

# The Unicorn Is A Myth No More: A Ratio Decidendi Analysis On First Official Predatory Pricing Case In Indonesia

*by* Zaid Zaid

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## The Unicorn Is A Myth No More: A Ratio Decidendi Analysis On First Official Predatory Pricing Case In Indonesia

Zaid <sup>27</sup>

Master of Law, Universitas Muhammadiyah Yogyakarta, Indonesia,

E-mail: [zaidrusdianto@gmail.com](mailto:zaidrusdianto@gmail.com)

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### ABSTRACT

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, it seems that the case that occurred to PT Conch South Kalimantan Cement broke the stigma in Indonesia, which has been legally proven to practice predatory pricing through the Business Competition Commission Council (KPPU) Case Decision Number: 03/KPPU-L/2020. Considering that it is the newness of this decision, this research then aims to analyze the strong reasons that underlie 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 elements of business actors, supply, goods, selling at a price 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 that the law governing competition (and its application) is itself reasonably controversial<sup>1</sup>. And one of the reasons is the articles contained in it. Based on observations from various study literature, it is found that related articles such as mergers and acquisitions<sup>2</sup>, price fixing<sup>3</sup>, margin squeeze<sup>4</sup>,

<sup>1</sup> Hufbauer, G., & Kim, J. (2009). International Competition Policy and the WTO. *The Antitrust Bulletin*, 54(2), p. 327.

<sup>2</sup> Régibeau, P., & Rockett, K. E. (2019). Mergers and Innovation. *The Antitrust Bulletin*, 64(1), hlm. 32.

<sup>3</sup> Kaplow, L. (2013). *Competition Policy and Price Fixing*. New Jersey: Princeton University Press, p. 1.

predatory pricing<sup>5</sup>. However, among the various antitrust violations, predatory pricing is one of the most serious and debated<sup>6</sup>.

Predatory pricing has been described as a form of abuse of dominant position in competition law in various countries<sup>7</sup>, 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<sup>8</sup>. The controversial side of predatory pricing can be referred from the difficulty of distinguishing an aggressive low price (predator) from a defensive low price<sup>9</sup>. Thus, a distinction must be made between low prices due to good and competitive competition and low prices due to consequentially poor predation<sup>10</sup>. On the one hand, this practice can also be anti-competitive, while on the other hand, this practice is the essence of competition<sup>11</sup>.

And 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 Frank H. Easterbrook considered it a rare practice which was later termed the mythological creature "Dragon"<sup>12</sup>. Others consider it as 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<sup>13</sup>. They doubt that predation will never be observed (discovered) in practice as this would be a highly ineffective strategy<sup>14</sup>.

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 at that time, 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. Meanwhile, in Indonesia, the enactment of Law

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<sup>4</sup> Colangelo, M. (2013). The Interface between Competition Rules and Sector-Specific Regulation in the Telecommunications Sector: Evidence from Recent EU Margin Squeeze Cases. *Competition and Regulation in Network Industries*, 14(3), p. 214.

<sup>5</sup> Zaid, Z., Dawaki, F. A., & Ololade, S. K. (2021). Should the State Control Tariffs? *Journal of Governance and Public Policy*, 8(1), p. 29.

<sup>6</sup> Giocoli, N. (2011). When low is no good: Predatory pricing and U.S. antitrust law (1950–1980). *The European Journal of the History of Economic Thought*, 18(5), p. 777.

<sup>7</sup> Petzold, D. (2015). It Is All Predatory Pricing: Margin Squeeze Abuse and the Concept of Opportunity Costs in EU Competition Law. *Journal of European Competition Law & Practice*, 6(5), p. 347.

<sup>8</sup> Lindberg, R. (2003). *The Ambiguity of Predatory Pricing: Strategy as a Clarifier*. Lund, Master Contemporary European Affairs of Lund University, p. 1.

<sup>9</sup> Hawkins, J. R. (2015). Predatory Pricing in Antitrust Law and Economics: A Historical Perspective. *Eastern Economic Journal*, 42(3), p. 491.

<sup>10</sup> Elzinga, K. G., & Mills, D. E. (2014). Antitrust Predation and The Antitrust Paradox. *The Journal of Law and Economics*, 57(S3).

<sup>11</sup> Mncube, L. (2013). Strategic Entry Deterrence: Pioneer Foods And The Bread Cartel. *Journal of Competition Law and Economics*, 9(3), p. 637

<sup>12</sup> Easterbrook, F. H. (1981). Predatory Strategies and Counterstrategies. *The University of Chicago Law Review*, 48 (2), p. 264.

<sup>13</sup> Cheng, H. F. G. (2020). An economic perspective on the inherent plausibility and frequency of predatory pricing: the case for more aggressive regulation. *European Competition Journal*, 16(2-3), p. 343.

<sup>14</sup> Mateus, A. M. (2011). Predatory Pricing: A Proposed Structured Rule of Reason. *European Competition Journal*, 7(2), p. 245.

no. 5 of 1999 on the Prohibition of Monopoly Practices and Unfair Business Practices to date, no significant cases of predatory pricing have been found. To date, the practice of predatory pricing is only still in the stages of suspicion, supervision, and suspicion. 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. This means that predatory pricing is no longer a “myth” like unicorns in Indonesia.

And because this first official case is still very new to be decided in Indonesia, therefore, of course, there is still no research that discusses and tries to examine 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<sup>15</sup> and impacts<sup>16</sup> no one has tried to analyze the decision pertaining to the case. In fact, it is not easy to prove the practice of predatory pricing. There are several criteria that need to be fulfilled. Therefore, further analysis is required regarding this decision. And on this basis, this study aims to analyze the 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. Method

Considering that the <sup>29</sup> purpose of this research is to analyze the KPPU's Case Decision, it will be clear that this research is normative research with a statutory, conceptual, and case approach. The case approach in this study uses Ratio decidendi reasoning, which according to I Made Pasek Diantha are the logical reasons that are the subject of a decision<sup>13</sup>. Thus, the data source that <sup>9</sup> will be used is 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. And to support and support these primary materials, this research also uses secondary legal materials taken from books, scientific journal articles, and sources from other trusted and reputable articles. The data that has been collected by the literature study technique is then analyzed using qualitative and prescriptive data analysis techniques.

<sup>15</sup> Rahmawati, C. R. (2021). Indikasi Predatory Pricing Yang Dilakukan Ovo Dengan Cara Burning Money. *Jurist-Diction*, 4(2); Santoso, B. (2018). Predatory Pricing in The Telecommunication Business Advertisement in Indonesia. *IOP Conference Series: Earth and Environmental Science*, 175.

<sup>16</sup> Febrina, R. (2017). Dampak Kegiatan Jual Rugi (Predatory Pricing) Yang Dilakukan Pelaku Usaha Dalam Perspektif Persaingan Usaha. *Jurnal Selat*, 4(2).

<sup>17</sup> Diantha, I. M. P. (2016). *Metodologi Penelitian Hukum Normatif dalam Justifikasi Teori Hukum*. Jakarta: Kencana, p. 32.

### 3. Results and Analysis

#### 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<sup>18</sup>. In principle, predatory pricing is a business actor practice 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<sup>19</sup>. This 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 by setting extremely low prices with the aim of eliminating or ruining the business of their competitors in the relevant market which may result in monopolistic practices and or unfair business competition.”

In relation to the Article, Zaid et al. 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 definitely below the competitor's price as well. Meanwhile, the narrative or editorial "selling at a loss" requires the price to be set below the average variable cost or cost ('AVC')<sup>20</sup>. Based on this, the logic is that prices below average variable cost ('AVC') are 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. This may be called a 'grey zone,' where prices may be predatory, depending on additional evidence<sup>21</sup>.

However, what needs to be emphasized here is that not all forms of low or 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 "with the aim of eliminating or ruining the business of their competitors in the relevant market." Therefore, according to Sih Yuliana Wahyuningtyas, competition law does not prohibit business actors from selling or offering products or services at very low prices. However, selling at such a low price that it could

<sup>18</sup> Funk, M., & Jaag, C. (2018). The More Economic Approach To Predatory Pricing. *Journal of Competition Law & Economics*, 14(2), p. 293.

<sup>19</sup> Taylor, J. E., Moldoveanu, M., & Taylor, J. L. (2013). Product Characteristics and the Effectiveness of Dow's Countermeasure for Predatory Pricing. *International Journal of the Economics of Business*, 20(1), p. 1.

<sup>20</sup> Zaid, Z., Dawaki, F. A., & Ololade, S. K. (2021). Op.Cit., p. 27.

<sup>21</sup> Brunet, F., & Levy, V. (2017). "Eviction Prices" and Predatory Prices (France). *Journal of European Competition Law & Practice*, 8(10), p. 654.

eventually force competitors out of the market (inevitably) may qualify as a predator, which is prohibited<sup>22</sup>.

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<sup>23</sup>.

Whereas in US law, the criteria for determining predatory pricing can be seen in the Ratio decidendi in the Supreme Court's decision against the Brooke Group, 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<sup>24</sup>. And 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, namely prices that imply profit sacrifices in the short term to eliminate competition and obtain higher profits in the long run<sup>25</sup>.

Meanwhile, in Indonesia, KPPU has made guidelines for the implementation of Article 20 regarding predatory pricing, which explains the elements that must be included in the determination of predatory pricing. In the guidelines, KPPU states that there are thirteen elements that must be considered in determining predatory pricing practices in the form of elements of business actors, supply, goods, and services, selling at a loss and very low prices, intentions, or goals, eliminating or killing competitors, markets, markets. concerned, monopolistic practices, and the last is the element of unfair business competition<sup>26</sup>.

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 most essential elements in predatory pricing in the form of a dominant position and also recoupment. And

<sup>22</sup> Wahyuningtyas, S. Y. (2016). The Online Transportation Network in Indonesia: A Pendulum between the Sharing Economy and Ex Ante Regulation. *Competition and Regulation in Network Industries*, 17(3-4), p. 276.

<sup>23</sup> Giocoli, N. (2013). Games judges don't play: predatory pricing and strategic reasoning in US antitrust. *Supreme Court Economic Review*, 21, p. 274.

<sup>24</sup> Park, S. (2012). Market Power Revisited. *Research in Law and Economics*. 25, hal. 3.

<sup>25</sup> Giocoli, N. (2011). *Op.Cit.*, hal. 780-781.

<sup>26</sup> Komisi Pengawas Persaingan Usaha. (2009). *Guidelines On Article 20 Concerning Predatory Pricing*. Jakarta, KPPU, pp. 13-15.

because of the large number of editorials or differences, there have been many demands for reform urging a prominent legal test for predatory pricing<sup>27</sup>.

### 3.2. Analisis Ratio decidendi Putusan Perkara Nomor: 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 Region<sup>28</sup>. After going through 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 rupiah)<sup>29</sup>.

Of course, every decision 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 the elements of logical and appropriate proof. Likewise, in this Decision Number: 03/KPPU-L/2020, there are at least nine elements to be used as the ratio decidendi as described in points 19.21.1 and 9.2 of the decision.

#### a. 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 that is established and domiciled or carries out activities within the jurisdiction of the Republic of Indonesia, either individually or jointly through agreements, carries out various business activities in the economic field.

And in this case, that what is meant by the business actor in the a quo case is PT Conch South Kalimantan Cement (the Reported Party) which is, in fact, a business entity in the form of a limited liability company (Ltd) that carries out business activities in the cement industry. This 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 fulfilled**<sup>30</sup>.

#### b. 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, innominative leasing

<sup>27</sup> Cheng, H. F. G. (2020). Loc.Cit.

<sup>28</sup> See the KPPU Council's Case Decision Number: 03/KPPU-L/2020, p. 1 first paragraph.

<sup>29</sup> See *Ibid*, p. 393 last paragraph.

<sup>30</sup> see *Ibid*, pp. 382-383 described in items 9.3.1-9.3.3.

(sewa menyewa), hire purchase, and nominative leasing (sewa guna usaha)”.

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. And then, the Reported Party also sold its products, namely OPC and PCC cement, including South Kalimantan, to distributors. Thus, the activities of the Reported Party in the 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 fulfilled**<sup>31</sup>.

c. 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".

About this case, that the Reported Party produces cement of the OPC and PCC types, which are also cement products that are commonly marketed. And the product referred to in the a quo case is a PCC-type cement product that can be categorized as goods. This is because PCC cement produced by the Reported Party is a tangible object that consumers or business actors can trade, use, or utilize. So, based on this, the third element in proving predatory pricing in the form of "goods element" in this case is **proven or fulfilled**<sup>32</sup>.

d. 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 essential elements in proving predatory pricing through a three-step structured rule of reason reasoning. And in relation to this case, the KPPU assembly found, 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.

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 the practice of 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 fulfilled**<sup>33</sup>.

e. Excluding or running out 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

<sup>31</sup> See *Ibid*, pp. 383-384 described in items 9.4.1-9.4.6.

<sup>32</sup> See *Ibid*, pp. 384 described in items 9.5.1-9.5.5.

<sup>33</sup> See the KPPU Council's Case Decision Number: 03/KPPU-L/2020, pp. 384- 385 described in items 9.6.1-9.6.5.

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<sup>34</sup>.

And in this case, it is known in the decision that that based on the cement market share in the South Kalimantan region, there are five business actors who 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 from the market because they could not compete with the reported price, which was too cheap. This then increases market concentration. And 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. So, 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 fulfilled**<sup>35</sup>.

f. Relevant market elements

In Article 1 number 10 of Law Number 5 of 1999, it is "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, the majority 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 the a quo case is the PCC cement sales market in the South Kalimantan region. So, based on this, the sixth element in proving predatory pricing in the form of "the relevant market element" in this case is **proven or fulfilled**<sup>36</sup>.

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

<sup>15</sup> "Resulting in monopolistic practices and/or unfair business competition" is the most essential 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 so as to create unfair business competition and can harm public interest." While the term "unfair business competition" is explained

<sup>34</sup> Hay, D. L., & Hay, G. A. (2015). Areeda-Turner "Down Under": Predatory Pricing in Australia Before and After Boral. *Review of Industrial Organization*, 46(3), p. 279.

<sup>35</sup> See the KPPU Council's Case Decision Number: 03/KPPU-L/2020, p. 385 described in items 9.7.1-9.6.4.

<sup>36</sup> See *ibid*, pp. 385-386 described in items 9.8.1-9.8.6.

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.

And seeing and referring to this case, that the Reported Party's actions in implementing a very low pricing strategy compared to its competing business actors from 2014 to 2019 had an impact on 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<sup>37</sup>.

**Table 1.** Fulfillment of the Elements of Proof of Predatory Pricing in the KPPU Assembly 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
Prices elements	Fulfilled	9.5
Selling at a loss/ setting extremely low prices elements	Fulfilled	9.6
Excluding or running out 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 the majority of the elements of proving predatory pricing practices have been fulfilled, there are several other elements that are also deemed very urgent by many experts, to be proven in proving predatory pricing practices, namely proving that the business actor is a business actor who has a dominant or incumbent position. And also proof of recovery. This is also stated in point 10.13.2 in the decision of the case where it is stated;

"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, the Case

<sup>37</sup> See *ibid*, pp. 386-387 described in items 9.9.1-9.8.5.

Decision Number: 03/KPPU-L/2020 also describes the dominant position and also 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. So that, this 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.

And suppose you look at Article 48 (2) of Law no. 5 of 1999. In that case, 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 - for 5 (five) months". And when compared, PT Conch South Kalimantan Cement did not get the highest fine even though it has been proven to have practiced predatory pricing. This, of course, cannot be separated from the relief granted by the KPPU Council by considering that the reported party is<sup>38</sup>;

- a. Foreign investor in the manufacturing industry sector with a high level of investment which has significantly added value to the national economy, especially in terms of creating jobs and business opportunities.
- b. Cement industry players, which according to Presidential Regulation Number 71 of 2015, 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 that is classified as "maverick" uses and implements innovative production processes to encourage the efficiency of the national cement industry.
- e. And the last one that relieves the reported fine is also due to the Covid-19 factor. It was stated that the condition of the Pandemic Corona Virus Disease 2019 (Covid-19) had resulted in almost all business actors being significantly affected, including the Reported Party.

#### 4. Conclusion

Considering the exposure and discussion of the above results, 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 or 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 also unhealthy recoupment must be proven. And in the Decision on Case Number: 03/KPPU-L/2020, the KPPU Assembly seems to use these elements, which

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<sup>38</sup> See *Ibid*, pp. 392-393, described in items 12.2.2.

are then used as the ratio decidendi in proving the practice of predatory pricing at PT Conch South Kalimantan Cement. And because all elements have been fulfilled, then through the Decision on Case Number 4/03/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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