

STUDY OF LAW NO. 11 OF 2008 CONCERNING ELECTRONIC INFORMATION AND TRANSACTIONS IN PROTECTING THE TRADE MARKET THROUGH ELECTRONICS BASED ON THE DEVELOPMENT OF CYBER CRIME IN INDONESIA VIEWED FROM THE PERSPECTIVE OF FREEDOM OF CONTRACT

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ABSTRACT

E-commerce is a form of trade that is relatively new also can not be separated from problems in its implementation. The problems that arise in the implementation of e-commerce include the validity of contracts in e-commerce (online-contract / econtract) and the strength of the proof of the contract if there is a dispute especially based on the principle of contractual contract.

In the field of civilization, a wider problem occurs because electronic transactions for trading activities through electronic systems have become part of national and international commerce. This fact shows that the convergence in information, media and informatics (telematics) technology continues to be unstoppable, along with the discovery of new developments in the fields of information technology, media and communications.

Law No. 8 of 1999 concerning Consumer Protection does not specifically regulate consumer rights in e-commerce. In other words, it is difficult for consumers to sue e-commerce businesses with Law Number 8 of 1999 concerning Consumer Protection because e-commerce businesses are very difficult to reach. While the regulations used to regulate e-commerce transactions are Law Number 11 of 2008 concerning Information and Electronic Transactions, but in this law, there are no provisions specifically regulating the protection of consumers against acts of default of business actors in e-commerce. Law Number 11 of 2008 concerning Information and Electronic Transactions is adapted to the development of e-commerce, including the number of cases of consumer losses that arise in the community, due to defaults from e-commerce business actors, so that a provision can be made in this law concerning the protection of consumers against the actions of defaulters of businesses in e-commerce transactions. Restrictions on the principle of freedom of contract can also be concluded through article 1338 paragraph (3) which states that an agreement is only carried out in good faith. Therefore the parties cannot determine at will the clauses contained in the agreement but must be based and implemented in good faith. Agreements based on bad faith such as fraud having legal consequences of the agreement can be canceled.

Keywords: Electronic Trade Market, Freedom of Contract

A. INTRODUCTION

The internet is a global system of all interconnected computer networks using the standard Internet Protocol Suite (TCP / IP) to service billions of users worldwide.

¹It was not until 1995 that the internet began to be open to the wider community. Then to make it easier for people to access information through the internet, Tim Berners-Lee developed the World Wide Web application (www).² With the internet making its users more and more developed, not only the Indonesian people but almost the whole world. The internet also has a great influence on science, and world view. By simply referring to search systems like Yahoo or Google, users have easy internet access to various information. The development of the Internet, which has increasingly improved both technology and its use, has brought many positive and negative impacts, especially in the economic field.

Buying and selling transactions via the internet are trading business activities known as Electronic Commerce (e-Commerce). According to Law No. 11 of 2008 concerning Information and Electronic Transactions, transactions in buying and selling over the internet are included in transactions that use internet electronic systems so that in the law are called electronic transactions. The definition of electronic transactions in Article 1 point 2 of Act No. 11 of 2008 concerning Information and Electronic Transactions is called that Electronic Transactions are;

"Legal actions carried out using computers, computer networks, and / or other electronic media."³

E-commerce as a form of trade that is relatively new also cannot be separated from problems in its implementation. Problems that arise in the implementation of e-commerce include the validity of contracts in e-commerce (online-contract / econtract) and the strength of proof of the contract in the event of a dispute.⁴

Wider problems occur in the civil field because electronic transactions for trading activities through electronic systems have

become part of national and international commerce. This fact shows that the convergence in information, media and informatics (telematics) technology continues information technology, media and communications.

Activities through electronic system media, also called cyber space, even though they are virtual, can be categorized as real legal actions or actions. Juridically, activities in cyber space cannot be approached by conventional legal size and

¹ <http://www.definitions.ws/95663/internet> diakses tanggal 22 September 2017, jam 15.32 WIB

² Dikdik M. Arief Mansur dan Elisatriis Gultom, *Cyberlaw: Aspek Hukum Teknologi Informasi*, Cetakan I, Bandung, PT. Refika Aditama, 2005, hal. 4

³ Indonesia, Undang – Undang no. 11 tahun 2008 tentang Informasi dan Transaksi Elektronik ,pasal 1 butir 2.

⁴ Dikdik M. Arief Mansur dan Elisatriis Gultom, *Op Cit*, hal. 172-172

qualification because if this method is taken, there will be too many difficulties and things that pass the law. Activities in cyber space are virtual activities that have a very real impact even though the evidence is electronic.

Thus, the perpetrators must also qualify as people who have actually committed legal actions. In e-commerce activities, there are known electronic documents whose position is equalized with documents made on paper. In this regard, it is necessary to pay attention to the side of security and legal certainty in the use of information, media and communication technologies in order to develop optimally.

B. PROBLEM FORMULATION

In the development of electronic transactions can not be separated from the internet because of e-commerce through the internet network. The benefits gained when transacting are increasing for the business world but create a gap for perpetrators of criminal acts to commit acts of malice.

Therefore, legal protection is needed for consumers in e-commerce transactions. Based on the background described above, a number of legal issues are formulated, namely: How is Law No. 11 of 2008 concerning Electronic Information and Transactions in protecting electronic trading markets based on the development of cyber crime in Indonesia viewed from the perspective of Freedom of Contract?

C. PURPOSE OF RESEARCH

The purpose of this study was to find out the Study of Law No. 11 of 2008 concerning Electronic Information and Transactions in protecting electronic trading markets based on the development of cyber crime in Indonesia viewed from the perspective of Freedom of Contract.

D. BENEFITS OF RESEARCH

The benefit of this research is to add insight and discourse on science, especially in the civil field related to the Study of Law No. 11 of 2008 concerning Electronic Information and Transactions in protecting the electronic trading market based on the development of cyber crime in Indonesia viewed from the perspective of Freedom of Contract.

E. LITERATURE REVIEW

1. Overview of Buying and Selling

In the formulation of the Civil Code in Article 1457, buying and selling in Indonesian civil law is "an agreement with which one party binds itself to submit a material and another party to pay the promised price".

Whereas buying and selling according to Subekti,⁵ is an agreement where one party undertakes to hand over the ownership rights to an item, while the other party undertakes to pay a sum of money as the price.

The elements of Buy and Sell can be deduced:

a. Goods and prices are essential elements (*essentilia*) in the sale and purchase agreement.

b. Buying and selling is a consensual agreement, meaning that it has been born as a legal agreement (having the force of law) in the second it reaches an agreement between the seller and the buyer,⁶ the consensual nature is affirmed in Article 1458 of the Civil Code which reads: "the sale and purchase is considered to have taken place between the two parties, immediately afterwards these people reached agreement on the terms and prices, even though the material has not been submitted, nor has the price paid".

Based on the formula given, we can see that buying and selling is a form of agreement that gives rise to obligations or commitments to provide something, which in this case is realized in the form of material delivery that is sold by the seller, and the transfer of money by the buyer to the seller. Because buying and selling in law is one form of agreement.

2. Trade Overview through Electronics

In general, according to David Baum, quoted by Onno W. Purbo and Aang Arif Wahyudi, "E-commerce is a dynamic set of technologies, applications, and business processes that link enterprises, consumers, and communities through electronic transactions and electronic exchange of goods, services, and information". E-commerce is a dynamic set of application technology and business processes

⁵ R. Subekti, *Hukum Perjanjian*, Intermasa, Jakarta, cetakan ke 6, 1979, hlm 29-3

⁶ *Ibid*, hlm 79

that connect certain companies, consumers and communities through electronic transactions and trade in goods, services and information carried out electronically.⁷

In this electronic sale and purchase transaction, there are many legal aspects that are in direct or indirect contact. E-commerce through EDI is exclusive in nature, which is limited only between companies (business to business). But since the early 90s, e-commerce has used internet facilities that are far more inclusive and very open. This is particularly related to the launch of the World Wide Web (www) in the year 1992 which is a popular internet tool for creating, manipulating and calling documents consisting of audio, video, graphic and text information.⁸

E-commerce opens a lot of business opportunities, ranging from procurement of goods and services, agency, leasing, investment, finance, banking, insurance, to the transportation business. The breadth of the e-commerce business scope will be a guarantee that activities in e-commerce will continue to grow.

The purpose of electronic commerce or e-commerce applications is:

1. People who want to buy goods or transactions via the internet only need internet access and the interface uses a web browser;
2. Making e-commerce portals not only a shopping portal, but a gathering place for communities by building community bases, building a market concept not just a place to buy and sell and as an information center (release, product review, consultation, etc.)
3. Service-oriented management, a combination of conventional and virtual service conceptions: Responsiveness (fast and friendly response). Dynamic, informative and communicative.
4. Up to date information, dynamic multi-direction communication
5. Payment model (credit card or transfer)⁹

An electronic transaction agreement is a form of sale and purchase agreement that has the same legal force as a conventional agreement. However, it has characteristics and accentuations that are different from the usual agreements in conventional buying and selling transactions. This illustrates that in e-commerce

⁷ Redynal Saat. *Electronid commerce Peluang dan Kendala*, http://www.cyberlaw.lkht.org/arsip/ecommercepeluang_atau_kendala_red.htm, diakses tanggal 15 Agustus 2018, jam 12.34 wib

⁸ Redynal Saat. *Electronid commerce Peluang dan Kendala*, http://www.cyberlaw.lkht.org/arsip/ecommercepeluang_atau_kendala_red.htm, diakses tanggal 15 Agustus 2018, jam 12.34 wib

⁹ <http://www.myindo.co.id/productservice/20/index.html>, diakses tanggal 15 Agustus 2018, jam 13.25 WIB

agreements between buyers and sellers are done electronically. These conditions lead to principles in conventional treaty law, as the legal requirements for an agreement must undergo fundamental changes. Of course the problem is that buying and selling agreements in the realm of e-commerce take place in click and point agreement institutions, because this method is considered the only practical way to reach a sale and purchase agreement in e-commerce transactions.

Agreements made online are an important factor in electronic commerce. This model agreement uses digital data instead of paper and digital data that functions as a medium for online agreements. One of the advantages of an online agreement is to increase the efficiency scale, especially for companies and individuals who run business activities globally. The benefits of online agreements are proven by the fact that companies that carry out their activities on the internet can easily make an agreement with their business partners. Reality also proves that they can make agreements in quantity that continue to increase and provide wide opportunities to collaborate with business partners from all over the world.

The rapid advancement of online agreement models is strongly influenced by the spectacular growth of information technology that allows an agreement to be made without the parties' physical meetings, as is common in conventional agreement practices. The only most widespread complaint of online agreements might be that caused by theoretical questions about since the agreement was binding on the parties. In fact, that online agreement also often leads to an unequal bargaining position between business actors and consumers who make transactions on the internet.

3. Review of the Development of Cyber Crime Indonesia

Cyber crime problems cannot be separated from the problems of computer network security or internet-based information security in this global era, if it is associated with information as a commodity. Information as a commodity requires reliability service so that what is presented does not disappoint its customers. To achieve a level of reliability, the information must always be updated so that the information presented is not outdated. This cyber crime arises along with the rapid development of information technology.

Cyber crime is an activity that uses a computer as a medium or media that is supported by a telecommunications system, either using a telephone or wireless system that uses a special wireless antenna. This is what is called "telematics", namely

the convergence between telecommunications, media and information technology which originally developed separately.

Cyber crime can be divided into 2 (two) categories, namely cyber crime in the narrow sense and cyber crime in the broadest sense. Cyber crime in a narrow sense is a crime against a computer system, while in a broad sense it includes crimes against computer systems or networks and crimes that use computers.¹⁰

F. RESULTS AND DISCUSSION

In Indonesia, this e-commerce phenomenon has been known since 1996 with the emergence of the [http.www site san com](http://www.san.com) as the first on-line bookstore. Although not too popular, in 1996 various sites that started e-commerce began to appear. Throughout 1997-1998 the existence of e-commerce in Indonesia was neglected due to the economic crisis. But in 1999 until now again became a phenomenon that attracted attention even though it was still limited to the Indonesian minority who knew technology.¹¹

E-commerce is a form of trade transactions that are most influenced by the development of information technology. Through these trade transactions, the concept of traditional markets (where sellers and buyers physically meet) is transformed into the concept of telemarketing (long distance trading using the internet).¹² E-commerce has also changed the way consumers get the desired product.

This electronic buying and selling transaction is special, this is because in e-commerce the parties that carry out buying and selling activities only relate through a public network which in the latest development uses internet media. Connection to the internet network as a public network is an insecure connection. This has the consequence that e-commerce carried out by connecting to the internet is a form of high-risk transactions carried out in unsafe media.¹³ The weakness of the internet as an unsecured public network has been minimized by the application of information encryption technology (Cryptography).

During this time, transactions through e-commerce are loaded with civil properties. Every transaction of goods must be accompanied by terms of use and sales

¹⁰Widodo, 2009, *Sistem Pemidanaan dalam Cyber Crime*, Yogyakarta: Laksbang Meditama, hlm. 24.

¹¹ Esther Dwi Magfirah, *Perlindungan Konsumen Dalam E-commerce*, dalam situs www.solusihukum.com. akses tanggal 14 Agustus 2018, jam 15.24 wib

¹² Albarda, *Sistem Informasi untuk Kegiatan Promosi dan Perdagangan*, makalah pada seminar infomas ITB Bandung, 1997

¹³ Ety.S.Suhardo, *Transaksi E-Commerce yang beresiko*, Surat Kabar Harian Suara Merdeka tanggal 29 September 2000, hlm. 5

term conditions. If consumers want to get the item, they only need to click on the options offered by the seller. In practice, usually the seller of goods has placed a special agreement on the web site. Users or consumers just choose the accept or accept button.¹⁴

The entry of internet media in the world of trade / business, many things will change, such as the problem of closeness of the parties (consumers and producers) in transactions become tenuous, because each party practically does not know each other closely (recognition is only known through the media internet), lack of clarity requires physical recognition (such as perfume and medicine, etc.) whereas we know that the relationships that arise between consumers and business people are always intended to make both parties enjoy the benefits.

The reality that arises is that consumers often do not get what they expect maximally as a result consumers are harmed. For this reason, many provisions have been made both nationally and internationally that can be used as a guideline to provide protection for the interests of consumers.

Basically, the consumer legal protection instrument in a buying and selling transaction is realized in 2 (two) forms of regulation, namely legal protection through a certain form of legislation (laws, government regulations and so on) that are general for everyone who transacts and legal protection based on a special agreement made by the parties in the form of substance / content of the agreement between consumers and producers, such as provisions on compensation, time period for filing claims, settling disputes, and so on.

So far the regulations used to protect consumer rights are Law Number 8 of 1999 concerning Consumer Protection, but this law does not specifically regulate consumer rights in e-commerce. In other words, it is difficult for consumers to sue e-commerce businesses with Law Number 8 of 1999 concerning Consumer Protection because e-commerce businesses are very difficult to reach. While the regulations used to regulate e-commerce transactions are Law Number 11 of 2008 concerning Information and Electronic Transactions, but in this law, there is no provision that specifically regulates consumer protection against acts of default of business actors in e-commerce transactions. The Law No. 11 of 2008 concerning Electronic Information and Transactions should be adjusted to the development of e-commerce, including the

¹⁴ Fred M.Greguras, *Regulasi E-Commerce Berpulang pada Keinginan Konsumen*, www.hukumonline.com, tanggal 9 Agustus 2018, hlm 1

number of cases of consumer loss that arise in the community, due to defaults from e-commerce business actors, so that a provision can be made in the law. This concerns the protection of consumers against the actions of defaulters of businesses in e-commerce transactions.

Among the two forms of legal protection above. Then legal protection through statutory provisions (regulation) is the most effective instrument / facility to be used considering that the legislation can be used as a basis for both parties in making agreements and the government through its tools can force the enforcement of the law, because every consumer has the right to security and balance when using the items offered to him.

Restrictions on the principle of freedom of contract can also be concluded through article 1338 paragraph (3) which states that an agreement is only carried out in good faith. Therefore the parties cannot determine at will the clauses contained in the agreement but must be based and implemented in good faith. Agreements based on bad faith such as fraud having legal consequences of the agreement can be canceled.

G. CLOSING

The regulations used to protect consumer rights are Law Number 8 of 1999 concerning Consumer Protection, but this law does not specifically regulate consumer rights in e-commerce. In other words, it is difficult for consumers to sue e-commerce businesses with Law Number 8 of 1999 concerning Consumer Protection because e-commerce businesses are very difficult to reach. While the regulations used to regulate e-commerce transactions are Law Number 11 of 2008 concerning Information and Electronic Transactions, but in this law, there are no provisions specifically regulating the protection of consumers against acts of default of business actors in e-commerce. The Law No. 11 of 2008 concerning Electronic Information and Transactions should be adjusted to the development of e-commerce, including the number of cases of consumer loss that arise in the community, due to defaults from e-commerce business actors, so that a provision can be made in the law. This concerns the protection of consumers against the actions of defaulters of businesses in e-commerce transactions.

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