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# Identifying the Effect of Harm on Competition in Price Parity Agreements

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## ABSTRACT

The paper aims to examine the harmful elements of price parity agreements by expounding showcases from Indonesia and Germany and discussing whether the rule of reason is the best approach to prohibit price parity agreements. The research is based on a normative legal study using legal comparison (Indonesia, Germany, and the European Union); the data is collected employing library research. The harmful elements of price parity agreements lie in limiting the freedom of suppliers to set prices and creating entry barriers for new players. The rule of reason approach to defining illegality is based on assessing the harmful effects of conduct, which implies that the respective conduct as such (per se) is not prohibited and becomes prohibited only when the second part of the clause is met. Further, although an effect assessment is required, the approach does not require an actual effect. A potential effect is sufficient for the prohibition. The originality of the paper is found in three aspects: first, the analysis of legal theories and regulations by challenging them with a different approach from the current approach for competition law assessment; second, drawing conceptual solutions to deal with the current problems; and third, providing scientific arguments to underpin the use of the application approach.

**Keywords: Price Parity Agreements; Harmful Effect; Competition; Rule of Reason; Illegality**

## INTRODUCTION

While competition law might serve different purposes, consumers should gain the ultimate benefit from competition. Without undermining the importance of other parameters, price is commonly recognized as a significant element to indicate the work of competition. Firms are forced to manufacture products efficiently in a static competition setting, focusing



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on the lowest price. In dynamic competition, firms strive to compete by introducing new products that might create new markets [1]. However, this paper will focus on the element of price in competition.

In order to compete, some firms apply a so-called 'price parity agreement or clause', or known as 'best price guarantee,' 'best price clause,' or 'best deal,' in which they offer the lowest price in the market to consumers. To enable this, they usually impose a specific term in the agreement with their suppliers to ensure that suppliers do not offer the same or lower prices to the competitors. This scheme could work if suppliers highly value the buyers due to the dominance in the market or at least a certain level of market power that enables them to influence the market as such that suppliers cannot simply switch to any other buyer without significantly losing profit.

In Indonesia, a case dealing with the price parity clause can be found in the "Carrefour Case" in 2005. Carrefour was alleged to use trading terms to maintain the retailer's power in the market, aiming to gain the lowest selling price by passing on costs to the suppliers, in which they had to pay some fees to have their products displayed in the retail store [2]. Although the case occurred over a decade ago, it is worth looking into as price parity agreements remain and gain even more relevance in the digital market. Digitalization has led to market transparency that enables market participants to obtain information about and monitor competitors' price information seamlessly. This development allows the implementation of price parity practices more easily than before, particularly due to the ability to track prices set by other parties of the agreement and respond to price changes, such as easily or automatically adjusting its own prices when other parties increase their prices above the best price level. The deployment of algorithms for this purpose makes such practices even easier.

Looking at case laws in another jurisdiction, in December 2015, the German Federal Cartel Office (FCO, Bundeskartellamt) prohibited price parity or the most favored nation (MFN) [3] clauses of Booking.com, an online hotel reservation portal, in all circumstances. In the same case, it also prohibited so-called narrow price parity agreements. The FCO ruled that such booking price parity distorts competition and violates the prohibition of anticompetitive agreements under § 1 of the Act against Restraints of Competition (ARC), i.e., Article 101 (1) of the Treaty for the Functioning of the European Union (TFEU).

In June 2019, the Düsseldorf Court of Appeal (OLG, Oberlandesgericht) overturned the FCO decision. The Court believed that narrow parity clauses were legitimate under Art. 101 TFEU. [4] However, against the Court decision and confirming the FCO decision, the German Federal Supreme Court (BGH, Bundesgerichtshof) held that the use of narrow price parity clauses to violate Art. 101 TFEU. The Supreme Court decision was based on (1) the restriction of intra and inter-brand competition between hotels due to the use of the narrow parity clauses; (2) the clauses do not fall under ancillary restraint in the meaning of Art. 101(1) TFEU; and (3) the argument of avoiding free riding in this case cannot be used as efficiency justification under Art. 101(3) TFEU [5].

In 2013, the competition authority also banned the price parity clause used by HRS, another popular online hotel reservation portal in the country. In 2015, the Düsseldorf Court of Appeal upheld the FCO decision, which becomes the final decision on this case [6]. A similar practice by Expedia, an online travel reservation portal, was also scrutinized by the FCO.

Although case laws are inclined to show the price parity deal as anti-competitive, the reasoning for such a deduction is not straightforward. The price parity clause is in itself not illegal. Clear elements are needed because the illegality is defined according to the effect of the harm test.

As an exercise of thought, let us think about a different scheme of price parity deals where the promise to provide the lowest price in the market is bundled with other products, be it some other goods or services. For instance, a buyer must also take the ink to get a printer at the lowest price. For proper use, buying a printer will only make sense if the ink accompanies it. However, the buyer can also buy the ink separately from any other seller, and it is only more expensive. Would the price parity deal with the bundling be considered anticompetitive?

Considering that price parity deals could benefit consumers and competition, it is not generally ruled as illegal. Thus, the rule of reason approach analyzes the legality of a particular price parity deal practice. This paper examines which positive effects of price parity deals to competition could compensate for the harmful effects. Upon this assessment, this paper seeks to answer whether the rule of reason is the best approach.

The paper also discusses challenges for competition law in the digital market to deal with exclusionary and exploitative conduct on the internet. The analysis focuses on two showcases. First, it analyses the allegation of abuse of power in Europe conducted by Google. In April 2015, the European Commission officially accused Google of abusing its dominant position in the EU's general internet search services market by systematically preferring its comparison-shopping product in its general search results pages and steering consumers to its in-house shopping services [7]. Second, the paper discusses the case of limiting the use of multiple shopping channels in selective distribution practices. In August 2015, the German Federal Cartel Office (FCO) ruled the online distribution system used by a running shoe company, Asics, which prohibits its dealers from using online price comparison services and platforms like eBay and Amazon anticompetitive. By prohibiting the dealers from using any online platform system other than its own, ASICS indirectly led consumers to use only its online shop, hindered competition with its rivals in the online shop market, and harmed small and middle-sized companies [8].

The paper will be structured in five parts. After exposing the background in the first part, the paper addresses the harmful elements of price parity agreements and expounds on showcases from Indonesia and Germany in the second part. The third part discusses whether the rule of reason is the best approach to prohibit price parity agreements. The fourth concludes.

## MATERIALS

### *Harmful Elements of Price parity agreements*

#### *1 Defining the Relevant Market and Dominance*

Defining relevant markets has been traditionally recognized as the first phase of competition law analysis, in which the scope of the assessment will be established. Based on the defined relevant market, several aspects shall be examined in the subsequent phases to understand (1) the market structure (whether there are sufficient players or the market is concentrated to (a) specific market player(s) instead); (2) the level of competition (whether there is effective competition in the market); (3) how powerful the firm under scrutiny is in the market as regards the quantity aspects (market share) and quality aspects (its ability to influence prices and production and (4) how the firm behaves in the market. If the definition of a market is too broad, it may result in the actual position of a large business looking less significant than it is because the market is divided into too many players and vice versa.

Market definition is generally based on market analysis from the point of view of end buyers on one side and suppliers or producers on the other side. In Law no. 5 of 1999, the relevant market is used to analyze most of its provisions [9]. The elements of the relevant market have a fundamental significance for competition analysis and should be done in a particular market both in terms of certain specific products and geographical areas [10] and, in some cases, it is temporally specific [11].

Article 1 No. 10 of Law No. 5/1999 defines the objective-relevant market in two phases: *First,* they are of the same or similar characteristics, or *second,* they are substitutes [12]. This paper focuses on the analysis to answer both criteria from the point of view of the demand-market side.

To determine if certain products are the same or similar in the first phase, the most straightforward test is whether they have similar material characteristics that can result in substitutability. Two exceptions apply to this assumption. *First,* the differences between brands might not be interchangeable, even when the characteristics of the materials are the same or similar. Nevertheless, not every brand can create a particular market. *Second,* products with different material characteristics can belong to the same market if they serve the same function to meet the consumers' needs [13]. Here, the purpose of use from the consumers' point of view can create substitutability as long as it concerns the primary and not merely the marginal purpose of use [14].

Under Indonesian competition law, to qualify for dominance, quantitative and qualitative requirements in Art. 25 par. (2) and Art. 1 no. 4 respectfully must be satisfied. While quantitative requirements rely on the market share thresholds, qualitative requirements are based on other indicators. According to the qualitative requirements, the term dominance means that the undertaking under scrutiny has no substantial competitor or has the highest ability compared to its rivals to compete in the market. Such ability to compete falls under dominance in terms of financial capacity, access to supply or selling, and the capability to adjust the supply or demand of a particular product, be it goods or service [15]. Regarding the market share threshold, the law applies two thresholds: 50% for a single undertaking or group of undertakings and 75% for two or more undertakings or two or more groups of undertakings [16].

The first type of prohibited abuse was at issue in the case of Carrefour in 2005. However, because the 50% market share threshold requirement was not met, the allegation of violating the prohibition of dominance abuse was not evident.

Indonesian competition law also recognizes the danger of abusing market power, although such power does not derive from market dominance according to the dominance threshold under Art. 25 par. (2) above. They are structured under the sub-chapter on market control, Art. Nineteen of Law No. 5 of 1999 lists a catalog of prohibited activities conducted unilaterally or in collaboration with other undertakings (s). Although substantially such activities could be carried out only by undertakings having enough market power to influence the market, the law does not require the fulfillment of dominance requirements to qualify anticompetitive conducts prohibited under Art. 19 of Law No. 5 of 1999.

The catalog of prohibited activities under Art. 19 of Law No. 5 of 1999 encompasses four types of anticompetitive conducts: (1) refusing or hindering other undertakings (s) to enter the market (refusal to deal); (2) hindering consumers from dealing with competitors; (3) restricting distribution or selling; and (4) discriminating particular undertaking(s).

For applying the prohibition of refusal to deal, essential facility doctrine would become a helpful tool to analyze under which circumstances certain conduct qualifies a refusal to deal. In the EU Microsoft case, the Court of Justice of the European Union has accepted that a refusal to provide essential facilities to competitors to enable them to enter or operate in the same market can violate Art. 82 of the Treaty (now Art. 102 TFEU). [17] The case introduces the concept of indispensability for the implementation of the prohibition of refusal to deal. In the judgment, the European Commission ruled that a compulsory licensing for interoperability could be imposed only in certain circumstances, namely when (1) the product is indispensable [18], (2) the refusal hinders the development of a new product, whereas there is a potential demand for the new product [19], (3) the refusal is not justified [20], and (4) it excludes all competition on a secondary market [21] [22].

In Indonesian case laws, the use of essential facility doctrine can be seen in the judgment of the Indonesian Competition Commission (hereafter, ICC) in the *Telkom* case [23] in 2004. The case dealt with forcing other companies at a retail level to refuse to deal with competitors [24]. In this case, *Telkom*, a dominant telecommunication network provider (95% market share nationwide), prohibited its telecommunication service retailers, Warung Telkom, from offering other access than Telekom's for international dialing, subject to a penalty of contract termination for violating this term. *Warung Telkom* was Telkom's outlet, a typical shop that offers services for its customers to make calls. According to Telkom's internal policy known as KD Warung Telkom, the services were run on the Telkom network under a telecommunication network provision contract. [25] Apart from *Telkom*, another telecommunication service provider, *Indosat*, also offered access for international dialing in the market. There were also other shops offering similar services with *Warung Telkom*, including international calls, so-called *Wartel*. The differences from *Warung Telkom* were there was no obligation to offer only *Telkom* access for international calls imposed on *Wartel*, and while *Warung Telkom* was not subject to an abonnement fee, it was not the case for *Wartel*. The limitation to offering access for international calls for Warung Telekom hindered Indosat from providing the same services as Telkom in Warung Telkom and thereby eliminating Telkom's competitor in providing the international connection services market.

ICC found this practice as violating the prohibition of refusal to deal according to Article 19 lit. (a) of Law No. 5 of 1999 [26]. Regarding the essentiality element, in the judgment, ICC stated that Telekom's local network was an essential facility for each international call service provider that offers the services on the local network [27]. In its decision, ICC emphasized the freedom of consumers to choose services and the right to interconnection. ICC also acknowledged that consumers would benefit more from the possibility to interconnect between different telecommunication service providers rather than relying on only one provider. Further, ICC considered interconnection between providers as both a business necessity for the providers themselves and an obligation imposed by law, i.e., Law No. 36 of 1999 on Telecommunication [28].

Under Article 102 TFEU, dominant companies are prohibited from abusing their power [29]. For the qualification of dominance abuse, dominance is first required, and for this purpose, a relevant market shall be defined. Relevant product market as defined by the European Commission encompasses 'all those products or services which are regarded as interchangeable or substitutable by the consumer, because of the products' characteristics, their prices and their intended use' [30]. A relevant market for online platforms that built their business based on personal data might cover a large market comprising search engines, social networks, and online travel services to any online shop. The relevant market, hence, needs to be defined on a case-by-case basis.

Abuse of dominance was at issue in the Microsoft case [31]. European Commission ruled that Microsoft abused its dominance against Art. 82 EC (now Art. 102 TFEU) refusing to supply interoperability information to its competitors, thereby restricting the interoperability between Windows PCs and non-Microsoft workgroup servers' [32]. In its ruling, the Commission required Microsoft to disclose complete and accurate interface documentation to allow non-Microsoft workgroup servers for full interoperability with Windows PCs and servers [33]. In the judgment, the Commission argued, 'if competitors cannot produce software that is interoperable with industry-leading computer programs, consumers will be deprived of innovative competing or complimentary products' [34]. Refusal to make interoperability information available would adversely impinge on the incentives of others to innovate and create new products [35]. However, under the general rule, there is no obligation to disclose interoperability information from the competition law viewpoint. [36] Thus, the necessity of imposing compulsory disclosure of interoperability information is decided on a case-by-case basis. Only under exceptional circumstances can a refusal to provide interoperability information qualify an abuse of dominant position under Art. 102 TFEU.

Art. 102 TFEU presupposes, first of all, a dominant position in the market [37]. *Anderman* formulates it as having a considerable degree of market power because it 'virtually amounts to a de facto monopoly [38]. In the next step, a compulsory licensing for interoperability as shown in the Microsoft case could be imposed only when (1) the product is indispensable [39], 2) the refusal prevents the emergence of a new product, while there is potential consumer demand for the new product [40], (3) the refusal is not justified [41], and (4) it excludes all competition on a secondary market [42] [43]. It is interesting to note that the element of indispensability in the Microsoft case referred to the degree of interoperability that 'was necessary to enable developers of non-Microsoft work group server operating systems to remain viably on the market' [44]. The interoperability information was indispensable because it allowed non-Microsoft workgroup servers to interoperate with client PCs and because of Microsoft's significantly leading position in the client PC operating system market [45].

The Microsoft case displays how the Commission based its judgment on the impact of interoperability on competition, taking into account consumers' interest as the primary benefactor of competition, i.e., the availability of consumer choices and the creation of new products through innovation processes. The case also shows how an exclusive right manifested in the right to exercise intellectual property rights is balanced against the prohibition of dominance abuse in the light of Art. 82 EC (now Art. 102 TFEU) under exceptional circumstances mentioned above [46].

### *2 Abuse of Buyer Power*

In the case of Carrefour, the imposition of trading terms by Carrefour was considered unfair because it did not provide enough opportunity for the suppliers to negotiate the content of the agreement unless the supplier also possessed a substantial market share on the supply level. In this light, it became essential to consider why it was important for the supplier to supply their products to Carrefour stores. Such importance could only result from market dominance or at least market control. Without access to the market-dominating or market-controlling retailer, the continuation of suppliers' business would be endangered or significantly affected. In this way, the suppliers became dependent on access to the retail market by concluding agreements with Carrefour. The question was whether market dominance or at least market control existed so that it could be examined further that an abuse of dominance or at least an abuse of market control had occurred. For this reason, an examination of the application of Article 1 No. 4 and 25 of Law No. 5/1999 concerning the dominant position and Article 19 of Law No. 5/1999 was essential.

The result of imposing the trading terms on suppliers was considered in different levels of the market, through which it could be seen how the imposition of trading terms, especially the minus margin, enabled Carrefour to indirectly control the price and variety of products of its competitors: First, in the supply level, it affected the relationship between the suppliers and the competitors of Carrefour, in which the suppliers had to make their best effort to avoid the competitor of Carrefour applying a lower selling price than Carrefour's selling price for the same products, to avoid the payment of minus margin. The price parity clause could be attained by not giving a lower purchase price to the competitors of Carrefour or even stop their supply to competitors of Carrefour until the competitors raised the selling price to a level that the price would not be lower Carrefour's selling price.

Second, on the retail level, the relation between the competitors of Carrefour and their customers was affected in two ways: On the one hand, competitors were hindered from gaining a better purchase price from the suppliers, by which consumers were, in turn, hindered from getting a competitive price for the same products. On the other hand, since suppliers stopped their supply to Carrefour's competitors, the competitors were hindered from selling the same products in the market, and the number of varieties of products in the competitors' stores was reduced. At the same time, the variety of products is the decisive factor for consumers, particularly when their purchase decision is based on the choice of a one-stop-shop. On the part of consumers, the limited varieties of products in the store of Carrefour's competitors restricted their choice of where to shop.

### *3 Price parity agreements*

The case Booking.com in Germany displays how the price parity deal could become a competition law concern. In this case, Booking.com applied the so-called 'most favored customer (MFC) clause in the contracts with its partners, which means that their partners promised to offer Booking.com the best rate in the market. Such a clause is also known as price parity or price parity deal/guarantee.

In this case, the hotel booking portal, Booking.com, obliged hotels to provide Booking.com with their lowest room prices, maximum room capacity, and most favorable booking and cancellation conditions on all online and offline booking channels. This term is known as the 'wide price parity clause.' In response to the investigation made by the German FCO, Booking.com offered a modification of the clause, in which the hotels were allowed to offer their rooms with lower prices on other hotel booking portals, under the condition that the prices displayed on the hotels' websites were not lower than on Booking.com. Thus, the comprehensive price parity clause was modified to narrow the price parity clause.

Responding to such an offer, the FCO found that even narrow price parity clauses restrained competition between the existing portals and the hotels. Andreas Mundt, the President of the FCO, clarified that by imposing such clauses, the freedom of hotels to define prices on their online booking channels was violated. Further, it creates barriers to enter the market for new platform providers.

A similar decision was made regarding Booking.com's competitor, HRS. The Düsseldorf Higher Regional Court, later on, backed up the decision of the FCO in its ruling that the price parity clauses imposed by HRS were illegal.

The case exposes the anticompetitive natures of what might seem to favor consumers' interest in prices. Although, in at least the short term, consumers benefit from gaining the lowest price in the market, this practice makes it impossible for the rivals to offer more competitive prices, and as a result, consumers are inhibited from having choices in the market. Thus, removing or limiting the freedom of its partners or suppliers to offer better prices to competitors makes it difficult for competitors to operate in the same market, i.e., due to higher prices and fewer customers. The ability to impose such a clause derives from the dominant position in the market, without which it would have been less likely to be able to force suppliers to agree on the clause.

### *4 Effect of Harms*

In the "Carrefour Case," I analyze the impact of imposing the trading terms on suppliers in two different levels of the market: supply level and retail level. At the supply level, it affected the relationship between the suppliers and Carrefour's competitors. To avoid the penalty of paying a minus margin, suppliers had to make their best effort to hinder Carrefour's competitors from offering a lower selling price than Carrefour's for the same products. It could vary from not giving a lower supply price to Carrefour's competitors to halting their supply until they raised the retail price to a lower level than Carrefour's.

At the retail level, it affected the relationship between Carrefour's competitors and their customers in two ways: (1) because competitors could not gain a better supply price than Carrefour's, consumers were hindered from getting a competitive retail price for the respective products from their stores. (2) With the termination of supply to Carrefour's competitors, the competitors were impeded from selling the same products in the market, and the number of varieties of products in their stores was cut down. Whereas a variety of products is a decisive factor for consumers to choose a shop, mainly when their purchase decision is based on a one-stop-shop, the cutting down of products means lessening the ability to compete with Carrefour. For consumers, this means limiting their choice of where to shop and increasing their dependence on Carrefour.

In the case of Booking.com, the effect of harm lies in two-fold. Andreas Mundt, the President of the FCO, clarified that by imposing such clauses, the freedom of hotels to define prices on their online booking channels was violated. Further, it creates barriers to new platform providers entering the market.

The case exposes the anticompetitive natures of what might seem to favor consumers' interest in prices. Although, in at least the short term, consumers benefit from gaining the lowest price in the market, this practice makes it impossible for the rivals to offer more competitive prices, and as a result, consumers are inhibited from having choices in the market. Thus, removing or limiting the freedom of its partners or suppliers to offer better prices to competitors makes it difficult for competitors to operate in the same market, i.e., due to higher prices and fewer customers. The ability to impose such a clause derives from the dominant position in the market, without which it would have been less likely to be able to force suppliers to agree on the clause.

## *Rule of Reason Approach to Define Illegality*

### *1 Rule of Reason and Per Se Illegal: Two Different Approaches*

Abuse of dominant position is referred to as exemplifying unilateral practices. Being dominant as such is not illegal; it is abusing the dominance that is prohibited. The prohibition of dominance abuse adopts the classical distinction between two categories of behaviors in competition law in this regard: exploitative and exclusionary practices [47]. Exploitative prototypes in unilateral practices can manifest, for instance, in the abuse of buyer power. Abuse of buyer power is typical when the buyer is dominant in the market and exploits its market power to dictate trading terms on the seller. It is plausible that the buyer is not dominant. However, it might be powerful enough to have superior bargaining power against the seller, for example, when the seller is an SME. Abuse of super bargaining power can be seen in ICC Decision on the case of Carrefour in 2005 for abusing its market power despite not being dominant in the market to impose unjustifiable trading terms towards its suppliers. The exploitative behavior in this case, however, is entangled with exclusionary characters. The content of the trading terms itself is exclusionary by imposing minus margin for suppliers that fail to provide the lowest price in the market for their products to Carrefour and thereby indirectly hindering Carrefour competitors from getting lower prices from the same suppliers and preventing them from operating in the same market with Carrefour [48].

Exclusionary prototypes in unilateral practices can be found in cases of abuse of dominance to refuse to deal [49]. Such practices also include abuse of intellectual property rights to the same extent [50], for instance, in typical cases of abuses of standard essential patents [51].

Different approaches can be used to qualify illegality. Two of the main approaches are, per se illegal and the rule of reason approach. According to the per se illegality, particular conduct is considered illegal due to its anticompetitive nature and, thus, harmful. Meanwhile, the rule of reason approach provides room to weigh the illegality based on the harmful effects of the conduct to be balanced out against the benefit that might be generated from the conduct.

Both per se and rule of reason approaches are applied in Law No. 5/1999, although both terms are not used in the law. The application of the rule of reason approach can be recognized from the clause such as '...could result in monopolistic practices or the occurrence of unfair business competition.' There are two elements in this clause: First, a requirement to assess the effect of an express agreement or conduct in the relevant market, which is shown in the term "could result in" or in some provisions "could be suspected to result in," and second, the benchmark for the harmful effect to the relevant market, which is described as "monopolistic practices" and "the occurrence of unfair (business) competition." Both are applied alternatively.

### *2 Qualifying Illegality under the Rule of Reason*

The assessment requirement on the effect of harms implies two significant consequences: First, it means that the respective agreement or conduct as such (per se) is not prohibited and becomes prohibited only when the second part of the clause is met. The second clause here refers to "monopolistic practices and or unfair (business) competition" [52].

Second, although an effect assessment is required, the approach does not require an actual effect. A potential effect is sufficient for the prohibition. This interpretation is derived from the wording "could result in" instead of "results in," which means it is unnecessary to prove that a harmful effect has occurred from an agreement or conduct.

Further, monopolistic practices are defined in Law No. 5/1999 as "...the concentration of economic power by one or more undertakings, resulting in the control of the production or marketing of certain goods or services giving rise to unfair business competition that could be detrimental to the public interests' [53]. Unlike the neutral nature of 'monopoly,' 'monopolistic practices' in this context imply harmful characteristics. [54] According to the definition, monopolistic practices can be performed in a market with a monopoly structure. It also encompasses practices to maintain the monopolistic position or gain it if the market structure is not monopolistic.

Law No. 5 of 1999 uses the term unfair business competition, defined as: 'competition between undertakings in undertaking production activities or marketing of goods or services dishonestly or illegally or restricting business competition' [55].

The terms' dishonest' and 'illegal' originate from Article 382 of the Indonesian Criminal Code concerning fraudulent acts and Article 1365 of the Indonesian Civil Code concerning illegal acts which cause damages to other parties, on purpose that any claims of unfair competition which before the enactment of Law No. 5/1999 relied merely on both provisions are now covered by the competition law. Säcker and Füller explain further that unlike the term 'illegal,' which is still acceptable and applicable, so that business conduct which is against the law is illegal, the term 'dishonest' is subject to a replacement with a more appropriate term if it is not at all covered yet by the term 'illegal' and 'restricting competition.' The reason is that the use of the term 'dishonest' overlaps with the content of 'illegal.' It is not necessary to prove that the conduct is, on the one hand, dishonest and, on the other, illegal. It is also sufficient to be prohibited under the Law of 1999. Further proof of the dishonesty of the conduct is unnecessary [56].

On the other hand, the term 'illegal' is used to distinguish conduct in areas such as, or per se, illegal from prohibited conduct because they have a restrictive impact on competition. Therefore, the second type of conduct requires proof of the restrictive impact on competition, which can be either an actual or a potential impact that will reasonably occur in the long run performing the conduct [57]. Illegal conduct prohibited per se includes price-fixing [58], price discrimination [59], conspiracy [60], abuse of dominant position [61], and interlocking directories [62].

Regarding the term 'restricting competition,' a primary consideration will be the fundamental principle of equality in Law No. 5/1999. Accordingly, restricting competition refers to a detriment to the equality to participate in the market, which can take the form of market conduct or a change of market structure. Market conduct is distinguished from a change of market structure in that restrictive market conduct restrains competition without directly changing the market structure, e.g., price cartel. In contrast, a change of market structure refers to changes created by undertakings in the market structure to restrain competition, e.g., by merging [63].

According to Art. 25 par. (1) of Law No. 5 of 1999, undertakings are prohibited from abusing their market dominance to carry out the following: (1) imposing trading terms with the object of hindering and or obstructing consumers to obtain competitive goods or services both in terms of price and quality; (2) restricting the market and the improvement of technology; or (3) hindering other undertakings that have potentials to become competitors to enter the relevant market. Different approaches seem to be applied to each type of prohibited conduct. While the first type is prohibited conduct by object, which means that assessing the effect of harm is not required, the second and third types are formulated with a different approach. It is not explicitly expressed in the prohibition in the last two types of conduct which approach is used. However, the acts of 'restricting' and 'hindering' have to be manifested in the course of action. They also have to be potentially harmful to competition. Therefore, in both cases, evaluating the effect of harm becomes indispensable.

### *3 Legal Implications for Retailers*

The price parity clause has become a more frequently used tool to attract customers, as the price is still an essential component of consumer consideration. It is commonly seen in the travel services industry, such as hotel and flight booking, and it is also practiced in other industries like food retail, e.g., hypermarkets. While offering price parity in the market benefits consumers, it would become harmful when, in order to do so, a retailer forces its suppliers to not agree on the same or better prices with its competitors. It is harmful because such practice puts entry barriers in the relevant market and will hinder consumers from getting a better deal at the end of the day. The word 'force' is used to emphasize the element of market power abuse, which in essence limits the freedom of contract on the part of the supplier by abusing the bargaining power of the buyer, i.e., the retailer.

In this case, the prohibition to abuse market power in making price parity deals might lie beyond what is usually understood as (part of) business ethics and, in practice, business strategy to negotiate trading terms between parties. However, competition law takes a step further by putting the value into words with legal consequences, i.e., legal sanctions. Retailers have to take it into account in their daily practices. While the rule of reason approach does not per se prohibit price parity agreements, two elements need to be taken into account in qualifying harm: harm by object and harm by effect. In harm by object, the test to qualify harm relies on whether or not there is a purpose to create harm in defining the trading terms.

While in practice, a retailer might not have the purpose of creating harmful effects to competition, the second test will answer whether the harmful effects at least potentially occur regardless of the existence of a purpose to create such harms. Thus, the retailer's responsibility to ensure that there is no harmful element in the trading terms does not end because there is a purpose of creating harm in closing the deal, but it goes further to the point of implementing the deal.

While usually, the dominant position becomes a prerequisite, such as in the EU, under German Competition Law, the prohibition of abuse also applies in cases of relative market power (relative Marktmacht, Marktmacht Stellung) where a business undertaking is relatively robust in comparison to its business counterpart. § 20 par. (1) of the Act Against Restraints on Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) sets forth the prohibition to abuse relative market power. According to the provision, the prohibition to abuse dominant position also applies to business undertakings and associations when small or middle-sized enterprises (SMEs), either as buyers or suppliers, depend on them because there is no sufficient or reasonable possibility to switch to other business undertakings. The dependence of a supplier of certain goods or services on its buyer is assumed when the buyer regularly requires additional benefits and a price reduction or any compensation for services.

The concept of relative market power is also recognized in Indonesian Competition Law, although "relative market power" is not used. Similar to the concept used in Germany, it implies the level of bargaining power that is strong enough to steer and define the terms of the contract, but the provision in Indonesian Competition Law does not specify the comparison to SMEs. In such a case, the quantitative qualification of dominance is based on market share, according to Art. 25 par. (2) of Law No. 5 of 1999 is not required. Instead, the prohibition under Art. 19 lit. (a) of Law No. 5 of 1999 that prohibits business undertakings to refuse or hinder other business undertakings to operate in the same relevant market might apply. The law does not explicitly refer to abuse of buyer power, unlike the provision under German law, but essentially it recognizes abuse of buyer power as a form of prohibited conduct.

## OECD View on Price Parity Agreements

In its Executive Summary of the Hearing on Across-Platforms Parity Agreements (APPAs), the OECD is of the view that price parity agreements prevent producers from setting lower retail prices on rival platforms that offer more competitive commission rates. This removes the incentive for platforms to compete on the commission they charge to producers, hence inflating the commissions and final prices consumers pay. These agreements may also prevent entry from new low-cost platforms, reduce innovation, and even facilitate collusion.

A decision by platforms and producers to adopt an agency relationship might increase prices, and the agreement of APPAs would help the firms to adopt such a relationship. APPAs might, therefore, also be indirectly responsible for price increases that occur when platforms and producers adopt an agency relationship.

However, it may also have efficiency-enhancing effects that are beneficial for consumers. They can remove the risk that consumers use a platform to compare products and enjoy additional services (such as customer reviews) and then purchase their favored product directly from the producer or on a cheaper platform. As a result, they can ensure that platforms are not discouraged from investing in the quality of their platform. The benefits consumers derive from these investments, and the extent to which these investments might also be protected through less anti-competitive measures likely depend on case-specific factors.

The magnitude of the anticompetitive effects of these agreements will depend on the market power of the platform requesting the agreement. The effects may also depend on the scope of the agreement; however, the impact of the scope of an APPA on the degree of price competition amongst platforms appears likely to depend on the specifics of the case.

In some cases, the agreements were considered horizontal conspiracies to fix prices. In other cases, they were considered as vertical price restraints. One expert suggested that these restraints should be treated as restrictions by object, with exemptions granted where the firms demonstrate that the agreement generates countervailing efficiencies, while others argued

that a case-by-case approach was required to assess competitive effect and that targeted remedies might benefit consumers. [64]

## CONCLUSION

Based on the analysis in the previous paragraphs, this paper comes to the following conclusion:

As shown in cases in different jurisdictions (Indonesia, Germany, and the EU), the harmful elements of price parity agreements lie in first, limiting the freedom of suppliers to set prices and second, in the creation of entry barriers for new players, because they cannot compete with the price set under the price parity clause.

The rule of reason approach to defining illegality is based on assessing the harmful effects of certain conduct. Such assessment entails: First, the respective conduct as such (per se) is not prohibited and becomes prohibited only when the second part of the clause is met.

Second, although an effect assessment is required, the approach does not require an actual effect. A potential effect is sufficient for the prohibition.

## CONFLICT OF INTEREST

The author declares there is no conflict of interest in this article.

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