

The Unicorn Is a Myth No More: A Ratio Decidendi Analysis on First Official Predatory Pricing Case in Indonesia

Zaid

Master of Law, Universitas Muhammadiyah Yogyakarta, Indonesia
Corresponding E-mail: zaidrusdianto@gmail.com

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ABSTRAK

Predatory pricing has long been termed like a dragon or a unicorn because the practice is often considered irrational and therefore impossible to find or at least unlikely to work. However, the case that befell PT Conch South Kalimantan Cement broke the stigma in Indonesia, which was legally proven to practice predatory pricing through the Business Competition Commission Council (KPPU) Case Decision Number: 03/KPPU-L/2020. Considering that predatory pricing is complicated to prove because it requires certain elements to be fulfilled, this research then aims to analyze the predatory pricing elements, which became strong reasons that underlay the KPPU Council's determination of PT Conch South Kalimantan Cement as a predatory business actor so that it is entitled to be punished with billions of rupiah. By applying the normative method with a statutory, conceptual, and case approach through primary and secondary legal materials, which were analyzed by qualitative and prescriptive analysis, this study ultimately found the results that the elements in the form of business actors, supply, goods, selling at a loss or fixing a very low price, eliminating or shutting down the business of its competitors, the relevant market, and causing monopolistic practices and/or unfair business competition have become the ratio decidendi of the KPPU Council in determining the practice of predatory pricing. These reasons can then be used as decisions on similar issues in the future.

Keywords: predatory pricing; ratio decidendi; unicorn.

1. Introduction

The competition law is one of many highly controversial laws. Even the World Trade Organization (WTO) has considered the law governing competition (and its application) reasonably controversial (Hufbauer & Kim, 2009). One of the reasons is the articles contained in it. Based on observations from various study literature, related articles were found such as mergers and acquisitions (Régibeau & Rockett, 2019), price-fixing (Kaplow, 2013), margin squeeze (Colangelo, 2013), and predatory pricing (Zaid,

Dawaki, & Ololade, 2021). However, among the various antitrust violations, predatory pricing is one of the most serious and debated (Giocoli, 2011).

Predatory pricing has been described as a form of abuse of dominant position in competition law in various countries (Petzold, 2015), which has long been highly controversial and has become one of the oldest and most classic prominent business conspiracy theories and continues to this day (Lindberg, 2003). The controversial side of predatory pricing can be referred to from the difficulty of distinguishing an aggressively low price (predator) from a low defensive price (Hawkins, 2016). Thus, a distinction must be made between low prices due to good and competitive competition and low prices due to consequentially poor predation (Elzinga & Mills, 2014). On the one hand, this practice can also be anti-competitive, while on the other hand, this practice is the essence of competition (Mncube, 2013).

Indeed, so controversial, this rule has divided the three views into three schools of thought, namely Harvard school, Chicago, and post-Chicago school. For the Chicago school, the law regarding the prohibition of predatory pricing is not accepted because they consider that predatory pricing itself is an irrational practice and is rarely practiced. Even Easterbrook, (1981) considered it a rare practice, later termed the mythological creature "dragon"¹. Others consider it a "white tiger," a very rare creature. Even some others think that price predation is more similar to "unicorn" because it is just a myth (Cheng, 2020). They doubt that predation will never be observed (discovered) in practice as this would be a highly ineffective strategy (Mateus, 2011).

Unlike the Chicago school, for post-Chicago and Harvard schools, predatory pricing is an unfair and rational business competition practice. Therefore, predatory pricing cases were found in America at the end of the 19th century involving a large antitrust company, Standard Oil Company. Meanwhile, in Europe, the first cases were found in the 1980s to the early 1990s involving *AKZO Chemie BV v European Community Commission*². Meanwhile, in Indonesia, since the enactment of Law No. 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Practices, no significant predatory pricing cases have been found. Before, predatory pricing was only still in the stages of suspicion, supervision, and distrust. Until early 2021, the Indonesian Commission for the Supervision of Business Competition (Commission for Supervision of Business Competition, hereafter KPPU), through its Decision Number: 03/KPPU-L/2020, stated that the reported party PT Conch South Kalimantan Cement legally and convincingly carried out the predatory pricing practice. It means that predatory pricing is no longer a "myth" like unicorns in Indonesia.

¹ Where Easterbrook argued that "Do we have so many theories because predation is a common but variegated phenomenon, curable by no single antidote? Or do we have so many theories for the same reason that 600 years ago there were a thousand positions on what dragons looked like? Unlike most of the recent writers, I conclude that there is no sufficient reason for antitrust law or the courts to take predation seriously"

² See Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* (Article 86 — Eliminary practices of a dominant undertaking)

Because this first official case is still very new to be decided in Indonesia, there is still no research discussing and examining the case decisions related to predatory pricing. This claim is further strengthened by the trend of research in Indonesia to date related to predatory pricing, which still revolves around the discussion of indications (Rahmawati, 2021; Santoso, 2018) and impacts (Febrina, 2017) no one has tried to analyze the decision about the case. In fact, it is not easy to prove the practice of predatory pricing. Concerning this, several criteria need to be fulfilled. Therefore, further analysis is required regarding this decision. On this basis, the question in this research, "how and what elements determine predatory pricing practices in KPPU Council's Case Decision Number: 03/KPPU-L/2020?" then appears. Based on it, this study aims to analyze the predatory pricing elements, which became strong reasons related to the Decision on Case Number: 03/KPPU-L/2020 by the KPPU Council associated with the predatory pricing case with the defendant or the reported party being PT Conch South Kalimantan Cement.

2. Methodology

Considering that this research aims to analyze the KPPU's Case Decision, it is clear that this research is normative research with a statutory, conceptual, and case approach. The case approach in this study used ratio decidendi reasoning, which according to I Made Pasek Diantha are the logical reasons that are the subject of a decision (Diantha, 2016). Thus, the data source used was also secondary data involving primary legal materials in the form of Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition and the Decision on the Case of the KPPU Council Number: 03/KPPU-L/2020. To support these primary materials, this research also employed secondary legal materials taken from books, scientific journal articles, and sources from other trusted and reputable articles. The literature study technique collected data were then analyzed using qualitative and prescriptive data analysis techniques.

3. Results and Discussion

3.1. Predatory pricing and its proof elements

Predatory pricing has a long and convoluted history in both economic theory and antitrust/competition law. Nonetheless, in most constituencies, competition law addresses predatory pricing to date (Funk & Jaag, 2018). In principle, predatory pricing is a business actor setting prices too cheap or too low. Hence, predatory pricing theoretically occurs when a firm cuts its price below cost with a motive to drive competitors out of the market so that the predatory firm can then act as a monopolist (Taylor, Moldoveanu, & Taylor, 2013). It is then very much in accordance with Article 20 of Law No. 5 of 1999, which states that:

"Business actors shall be prohibited from supplying goods and/or services by selling at a loss or setting extremely low prices to eliminate or ruin their competitors' business in the relevant market, which may result in monopolistic practices and or unfair business competition."

Concerning the article, Zaid et al., (2021) explained that the narrative of "setting extremely low prices" in the law requires the price to be set very low and is usually below the market price and the competitor's price. Meanwhile, the narrative or editorial "selling at a loss" requires the price to be set below the average variable cost or cost ('AVC')³. Based on this, the logic is that prices below average variable cost ('AVC') is a "black zone" and should be considered a predatory practice, while prices above AVC will be safe from predatory charges. Below average total costs ('ATC') are still considered or suspected of being a predator when intended to eliminate competitors. Depending on additional evidence, it may be called a 'grey zone,' where prices may be predatory (Brunet & Levy, 2017).

However, what needs to be emphasized here is that not all forms of low prices are predatory pricing practices. Therefore, the editor of Law No. 5 of 1999 does not stop at simply "selling at a loss" or "setting extremely low prices" but also continues with "to eliminate or ruin the business of their competitors in the relevant market." Therefore, according to Sih Yuliana Wahyuningtyas, competition law does not forbid business actors from selling or offering products or services at very low prices. However, selling at such a low price that it could eventually force competitors out of the market (inevitably) may qualify as a predator, which is prohibited⁴ (Wahyuningtyas, 2016).

Whereas in other literature, it is stated that in predatory pricing, the two essential ingredients of any alleged predatory behavior must be the structural requirements of market power and the intention to exploit price declines unfairly to increase or consolidate that power. Market power and predatory intent are essential features that antitrust courts must detect to validate predatory behavior allegations (Giocoli, 2013).

In United States law, the criteria for determining predatory pricing can be seen in the Ratio Decidendi in the Supreme Court's decision against the Brooke Group in Brooke Group Ltd. V. Brown & Williamson Tobacco Corp⁵, where the plaintiff must be asked to prove two elements, namely in the form of an alleged price setting that is too low from the predator and the second has reasonable prospects, or, based on Section 2 of the Sherman Act, possibly dangerous, to be able to recoupment (Park, 2012). This criterion is more in line with the modern definition of predatory pricing, namely prices that maximize profits only because of their exclusive or other anti-competitive effects, i.e., prices that imply profit sacrifices in the short term to eliminate competition and obtain

³ The term "selling at a loss" as what is mentioned in the law this is because refers to the sale of products or services below cost or average variable cost (AVC). Thus, the price set is shallow and definitely below the competitors' prices"

⁴ "First of all, competition law does not prohibit offering products with very low prices per se. However, selling a product at such a low price that it forces competitors to exit the market might qualify as predatory and under certain circumstances be prohibited."

⁵ See Brooke Grp. v. Brown & Williamson Tobacco Corp. - 509 U.S. 209, 113 S. Ct. 2578 (1993)

higher profits in the long run (Giocoli, 2011).

Meanwhile, in Indonesia, KPPU has made guidelines for implementing Article 20 regarding predatory pricing, which explains the elements that must be included in determining predatory pricing. In the guidelines, KPPU states that thirteen elements must be considered in determining predatory pricing practices in the form of business actors, supply, goods and services, selling at a loss and very low prices, intentions or goals, eliminating or killing competitors, markets concerned, monopolistic practices, and unfair business competition (Komisi Pengawas Persaingan Usaha, 2009).

Although the elements of predatory pricing evidence set by the KPPU based on Article 20 of Law Number 5 of 1999 are more than the explanations of the experts mentioned previously, these elements still miss or omit the essential elements in predatory pricing in the form of a dominant position and recoupment. Also, because of the large number of editorials or differences, there have been many demands for reform urging a prominent legal test for predatory pricing (Cheng, 2020).

3.2. A Ratio Decidendi Analysis on Case Decision Number: 03/KPPU-L/2020

Initially, the Decision on Case Number: 03/KPPU-L/2020 was born because of Case Number 03/KPPU-L/2020 concerning Alleged Violations of Article 20 of Law Number 5 of 1999 concerning predatory pricing committed by PT Conch South Kalimantan Cement in Cement sales in South Kalimantan Region⁶. After deliberation in the Commission Council Session, the decision was finally set on January 13, 2021, and read out in a session open to the public through electronic media on January 15, 2021. The decision ultimately declared that the reported party had legally and convincingly violated Article 20 of Law Number 5 of 1999 and sentenced him to a fine of Rp.22,352,000,000.00 (twenty-two billion three hundred and fifty-two million rupiahs)⁷.

Every decision, of course, must have a ratio decidendi; moreover, in the case of predatory pricing, which is considered very difficult to find and prove. Therefore, it is necessary to look at logical and appropriate proof elements. Likewise, in this Decision Number: 03/KPPU-L/2020, at least nine elements were used as the ratio decidendi as described in points 19.21.1 and 9.2 of the decision.

3.2.1. Business actors' elements

In Article 1 number 5 of Law Number 5 of 1999, it is explained that what is called a business actor is "any individual or business entity, whether in the form of a legal entity or not a legal entity established and domiciled or carries out activities within the jurisdiction of the Republic of Indonesia, either individually or jointly through agreements, and carries out various business activities in the economic field.

In this case, what is meant by the business actor in a quo case is PT Conch South Kalimantan Cement (the reported party) which is, in fact, a business entity in the form

⁶ See the KPPU Council's Case Decision Number: 03/KPPU-L/2020, p. 1 first paragraph.

⁷ See Ibid, p. 393 last paragraph.

of a limited liability company (Ltd) that carries out business activities in the cement industry. It proves that PT Conch South Kalimantan Cement is a business actor. Thus, the first element in proving predatory pricing in the form of "business actor elements" in this case is proven or fulfilled⁸.

3.2.2. Supply element

In the provisions of Article 15 paragraph (1) of Law Number 5 of 1999, it is explained that "what is included in the definition of supply is providing supplies, both goods and services, in buying and selling activities, in nominative leasing or hire purchase, or nominative leasing."

In connection with this case, the reported party is a business actor established with the intent and purpose to engage in the cement industry, which produces cement of Ordinary Portland Cement (OPC) and Portland Composite Cement (PCC) from its factory located in Tabalong, South Kalimantan. The reported party also sells its products, namely OPC and PCC cement, including South Kalimantan, to distributors. Thus, the activities of the reported party in a quo case can be claimed as activities in the form of supplying goods through one of them selling PCC cement. Thus, the second element in proving predatory pricing in the form of "supply elements" in this case is proven or fulfilled⁹.

3.2.3. Goods elements

In Article 1, number 16 of Law Number 5 of 1999, what is meant by goods is "every object, both tangible and intangible, both movable and immovable that can be traded, worn, used or utilized by consumers or business actors."

In this case, the reported party produces cement of the OPC and PCC types, also commonly marketed cement products. In a quo case, the product referred to is a PCC-type cement product categorized as goods. It is because PCC cement produced by the reported party is a tangible object that consumers or business actors can trade, use, or utilize. Hence, based on this, the third element in proving predatory pricing in the form of the "goods element" in this case is proven or fulfilled¹⁰.

3.2.4. Selling at a loss/setting extremely low prices elements

The element of selling at a loss or setting a very low price is one of the most important elements in proving predatory pricing through a three-step structured rule of reason reasoning. In addition, concerning this case, the KPPU Council found that, based on data obtained from the reported party and its distributors (which are confidential), in 2015, the reported party's cost of goods sold was higher than the reported party's average selling price, which resulted in a loss in 2015. The same as in 2019, the selling price of the reported party's PCC-type cement was also lower than its competitor business actors in the South Kalimantan region.

⁸ see Ibid, pp. 382-383 described in items 9.3.1-9.3.3.

⁹ See Ibid, pp. 383-384 described in items 9.4.1-9.4.6.

¹⁰ See Ibid, pp. 384 described in items 9.5.1-9.5.5.

On the other hand, from 2016 to 2019, the reported party's cost of goods sold was lower than the reported party's average selling price. Thus, the reported party has carried out selling at a loss in 2015. Therefore, based on this, the fourth element in proving predatory pricing in the form of "selling at a loss or setting a very low price" in this case is proven or fulfilled¹¹.

3.2.5. Excluding or running out of competitors' business (barriers to entry) elements

In addition to the price element, barriers to entry are also an essential element in establishing a practice. In fact, because of the importance of this element, the High Court of Australia may not ask to show the possibility of compensation (which incidentally is also the most crucial element in proving predatory pricing) if a predatory business actor starts with a dominant share in a market with high barriers to entry (Hay & Hay, 2015).

In this case, it is known in the decision that based on the cement market share in the South Kalimantan region, and five business actors exited the South Kalimantan area, including PT Cemindo Gemilang, PT Semen Bosowa Maros, PT Solusi Bangun Indonesia, PT Jui Shin Indonesia, and PT Semen Jawa. The five left and died in the market because they could not compete with the reported price, too cheap. It then increased market concentration. The higher the market concentration, the higher the monopoly power and the lower the level of competition. Therefore, increasing market concentration may result in monopolistic practices and/or unfair business competition. Based on this, the fifth element in proving predatory pricing in the form of "the element of getting rid of or shutting down the business of its competitors" in this case is proven or fulfilled¹².

3.2.6. Relevant market elements

Article 1 number 10 of Law Number 5 of 1999 states "a market related to a certain marketing range or area by business actors for the same or similar goods and/or services or a substitute for certain goods and or services."

In this case, it is known that, in general, there are two types of cement products marketed by the reported party, namely OPC and PCC cement. Meanwhile, most of the reported party's cement production in the South Kalimantan region was PCC-type cement, which was also corroborated based on the testimony of witnesses. Thus, the relevant market in a quo case is the PCC cement sales market in the South Kalimantan region. Thus, based on this, the sixth element in proving predatory pricing in the form of "the relevant market element" in this case is proven or fulfilled¹³.

¹¹ See the KPPU Council's Case Decision Number: 03/KPPU-L/2020, pp. 384- 385 described in items 9.6.1-9.6.5.

¹² See the KPPU Council's Case Decision Number: 03/KPPU-L/2020, p. 385 described in items 9.7.1-9.6.4.

¹³ See *ibid*, pp. 385-386 described in items 9.8.1-9.8.6.

3.2.6. "Resulting in monopolistic practices and/or unfair business competition" elements

"Resulting in monopolistic practices and/or unfair business competition" is the most important element in the rule of reason in proving predatory pricing. "Monopoly practice" is then termed in the provisions of Article 1 number 2 of Law Number 5 of 1999 as "concentration of economic power by one or more business actors, which results in the control of production and/or marketing of certain goods and/or services to create unfair business competition and can harm the public interest." Meanwhile, the term "unfair business competition" is explained as "competition between business actors in carrying out production and/or marketing activities of goods and/or services carried out dishonestly or against the law or hindering business competition" based on the provisions of Article 1 point 6 of Law Number 5 of 1999.

Referring to this case, the reported party's actions in implementing a very low pricing strategy compared to its competing business actors from 2014 to 2019 impacted the reported party's market increase significantly due to the exit of five competing business actors from the relevant market. The significant increase in the market share of the reported party and the exit of 5 (five) competing business actors from the relevant market resulted in an increasingly concentrated market, resulting in monopolistic practices and/or unfair business competition. Thus, based on this, the seventh element, which is also the last element in proving predatory pricing in the form of "the element resulting in monopolistic practices and/or unfair business competition" in this case, is **proven or fulfilled**¹⁴.

Table 1. Fulfillment of the Elements of Proof of Predatory Pricing in the KPPU Council's Decision Number: 03/KPPU-L/2020

| Elements of Proof | Fulfillment | Decision points |
|---|-------------|-----------------|
| Business actor elements | Fulfilled | 9.3 |
| Supply elements | Fulfilled | 9.4 |
| Goods elements | Fulfilled | 9.5 |
| Selling at a loss/ setting extremely low prices elements | Fulfilled | 9.6 |
| Excluding or running out of Competitors' Business (barriers to entry) elements | Fulfilled | 9.7 |
| Relevant market elements | Fulfilled | 9.8 |
| "Resulting in monopolistic practices and/or unfair business competition" elements | Fulfilled | 9.9 |

Source: The KPPU Council's Decision Number: 03/KPPU-L/2020, (2021)

Although most of the elements of proving predatory pricing practices have been fulfilled, several other elements are also deemed very urgent by many experts to prove predatory pricing practices, namely proving that the business actor has a dominant or incumbent position and proof of recovery. It is also stated in point 10.13.2 in the decision of the case where it is stated:

¹⁴ See *ibid*, pp. 386-387 described in items 9.9.1-9.8.5.

"The dominant position or market power of a business actor is an important consideration in predatory pricing issues. Even the condition of a dominant position or having an enormous market power is often one of the important requirements that must be fulfilled by a business actor who wants to carry out a predatory pricing strategy."

Although not included in the elements that must be fulfilled, Case Decision Number: 03/KPPU-L/2020 also describes the dominant position and efforts to increase profits after the practice of selling at a loss and/or meager price from the reported party, which is very clear and long explained in items 10.13.2 to 10.13.3. Thus, it reinforces that PT Conch South Kalimantan Cement has actually and firmly carried out a prohibited predatory pricing practice so that the reported party paid a fine of Rp. 22,352,000,000.00 (twenty-two billion three hundred fifty-two million rupiahs) for violation of Article 20 Law Number 5 of 1999.

According to Article 48 (2) of Law No. 5 of 1999, the threat for predatory business actors is the threat of "a fine of a minimum of 5,000,000,000.00 (five billion rupiahs) and a maximum of Rp. 25,000,000,000.00 (twenty-five billion rupiahs), or imprisonment in lieu of a fine for 5 (five) months". When compared, PT Conch South Kalimantan Cement did not get the highest fine even though it has been proven to have practiced predatory pricing. It, of course, cannot be separated from the relief granted by the KPPU Council by considering that the reported party is¹⁵;

- a. A foreign investor in the manufacturing industry sector with a high level of investment has significantly added value to the national economy, especially in creating jobs and business opportunities.
- b. According to Presidential Regulation Number 71 of 2015, cement industry players are classified as commodities categorized as Important Goods.
- c. Always cooperative and respectful of the trial process, as evidenced by always being present during the trial process
- d. A company classified as a "maverick" uses and implements innovative production processes to encourage the efficiency of the national cement industry
- e. The last one that relieves the reported fine is also due to the COVID-19 factor. It was stated that the condition of the Corona Virus Disease 2019 (COVID-19) Pandemic had resulted in almost all business actors being significantly affected, including the reported party.

Therefore, the decision of the KPPU Council is proof that predatory pricing exists and may occur. This decision can also be used to determine predatory pricing, especially in Indonesia. Given that the approach to predatory pricing in Indonesia is a rule of reason, of course, determining whether pricing is predatory or not is quite difficult and complicated. Several criteria or elements must then be met and proven to justify predatory pricing.

¹⁵ See Ibid, pp. 392-393, described in items 12.2.2.

4. Conclusion

Based on the discussion, it can be concluded that predatory pricing is an unfair business competition practice because it violates Article 20 of Law No. 5 of 1999. In determining the practice of predatory pricing, elements such as business actors, supplying goods, selling at a loss, setting meager prices, eliminating, or shutting down the businesses of competitors, the relevant market, resulting in monopolistic practices and/or business competition, dominant position and unhealthy recoupment must be proven. In the Decision on Case Number: 03/KPPU-L/2020, the KPPU Council seems to use these elements, which were then used as the ratio decidendi in proving the practice of predatory pricing at PT Conch South Kalimantan Cement. Besides, because all elements have been fulfilled, through the Decision on Case Number: 03/KPPU-L/2020, PT Conch South Kalimantan Cement was finally declared to have violated Article 20 of Law No. 5 of 1999 with due regard to aspects that can alleviate it. Thus, what has been decided by the KPPU Council is appropriate and correct. Therefore, these reasons can then be used for future decisions on similar problems (predatory pricing).

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Law

Law No. 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Practices.

Decision

KPPU Council's Case Decision Number: 03/KPPU-L/2020, 2021.