

The Negative Impact of Predatory Pricing Practice to Fair Competition (The Study of KPPU Decision Number 03/KPPU-L/2020)

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Abstract. This study analyzes the KPPU Decision Number 03/KPPU-L/2020 pertaining to the case of predatory pricing in South Kalimantan's cement industry. In this particular case, the Reported is a company that enters the cement market in 2015, and rapidly increases its market share while the other competitors experience a decline. The analysis reveals that the evidence supports the proof of predatory pricing through the Pre-Cost Test and Recoupment Test approaches, and also by implementing the Rule of Reason approach. This predatory pricing practice has a negative impact that widespread and lessens fair competition, harms consumers, inhibits innovation, and potentially creates monopoly. A sharp decline of price forces other competitors to exit the market and the rest to experience financial loss. The implication is not only suffered by business actors, but also by the economy as a whole. The government and supervisory bodies have to supervise, apply effective test, and create collaboration between business actors, the government, and consumers in order to maintain fair competition. The importance of the Rule of Reason approach is also emphasized to prevent excessive scrutiny towards legitimate business practices. It is expected that these steps will be able to create a business environment that is just, innovative, sustainable, and one that protects consumers and public interest altogether.

Keywords: Analysis, Negative Impact, Cement Industry, Predatory Pricing, KPPU Decision

Abstrak. Studi ini menganalisis Putusan Nomor 03/KPPU-L/2020 tentang kasus predatory pricing di industri semen Kalimantan Selatan. Dalam kasus ini, terlapor adalah perusahaan baru yang memasuki pasar semen pada 2015, dengan cepat meningkatkan pangsa pasarnya sementara pesaing mengalami penurunan. Analisis mengungkapkan bahwa bukti mendukung pembuktian predatory pricing melalui pendekatan pre-cost test dan recoupment test, dengan menerapkan pendekatan rule of reason. Praktik predatory pricing ini memiliki dampak negatif yang meluas, termasuk penurunan persaingan sehat, merugikan konsumen, menghambat inovasi, dan potensial menciptakan monopoli. Penurunan harga yang tajam mengancam pesaing keluar dari pasar dan pesaing lain mengalami penurunan pendapatan. Implikasinya tidak hanya pada pelaku usaha, tetapi juga ekonomi secara keseluruhan. Pemerintah dan lembaga pengawas harus melakukan pengawasan, menerapkan uji efektif, serta kolaborasi antara pelaku usaha, pemerintah, dan konsumen untuk menjaga persaingan sehat. Pentingnya pendekatan rule of reason juga ditekankan untuk menghindari penilaian berlebihan terhadap praktik bisnis yang sah. Diharapkan langkah-langkah ini mampu menciptakan lingkungan bisnis adil, inovatif, dan berkelanjutan, melindungi kepentingan konsumen serta masyarakat secara menyeluruh.

Kata Kunci: analisis, dampak negatif, industri semen, predatory pricing, Putusan KPPU.

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INTRODUCTION

Business competition can be categorized into fair competition and unfair competition. A fair competition is an “open equitable, and just competition between business competitors.”¹ One of the forms of unfair competition is predatory pricing practice. This predatory pricing practice is a marketing strategy where a company determines the selling price of a product or service below its production cost with the aim to eliminate its competitors and to monopolize the market. Such behavior is against Article 20 of the Law Number 5 of 1999.²

The Decision Number 03/KPPU-L/2020 states that a predatory pricing practice has been proved by KPPU. A cement company sold its product with a price below its production cost which harmed other competitors and forced some of them to exit the market.³ This action violates the principle of fair competition and hurts market stability. This case confirms the need for a strict supervision on predatory pricing practices so as to protect other competitors, consumers, and the market as a whole.⁴

The predatory pricing practice in this case was committed by the cement company with the aim to eliminate its competitors within the market.⁵ By setting a price below the production cost, that cement company created a significant barrier to other competitors, resulting in those competitors to lose their market share and to struggle to compete fairly. Practices such as this is not merely harmful to the eliminated competitors, but it can also hinders new competitors to enter the market, limits product variations, and eventually harms the consumers due to the limited options and inefficient prices.

The case of PT Conch South Kalimantan Cement (PT CSKC) started from an allegation of a predatory pricing practice, where the company was allegedly selling cement with a price below its variable production cost with the purpose to eliminate its competitors

¹ Siti Anisah, *Persaingan Usaha*, 1st Print, FH UII Press, July 2022, P. 2.

² Article 20 Of The Law Number 5 Of 1999.

³ KPPU Decision No. 03/KPPU-L/2020.

⁴ KPPU Decision On PT Conch South Kalimantan Cement Upheld By The Supreme Court, KPPU, Print <https://kppu.go.id/blog/2021/08/putusan-kppu-atas-pt-conch-south-kalimantan-cement-dikuatkan-mahkamah-agung/>, On June 6th 2023, At 22:34 Western Indonesia Time.

⁵ Indonesia Competition Commission, Case Decision Number 03/KPPU-L/2020 (Jakarta: KPPU, 2020).

from the market and to gain a dominant position. The Indonesia Competition Commission (KPPU) initiated an investigation on PT CSKC in relation to its unfair practice. On August 4th 2021, KPPU issued a decision in which PT CSKC was found guilty in violating the competition law through its predatory pricing practice. PT CSKC was given a fine amounting to 10 billion Rupiah and was required to stop that practice in question.

Proving a predatory pricing practice is a task that demands a careful analysis and investigation. A competition supervisory body, such as KPPU in Indonesia, needs to collect strong evidence and data to support the allegation of a violation. This process involves the collection of price and production cost data from the alleged company, as well as an analysis of the price trend and market behavior. Moreover, KPPU has to investigate whether or not there is an indication of cooperation between companies involved in the predatory pricing practice. The process of proving such violation must be based on legal standard and just competition principle in order to achieve an accurate and just decision.

The enforcement of the law against predatory pricing practice is important to protect fair competition, as well as consumers and competitors. A competition supervisory body such as KPPU has the main role to oversee and to take action against this unfair practice.⁶ The rule of reason approach in this case observes the Scherer theory which proposes additional test to identify predatory pricing. Unlike the cost test, this test observes the behavior of the incumbent company, its intention, and its consequence aside from the cost aspect. Scherer emphasizes on the in-depth economic and historical analysis, as well as focusing on the intention and consequence of such behavior. However, the implementation of this approach is obstructed by the complexity of information which is large in scale in and impractical to be examined by competition authority.⁷ Despite such obstruction, a more comprehensive effort in

⁶ Tugas Dan Wewenang, KPPU, Print <https://kppu.go.id/tugas-dan-wewenang/>, On June 8th 2023, At 17:04 Western Indonesia Time.

⁷ Simge Şaşmaz, PREDATORY PRICING IN COMPETITION LAW, Sabancı University, Fall 2009, P. 27

supervising and proving predatory pricing practice remains significant to ensure a fair and efficient competition.⁸

An approach such as this may also create legal uncertainty, considering that without an exact parameter, the company who is involved in price competition may not be aware when its price has violated the price limit and thus considered as a predatory pricing behavior. Indeed, it is said that while the Areeda and Turner test is a good law based on a bad economy, the Scherer recommendation is a bad law based on a good economy.⁹ Based on the introduction above, the problem statements are: How to prove the occurrence of predatory pricing practice as stipulated in the KPPU Decision Number 03/KPPU-L/2020? And does the negative impact of predatory pricing practice have been considered appropriately in the KPPU Decision Number 03/KPPU-L/2020?

METHODOLOGY

The author applied the normative research method by reviewing literature sources. This method is also known as doctrinal research which analyzed the law based on the doctrine hold by the legal conceptor. The legal argument from this analysis is expected to support the conclusion of the main issue in this thesis. The focus of this research include the regulations pertaining business competition law and predatory pricing. This research adopted normative legal method with statutory, conceptual, and case approach with the purpose to provide a comprehensive understanding.

RESULT AND DISCUSSION

The Substantiation of Predatory Pricing in the KPPU Decision Number 03/KPPU-L/2020

⁸ Christian Barthel, Predatory Pricing Policy Under EC And US Law, Faculty Of Law University Of Lund, 2002, P. 19.

⁹ R.H. Koller, When Is Pricing Predatory, 24 The Antitrust Bulletin, 1979, P. 286.

Pricing or price setting has a significant part in the context of business competition. In a perfect competition framework, it is assumed that all prices are in line with the marginal cost,¹⁰ given that companies operate efficiently. Therefore, a lower price is perceived positively in the context of competition. However, it is to be noted that this view is not always true, especially considering the probable occurrence of predatory price phenomenon. At times, an extremely low price can be detrimental to competition and to the market.¹¹

Bolton and Riordian definitively described predatory pricing as a price decrease with the intention to gain additional market power by eliminating other competitors. Though, historically, a predatory pricing may be considered as a sensible strategy, but at the end of the spectrum, McGee argued that predatory pricing is irrational in nature and rarely applied in actual business practices. Nevertheless, contemporary views still support the primary argument that predatory pricing could be a rational strategy in certain conditions.¹²

Predatory pricing is one of many tactics implemented by business actors to sell their products with a price lower or below the production cost (average or marginal cost). According to Areeda and Turner, this tactic cannot be considered as predatory pricing if the price setting is equal or exceeds the margin production cost of a product. The main goal of predatory pricing is to eliminate competitors from the market and to prevent potential competitors from entering the same market.¹³

In a practical context, the implementation of predatory pricing requires a careful assessment over several aspects. First of all, the company needs to have a strong financial resilience to endure the temporary loss during the price predation period.¹⁴ Furthermore, the company has to be sure that the price decrease will be able to force

¹⁰ Fandy Tjiptono, *Strategi Pemasaran*, 4th Print, Yogyakarta, 2017, P. 315.

¹¹ Alem Savier, Teddy Prima Anggriawan, *Fenomena Predatory Pricing Dalam Persaingan Usaha Di E Commerce (Studi Kasus Antara Penetapan Tarif Bawah Antara Aplikasi Indrive Dan Gojek)*, *Jurnal Ilmiah Wahana Pendidikan*, July 2023, P. 2.

¹² Simge Şaşmaz, *Op.Cit*, P. 1.

¹³ Rezmia Febrina, *Dampak Kegiatan Jual Rugi (Predatory Pricing) Yang Dilakukan Pelaku Usaha Dalam Perspektif Persaingan Usaha*, *JURNAL SELAT* Volume. 4 Number. 2, May 2017, P. 243.

¹⁴ Print <https://www.simulasikredit.com/apa-itu-predatory-pricing-strategi-penetapan-harga-predatory/> On August 2023 At 09:50.

other competitors to exit the market or prevent new competitors from entering it. This may involve a series of actions, such as utilizing the existing economical scale, performing an aggressive marketing campaign, or even setting an extremely low price for a certain period of time.

Predatory pricing practice may draw the attention of competition authority. If this practice is deemed as a violation of the antitrust law or harmful to competitors and consumers, the company might face serious legal consequences. Therefore, in planning and executing a predatory pricing strategy, the company has to consider the legal implication to the relevant market.

Predatory pricing practice also requires a careful calculation and a balance approach. On one side, by setting a low price, the company may seize the opportunity to expand its market share and gain long-term profit. However, on the other side, this practice may also harm fair competition and inhibit innovation as well as gatekeeping the market from potential competitors that may bring new benefits to consumers. A comprehensive assessment on the effect and implication of predatory pricing is essential to maintain the integrity and efficiency of the market.

Assessing the effectivity of predatory pricing is not as simple as it seems. To identify whether or not such low prices can be categorized as predatory pricing that may harm competition can be a complex task. The many approaches that the authority can employ to identify this practice may include cost analysis, competition behavior, long-term market implication, and evaluation over the purpose and motivation of the company that uses this strategy.

The regulation on predatory pricing or low price setting can be found in Article 20 of the Law Number 5 of 1999 about the Prohibition of Monopoly Practice and Unfair Competition which states that:

“A business actor is prohibited to supply goods and or services through the means of underpricing or setting a very low price with the intention to eliminate or to shut down its competitors in the relevant market, resulting in a monopoly practice and or unfair competition.”

Clearly, such regulation strictly prohibits business actors from dominating the market by using predatory or unusual prices in order to eliminate other competitors or prevent potential competitors from entering the market. This practice is a form of unfair competition that may harm the consumers and undermine the fair competition climate. The primary aim of such regulation, in governing business competition practices that involve predatory prices, is to prevent and to take action against competition practices that are harmful and detrimental to fair competition.

The context of this Article is the description of predatory pricing which refers to an action of a business actor that sets the price of its product or service below the production cost or variable cost. The main goal of such practice is to harm competitors or prevent new competitors from entering the market. Practices such as this has the potential to disturb fair competition and keep other competitors from accessing the market, and negatively affect the consumers in the long run.

In 2020, PT Semen Conch was involved in a case of unfair competition. This case highlighted the company's action in selling products with prices far below the production cost, a particular practice known as predatory pricing. In the context of competition, predatory pricing is a strategy where a company sets a very low selling price, even below its production cost, with the aim to decrease the amount of competitors or prevent new competitors from entering the market. This practice creates a controversial competition dynamics, where the long-term consequences to the market and consumers is the primary issue.

In the case of PT Conch South Kalimantan Cement, KPPU sent an official notice and a summons to the Reported, which is PT Conch South Kalimantan Cement, including the information of a preliminary examination. On June 23rd 2020, KPPU held the Commission Panel Preliminary Examination I, where the Violation Allegation Report (LDR), written by the Investigator, was read before the Reported. The LDR in question consisted of the Reported identity or profile, including its official address and factory address in North Jakarta and Tabalong Regency, South Kalimantan province. The entire process represents a systematic and structured approach in handling

competition cases in order to maintain transparency and to ensure a procedure which is in accordance with the prevailing law.

Prior 2015, the cement market in South Kalimantan was controlled by five major players, including PT Indocement Tunggal Prakarsa, Tbk, and PT Semen Indonesia, Tbk, as reflected by the sales data of 2013 and 2014. In 2014, the Reported entered the market with a market share of 2% from the total cement sales in that region. However, a drastic change happened in 2015, when PT Conch South Kalimantan Cement, whose market share was only 2%, suddenly gained 48% market share within a year and continued to grow until the third quarter in 2019. This phenomenon changed the market structure significantly, causing a decrease of market share for the other competitors. The market shares of PT Semen Indonesia, PT Indocement Tunggal Prakarsa, Tbk, and PT Solusi Bangun Persada/PT Holcim Indonesia, Tbk, declined dramatically every year. Meanwhile, the market share of the Reported increased suspiciously from 2% in 2014 to 49% in 2018. This fact indicated that PT Conch South Kalimantan Cement was able to successfully dominate the cement market in South Kalimantan and achieve a massive market share in a relatively short time.

To better describe the current market situation, a further examination is required. Based on Article 20 of the Guideline made by KPPU, there are several methods that can be employed to identify the practice of predatory pricing by a company. Some of these methods are frequently used by the competition authority body to assist in examining whether or not there is an indication of predatory pricing practice by a company. There are five methods, which are the "Price-Cost Test; Areeda-Turner Test; Average Total Cost Test; Average Avoidable Test; and Recoupment Test."¹⁵ In this particular test, KPPU only used two tests, the Recoupment Test and the Price-Cost Test.

The Recoupment Test has two sequential steps since PT Conch South Kalimantan entered the market. The first step involved the initiation of significant decrease of

¹⁵ Indonesia Competition Commission, *Pedoman Pelaksanaan Article 20 Tentang Jual Rugi (Predatory Pricing)*, Central Jakarta, 2009, P. 29.

price, alongside with the increase of production. The main goal of this strategy is to absorb market demand at such low price level. This act of price reduction did not only implicate the existing demands, but also the demands that occurred due to the price reduction. Nevertheless, it shall be noted that the producer's ability to satisfy all of the demands due to the price reduction may act as a key component in the success or failure of this strategy. If the producer did not possess a strong market power to handle the excess demands, other competitors may have the chance to fill that gap and to profit from it by setting a higher price.

An in-depth analysis pertaining to the development of selling price applied by the Reported revealed that there was a significant predatory pricing practice during the 2015 period. During this period, the selling price of cement which was applied by the Reported was below the cost of goods sold that created a situation where the Reported may sell its product below its production cost. Subsequently, the second step of the strategy, which was employed by the Reported, involved the responds of the increase of market demand with the increase of production volume. This fact is also connected with the increase of the plant capacity utility until it reached the maximum level of 84.38%.

Moreover, based on the financial report audited by the public accountant firm Siddharata Widjaja & Partners in 2015, it showed that the Reported recorded a significant financial loss amounting to Rp67.630.000.000,00. This loss seemed to be connected with the behavior of the Reported who sold its cement product in South Kalimantan with the price below the cost of goods sold (COGS). This fact indicated a potential predatory pricing practice with the aim to take over the market share through price reduction to force demands.

This noticeable change happened in 2016, where the Reported was able to turn around its financial situation with a profit of Rp388.243.000.000,00. This increase in production or sale volume in that periode indicated that the predatory pricing practice in the previous year might had been successful to attract consumers' interest and thus gained a larger market share.

The situation changed in 2017, where the Reported, once more, recorded a financial loss of Rp110.198.000.000,00 (one hundred and ten billion one hundred ninety eight million rupiah). The decrease of the average cement selling price in that year showed that there was a competition pressure or perhaps a strategy by the Reported to maintain its dominant position by lowering the price. In 2018, the result of a financial audit conducted by the public accountant firm Amir Abadi Jusuf, Aryanto, Mawar & Partners revealed that the Reported still suffered financial loss, even though it was not greater compared to 2017, which was Rp. 11.671.998.000 (eleven billion six hundred and seventy one milion nine hundred and ninety eight thousand rupiah). Yet, the data showed that the Reported took a step to increase the cement selling price. This step can be interpreted as an effort by the Reported to overcome the previous loss and to increase its profit margin.

An audit which was conducted on the 2019 financial report, the Reported had recorded a significant profit of Rp199.490.585.000,00 (one hundred and ninety nine billion four hundred and ninety million five hundred and eighty five thousand rupiah) which was in line with the price increase of cement. This indicated that the recoupment effort by the Reported was successful, by increasing the price and profit to balance the financial loss that it had suffered from the previous years. Looking at it as a whole, this pattern of behavior reflected the possibility of a predatory pricing practice committed by the Reported to control the market, including a recoupment practice to recover its losses. Therefore, this analysis provides a description about the dynamics of competition within the market and its role in creating barriers for competitors, including the potential negative impact to market efficiency.¹⁶

On the other side, the recoupment test is done not only by looking at the market control and financial loss recovery through the means of predatory pricing practice, but also by looking the other competitors' side who are inside the market. In applying the recoupment test (loss recovery) in its analysis, KPPU took into consideration a

¹⁶ Korah, Valentine An Introductory Guide To EC Competition Law And Practise 4th Print, Oxford 2000, P. 125

number of aspects that contribute to the success of predatory pricing practice.¹⁷ These aspects pertain to the exit of a number of competitors from the relevant market, such as PT Cemindo Gemilang, PT Semen Bosowa Maroa, and PT Semen Indonesia (Persero). In this case, KPPU used the information provided by these competitors to prove that there was indeed a market exit by companies who were eliminated from the market, which supported the suspicion of a predatory pricing practice that in turn caused unfair competition.

Price Cost Test aims to identify whether or not a company is experiencing a sensible financial loss as a part of the predatory pricing strategy. By objectively comparing cost and price data, this test is not only focusing on the company's intention, but also on whether such practice really happened. This is important because the impact of the action is more significant than the intention itself.¹⁸ The Price Cost Test which was conducted by KPPU aimed to analyze whether the Reported (PT Conch South Kalimantan Cement) experienced a rational financial loss as a part of its predatory pricing strategy. This test refers to the comparison between the product selling price with the cost incurred during the production and sales processes. This approach is objective in nature and does not examine the company's intention to commit predatory pricing, instead it focuses on the validity of such action in an economic context.

Through this comparison between cost and price, KPPU discovered that there was indeed an indication of predatory pricing by the Reported. In 2015, it was found that the profit margin gained by the Reported was always in the minus. For example, the profit margin on the sale of the 40 kilogram PCC cement for each ton was -0.87%, meanwhile the sale of the 50 kilogram PCC cement for each sack was -2.32%. A similar result was also found on the sale of the 40 kilogram PCC cement which was -2.29% and the sale of the 50 kilogram PCC cement for each sack was -30,25%.

¹⁷Louis Kaplow, *RECOUPMENT AND PREDATORY PRICING ANALYSIS*, Oxford University Press, 2018, P. 3

¹⁸Directorate For Financial And Enterprise Affairs Competition Committee, *Predatory Foreclosure.*, 2004, P. 21.

This negative profit margin showed that the Reported had experienced financial loss in its product sales. It means that the revenue gained from the sales was insufficient to cover the production cost. Furthermore, this condition indicated that the Reported had sold its products with a price below the cost of goods sold which, in the context of economic analysis, can be categorized as an unreasonable low price.¹⁹

According to the data that revealed the average selling price comparison, the average selling price which was offered by the Reported had the proclivity to be lower compared to some of the other major competitors within the period of 2015 until 2019. During those years, the price comparison result showed that the Reported consistently had a lower price than PT Semen Gresik (Persero), Tbk, and PT Indocement Tunggal Prakarsa, Tbk, for all the 40 kilogram and 50 kilogram PCC type cement

This price difference varies, with differences that can reached between Rp.10.000,00 to Rp23.000,00 for the 40 kilogram package, and between Rp5.000,00 to Rp16.000,00 for the 50 kilogram package. This data provided an overview that the Reported had consistently sold its products with a price lower than its main competitor in that region.

This data is also supported by the information given by several witnesses who gave their views regarding the market situation. These witnesses are the parties who have direct knowledge about the cemen market situation in South Kalimantan. For instance, Oza Guswara, the General Manager of Sales & Marketing of PT Cemindo Gemilang, said that the price difference that reached Rp10.000,00 between the products of the Reported and its competitors is very large price disparity.

The same view is also confirmed by Listusna Al Aini, the Head of Sales Div. Area Manager of PT Semen Bosowo Maros, who explained that other competitors were struggling to compete in terms of maintaining a competitive cement price in South Kalimantan. These competitors even went to employ cross-subsidization from other region in order to stay competitive. Moreover, Rahman Kurniawan, the SVP of Sales

¹⁹ Rezmia Febrina, Dampak Kegiatan Jual Rugi (Predatory Pricing) Yang Dilakukan Pelaku Usaha Dalam Perspektif Persaingan Usaha, Volume. 4 Number. 2, May 2017. P. 6.

of PT Semen Indonesia (Persero), Tbk, provided information regarding the change of market share and cement price reduction in the region, which showed a significant increase of market share for the Reported (Semen Conch).

The Rule of Reason approach is a method in competition law used to evaluate complex business measures or obscure actions that may or may not violate the anti monopoly regulation. In this approach, business measures are evaluated based on the analysis of economic and competitive factors, including its implication to competition and the market itself.²⁰ Within the context of this description, the Rule of Reason approach is used to analyze measures taken by PT Conch South Kalimantan Cement (the Reported) related to cemen selling price and its impact to competition in the South Kalimantan cement market.

In this case, there are two theories of proof used in the Rule of Reason approach, Bright Line Evidence theory and Hard Line Evidence Theory.²¹ The Bright Line Evidence theory proposes that a business actor has committed monopoly practice or caused unfair competition if it has removed competition within the relevant market. In other words, if a business actor's action caused competition to be non-existent, thus it is considered as a violation.²² The significant change in market share and a dominant position gained by the Reported in a relatively short time may support the argument that the measures taken by the Reported has resulted in the elimination of competition in the South Kalimantan cement market. The Reported's market domination was indicated by its main competitor's decrease of market share, such as PT Indocement Tunggal Prakarsa, Tbk, and PT Solusi Bangun Persada/PT Holcim Indonesia, Tbk. This drastic decrease of market share is a proof of competition elimination within the South Kalimantan cement market. The Reported was able to create entry and re-entry barriers to the market, which indicated an effort by the Reported to prevent competition and to maintain its dominant position.

²⁰ Andi Fahmi Lubis, Et.AL., Hukum Persaingan Usaha, Indonesia Competition Commission (KPPU), 2nd Print, 2017, P. 77.

²¹ L. Budi Kagramanto, Mengenal Hukum Persaingan Usaha, Surabaya: Laros, 2015, P. 112.

²² Ni Luh Putu Diah Rumika Dewii Dewa Made Suartha, Penerapan Pendekatan Rules Of Reason Dalam Menentukan Kegiatan predatory Pricing Yang Dapat Mengakibatkan Persaingan Usaha Tidak Sehat, Journal, Vol 5 No 2, 2017, P. 4.

The Hard Line Evidence requires a more in-depth economic analysis in order to prove a violation. In this case, a Price-Cost Test was conducted to identify whether the Reported has rationally experienced financial loss as a part of its predatory pricing practice.²³ This analysis involved the comparison between selling price and production cost. The result of the test revealed that the Reported had sold its products with a price lower than the cost of goods sold, which then indicated a predatory pricing practice. This analysis may also support the argument that there was an recoupment effort, where the Reported tried to recover its losses by increasing its selling price after successfully dominating the market. In the context of Hard Line Evidence theory, an economic analysis is used to prove the anti-competitive effect due to the Reported's action. This test used the Price-Cost Test and the Recoupment Test. The Price-Cost Test showed that the Reported had consistently sold its products below the cost of goods sold, which indicated a predatory pricing practice. By selling its products below the cost of goods sold, the Reported might have aimed to take over the market share through price reduction.

The fulfillment of these elements of proof on the predatory pricing behavior through the Pre-Cost Test and the Recoupment Test has been proven, and the Rule of Reason approach in two ways which are the Hard Line Evidence Theory and the Bright Line Evidence Theory have also been implemented in the approach. However, the evidence submitted by the investigator to the Panel was inadmissible because it was not in accordance with the Commission Regulation Number 1 of 2019 Article 55 paragraph 2 which stated that "Letters or documents submitted as evidence are the transcript or copy of the original letter or document that have been legalized in the post office." This was particularly referring to the evidence with code C1045-C1060 which was legalized by the post office only once or one stamp placement.

The facts within the court trial revealed that the C1045-C1060 evidence was actually consisted of 15 (fifteen) evidences different from each other. Each of these evidences contained different information, which resulted in the lack of consistency among these

²³ Ibid, P. 5.

evidences. However, within the context of presentation in a court, the investigator decided to present the evidence as a whole in a single bundle that had been given one post stamp.

When this evidence was submitted to the panel of judges as a part of a supporting evidence to the predatory pricing practice, this particular evidence had been inspected by the registrar. Even though it was found that the evidence had only one post stamp in a single bundle of 15 different evidences, the registrar still accepted and considered the whole evidence as a legitimate and relevant entity to be submitted to the panel of judges in order to support the proof of the case.

This brings attention to the question regarding the integrity and legitimacy of the presented evidence. Even though they were physically placed in a single bundle, the impression on its integrity and continuity may rise questions about its consistency and accuracy of its presentation. Even so, the registrar's acceptance of this particular evidence as legitimate, affirmed that within the framework of the prevailing law, an evidence in this sort of situation can still be admissible and used by the court.

This is actually contradicts with Article 55 paragraph (2) of the Commission Regulation Number 1 of 2019 "Letters or documents submitted as evidence are the transcript or copy of the original letter or document that have been legalized in the post office." This article explained that the letters or documents must be legalized by the post office as a legitimate evidence in accordance with the regulation of KPPU. Even though the regulation does not explain the amount of the evidence that must be legalized by the post office, the C1045-C1060 evidence has different data and content. The admission of the C1045-C1060 as an element of consideration within the decision caused a significant implication in this case. It showed a probable violation of Article 55 paragraph (2) of the KPPU Regulation Number 1 of 2019. The substance of this evidence, which is data pertaining to the average sales of PT Cement to distributor, had a strong relevance to evidence through the application of the Pre-Cost Test and Recoupment Test. Both of these tests require the average selling price as a crucial calculation basis in order to proof predatory pricing practice. The existence of this

evidence, with the presented information around the average selling price, becomes an important factor in validating the analysis on whether such practice has violated fair competition principles. Therefore, this evidence serves as a foundation for the use of test equipment and a deeper analysis in this case, and it adds a significant dimension to the element of proof in the context of competition law.

Rejection over the admission of such evidence can significantly implicate the use of tests such as the Pre-Cost Test and the Recoupment Test in proofing the case. Especially because the evidence with the C1045-C1060 code represents the Average Selling Variable Price which requires an accurate calculation on the Average Production Price of PT Cement Conch. This evidence is relevant in determining a deeper Margin Cost, so then it can describe more comprehensively the financial gains and losses of PT Conch in doing their sales. However, if the legality of this evidence is being questioned and eventually declared inadmissible, this can potentially weaken the arguments that use the test. Therefore, determining the validity and legality of evidence is crucial to ensure a strong basis for an in-depth analysis on the practice of predatory pricing. In a broader analysis, it is important to protect the integrity and legitimacy of all the evidence that are being used in the legal proceedings, to make sure that the conclusion has a strong and legitimate foundation within the context of competition law.

One aspect that is also the focus of attention in this case is the limited use of indicative evidence or test. In this context, there are only two indicative evidences, they are the Pre-Cost Test and the Recoupment Test. However, this raised a question regarding the legitimacy and integrity of the analysis used by KPPU. Pursuant to the KPPU Regulation Number 6 of 2011 about The Guideline on Article 20 of the Law Number 5 of 1999 , there are five tests that can be employed to identify predatory pricing practice, they are the Price-Cost Test, Areeda-Turner Test, Average Total Cost Test (ATC Test), Average Avoidable Cost Test (ACC Test), and Recoupment Test.

In the context of the KPPU Decision Number 03/KPPU-L/2020, even though only the Pre-Cost Test and Recoupment Test that were being used, the KPPU regulation that mentions all five types of tests indicates the importance of a more holistic approach in

identifying predatory pricing practice. The implementation of all these tests will be able to provide a more accurate and complete picture of predatory pricing practices. Thus, the criticism towards the limited use of tests in this case becomes relevant because of the potential significant implication of predatory pricing on market ecosystem.

The limited use of tests can also have an impact on the understanding and confidence of the public and market players on the decision of KPPU. The important goal of using a variety of tests is to be able to analyse predatory pricing practice from various points of views, thus it will minimize the risk of misinterpretation and also increase the accuracy of the conclusion. Therefore, a balanced and comprehensive application of various tests can reinforce the evidence and the decision of KPPU regarding predatory pricing practice.

The Consideration of KPPU on the Negative Impact of Predatory Pricing in the Decision Number 03/KPPU-L/2020

Article 20 of the Law Number 5 of 1999 stated that a business actor is prohibited to supply goods and/or services through the means of underpricing or setting a very low price with the intention to eliminate or to shut down its competitors in the relevant market. This has the potential to cause monopoly practice and/or unfair competition.²⁴

In the Decision Number 03/KPPU-L/2020, KPPU has carefully reviewed the negative impact of predatory pricing practice. Though it may seem at the beginning that such low price may benefit the consumers, but this practice can have a long-term negative implication in the context of business competition and the market dynamics as a whole.

In its analysis, KPPU identified that the practice of predatory pricing has the potential to induce elimination of other competitors from the market. A price offer which is below the production cost can make competitors unable to participate effectively in a

²⁴ Lukman Haryanto Sianipar, Lesson Sihotang, Tulus Siambaton, 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), Volume 07 Number 03, Desember 2018, P. 6.

fair competition.²⁵ These competitors will also struggle to cover their own production expenses. This phenomenon triggers competitors to exit the market, or even experience a significant market share reduction. This impact has the potential to reduce choices or various options available to the consumers.²⁶

The decision of KPPU highlighted the impact of unfair competition, particularly to innovation. Predatory pricing practice can hinder innovation because the lesser competitor often lacks the necessary resources to maintain its position within the market against unfair competition. Consequently, there is less stimulation for the competitor to innovate as the incentive to create better and efficient products and services decreases.

The decision of KPPU projected the potential impact of a long-term decline of investment in the industry. Predatory pricing practice, which enables the monopoly company or the one that dominates the market to eliminate competitors effectively, can create a situation where the dominant companies take full control over the market. Consequently, these dominant companies will not consider it necessary to invest in quality improvement, innovation, or better service due to the non-existing competition.

The Decision Number 03/KPPU-L/2020 supports the idea that predatory pricing practice can inhibit fair competition and also harm the consumers and the market dynamics as a whole. Therefore, the decision of KPPU in this case reflected on the urgency to maintain fair and balanced competition in order to protect the interests of all the stakeholders involved within the market ecosystem. The phenomenon of consumers shifting to less expensive products is a natural part in market competition. Consumers tend to seek the best value in considering the quality and price of a product. However, in the context of competition law, predatory pricing practice, as regulated in the Law Number 5 of 1999, has a more complex implication and can bring serious consequences on competition and on the market stability.

²⁵ Andi Fahmi Lubis Etc, Op.Cit, P. 26

²⁶ Suhasril Mohammad Taufik Makarao, Hukum Larangan Praktik Monopoli Dan Persaingan Usaha Tidak Sehat Di Indonesia, Bogor, Ghalia Indonesia, 2010, P. 47

In the case as described above, the Reported used the selling price below the cost of goods sold strategy with the aim to increase its market share and to reduce the competitiveness of its competitors. Even though the consumers' shift to less expensive product is a natural occurrence, this shift can have significant negative impact in the long run, especially if there is a lack of fair competition. When a company like the Reported uses a low price strategy with the intention to eliminate competitors and to take over the market, the potential of a monopoly practice and unfair competition increases. In this case, competitors exited the market because they could not compete with the Reported's very low price offer. This led to the reduction of the competitors' revenue which threatened the sustainability of their businesses.

The aim of underpricing is to influence market price, so that the business actor who employs such strategy will be able to dominate or control the market. This happens because other competitors are unable to adjust with such low price, resulting in a financial loss as consumers tend to choose products or services with cheaper prices. Consumers' behavior to prefer a cheaper option is not in any way a mistake, instead it is a natural behavior in society, where consumers will generally choose products or services of similar quality but cost less. Article 5 of the Law Number 5 of 1999 defines underpricing as an act of business actor that offers a lower price reference compared to its similar or identical competitors. The element of "awareness/intention" to be involved in an unprofitable business conduct or underpricing with the intention to harm other competitors that will result in their financial losses and pave the way to monopoly practice and unfair competition, is regulated in the competition regulation. Article 7 of the Law Number 5 of 1999 regulates this type of violation and states that: "a business actor is prohibited to make an agreement with its business competitors to set a price below the fair market price which can cause unfair competition."²⁷

Another impact of this predatory practice is the financial state disruption of the competitors who exited the market. A continuous decline in profit can harm these

²⁷ Wahyu Buana Putra, Teddy Prima Anggriawan, Akibat Hukum Praktik Jual Rugi Semen Conch Dalam Persaingan Usaha Industri Semen Di Indonesia, Jurnal Hukum, Politik Dan Ilmu Sosial (JHPIS) Vol. 2, No. September 3rd 2023.

companies' financial condition and lessen their competitiveness in other markets. Moreover, these companies will also face the risk of layoffs and an extensive socio-economic consequences.

As a result of the Reported's increase in market share, a number of competitors exited from the South Kalimantan cement market. PT Cemindo Gemilang, PT Semen Bosowa Maros, PT Solusi Bangun Indonesia, PT Jui Shin Indonesia, and PT Semen Jawa experienced a decline in sales and were struggling to compete with the low price offered by the Reported. Some of these companies halted the sales of their cement product in that region due to the shrinking profit margin and the difficulty to compete with the Reported's low price offer.

CONCLUSION

The analyzed decision set forth that the proof process was done through the Pre-Cost Test and the Recoupment Test. In the Pre-Cost Test analysis, the relation between the cement selling price of PT Semen Conch and the production cost was analyzed by using the Average Total Cost and the Average Avoidable Cost Test. As a result of this analysis, it was found that there was indeed a low price practice below the production cost in 2015, including the company's intention to harm its competitors. The Recoupment Test showed the company's potential to gain long-term profit through monopoly practice after taking over the market. Subsequently, with the Rule of Reason approach, the predatory pricing practice of PT Semen Conch had caused its competitors to experience decrease in profit and exited the market, including disruption to innovation. This practice also led to the potential market domination by a single company.

Overall, the negative impact of predatory pricing practice can include market distortion, innovation decline, and the creation of monopoly. The effort to maintain a competitive, fair market and to protect consumers has become essential to overcome these types of unfair conduct. This conclusion emphasizes the need to protect and

maintain a fair competition environment in order to have a balanced economy and to prevent negative impact to all involved parties.

KPPU needs to act firm against predatory pricing practices as a way to deter business actors who tend to take benefits for themselves by harming other competitors and consumers. KPPU and the related authorities are expected to take pro-active steps to prevent such unfair competition, so that business ecosystem can continue to operate fairly and competitively

Besides that, concrete steps can be taken to amplify the integrity of evidence related to predatory pricing cases. KPPU can improve the evidence by reinforcing the analysis as stipulated in the Guideline on Article 20, as well as improving the quality of indicative evidence that supports the case. The involvement of experts who are competent in the field of economy or competition law may also provide more depth to the analysis and the proof process.

A transparent and proportional supervision during the court proceedings and case handling is the key point to build public trust towards business competition supervisory body such as KPPU. This very step does not only guarantee that the proof of predatory pricing practice is carried out in a fair and objective manner, but it also stops potential bias or manipulation that can harm the integrity of the legal proceedings. Therefore, by ensuring transparency, the competition supervisory authority can gain support and recognition from the public, which in turn can increase the impact of law enforcement on predatory pricing practice. This strategy will contribute to the preservation of fair competition and stronger consumer protection from harmful practices.

Additionally, a close cooperation between the government, business actors, and the public has a central role in creating a just and dynamic competition environment. The government needs to give incentive to push innovation and growth of sustainable businesses, while providing adequate education to business actors on legal and ethical business practices. Consumer awareness also needs to be improved through education about the long-term effect of purchasing products with very low prices to

market stability and industrial development as a whole. With these steps, the synergy between various parties can result in a balanced and sustainable economic environment, where fair competition can develop and consumers are well protected.

COMPETING INTEREST

There is no conflict of interest in the publication of this article

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