



The Characteristics of Predatory Pricing Violations According to Competition Laws in Indonesia

Rilda Murniati^(✉), Sunaryo, and Rohaini

Faculty of Law, Lampung University, Bandar Lampung, Lampung, Indonesia
rilda_murniati@gmail.com, sunaryo.fhunila@gmail.com,
rohaini.1981@fh.unila.ac.id

Abstract. The practice of predatory pricing as a trading business strategy to set a very low price for a product or service in the relevant market. There is no prohibition for businessman to set very low prices for goods/services as long as the selling behaviour has a purpose that does not violate the Law. In the short term, predatory pricing can be profitable because consumers enjoy low prices for goods or services. However, in the long term, after competitors are eliminated from the market, predatory businessman will increase the price of goods or services. Thus, the predatory pricing practices may result in monopolistic practices and/or unfair business competition as stipulated in Article 20 of Law. It will analyse in this research. Determine the characteristics of the practice of predatory pricing as a prohibition in the Law by analyse the Supreme Court's Decision on the PT Semen Conch case.

Keywords: Business Competition · Predatory Pricing · Violations

1 Introduction

A. Background

The Business Competition Law prohibits trading practices or strategies that ultimately kill the business and make the superior businessman dominate the market and ultimately determine the price and quantity of goods in circulation, thereby increasing extraordinary profits as a result of the business strategy. The practice of predatory pricing is a model strategy of businessman to be able to dominate the market and have market power that occurs because of the dominant position in the market of a product in the relevant market. If it exceeds the limits of the Business Competition Law, then market control becomes a prohibited activity.

Predatory pricing is a trading strategy or business method to sell goods at a lower price than necessary, usually it is done in order to eliminate competing businessman from the market. Businessman set prices that are economically detrimental, resulting in competitors' businessman being eliminated from the relevant market and/or preventing other businessman from entering the market. For this reason, predatory pricing is an

effort to dominate the market by eliminating existing business competitors, which is a dishonest and anti-competitive business practice.

Predatory pricing practices aimed at eliminating or killing market competitors have long been associated with trade fairs as entrepreneurs, or established entrepreneurs, who generally hold dominant positions in the market. It is the behavior of entrepreneurs who set economically unfavorable prices. This strategy may force competitors out of the relevant market or prevent other entrepreneurs from entering the market. In the short term, predatory pricing is highly profitable for consumers, but after driving competitors out of the market and discouraging potential new entrants, dominant entrepreneurs or incumbents will push prices We hope to raise it significantly. In general, the price set to cover losses is a monopoly price (higher), which can harm consumers. This practice is an attempt to maximize profits and cover any losses incurred when prices are competitive or low.

Predatory pricing practices are governed by Article 20 of Law No. 5 of 1999 on Prohibition of Monopoly Practices and Unfair Business Competition. Selling goods and/or services in any way is prohibited. Pricing provides or sets prices. Very low selling prices intended to eliminate or put competitors out of business in the relevant market because they lead to monopoly practices and/or unfair commercial competition. From the wording of Article 20 we can see that not all sales at predatory or very low prices are automatically illegal. If there are indications of behavior by entrepreneurs engaging in predatory trade, whether there are acceptable reasons to justify such behavior and whether these behaviors are in fact a combination of monopoly practices and unfair competition. You should consider whether it can lead to.

Every economic activity (trade) which is indicated to violate Law then authorizes the Business Competition Supervisory Commission (KPPU) to examine, measure and determine an action or business strategy carried out by businessman in their activities violating the prohibition limits as stipulated in Law. KPPU is an institution authorized to examine and decide whether or not there has been a violation of business competition law by businessman in carrying out business activities as stipulated in Law. Businessman who are proven to have violated the KPPU will be subject to sanctions in the form of fines in accordance with the article of violation. However, the Procedural of Business Competition Law stipulates legal remedies against the KPPU's decision for such businessman through an objection to the Commercial Court and an appeal to the Supreme Court.

The case of the practice of selling and losing which was examined by the Business Competition Supervisory Commission (KPPU) and declared as a violation of the Business Competition Law is contained in the KPPU's decision Number: 03/KPPU-L/2020 concerning the alleged violation of the practice of selling and losing committed by PT Conch South Kalimantan Cement (abbreviated as PT Semen Conch) in the South Kalimantan region. KPPU based on the results of the examination decided that PT Conch which was designated as the Reported Party violated the prohibition on the practice of selling and losing which is regulated as an activity prohibited in Law. For this reason, the Reported Party made an objection to the Commercial Court as an implementation of the enactment of Law Number 11 of 2020 concerning Job Creation (abbreviated as Omnibus Law on Job Creations) which contains amendments to Article 44 of Law. It is the first

violation case examined in the Commercial Court since the enactment of Omnibus Law on Job Creations. In this case, a cassation to the Supreme Court was also carried out as stated in the Supreme Court's Decision Number: 951K/Pdt.Sus-KPPU/2021.

The Supreme Court decided that PT Conch had practicing the predatory pricing that violated Law and as the first case that could be proven as a violation in the midst of several forms of predatory pricing business strategies that have been carried out by businessman in the Indonesian market but have never been proven to have violated the law. KPPU. By reviewing the decision, this study aims to formulate a clear concept related to the characteristics of the practice of selling and losing as a violation according to the Law in Indonesia.

B. *Research Methodology*

The form of studies used on this paper is normative felony studies due to the fact the approach or approach utilized in felony studies is accomplished through analyzing library substances. Due to this studies is normative felony studies, the facts supply is secondary facts within side the shape of felony substances, each number one felony substances and secondary felony substances. The form of technique used on this studies is a judicial case observe and a statutory technique. The felony substances which have been received are accomplished through descriptive, analytical, and argumentative methods.

2 Discussion and Analysis

A. *Definition and Predatory Pricing Indications*

Based on economic theory, predatory pricing is the condition of fixing the selling price of goods and/or services produced by businessmen below their average total cost. A businessman makes a profit only if he can price the goods and/or services he produces above the average total cost. Cost. However, a price set below the average total cost can be called a reasonable price even if it is above the average variable cost. Replaces capital goods. It's already broken. On the other hand, if an entrepreneur produces at a price below the average variable cost, then it can be said that the price is no longer reasonable, and there is a suspicion that the predatory prices posed by the entrepreneur serve a specific purpose.

In general, the practice of predatory pricing is intended for 5 (five) main objectives, namely:

- Killing competing businessman in the same relevant market;
- Limiting competitors by imposing a selling price at a loss as an entry barrier;
- Earn big profits in the future;
- Reduce losses that occurred in the past, or
- Is a promotional price in an effort to introduce new products as a marketing strategy tool.

A businessman can be considered as supplying goods and or services by setting a very low price if the price set is much lower than the price set by a number of other

businessman. So this must be done horizontal comparison. A businessman who supplies goods and or services at a very low price may be suspected of having the intention to eliminate or kill the business of his competitors in the relevant market, if at the price he determines the profit to be earned is lower than the prevailing interest rate.

B. Decision Number: 03/KPPU-L/2020 as the First Decision in Indonesia Regarding Violation of Predatory Pricing Practices

In 2000 the Business Competition Supervisory Commission (KPPU) was established, and for the first time in 2000, KPPU received reports and examined business competition cases related to the practice of selling and losing. PT Conch South Kalimantan Cement as the Reported Party registered in the registration of Case Number: 03/KPPU-L/2020 was examined on suspicion of having violated the practice of predatory pricing in Indonesia. This case is also the first case for the Commercial Court in deciding the legal effort to object to the KPPU's decision after the enactment of Omnibus Law of Job Creations which contains amendments to Article 44.

The case of the practice of selling and losing is a case that is handled and resolved by the KPPU which is sourced from the report. Handling cases based on reports sourced from the public or businessman who feel disadvantaged by competitors.

Preliminary examination is a series of examinations conducted by the Commission Council on reports of alleged violations of Law as regulated in Article 1 Number 20 of Perkom No. 1 of 2019. The alleged violation of the practice of selling and losing is based on the selling price of cement produced by PT Semen Conch which is sold at a very low price, so that competing businessman lose consumers in the same relevant market.

In this case, the Commission Board stated in its decision number:

03/KPPU-L/2020 PT Semen Conch legally and persuasively violated Article 20 of his 1999 Law No. 5 and fined PT Semen Conch Rp 22,352,000,000 was found guilty and convicted. A decision on Case No. 03/KPPU-L/2020 was taken in an advisory capacity at the Commission Plenary on Wednesday, January 13, 2021 and delivered via electronic media at a public meeting on Friday, January 15, 2021. Read aloud.

Against this decision, PT Semen Conch filed an objection to the Commercial Court, this is based on the provisions of Article 118 of the Job Creation Law regarding the amendment to Article 45 of Law which removes the authority of the District Court to handle objections to the KPPU's decision. The Panel of Judges of the Commercial Court continues to strengthen the considerations of the KPPU Commission Council in its Decision Number 1/Pdt.Sus-KPPU/2021/PN.Niaga. Jkt.Pst. For this reason, PT Semen Conch continues to make legal efforts to appeal to the Supreme Court but the Supreme Court of Justice continue to provide the same legal considerations as confirming and confirming the decisions of the previous judicial institutions as contained in the cassation decision Number: 951 K/Pdt.Sus-KPPU/2021.

PT Semen Conch's legal reasons and considerations are deemed proven to have violated the practice of selling and losing money by applying the rule of reason approach adopted in the formulation of Article 20 of Law. The rule of reason approach examines that the economic actions of businessman have an impact on law violations that result in monopolistic practices and unfair business competition which are prohibited by the Business Competition Law. From an economic point of view, PT Semen Conch which

implemented a loss-selling strategy has resulted in a significant increase in market share from its financial capabilities so that there are 5 (five) competing businessman who were eliminated and left the same relevant market in the South Kalimantan region as well as creating barriers to entry. For new businessman who will enter the relevant market. After the competitor was eliminated from the market, PT Semen Conch increased the price to cover the losses that had been suffered due to the practice of predatory pricing that had been implemented. Thus, after a thorough analysis of the impact test, PT Semen Conch has been proven to have created monopolistic practices and unfair business competition as a violation of Law.

C. Characteristics of of Predatory Pricing Violations according to Competition Laws in Indonesia

Referring to the considerations of the KPPU's Decision, the Commercial Court, and the Supreme Court, the requirements to determine whether or not there is a violation of the practice of fair business competition in predatory pricing are determined from whether or not the elements of the provisions of Article 20 of Law in conjunction with the Supervisory Regulation of the Business Competition Supervisory Commission are fulfilled, namely:

1) Elements of the Presence of Business man

The definition of entrepreneur refers to the provisions of Article 1(5) of the Act and defines an entrepreneur as any natural or defined as a business entity. The jurisdictions of the Republic of Indonesia, either individually or jointly by agreement, are engaged in various business activities in the economic field. PT Semen Conch is a limited liability company incorporated by a Jakarta notary and located in North Jakarta. So, PT Semen Conch is a legal entity carrying out business activities of cement production and marketing in South Kalimantan and is correct as a company or a businessman. Thus the merchant element is fulfilled.

2) Elements of Supply

As used in the description of Sect. 15 of the Act, the definition of supply is trading activity, leasing, leasing and provision of supplies of both goods and services in a lease. PT Semen Conch manufactures and sells Ordinary Portland Cement (OPC) and Portland Composite Cement (PCC) from its factory located in Tabalong, South Kalimantan. PT Semen Conch sells its products namely His OPC cement and His PCC cement to distributors in South Kalimantan region. PT Semen Conch's activities can therefore be classified as those related to the supply of commodities, namely cement, especially his PCC cement. This fulfills the delivery factor.

3) Elements of Goods and/or Services

To interpret the goods or services element of Sect. 20, reference should be made to the provisions of Sect. 1(16) of the Act. This provision defines objects as all objects,

tangible and intangible, movable or immovable, that are traded and worn., or can be used by consumers or businessmen. According to § 1 No. 17 TKG, services are all services in the form of works or services traded in the community for use by consumers or entrepreneurs.

PT Semen Conch produces and markets cement in 2 (two) types, namely Ordinary Portland Cement (OPC) is a hydraulic cement that is widely used for general construction or buildings that do not require special requirements and Portland Composite Cement (PCC) is cement from slag milling, Portland cement, gypsum, and one or more inorganic materials, for general concrete construction, masonry, plastering, guttering, manufacture of special building elements such as precast concrete, prestressed concrete, and paving blocks. The OPC and PCC types of cement produced by PT Semen Conch are tangible objects that can be traded, used, used or utilized by consumers or businessman. For that, the elements of goods and/or services are fulfilled.

4) *The Elements of Predatory Pricing or Setting Too Low Pricess*

A predatory price is a sales price set by an entrepreneur that is lower than the costs described in this guideline. A low price is a price set unreasonably low by an entrepreneur. Determining fairness requires an approach that considers the appropriateness of pricing by operators. This approach includes the need to:

- Analysis of the ability of the businessman to cover losses in a fairly long period of time;
- Financial analysis of businessman related to the comparison between revenues and costs incurred for production.

This analysis is performed to see if low pricing is justified. Consideration must be given to the possibility of unreasonable pricing as a result of market expansion. In general, the larger a businessman's production scale, the more he can reduce production costs and achieve lower prices compared to other businessmen.

5) *Elements with the Intention of Getting Rid of or Shutting Down the Business of Its Competitors*

The intentional element means that the activity is carried out with a desire or purpose. Elimination or closure means the exclusion or exclusion of a competitor entrepreneur from the relevant market or the closure of his business. A competitor is another entrepreneur's business in the same relevant market. Based on decision number: On 03/KPPU-L/2020, data collected show that the sale and loss practices of PT Semen Conch have led entrepreneurs to leave the relevant market.

PT Cemindo Gemilang; PT Sperm Bosowa Maros; PT Sorsi Bangan Indonesia; PT Juy Singh Indonesia; and PT Sami Jawa. Competing entrepreneurs have either apparently withdrawn or have exited the relevant markets as a result of the sale of PT Semen Conch. For this reason, the element of abolishing or closing competing stores is fulfilled.

6) *Relevant Market Elements*

The definition of relevant market is a market associated with a particular area or sales area of traders for the same or similar goods and/or services, or substitutes for those goods and/or services. The markets involved in this sale and loss case consist of product markets and geographic markets. The product market is Portland Composite Cement (PCC). The geographical market is located in South Kalimantan region. From the related market descriptions, we can see that the cement marketing activities are conducted in the same related market. For this reason, the relevant market factors are met.

7) *Elements of Monopoly and/or Unfair Business Competition*

The definition of a monopoly under Sect. 1(2) of the Act is the concentration of economic power by one or more entrepreneurs, resulting in the sale of certain goods and/or services, in order to create unfair commercial competition. You will manage production and/or marketing. Acts that harm the public interest. The definition of unfair commercial competition according to Sect. 1(6) of the Law is competition between entrepreneurs in the production of goods and/or services and/or in the performance of marketing activities, which is carried out in an unfair or illegal manner. or interfere with commercial activity. Competition.

The impact that occurs from the practice of predatory pricing carried out by PT Semen Conch, among others, is that since 2015 it has resulted in an increase in sales of marketed products. The increase in sales results in reduced product sales from competing businessman in the relevant market. Competitors who experienced a decline in market share in cement sales in South Kalimantan. The decline in the market share of competitors' sales was due to a market shift which was taken over by PT Semen Conch. The Commission Council assessed that PT Semen Conch was proven to have implemented a selling price strategy below cost of goods sold for 1 (one) year, namely in 2015. PT Semen Conch experienced an increase in sales market share from 2% (two percent) to a significant increase of 44% (forty percent). Four percent). To that end, PT Semen Conch succeeded in monopolizing cement sales in South Kalimantan. For this reason, there was a significant increase in PT Semen Conch's market share due to the exit of 5 (five) competing businessman from the market. The subsequent impact on the market is that it becomes increasingly concentrated. Thus, it is proven that PT Semen Conch has succeeded in implementing the practice of predatory pricing which has resulted in monopolistic practices and unfair business competition. To that end, the elements of monopoly and/or unfair competition are fulfilled.

3 Conclusion

In the short term, predatory pricings very profitable for consumers. Although predatory pricing carried out by businessman by setting low prices can benefit consumers, but these profits are only for a short period of time, because after a certain period of time, a number of competing businessman are eliminated from the market. In fact, consumers will be harmed after businessman set a very high price which leads to or can constitute a monopoly price. The characteristics of businessman who are proven to have practiced

loss-making practices are as stated in the provisions of Article 20 of Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

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References

1. Alfarizi, Muhammad Fikri et al., Article: Penyalahgunaan Posisi Dominan dalam Perspektif Kejahatan Korporasi Berdasarkan Undang-Undang Nomor 5 Tahun 1999 tentang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat, Fakultas Hukum, Universitas Brawijaya.
2. Andih, Sterry Fendy, "Pengaturan Bukti Petunjuk pada Hukum Acara Persaingan Usaha dalam Kerangka Hukum Pembuktian di Indonesia", Jurnal Magister Hukum Udayana (Udayana Master Law Journal), Vol. 8 No. 4, December 2019, Pg. 575-587.
3. Dewi, Ni Luh Putu Diah Rumika, Article: "Penerapan Pendekatan Rules Of Reason Dalam Menentukan Kegiatan Predatory Pricing Yang Dapat Mengakibatkan Persaingan Usaha Tidak Sehat", Fakultas Hukum, Universitas Udayana, April 2016.
4. Fadhilah, Meita, Penegakan Hukum Persaingan Usaha Tidak Sehat Oleh Komisi Pengawas Persaingan Usaha (KPPU) Dalam Kerangka Ekstrateritorial, Jurnal Wawasan Yuridika, Vol. 3 No. 1 2019.
5. Fuady, Munir, 2016, Pengantar Hukum Bisnis Menata Bisnis Modern di Era Global, Bandung, PT. Citra Aditya Bakti.
6. Ginting, Loto Srinaita, 2021, *Dua Dekade Penegakan Hukum Persaingan*, Jakarta, Komisi Pengawas Persaingan Usaha
7. Hartomo, Denny Dwi, "Pengaruh Konsentrasi dan Pangsa Pasar Terhadap Pengambilan Risiko Bank", *Jurnal Bisnis & Manajemen* Vol. 17, No. 2, 2017 : Pg. 35-50
8. Hermansyah. 2008. *Pokok-pokok Hukum Persaingan Usaha Di Indonesia*, Jakarta: Kencana Prenada Media Group.
9. Lubis, Andi Fahmi. 2017. *Hukum Persaingan Usaha: Buku Teks*, Jakarta Pusat: Komisi Pengawa Persaingan Usaha (KPPU).
10. Muhammad, Abdulkadir. 2004. *Hukum dan Penelitian Hukum*. Bandung: Citra Aditya Bakti
11. Mustaming, Persaingan Harga Dalam Usaha Dan Peran Komisi Pengawas Persaingan Usaha (KPPU), *Jurnal Muamalah: Volume V, No 1*, June 2015.
12. Rekarti, Endi, "Analisis Structure Conduct Performance (Scp) jika Terjadi Merger Bank Pembangunan Daerah dan Bank Bumn Persero Berdasarkan Nilai Aset dan Nilai Dana" *Jurnal Ilmiah Manajemen dan Bisnis, Volume 2, Nomor 1*, March 2016.
13. Ridwan, Moch., Pendekatan Sistem dalam Penyelesaian Upaya Kasasi (The System Approach To The Settlement Of Cassation Efforts), *Jurnal Ilmiah Kebijakan Hukum*, Vol. 15, No. 2, July 2021: Pg. 305-326.
14. Sianipar, Lukman Haryanto, Tinjauan Hukum Praktik Jual Rugi dalam Industri Retail Berdasarkan UU No.5 Tahun 1999 tentang Larangan Praktik Monopoli dan Persaingan Usaha Tidak Sehat (Studi Pada Swalayan Maju Bersama Glugur), *Jurnal Hukum, Volume 07 Nomor 03*, December 2018.

15. Wanti Widyantari, Dela, Tinjauan Yuridis Keterkaitan Hukum Persaingan Usaha Terhadap Perlindungan Konsumen Di Indonesia (Studi Putusan Komisi
16. Pengawas Persaingan Usaha Nomor 26/KPPUL/2007 Tentang Kartel SMS dan Nomor 25/KPPU-I/2009 Tentang Penetapan Harga Fuel Surcharge).

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