus Abusive Use of Control

The constitutional foundation of SOE control creates a presumption of legality regarding ownership or operation of strategic facilities. It does not create a presumption of legality for exclusionary conduct. The legal inquiry must therefore separate two questions. The first question is whether the SOE is authorised to control the facility. The second question is whether the SOE uses that control in a manner that restricts competition beyond what is necessary to achieve public-interest objectives.

A lawful access policy should be based on objective and transparent criteria. Examples include capacity limits, safety standards, technical compatibility, security requirements, environmental obligations, payment of reasonable access charges, and compliance with sectoral regulations. By contrast, access restrictions become suspicious when they are linked to the commercial interests of the SOE's downstream affiliate rather than to the proper management of the facility. Such restrictions include requiring users to purchase affiliated services, delaying or degrading access for independent competitors, imposing different tariffs for similarly situated users, or allocating capacity in a way that favours the SOE's own group.

The legal challenge is therefore not to prohibit SOE control, but to discipline the exercise of control. Competition law should intervene when the access condition is exclusionary, discriminatory, disproportionate, or unsupported by objective justification. This approach respects Article 33 of the Constitution while preventing the constitutional mandate from being transformed into a shield for private or group-based commercial advantage.

3. Forms of Abuse in Essential-Facility Cases

Several forms of abusive conduct may arise when an SOE controls an essential facility. The first is refusal to deal. This occurs when the facility controller refuses access to a competitor that needs the facility to compete in the relevant market. Refusal may be explicit, such as a formal rejection, or constructive, such as imposing conditions so onerous that access becomes commercially meaningless.

The second is discriminatory access. Discrimination occurs when comparable users are treated differently without objective justification. In essential-facility settings, discrimination may involve different tariffs, service levels, queue priorities, capacity allocations, data access, technical requirements, or administrative procedures. Discrimination is especially problematic when the SOE gives more favourable conditions to its own subsidiary or affiliated enterprise.

The third is tying or bundling. A facility controller may require a user to purchase an ancillary service as a condition of obtaining access to the essential facility. If the ancillary service is offered in a competitive downstream market, such tying may foreclose independent downstream competitors. This was the central concern in the Pelindo II case, where access to port-related space and operations was linked to the use of Pelindo II's own stevedoring services (KPPU, 2013).

The fourth is self-preferencing. Self-preferencing occurs when a vertically integrated facility owner gives preferential treatment to its own downstream unit, subsidiary, or affiliated undertaking. Although the term is often used in digital-platform regulation, the underlying concept also applies to traditional infrastructure sectors. A port operator, airport operator, rail infrastructure controller, or transmission-network operator may self-preference by allocating better time slots, faster service, lower access charges, or superior information to its affiliated entity.

The fifth is imposing disproportionate or exclusionary fees. Access charges may be lawful where they reflect cost recovery, investment, maintenance, risk, and reasonable returns. They become problematic where they are structured to raise rivals' costs, penalise the use of independent service providers, or reduce the ability of competitors to compete effectively.

4. The Pelindo II Case as an Illustration of Essential-Facility Abuse

KPPU Decision No. 02/KPPU-I/2013 concerning PT Pelabuhan Indonesia II (Persero) provides an important illustration of the relationship between SOE control, essential facilities, and abuse of dominance. PT Pelindo II controlled Teluk Bayur Port and supporting infrastructure. The disputed policy required tenants or users in the port area to use stevedoring services provided by Pelindo II. The practical effect was to reduce the opportunity of independent stevedoring companies to offer competing services within the port environment.

The case is important for three reasons. First, it recognises that port infrastructure can function as an essential facility because access to the port is indispensable for port-related downstream services. Second, it shows that abuse may arise not from ownership of the port itself, but from conditioning access in a way that favours the facility owner's own service. Third, it demonstrates that anticompetitive effects can include exclusion of rivals and increased operating costs, not merely higher prices to final consumers.

The Pelindo II reasoning supports the view that SOE status cannot automatically immunise a facility controller from Law No. 5 of 1999. The decisive issue is whether the SOE's conduct is necessary for public service and facility management or whether it is used to protect or expand the SOE's downstream commercial position. Where the latter is proven, the conduct may fall within Article 19 on market control and Article 25 on abuse of dominant position.

5. Proposed Five-Factor Test for Indonesian Essential-Facility Cases

This article proposes a five-factor test to guide KPPU, courts, regulators, SOEs, and competitors in assessing essential-facility disputes. The factors are cumulative but should be applied with contextual sensitivity to sectoral regulation and public-interest obligations.

Table 1. Proposed analytical test for essential-facility abuse by SOEs.

Factor	Legal question	Indicators	Practical implication
1. Essentiality	Is the facility indispensable for effective competition?	Non-duplicability; lack of realistic substitute; technical or legal bottleneck; high sunk cost.	Only indispensable facilities should trigger access duties.
2. Dominance	Does the SOE or facility controller possess market power?	Control over access; market-share thresholds; vertical integration; barriers to entry; dependency of downstream users.	Dominance should be assessed in the relevant facility and downstream markets.
3. Exclusionary conduct	Has access been refused, limited, tied, discriminated, or self-preferenced?	Refusal to deal; discriminatory tariffs; mandatory use of affiliated services; unequal service quality; delays.	Lawful control becomes problematic when used to disadvantage rivals.
4. Anticompetitive effect	Does the conduct foreclose rivals or distort market structure?	Barriers to entry; raised rivals costs; reduced consumer choice; foreclosure of independent service providers.	KPPU should show likely or actual competitive harm.
5. Objective justification	Is the restriction necessary and proportionate?	Safety; security; capacity constraints; technical integrity; public service; efficiency evidence.	Restrictions may be lawful if objectively justified and proportionate.

6. Objective Justification and Public-Interest Defences

Because SOEs often operate under public mandates, objective justification must play a central role in the analysis. A restriction may be justified where it is necessary to protect safety, security, technical integrity, environmental compliance, capacity management, continuity of public service, or the financial sustainability of the facility. However, the burden of explanation should rest on the facility controller once the complainant establishes essentiality, dominance, restrictive conduct, and likely anticompetitive effect.

Objective justification should be assessed through proportionality. The measure must pursue a legitimate aim, be suitable to achieve that aim, be necessary in the sense that less restrictive alternatives are unavailable, and be proportionate in the narrow sense that the competitive harm is not excessive compared with the public benefit. For example, capacity allocation rules may be justified if capacity is genuinely limited, but they should be applied transparently and without favouring affiliated undertakings. Safety rules may justify technical requirements, but they should not be designed to exclude rivals through unnecessary or selectively applied standards.

This analysis is particularly relevant to SOE synergy policies. Synergy among SOEs may produce efficiency, reduce duplication, and improve public service delivery. Yet synergy becomes problematic when it produces exclusive access arrangements that prevent non-SOE competitors from using an essential facility. The legal test should therefore ask whether the synergy arrangement is necessary to achieve measurable efficiency or public-service objectives and whether comparable access remains available to independent competitors on non-discriminatory terms.

7. Regulatory Implications

The absence of an explicit essential-facility provision in Law No. 5 of 1999 creates uncertainty. This uncertainty can be reduced through statutory reform or, at minimum, through a KPPU guideline. A guideline should define essential facilities, specify the criteria for indispensability and non-duplicability, explain how dominance should be assessed in facility-control cases, identify forms of refusal and discrimination, and provide a structured method for assessing anticompetitive effects and objective justification.

A second implication concerns coordination. Essential-facility disputes often sit at the intersection of competition law and sectoral regulation. Ports, electricity, railways, airports, telecommunications, and digital infrastructure are usually regulated by technical ministries or specialised agencies. KPPU should coordinate with the relevant ministry and the Ministry of SOEs to ensure that access regulation, public-service obligations, and competition-law principles are aligned.

A third implication concerns compliance by SOEs. SOEs that operate essential facilities should adopt access policies based on transparency, non-discrimination, proportionality, and objective criteria. They should document capacity constraints, publish access terms where appropriate, separate facility-management functions from downstream commercial operations, and establish internal competition-law compliance review for transactions involving subsidiaries or affiliated entities.

A fourth implication concerns remedies. In essential-facility cases, remedies should not be limited to fines. Effective remedies may include orders to cease discriminatory conduct, obligations to provide access on fair and reasonable terms, separation of accounting or operational functions, transparent tariff methodologies, monitoring trustees, reporting obligations, and coordination with sectoral regulators. Remedies should be designed to restore competitive access without undermining safety, reliability, and investment incentives.

CONCLUSION

The control of essential facilities by SOEs is not unlawful per se under Indonesian competition law. In many sectors, such control reflects the constitutional mandate under Article 33 of the 1945 Constitution and the state's responsibility to manage strategic assets for the public interest. However, constitutional legitimacy and public ownership do not confer a general exemption from competition law. When an SOE uses an indispensable facility to exclude competitors, discriminate among users, tie access to affiliated services, impose disproportionate access costs, or favour its own downstream business, the conduct may constitute market control and abuse of dominant position under Articles 19 and 25 of Law No. 5 of 1999.

The main doctrinal difficulty in Indonesia is the absence of an explicit Essential Facilities Doctrine in Law No. 5 of 1999. As a result, enforcement relies on interpretation of market-control and abuse-of-dominance provisions. This article argues that Indonesian law should adopt a structured analytical framework based on five cumulative factors: essentiality of the facility, dominance of the facility controller, exclusionary or discriminatory conduct, anticompetitive effect, and absence of objective justification. This framework would help distinguish legitimate SOE facility management from anticompetitive foreclosure.

The Pelindo II case demonstrates that a port and its supporting infrastructure may function as an essential facility and that requiring users to rely on the SOE's own downstream service may restrict competition. The case also shows why KPPU should develop clearer standards for access obligations, discrimination, tying, self-preferencing, and objective justification in SOE-controlled infrastructure markets.

Policy Recommendations

First, the legislature should consider incorporating essential-facility standards into Indonesian competition law or its implementing regulations. The rule should define essential facilities, identify the conditions under which access duties arise, and clarify the relationship between competition law and sectoral regulation.

Second, KPPU should issue a specific guideline on the Essential Facilities Doctrine. The guideline should include the five-factor test proposed in this article, examples of exclusionary conduct, methods for assessing anticompetitive effects, and standards for objective justification.

Third, the Ministry of SOEs and sectoral regulators should ensure that SOE synergy policies do not become exclusive arrangements that foreclose private competitors. Synergy should be assessed not only by internal efficiency within the SOE group, but also by its impact on market access and competition neutrality.

Fourth, SOEs that control essential facilities should adopt transparent and non-discriminatory access policies. Access terms should be based on objective criteria, and differences in treatment should be justified by capacity, safety, technical, or public-service reasons rather than affiliation.

Fifth, remedies in essential-facility cases should be structural or behavioural as necessary. Besides administrative fines, KPPU should consider access orders, tariff transparency, non-discrimination obligations, compliance reporting, and coordination with sectoral regulators.

Limitations and Future Research

This article is doctrinal and does not provide econometric measurement of market foreclosure, access pricing, or consumer welfare effects. Future research may extend the analysis through empirical case studies of ports, airports, electricity transmission, railways, telecommunications, and digital platforms. Further research may also compare Indonesian access regulation with the European Union, United States, and ASEAN competition-law systems to develop sector-specific remedies.

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