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The Impact of Mergers and Acquisitions on the Potential Anticompetitive Behaviors of a Firm: An Economic Legal Analysis

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ABSTRACT

Mergers and acquisitions are common strategies for business expansion, but they also carry the risk of enabling anti-competitive practices. This paper analyses the potential of engaging in anti-competitive practices before a company engages in M&A, such as predatory pricing, so that the competitor has no other option, but to sell the company to the dominant or superior firm. Vertical integrated firms can further exacerbate the impacts caused by the anticompetitive actions; due to the higher leverage it has to absorb the losses. This paper established its research by using normative legal analysis method and comparative and case-based approach. The objective of this research is to examine the legal gap in Indonesian competition law concerning pre-merger anti-competitive behavior, particularly predatory pricing, and to propose legal reforms to ensure more comprehensive oversight of merger activities. The case of Amazon-Quidsi is used as a comparative case, highlighted the importance of the supervision of anti-competitive actions during pre-merger, in which the current Indonesian Law No. 5 1999 only highlights the anti-competitive possibilities during post-M&A. Therefore, this paper has established that pre-merger anticompetitive practices, such as predatory pricing, pose a threat to fair competition and is insufficiently regulated under current Indonesian competition law. Based on this analysis, the paper proposes specific legal reforms, targeting to minimize the regulatory gaps to ensure efficient oversight of merger activities from pre-merger stage.

Keywords: horizontal & vertical integration; mergers & acquisition; predatory pricing.

INTRODUCTION

With the robust growth of an economy, it is a fundamental objective for business owners and companies to generate more profits and achieve sustainable growth. It is inevitable that, over the years, businesses seek for strategies to enhance their market presence, efficiency, and increasing shareholder values. Mergers & Acquisition (M&A) is one of the strategies applied by the businesses to achieve their above-mentioned desired goals. M&A

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has been a very favorable strategy, by implementing M&A companies can scale their operations, entering new markets which can lead to more diversification of income; and enhancing their competitiveness, which would result in acquiring a greater amount of market share, if the market positioning is perfectly executed and applied.¹ When firms engage in M&A, synergies are often established. One synergy that can be obtained from an M&A is market power synergy.

Williamson believes that acquisition is often the only way to gain market power because the acts of coordinating and contracting oligopolistic activities can be more expensive than internalizing the other competitors in the same industry.² Acquisitions are practiced in two different forms, vertical integration and horizontal integration. By definition, vertical integration refers to the integration in which the same firm has the ownership or control over the next stages of production or distribution process; and the process in which the external transactions are replaced with internal operations.³ On the other hand, horizontal integration is a strategy adopted by firms in which they consolidate with their direct competitors at a similar stage of supply chain. Vertical integration increases the buying or pricing power of a firm, while horizontal integration improves a firm's market influence by eliminating or controlling the competitors.⁴ Inevitably, an M&A can significantly increase the wealth of the shareholders if the processes are fully and properly executed, however, it is also posed to negative welfare effects. It is not common that allegations regarding being anti-competitive were made for companies that engage in an M&A, especially in vertical and horizontal integrations.

In the context of vertical integration, it is theoretically possible for merged firms that have high levels of cost savings and have the ability to offer extensive products, hence increases the demand efficiency. Therefore, without having to engage in any forms of anti-competitive behaviors, the competitors may not be able to compete at the same pace as the merged company. On the other hand, it is also very likely for the merged firms, which have had higher levels of financial and market standings, to exploit its position.⁵ Hence, using their advantages to drive the other competitors out from the market. Since vertical integration involves acquiring other firms that are related to its

¹ Patrick A. Gaughan, (2000), *Mergers, Acquisitions, and Corporate Restructurings*, John Wiley & Sons, New Jersey, p. 157-162.

² Oliver, E. Williamson, (1975), *Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization*, The Free Press, New York, p. 158-175, <https://ssrn.com/abstract=1496220>.

³ Giuseppina, Gianfreda, (2020), *Vertical Integration Encyclopedia of Law and Economics*, Springer, New York, p. 1-7. https://doi.org/10.1007/978-1-4614-7883-6_672-2.

⁴ Emilie, R. Feldman & Exequiel Hernandez, (2022), "Synergy in Mergers and Acquisitions: Typology, Lifecycles, and Value", *Academy of Management Review*, 47(4), p. 549-578, <https://doi.org/10.5465/amr.2018.0345>

⁵ Massimo Motta, (2004), *Horizontal Mergers*, Cambridge University Press, Cambridge, p. 231-301.

supply chain, a company may integrate with its suppliers or distributors of the raw materials or components of their products. Therefore, the competitors who still relied on external transactions would not be able to compete with the merged company. In this context, the merged company could have cost advantage over its competitors in the markets. This strategy that can be adopted by firms was introduced by Salop and Scheffman, it was referred as cost predation, which is an ability of a firm to increase its competitors' cost of production.⁶ Although both predatory pricing and cost predation resulted in the reduction of consumer surplus, the impact raised by cost predation would be worse compared to predatory pricing, as predatory pricing benefits the consumer in the short-run, due to the low price offered by the company to drive its competitors out of the market.⁷

In a horizontal merger, a firm integrates with its direct competitors, thereby gaining greater market presence, influence, and concentration. As a result, the merged company has higher output than before, which can lead to economies of scale and lower average production costs. On the surface, this may appear as a cost advantage stemming purely from efficiency. However, when two companies merge, their financial strength also increases, as their assets, resources, and capital are combined. This financial power, coupled with economies of scale and greater market presence causes the merged company to dominate the industry, hence poses the chances to be a monopoly, which is an anti-competitive outcome for the economy. Furthermore, the merged firm with greater resources and market positioning has greater power to engage in other anti-competitive behaviors, such as predatory pricing, to drive the competitors out of the market. If the merged firm strategically lowers prices below cost with the intent of driving competitors out of the market, it can better withstand short-term losses. Its lower production costs further help offset these losses, making it easier to sustain below-cost pricing until competitors are forced to exit.

Therefore, this journal seeks to answer the following research questions, how do mergers and acquisitions (M&A), particularly through horizontal and vertical integration, contribute to anti-competitive behavior aimed at eliminating competitors and reinforcing market dominance? What legal actions necessary to address and mitigate the potential anti-competitive risks posed by M&A activities, especially those not explicitly covered under the current Indonesian law?

⁶ Steven C. Salop & David T. Scheffman, (1983), "Raising rivals' costs", *The American Economic Review*, 73(2), p. 267-271, <https://www.jstor.org/stable/1816853>.

⁷ Steven R. Elliott, Robert Godby, Jamie Brown Kruse, (2003). "An experimental examination of vertical control and cost predation", *International Journal of Industrial Organization*, 2(2), p. 253-281. [https://doi.org/10.1016/S0167-7187\(02\)00055-3](https://doi.org/10.1016/S0167-7187(02)00055-3).

RESEARCH METHOD

This paper adopts a normative legal analysis method, focusing on statutory, comparative and case-based approaches. As a study that combines both legal and economic perspective, it aims to analyze the regulatory loopholes within the Indonesian competition law that may fail to capture anti-competitive conduct, arises from horizontal and vertical integrations. The legal materials consist of the laws and regulations, such as Law No. 5 of 1999 regarding the Prohibition of Monopolistic Practices and Unfair Business Competition and KPPU Regulation No 3 of 2023 regarding the Assessment of Mergers, Amalgamations, or Acquisitions of Shares and/or Assets That May Result in Monopolistic Practices and/or Unfair Business Competition. Secondary materials consist of journals, legal textbooks and several documented cases. This analysis is prescriptive and analytical, examining the current legal provisions and proposing refinements to better address the modern market dynamics, aiming to offer constructive recommendations for improving the legal framework, to ensure fair competition and enhancing consumer welfare.

DISCUSSION

M&A has been widely used by firms to expand their businesses. However, often, some cases were discussed where firms deliberately became anti-competitive to achieve the M&A itself, by engaging in predatory pricing. While in other cases, anti-competitive practices were also found post M&A. Some firms performed predatory pricing, with the purpose of eliminating competition to achieve increased market dominance. McGee, however, shared an interesting view between the relationship of mergers and predatory pricing strategies. McGee in his view believed that predatory pricing, an action which firms sell below cost to eliminate competition, is not essentially more efficient, in fact, it is considered as irrational and often unprofitable. McGee, based on his findings on the Standard Oil case, believed that instead of engaging in predatory pricing, merger is a more superior alternative which he believed is more efficient and less costly. Furthermore, predatory pricing can cause legal issues to the predator firms.⁸ Economists from Chicago School enhanced McGee's view. They believed that mergers are conducted by firms with the purposes of increasing efficiency, not to monopolize. Therefore, by improving the firms' efficiency, consumer welfare is also improved. Hence, merger activities are not necessarily anti-competitive, but rather pro-competitive.⁹

⁸ John, S. McGee, (1958), "Predatory Price Cutting: The Standard Oil Case", *Journal of Law and Economics*, 1, p. 137-159, <https://doi.org/10.1086/466547>.

⁹ Frank H. Easterbrook, (1984). "Limits of Antitrust", *Texas Law Review*, 63(1), p. 1-40.

On the other hand, there are also other theories that contradicts this idea. Bain (1956) foresee a merger as a method for a firm to increase the market power, hence providing an opportunity for the firm to maximize its profits by increasing the prices above the competitive levels, which could result to reducing consumer welfare.¹⁰ When a firm becomes dominant and has the ability to control prices, this creates a monopolistic economy. Firms can easily increase the prices at the consumer's expense for gaining profits that are greater and above competitive level. The post-Chicago School theories rejected the previous Chicago School Theory that most mergers are pro-competitive. They believe that mergers create oligopolistic structures therefore has the ability to coordinate prices, instead of competing competitively.¹¹ In other words, unilateral effects are created by mergers, where the merged firms eliminate the direct competitors, then eliminate the price competition. Because the market competition is removed by acquisition rather than natural market forces, firms can potentially engage in aggressive pricing strategies that is further enhanced by the reduced external competition.¹² Williamson also highlighted an important insight into its argument, which is the trade-off between the benefits and costs from a merger. While mergers can increase consumer welfare due to its enhanced efficiency from economies of scale. However, if the merged firm were to structure into monopolistic structure, any gains from improved efficiency and cost reduction may not be able to offset the decreased competition from the mergers.¹³

In some cases, predatory pricing is not only linked to the acquisition itself but also to the pre-acquisition phase.¹⁴ A dominant firm may intentionally lower prices to weaken a competitor financially, forcing them into a vulnerable position where acquisition becomes the only viable option. Once acquired, the dominant firm can then either absorb the competitor's customer base or discontinue its operations entirely, effectively eliminating the threats in the market. After the treat is eliminated, the

¹⁰ Joe, S. Bain, (1956). *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries*. Harvard University Press, Cambridge and London, p. 56-79. <https://doi.org/10.4159/harvard.9780674188037>.

¹¹ Joseph Farrell & Carl Shapiro, (1990). "Horizontal Mergers: An Equilibrium Analysis". *The American Economic Review*, 80(1), p. 107-126. <http://www.jstor.org/stable/2006737>.

¹² Richard Whish & David Bailey. (2024). *Competition Law*, Oxford University Press. Oxford, p. 909-921. <https://www.oxfordlawtrove.com/view/10.1093/he/9780198906032.001.0001/he-9780198906032-chapter-20>.

¹³ Oliver, E. Williamson. (1972). *Economies as an Antitrust Defense: The Welfare Tradeoff*. Palgrave, London, p. 111-135, https://doi.org/10.1007/978-1-349-15486-9_7.

¹⁴ Burns, M. R. (1986). "Predatory Pricing and the Acquisition Cost of Competitors". *Journal of Political Economy*, 94(2), 266-296. <http://www.jstor.org/stable/1837405>.

dominant firm can simply raise prices to recoup the losses.¹⁵ This tactic commonly used in markets with high barriers to entry, where the dominant firm has greater pricing control and the new or potential competitors cannot easily emerge to challenge the firm's strong positioning in the market.¹⁶ In the instances of post-M&A, it is possible for firms to decide in performing an M&A to expand their businesses but its course of actions, followed by the market dominance, could translate the firms to be anti-competitive. Several case studies will be elaborated.

Comparative case: Amazon's Acquisition of Diapers.com (Quidsi)

One of the most notable examples of an M&A transaction allegedly facilitating predatory pricing is Amazon's 2010 acquisition of Quidsi. Quidsi is one of the fastest growing e-commerce companies, with several brands that were established, diapers.com focusing on diapers, soap.com for household products, and beautybar.com for beauty products. Quidsi was an emerging e-commerce retailer specializing in baby products and had gained a significant market presence. In 2010, Quidsi generated sales of approximately \$300 million annual sales.¹⁷ Hence, posing a direct challenge to Amazon's dominance in the sector. To counter this competition, Amazon was suspected to perform predatory pricing, which is selling the diapers at a loss to undercut Diapers.com. However, with the recent publish in 2019, there were some emails found between the executives of Amazon that saw Quidsi as a threat to their businesses in the diaper sector, especially that Quidsi had strategized to obtained lower fulfillment cost in enabling the business.¹⁸

Prior to the findings above, Amazon offered to acquire Quidsi di 2009, however, they decline its offer. Afterwards, Amazon slashed prices for diapers and baby products up to 30% and created a new program labelled "Amazon Mom" that creates significant benefit to its user.¹⁹ It is a subscription program that allows the customer to pay upfront for the additional service. In this case, the benefits were full year of 2-days prime shipping, and additional 30% discount on diapers prices for monthly deliveries under

¹⁵ Christopher R. Leslie. (2013). "Predatory Pricing and Recoupment". *Columbia Law Review*, 113, no.7, November, p. 1695. Retrieved from <https://columbialawreview.org/content/predatory-pricing-and-recoupment/>

¹⁶ Lina, M. Khan. (2017). "Amazon's Antitrust Paradox". *Yale Law Journal*, 126(3), p. 564-907. Retrieved from <https://www.yalelawjournal.org/note/amazons-antitrust-paradox>

¹⁷ Heather Struck. (2010). "Amazon Absorbs Diaper Competitor Quidsi,". *Forbes*, 8 November 2010, <https://www.forbes.com/2010/11/08/amazon-quidsi-acquisition-markets-equities-online-retail.html>, accessed on 5th April 2025.

¹⁸ Timothy, B. Lee. (2020). "Emails detail Amazon's plan to crush a startup rival with price cuts,". *Ars Technica*, 31 July 2020, <https://arstechnica.com/tech-policy/2020/07/emails-detail-amazons-plan-to-crush-a-startup-rival-with-price-cuts/>, accessed on 5th April 2025.

¹⁹ *Ibid*

“subscribe and save” program.²⁰ Quidsi’s executive estimated Amazon’s loss to be \$100 million USD, just alone from the diapers, for over three years.²¹

Having this price wars imposed to Quidsi, Quidsi decided to sell the company to Amazon for \$545 million. Amazon acquired Quidsi by engaging in extreme pricing strategies by giving heavy discounts on products, causing Quidsi to bleed money. Therefore, leaving Quidsi no further room for growth and couldn’t sustain its business in the markets. After the acquisition had completed, Amazon raise the prices for diapers and other baby products sold. A year after completing its acquisition and seemed to be losing millions, Amazon limited the Mom program it previously introduced, starting from gradually scaling back the discounts and shipping benefits.²² Many of the users were disappointed with the cut down of the benefit and would prefer to return its business to Diapers.com, however, it will no longer be possible as Amazon has already acquired Quidsi.²³ In 2017 onwards, Amazon decided to shut down Quidsi as it valued that it is not profitable.

Amazon’s Vertical Integration

With Amazon’s conduct to absorb losses to eliminate the market competition, it has become more apparent that Amazon has the capacity to increase its dominance in the market. Amazon has utilized its dominance to gain favorable terms in the delivery industry. Amazon launched its fulfillment centers in 2010 under the “Fulfillment by Amazon (FBA)”, where it has factories scattered all across America, that helped to facilitate the sellers’ orders, from storage, packing to deliveries. It was estimated that big retailers like Amazon has acquired nearly 70% discounts on the shipping rates, compared to the smaller companies. While Amazon free shipping’s program costs 4% from the sales, this is not profitable for Amazon, stand-alone its delivery sector, but creates marketing benefits, especially when shipping costs become a great consideration

²⁰ *Ibid.*

²¹ Will Oremus. (2023). “The Time Jeff Bezos Went Thermonuclear on Diapers.com,” *Slate*, 10 October 2023, <https://slate.com/technology/2013/10/amazon-book-how-jeff-bezos-went-thermonuclear-on-diapers-com.html>, accessed on 7th April 2025.

²² Laura, H. Owen. (2014). “Amazon cuts the benefits again in Amazon Mom, its Prime program for parents,” *Yahoo Finance*, 29 September 2014, https://finance.yahoo.com/news/amazon-cuts-benefits-again-amazon-144256988.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAC4wDU7x1D_OxBliLEce9q_rpR08VsyVIZzTxxf62xYqrj69FDR34-KVMEqqEITAbzdozDI2AM1mjtRIsTE1tpjXK8dQFAXXis57fZFz_os-5EiD2LD9OUe0stjwYytZMhU5Ik85IcS_Ce3p0UZ4ozgUZnZcKnuLzBR14iJxacD, accessed on 12th April 2025.

²³ Khan, *Op. Cit.*, note 16, 771.

factor for consumer while performing its purchase.²⁴ The great delivery discounts that large retailers can obtain, has caused the delivery companies to substitute its profit, by raising the delivery costs of other smaller retailers.²⁵ Some other retailers couldn't afford providing free discounts for their customers, only on special occasions like holiday season, or some others that provide free shipping in other forms, but without receiving any discounts from the shipping company, their shipping costs were accounted for nearly 35% of sales.²⁶ While Amazon only spent 4% of its sales on shipping, it had a stronger capacity to absorb losses from the delivery side, partly because it earned profits from its fulfillment services. This situation illustrates how a dominant company can leverage its market position to strengthen its competitiveness. In this case, with the combination of vertical integration and strategic partnerships, Amazon gained cost advantages that indirectly impacted other businesses and competitors by shifting the competitive balance in its favor, resulting into an indirect cost predation.

By establishing the FBA, this illustrates Amazon's capability to use its dominance in its online retail and delivery sector, that somehow creates a typing relationship to the outcome generated.²⁷ Amazon was also charging higher price for its fulfillment services, where a third-party seller, was charged between \$0.48 to \$2.40 to store their products at Amazon's fulfillment centers, but only \$0.19 in Fedex. In an economic perspective, putting all other variables constant, it makes no economic sense to choose Amazon's warehouse services. Herewith, with higher price, third party sellers still opt for Amazon's services to reach more customers due to the Amazon Prime program, that enables the customer to obtain more free shipping benefits.

Amazon was criticized for using the sales data from sellers selling in Amazon's platform to create Amazon's private label products. It was reported that Amazon's team in India has copied the products sold by other companies in the platform, then sells it at a more competitive price.²⁸ Even worse, the strategy adopted further exacerbate its anti-

²⁴ Stephanie Clifford & Claire, C. Miller. (2010). "Wal-Mart Says 'Try This On': Free Shipping". The New York Times, 11 November 2010, <https://www.nytimes.com/2010/11/11/business/11shipping.html> , accessed on 13th April 2025.

²⁵ Laura Stevens. (2016). "'Free' Shipping Crowds Out Small Retailers". The New York Times, 27 April 2016. <https://www.wsj.com/articles/for-online-shoppers-free-shipping-reigns-supreme-1461789381>, accessed on 13th April 2025.

²⁶ Clifford & Miller, *Op. Cit.*, note 24.

²⁷ Khan, *Op. Cit.*, note 16, 779.

²⁸ Aditya Kalra & Steven Stecklow. (2021) Amazon copied products and rigged search results to promote its own brands, documents show, Reuters, 13 October 2021, <https://www.reuters.com/investigates/special-report/amazon-india-rigging/> , accessed on 14th April 2025.

competitive actions by altering the search algorithms, therefore, products from Amazon's own brand would appear at the top part of the search results.²⁹

Economic Legal Analysis

M&A is one of the ways to reshape market structures, however it often resulted into anti-competitive practices, predatory pricing is one of them. While horizontal mergers can lead to price suppression due to increased market power, vertical integration enables more subtle but equally damaging outcome. Indonesia's competition law, like many global counterparts, may not be adequately equipped to address the complexity of these modern anti-competitive behaviors. Horizontal mergers typically raise concerns of market dominance and direct competition suppression. Predatory pricing, an act of pricing below cost with the aim of eliminating competitors, is regulated under the Indonesian Law of Article 20 of Law No. 5 of 1999. This article, explains:

“Pelaku usaha dilarang melakukan pemasokan barang dan atau jasa dengan cara melakukan jual beli atau menetapkan harga yang sangat rendah dengan maksud untuk menyingkirkan atau mematikan usaha pesaingnya di pasar bersangkutan sehingga dapat mengakibatkan terjadinya praktek monopoli dan atau persaingan usaha tidak sehat.”

in translation

“Business actors are prohibited from supplying goods and/or services by selling or setting prices very low with the intention of eliminating or destroying their competitor's business in the relevant market, which may result in monopoly or unfair business competition.”

In the United States, predatory pricing is governed by Section 2 of the Sherman Act and was clarified in the Supreme Court case *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The Court laid out a two-part test: (1) the plaintiff must show that the prices were below an appropriate measure of cost, and (2) there must be a dangerous probability that the defendant would recoup its investment through higher prices after eliminating competition.³⁰ While the Court did not specify a precise cost standard, lower courts and scholars often interpret “appropriate measure of cost” as average variable cost (AVC).³¹

²⁹ Gadjó Sevilla. (2022). “Amazon's use of seller data for private-label business is under SEC scrutiny”. Emarketer, 7 April 2022, <https://www.emarketer.com/content/amazon-s-use-of-seller-data-private-label-business-under-sec-scrutiny>, accessed on 15th April 2025.

³⁰ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993),

³¹ Phillip Areeda & Donald, F. Turner. (1975). “Predatory Pricing and Related Practices under Section 2 of the Sherman Act”. *Harvard Law Review*, 88(4), p. 697-733, <https://doi.org/10.2307/1340237>,

In the European Union, in contrast, the European Union takes a more interventionist approach under Article 102 of the Treaty on the Functioning of the European Union (TFEU), which prohibits abuse of a dominant position. In *AKZO Chemie BV v Commission* (Case C-62/86), the European Court of Justice established a presumption of abuse when prices are: (a) below average variable cost, or (b) between average variable cost and average total cost, if there is intent to eliminate a competitor.³²

The Indonesian Law of Article 20 of Law No. 5 of 1999 has established the requirements to prove the predatory pricing, (1) setting very low prices, and (2) the intent of eliminating competitors. Comparing the Indonesian standards with the United States' and the European Union's, it can be concluded the pricing standards is not established by an objective cost-based test. In other words, it lacks an economic benchmark, causing ambiguity as there's no benchmark on how low a company can be categorized to be classified as engaging in predatory pricing, therefore possibly in making the law enforcement and legal certainty difficult. Moreover, the intent of eliminating competitors is somehow very hard to proof in most cases, therefore leaving a loophole for the predators to escape from its actions. The intent of competitor elimination can simply be cloaked the firms as an action resulting from improved efficiency, leading to increased economies of scale³³, temporary promotions to attract new customers.

Although the Indonesian Law that regulates the assessment of mergers and acquisition has been quite forward looking, there is some issues as what was found on the Amazon-Quidsi case that was not yet covered. Under Peraturan Komisi Pengawas Persaingan Usaha (PerKPPU) No. 3 Tahun 2023 concerning the assessment of mergers and acquisitions, KPPU focuses primarily on post-merger effects. The mergers and acquisition assessment includes (1) initial assessment and (2) comprehensive assessment, both are discussed in Article 19 and Article 22, respectively. The initial assessment concerns the market concentration analysis, while the comprehensive assessment analyzed, (1) entry barriers, (2) potential anti-competitive behavior, (4) efficiencies, (5) bankruptcy risks, (6) policy that increases competitiveness and strengthen national industry, (7) technology development, (8) MSME protection, (9) labor impacts, (10) regulatory compliance. While potential anti-competitive behaviors were mentioned in the latter assessment, it translates to future conduct. As a result, there is no explicit framework that investigates the anti-competitive pre-acquisition strategy, such as predatory pricing that resulted to a force exit by the targeted firm. Therefore,

³² *AKZO Chemie BV v Commission* (Case C-62/86).

³³ Michael Funk & Cristian Jaag. (2018). "The more Economic Approach to Predatoy Pricing". *Journal of Competition Law & Economics*, 4(2), p. 292-310, <https://doi.org/10.1093/joclec/nhy008>.

this creates a regulatory blind spot, a company can engage in strategic underpricing to pressure a rival or acquisition target (as seen in the Amazon–Quidsi case) before the transaction is even notified, and yet this conduct is unlikely to be scrutinized by KPPU unless a clear post-merger abuse occurs.

As for vertical integration, it is regulated under Article 14 of Law No. 5 of 1999. It explains that,

“Pelaku usaha dilarang membuat perjanjian dengan pelaku usaha lain yang bertujuan untuk menguasai produksi sejumlah produk yang termasuk dalam rangkaian produksi barang dan atau jasa tertentu yang mana setiap rangkaian produksi merupakan hasil pengolahan atau proses lanjutan, baik dalam satu rangkaian langsung maupun tidak langsung, yang dapat mengakibatkan terjadinya persaingan usaha tidak sehat dan atau merugikan masyarakat.”

which translates to,

“Business actors are prohibited from making agreements with other business actors with the aim of controlling the production of a number of products included in a series of production of certain goods and/or services, where each series of production is the result of processing or further processing, either in a direct or indirect series, which may result in unfair business competition and/or be detrimental to the community.”

This article has a significant limitation of its focus on inter-firms’ agreement only, where as often times, vertical integration can be found to be executed internally, through organic growth or intra-corporate M&A. For example, a company may acquire or establish its own logistics, payment company or production services under a unified corporate structure. Therefore, when a company vertically integrate internally, it does not necessarily have to include other companies. A relevant comparative case is Amazon and its fulfillment services. Amazon’s dominant position in the retail market, with high volumes, benefited Amazon to secure preferential shipping rates from logistics providers, which in turn may respond by increasing rates for smaller, less powerful competitors. This phenomenon, known as the waterbed effect³⁴, arises when a dominant firm like Amazon negotiates significantly lower rates due to its scale, forcing suppliers, such as the shipping companies, to recoup lost margins by raising prices for smaller competitors. Although there is no explicit agreement or direct instruction from the dominant firm, its market power creates economic pressure that distorts competition. This reflects how firms can exert structural market influence without engaging in formal

³⁴ Roman Inderst & Tommaso, M. Valletti. (2011). “Buyer Power and the “Waterbed Effect”. *The Journal of Industrial Economics*, 59(1), 1–20, <http://www.jstor.org/stable/41289440>.

or even tacit collusion. The result is a de facto foreclosure of rivals, as smaller players face inflated operational costs not due to inefficiency, but as a consequence of the dominant firm's preferential treatment. Such scenarios fall into regulatory blind spots where traditional antitrust frameworks struggle to address market outcomes shaped by asymmetrical bargaining power.

CONCLUSION

Therefore, based on the analysis above, it is concluded that anti-competitive actions can arise pre-M&A, such as predatory pricing to bleed the competitor, therefore created a force exit, like how the Amazon-Quidsi case had highlighted. On the other hand, anticompetitive behaviors can also be found on vertically integrated companies, they can engage in cost predation and do not necessarily have to directly recoup the losses that possibly occur, due to the ability for cross subsidize.³⁵ Hence, the writer proposes the several regulatory refinements, (1) to clarify the Price Benchmark for Predatory Pricing: Article 20 of Law No. 5 of 1999 should include more objective and quantifiable criteria, such as the use of Average Variable Cost (AVC) or Marginal Cost, as benchmarks for identifying unlawfully low pricing. The current phrase "harga yang sangat rendah" ("very low price") is vague and leaves room for excessive judicial discretion, which reduces legal certainty and enforcement success, (2) to reformulate the Predatory Intent Requirement: The burden of proving subjective intent to eliminate competitors is often too high and difficult to establish. As an example, a shift towards a more effects-based approach, where anti-competitive outcomes serve as strong proxies for intent can enhance enforcement effectiveness while still protecting legitimate competitive behavior, (3) to expand the Scope of Vertical Integration Oversight: Current laws, such as Article 14 of Law No. 5 of 1999, focus primarily on agreements between companies. However, vertical integration often occurs internally through corporate acquisitions or expansion into adjacent markets (e.g., logistics, payment systems). Regulation should be enhanced to recognize how such intra-corporate integration can lead to indirect exclusionary conduct, such as cost predation or waterbed effects, even without explicit agreements.

³⁵ Burns, M. R. (1986). Predatory Pricing and the Acquisition Cost of Competitors. *Journal of Political Economy*, 94(2), 266–296. <http://www.jstor.org/stable/1837405>.

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