

LEGAL CONSTRUCTION OF RULE OF REASON APPROACH TO PREDATORY PRICING IN DIGITAL BUSINESS

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Abstract

Technological advancements in the business sector marked by digitization enable virtual transactions through platforms, giving rise to a new business sector-platform provider. Competition in this sector increasingly leads to unfair business practices, such as predatory pricing, which can harm the market. However, the current regulations, particularly in Article 20 of Law Number 5 Year 1999, do not have clear enough provisions to deal with predatory pricing in the context of digital business. This research aims to formulate an appropriate legal construction in dealing with predatory pricing practices. The method used is descriptive analytical, which examines the applicable laws and regulations by linking legal theories and legal economic analysis. The results show that the application of the compensation test as preliminary evidence in predatory pricing practices is not fully in accordance with the principles of legal economic analysis. At the recoupment stage, business actors who successfully control the market actually show more substantial violations. Therefore, this study proposes a reconstruction of the application of the predatory pricing test by repositioning the test, adding other indicators, and applying the Per Se Illegal approach based on the fairness standard. This approach aims to strengthen law enforcement, provide legal certainty, and reduce losses for consumers, so as to maximize consumer welfare (wealth maximization). Thus, it is expected that this approach can improve the market structure and reduce the negative effects of selling practices in digital businesses.

Keywords: Legal construction, Competitive law, Rule of Reason, Predatory pricing, Bisnis digital

INTRODUCTION

Technological advances occur in various sectors of people's lives, one of which is in the economic sector, namely trade or business, with these technological advances in the digitalization of business by utilizing the use of online platforms and digital tools to carry out buying and selling activities and other transactions, Digital transformation has changed from a technological opportunity to a pure necessity to manage the needs and expectations of the world's growing population (Putri & Hariyanti, 2022). Digital Transformation is a big challenge not only for individual companies, but also for the national economy, one of which is Competition in digital businesses that are not so concerned because they are trapped between the paradigm of competition that benefits or harms.

Digital business has various forms, namely Marketplace, E-Commerce, Ad-Supported, and Subscription, but there is one form of digital business that is most widely used and is the core or core of digital business because it connects between business forms in digital business as a "Digital market", namely Marketplace. It is known that Marketplace is a form of business that adopts all types of digital business forms at once on one platform and is an important business sector and needs to be given special attention because the implications caused by the behavior of business actors depend on the relevant market or related market (Pamungkas, 2023). So to find out the outline of the competition that occurs in digital businesses, it is necessary to make competition in the marketplace provider market as a reference for investigation to measure the market competition index, "digital markets that ecosystems emerged as a natural way to describe the economic activity that develops around firms that orchestrate the creation and provision of products and services to users" (Stylianou & Carballa Smichowski, 2023).

It is known that there are several marketplace companies in Indonesia and the top five that occupy the highest market share with the highest total visitors in the first quarter of 2023, namely Tokopedia, Bukalapak, Lazada, Bilibli.com, and Shopee as reported by data from databoks (Ahdiat, 2023). The existence of business actors in the relevant market raises a competition between business actors, which provides 2 (two) possibilities between healthy or unhealthy competition. Competition between the business world and the economy should aim to spur business actors to innovate to produce varied products at competitive prices and will be able to benefit producers and consumers. (Hayati, 2021) Thus creating economic efficiency, which means that business actors can sell goods at reasonable prices (Susanto et al., 2019). *"Marketplace where benefits reside in an increased variety of goods of fered, and there is the expectation that market institutions will facilitate consumers"*. (Kuenzler, 2019)

At a macro level, there is a tendency for many countries to adopt a free market, where business actors can "freely" fulfill consumer needs by providing diverse and efficient products. Market freedom in this system not infrequently makes actors perform behavior that form a market structure that is monopolistic or oligopolistic (Hariz, 2023). The formation of a monopolistic market structure is certainly supported by other business competition activities to achieve the scheme such as predatory pricing, which is also a business competition activity that is often found in the relevant market, as reported in Dinsight and research conducted by Cube Asia which states that E-Commerce companies will continue the strategy of burning money or selling at a loss to gain a competitive advantage in 2024. (Dinsight, 2024)

As evidenced by the competition in the form of discount programs, selling at a loss strategy provides benefits from both actors and consumers, but selling at a loss behavior also provides high risks, especially for businesses with low levels of economic efficiency due to limited resources, especially capital. *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.* (Alfath & Anisah, 2024)

Predatory pricing business competition activities are regulated in Article 20 of Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, hereinafter referred to as UULPM. which states that,

"Pelaku usaha dilarang melakukan pemasokan barang dan atau jasa dengan cara melakukan jual rugi atau menetapkan harga yang sangat rendah dengan maksud untuk menyingkirkan atau mematikan usaha pesaingnya di pasar bersangkutan sehingga dapat mengakibatkan terjadinya praktek monopoli dan atau persaingan usaha tidak sehat".

Based on the article, it states the prohibition of Predatory pricing activities or selling at a loss that leads to unfair business competition, but at the same time provides a loophole with a statement that allows such activities. Thus, the problem that will be faced is the vagueness of norms regarding the limitations of these activities that are not elaborated in detail in the article, making it difficult to determine which Predatory pricing activities are prohibited and allowed. Therefore, legal construction using the rule of reason approach is needed, which also allows the court to interpret the UULPM (Simbolon et al.,

2013), so that it can be applied to concrete events such as predatory pricing in digital business, by applying the rule of reason approach. The rule of reason principle has a broader scope than Per se Illegal, not only as an economic approach but also as a legal approach taken by competition authorities or courts to assess a business actor's actions (Mahmuda, 2021).

Research related to the legal construction of the rule of reason approach to be carried out is important, considering that business actors who conduct predatory pricing have the potential to abuse their power to control the market (abuse market power) and abuse their dominant position (abuse dominant position). Based on the above background, it is interesting to study "Legal Construction of Rule of Reason Approach to Predatory pricing in Digital Business."

Based on this description, two main problem formulations are formed in this research. First, how is the practice of predatory pricing in digital business in the perspective of the rule of reason principle. Second, how is the legal construction of rule of reason approach that will be used to regulate predatory pricing in digital business. The research aims to find a comprehensive and in-depth renewal of the approach method, to accommodate the times in business competition, especially in digital business, which not only prioritizes the economic approach but also the juridical approach, as the development in the digital era society.

In relation to the research objectives presented, the economic analysis of law approach developed by Richard Posner will be used, which focuses on efficiency, that the law must be applied effectively and efficiently and make law as economic tools to achieve maximization of happiness. (Sugianto, 2013) The application of this approach is carried out through 3 basic economic values or economic standards, namely value, utility and efficiency by not overriding the value of legal antinomy, namely legal certainty, so that the concept of existing legal construction will be developed with new thoughts and make it a new system, but does not change the essence of existing theories or updated through reconstruction to support research results as well as being a form of novelty in terms of the use of theory and research results.

RESEARCH METHOD

The method used in this research is a normative juridical approach. The normative juridical approach is legal research by examining library materials and or secondary data such as laws, legal works and research results (Soekanto & Mamudji, 2014). This research also uses a descriptive analysis specification method, namely describing the applicable laws and regulations and is associated with legal theories and positive legal implementation practices related to this research problem (R. Soemitro, 1994). In this research, data collection techniques are carried out through library research. Data collection is focused on legal materials and literature related to the problem under study. This technique is in accordance with the normative juridical approach, which focuses on analyzing legislation, legal documents, and relevant legal theories.

RESULTS AND DISCUSSION

Juridical Study of Predatory pricing Practices in Digital Business in the Perspective of the Rule of Reason Principle

The ideal competition climate is a manifestation of a country's enforcement priority commitments that are reflected in the substance of the regulation "*The promulgated goals of competition also often reveal what jurisdictions' enforcement priorities are and how they are likely to interpret the substantive commitments embedded in the law. There is considerable variance in these goals across countries*" (Bradford et al., 2019). It can be seen from several developed countries in the world that they show their commitment and priorities in enforcing competition law through competition law enforcement agencies and the substance contained in the applied competition law. In general, the substance contained in business competition has something in common, namely opposing monopolistic practices, besides that the functions of the authorized institutions in enforcing competition law are almost similar, such as between the KPPU, FTC and DOJ (Farhandi Himawan & Anna Maria Tri Anggraini, 2023).

The difference that can be seen is from the priority of law enforcement related to strict prohibition elements such as the American state through the Sherman act which regulates "*abuse of dominance and prevents events such as price fixing, creation of cartels, abuse of power by monopolies etc.*" In contrast to the UK which is included in the European continent prioritizes harmony rather than strictness of regulations in each country through "*Provisions of Treaty on the Functioning of the European Union*" (Achuthan, 2021).

Competition Law in Indonesia, formed and enacted based on the background of the broad economic system reforms and especially the regulatory policies carried out since 1980, within a period of 10 years has led to a situation that is considered very critical. conglomerates of business actors

controlled by certain families or parties, and these conglomerates are said to exclude small and medium-sized businesses through abusive business practices and try to influence as much as possible the drafting of laws and financial markets (Fadhilah, 2019). According to Hikmahanto Juwana, Law No. 5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, hereinafter referred to as UULPM, is a milestone for jurisprudence in Indonesia, because the law has changed the legal culture from cooperative to competitive (Hermansyah, 2008).

Based on this explanation, it can be understood that Indonesian Competition Law emphasizes the protection of healthy, fair, efficient, and effective competition conditions as stated in the consideration of the UULPM. So that with the application of business competition law in accordance with the value of fair competition as previously intended, it is expected to improve consumer welfare with the availability of options and improvement in the quality of goods and/or services that continue to grow due to competition of business actors in a healthy market in accordance with the value and utility of the application of the Law. Therefore, all forms of unfair business competition behavior or activities have been regulated in the Law, one of which is prohibited selling or predatory pricing.

Predatory pricing is the practice of selling goods or services at very low prices, with the aim of excluding competitors from the relevant market, or creating entry barriers for potential new competitors. If a competitor or potential competitor cannot maintain the same or lower price without incurring losses (Utami et al., 2021), to eliminate or kill a competing business actor in an effort to maintain its position as a monopolist or dominant (Diah Rumika Dewi & Made Suartha, 2017). Selling losses with the intention of eliminating or killing a competing business actor is by setting a very low price (predatory price) so as to affect the efficiency level of competing business actors and have an impact on the inability to compete with competing business actors in the relevant market. *“Predatory pricing as part of a plan to eliminate a competitor and more recently to eliminate as efficient competitors”* (Sauter, 2020).

Predatory selling is regulated in Article 20 of Law Number 5 Year 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition. The article states the prohibition of Predatory pricing activities or selling at a loss that leads to unfair business competition, but at the same time provides a loophole with a statement that allows such activities, based on the elements of the article, it is known that so far to find out between prohibited selling at a loss (Predatory pricing) and permissible selling at a loss is to know the intent and purpose based on the reason for the selling at a loss, if the selling at a loss does not intend to get rid of or kill the business of a competing business actor that can lead to monopolistic practices and unfair business competition, then selling at a loss is allowed.

Based on the provisions of the article, which are not strict in applying the limitation elements related to prohibited selling, it does not become an excuse for the business actors to continue to carry out such business competition behavior, as in the adage in Indonesia, namely the principle that a person cannot avoid that he does not know the existence of a law, and cannot avoid that he does not know that his actions are included in unlawful acts (Siregar, 2023). So the next challenge is the application of law enforcement related to supervision in terms of preventive efforts to warn business actors such as Predatory pricing Practices in digital business.

The vagueness of the norms on the express qualifications related to the actual prohibited selling of losses requires legal interpretation or construction through legal principles and joints (Juanda, 2017). To conduct interpretation using the principles of business competition law, it is known that in business competition law there are two principles of juridical approaches to business competition used, namely Rule of reason and Per se illegal.

Predatory pricing practices in Digital Business in the perspective of the Rule of reason principle, needs to be reviewed from the substance of the application of the Rule of reason principle to the regulation of predatory pricing in the business competition law in Indonesia, which can be seen in the context of the sentence of Article 20 UULM, which opens an alternative interpretation that selling loss needs to be proven as a whole by fulfilling the elements specified in the Law, also making the Rule of reason approach as an approach that combines legal and economic approaches. The Rule of reason approach to articles containing rule of reason rules still requires a proof (Lengkong et al., 2021). focused on consideration of the circumstances surrounding the case to interpret the intent and purpose (reason) of the business actor as reasonable or unreasonable so as to inhibit competition and how far the anti-competitive action will result in market conditions.

KPPU as an institution tasked with overseeing and enforcing the implementation of the Law as stated in Article 30 paragraph (1) UULPM, can develop a legal construction in handling legal events of Predatory pricing Practices in digital business in order to enforce the implementation of Article 20 UULPM on prohibited selling. It is known that the implementation of the Rule of reason approach can be seen in the substance of the operational standards stipulated in the Regulation of the Business Competition Supervisory Commission Number 6 of 2011 concerning Guidelines for Article 20 of Law

Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, which is then used as a minimum operational standard for the KPPU in following up on prohibited selling.

The economic method and analysis used as the operational standard of Perkom Number 6 of 2011, is applied to the case handling process through the stages of business competition procedural law as stipulated in Article 38 to Article 46 regarding the procedures for handling business competition law enforcement cases which are further regulated in the Regulation of the Business Competition Supervisory Commission Number 1 of 2019 Procedures for Handling Cases at the Business Competition Supervisory Commission.

In connection with this description, the juridical analysis related to the alleged practice of Predatory pricing in Business in the perspective of the Rule of reason approach relates to business competition law enforcement which is reviewed through legal construction of Article 20 of the UULPM based on Perkom number 6 of 2011. It is known that law enforcement is divided into 2 stages, namely preventive and repressive efforts, but preventive efforts are the stages that will be analyzed further considering that the preventive stage is a description of the effectiveness of the application of a regulation by anticipating all forms of actions that are prohibited as stipulated in the provisions in this case the handling of business competition cases.

The implementation of preventive efforts as referred to earlier is Supervision by the authorized institution in this case KPPU as in Article 30 paragraph (1) UULPM, which begins with an assessment of business activities and or actions of business actors that may result in monopolistic practices and or unfair business competition in Predatory pricing Practices in digital business as stipulated in Article 35 letter (b) UULPM, KPPU will conduct an investigation of the reported party and collect evidence (Nur et al., 2023) as preliminary evidence to assess the elements of violation as the basis for the initial investigation and examination as mandated by the provisions of Article 36 UULPM, the assessment can be carried out either through KPPU's initiative or on the basis of complaints from the public.

Based on the Regulation of the Business Competition Supervisory Commission No. 6 of 2011, standard guidelines for the testing stage of Predatory pricing Practices have been established, which are carried out by the Competition Supervisory Commission to seek preliminary evidence, namely:

1. Review of Unreasonably Low Price

The assessment at this stage is to determine the unreasonable price or predatory price at the predation stage set by a business actor that may lead to the practice of selling at a loss. As a first indication, the market power of a business actor will be assessed, which will be determined to have market power if it has a share in the market of at least 35% (thirty-five percent). If the business actor does have market power, then the test is continued by looking at the relationship between prices and costs incurred for production.

2. Recoupment Test

The assessment at this stage is to show that the accused business actor did in fact increase prices to cover its losses, the application of the recoupment test is used as the initial and decisive evidence to consider whether or not the business actor is released from the alleged prohibited loss-making.

The application of the Recoupment test as one of the components included in the legal construction of the Rule of reason approach to Predatory pricing needs to be analyzed by evaluating the economic portions in terms of effectiveness against regulations and legal provisions. The existence of the Recoupment test in KPPU's operational standards in enforcing the law as a preventive effort is difficult to do (value), because the act of raising prices after eliminating competing business actors does not always occur:

"During the predation phase, the predator charges a price below its own costs, based on the belief that its competitors will not be able to match this low price. Rivals will exit the market to avoid losing money. After the rivals have exited the market, assumes that predatory pricing is irrational, does not occur, and is beneficial to consumers when the monopolist does not recoup its losses. These assumptions, however, are flawed. First, economic theory explains how predatory pricing can be rational behavior, and empirical studies show that the Court's claims that predatory pricing is implausible and does not occur are incorrect." (Leslie, 2024)

The assumption that business actors suspected of committing prohibited selling cannot possibly not recoup is wrong. The predation phase is not always accompanied by the Recoupment phase, but on the contrary, the recoupment phase is always accompanied by the predation phase. So that at the Recoupment phase, the business actor's goal has been realized by eliminating or shutting down the business of its competitors so that if applied at the preventive or preliminary evidence stage, it does not function according to its purpose (utility), and will have an impact on consumer losses (deadweight loss) which shows the absence of efficiency in its application (efficiency).

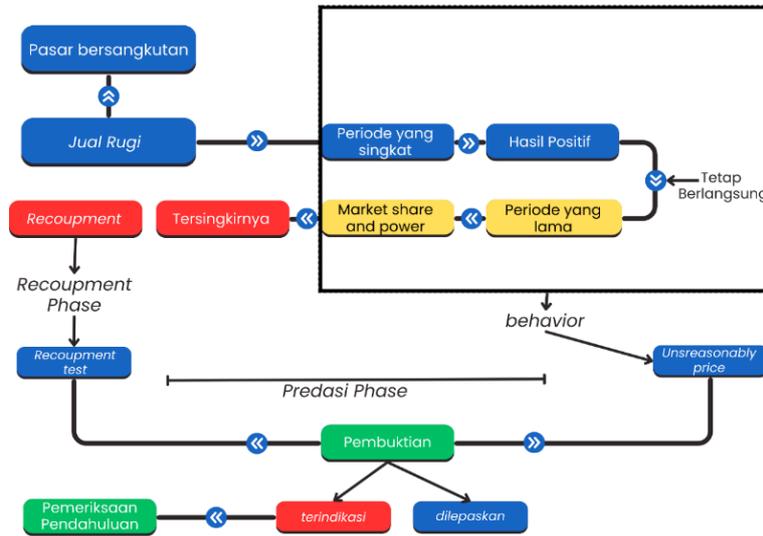


Figure 1. Scheme of Law Enforcement against Predatory pricing Practices

Based on the Scheme, it is illustrated that in the perspective of the Rule of reason approach applied in Perkom number 6 of 2011, setting limits related to selling and loss activities is not firm, as can be seen in the green-colored column which is included in preventive efforts including the preliminary examination stage, even though there is an indication that the long period of time in selling and loss activities accompanied by market power and market share is sufficient to qualify for supervision or preliminary examination, while considering these 2 (two) indicators can be a sign of selling and loss activities entering the predatory pricing stage and leading to unfair business competition.

Legal construction through the Rule of reason approach currently applies the minimum requirement of preliminary evidence based on unreasonably priced which is then determined through the Recoument test, which if seen in the scheme (see Figure 1), the impact of Predatory pricing has occurred with the elimination of competing business actors, because Recoument will not be proven before the business actors are eliminated in the relevant market, so it is proven that it is appropriate to state that by applying the recoument test at the initial examination stage, there is a blurring of norms or lack of legal certainty, especially related to preventive efforts in controlling the business competition climate.

The recoument test in essence has passed the predation stage so that it has affected the state of the relevant market with a negative impact not only anti-competitive behavior that damages market efficiency, with the elimination of competitors being an impact that has implications for the losses experienced by consumers (deadweight loss).

Considering this, the essence of the Rule of Reason Approach is that it does not rely on one of the Tests, but an approach that emphasizes economic analysis that produces economic evidence to interpret a business competition behavior, aimed at strengthening allegations of monopolistic practices and or unfair business competition(Darmawan, 2022).So that the unreasonably price is sufficient to determine the preliminary evidence of Predatory pricing practices in Digital Businesses that have begun to enter the predation stage and potentially lead to unfair business competition.

Preventive efforts must be made immediately, seeing that the sale and loss that occurs in the digital business has clear indications in the form of high market share and market power by several relevant business actors in the relevant market, as illustrated by the research results of iPrice Group and IPSOS (see Figure 2).

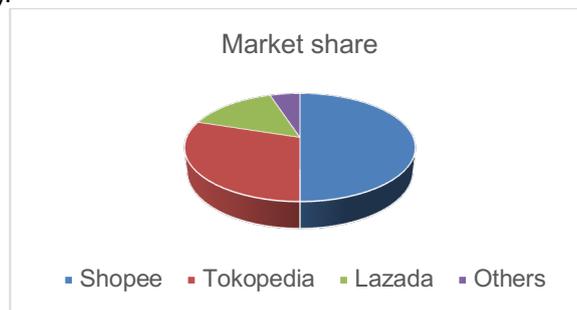


Figure 2. Marketplace Platform Users in Indonesia (Source: iPrice and IpSOS research results, 2021)

Shopee with a market share of 50% followed by Tokopedia 30% and Lazada 15% and the rest is filled by several other business actors (Rochman, 2022). The data is obtained based on the results of iPrice Group research as well as IPSOS in 2022 through several indicators, namely, BUMO (Brand Use Most Often), Top of Mind, consumer penetration, and transaction value, so that based on the dominant market share, of course the sale and loss carried out has the potential to limit and hamper business competition both directly and indirectly as explained in article 25 paragraph (1) UULPM.

Selling losses carried out by business actors either consciously or unconsciously can result in the elimination or death of their competitors' businesses, which results in competing business actors being unable to balance the efficiency of dominant business actors to follow the selling losses carried out, this happens because selling losses carried out by dominant business actors affects the level of economic efficiency of their competitors, in this case business actors with low market share and new business actors (incumbent).

It is known that in addition to the bright line evidence as described earlier, in the case of Predatory pricing in digital business, it is also found in the form of statement evidence, which is indirect evidence based on the results of interviews in research conducted by Dinsight and Cube Asia, that E-Commerce Companies will continue the strategy of burning money or selling to gain a competitive advantage in 2024 (Dinsight, 2024). The statement can be indirect evidence as regulated in Article 57 paragraph 2 and 4 of Perkom Number 1 of 2019.

Evidence of the statement is one of the evidence of clues to the condition of business competition in the digital business which makes the standard of competition based on selling, by selling losses carried out in the relevant market, of course the dominant business actor will be favored with a better level of efficiency than its competitors, by continuing the strategy of burning money or Predatory pricing forces its competitors to be in control of the price it sets. so that these competitors are forced to operate at a loss, which in the end has the potential to be eliminated from the market.

As described regarding the indicators that produce economic evidence in the form of bright line evidence, it can be used as a reference as evidenced by several cases that have occurred previously, that these indicators can indirectly refute the pretext of justification or reasonable reasons for selling losses based on the guidelines in the Regulation of the Business Competition Supervisory Commission Number 6 of 2011.

The statements of business actors as previously described, which are a form of indirect evidence, can support Bright line evidence. Such evidence can be used as a sufficient basis to serve as the basis for KPPU's assessment as stipulated in Article 35 letter (b) UULPM, which can then be continued at the preliminary examination stage based on the provisions of Article 2 of the Regulation of the Business Competition Supervisory Commission Number 1 of 2019. In relation to the provisions of Article 39 paragraph (1) UULPM, the preliminary examination referred to is on the basis of KPPU's initiative based on the previous assessment, which is carried out for 30 days after the decision letter stipulating the preliminary examination.

The preliminary examination is carried out based on the procedures for implementation stipulated in articles 29 to 39 of the Regulation of the Business Competition Supervisory Commission Number 1 of 2019, which in short, after reading the report on the alleged violation in the form of unfair business competition activities, an opportunity will be given to change behavior as a form of commitment of business actors to carry out business competition activities fairly or in accordance with the Law, The implementation of the Behavior Change Integrity Pact becomes the object of supervision by the Commission, and supervision will be carried out for a maximum of 60 (sixty) days as stipulated in article 35 paragraph (3), then within the supervision period, the supervision is terminated and stated in the Determination of the Commission Assembly, the determination can be in the form of stopping the case or continuing to further examination.

Legal Construction Analysis of Rule of Reason Approach to Predatory pricing Regulation in Digital Business

Legal construction is needed to support law enforcement on concrete events because of regulations or laws that are considered difficult to apply, judging from elements that are less assertive as in Article 20 of the UULPM, which regulates the sale of loss. Legal interpretation or construction through joint principles of law in this case the application of the Rule of reason principle, but based on previous studies there are shortcomings in the Rule of reason approach as in Perkom Number 6 of 2011, which is known to be the application of the Rule of reason which is not strict and too broad in scope for the initial examination stage, resulting in inefficiency in the process of law enforcement stages, especially preventive efforts.

Preventive efforts through preliminary examination will lose its essence if it sets a high standard of proof, which in fact the hard line evidence used based on the recoupment test does not always appear, making it difficult to prove, besides that the recoupment stage has basically passed the predation stage with the elimination of competing business actors in the relevant market, so it is not in accordance with the elements in Article 20 UULPM, namely the intent and purpose of eliminating or shutting down the business of its competitors, the “intent and purpose” should be the main focus of the purpose of the economic analysis.

Based on this explanation, it is necessary to reconstruct existing law enforcement both in the form of repositioning and adding indicators that can help with existing law enforcement in this case in Perkom Number 6 of 2011, the repositioning carried out can be seen through the legal construction scheme in accordance with value, utility, and efficiency, to be applied to law enforcement based on the Rule of reason approach (see Figure 3).

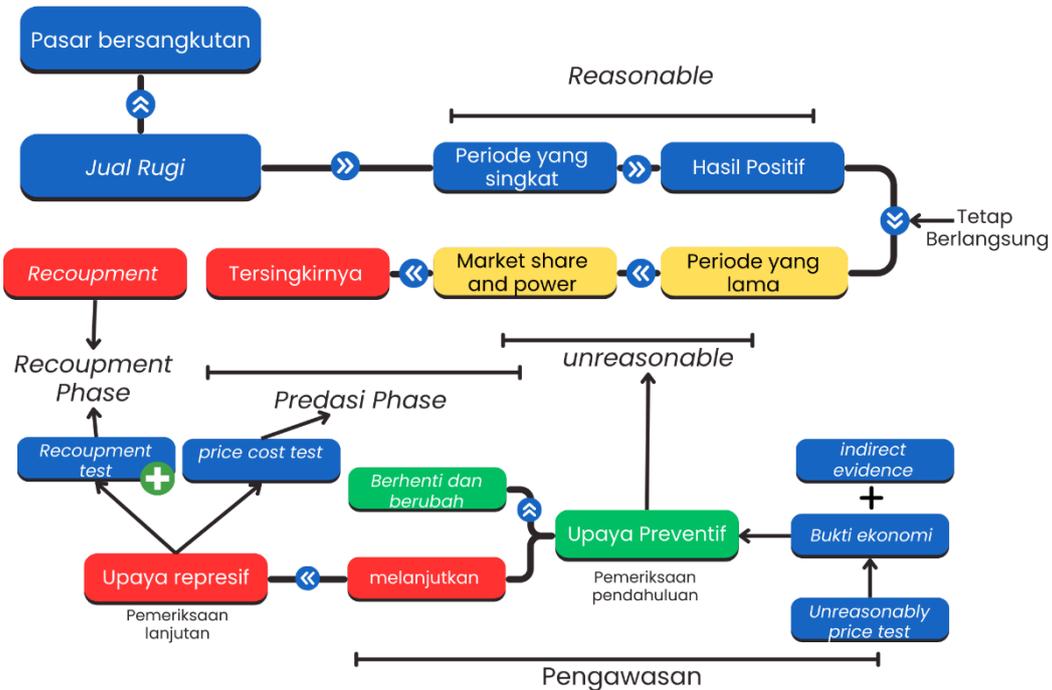


Figure 3. Scheme of Legal Construction of Rule of reason Approach towards Predatory pricing Practices in Digital Business

Based on the Scheme, it can be seen that the use of the test is applied in accordance with the usefulness in each stage of law enforcement, without eliminating the essence of the Rule of reason approach that has been applied, adjustments and additions to the indicators are based on the development of business competition law, especially predatory pricing cases that have previously occurred, related to the essence of the Rule of reason apart from the economic analysis method used is to allow a business competition behavior or activity regulated in the UULPM, to be allowed to be carried out with certain restrictions, as in the scheme of restrictions related to the period and objectives included in the Reasonable reason.

The difference can be seen from the existence of strict indicators related to the unreasonable element based on the indicators applied to Unreasonably Price, which if connected to Predatory pricing in Digital Business, there is Indirect evidence that can be used to support preliminary evidence so that preventive efforts through preliminary examination can be carried out immediately and the implementation of the supervisory function through behavioral changes on the warning given by KPPU.

Reviewing the problems previously described requires a legal approach with strict limits and effective assessment. This strict limitation is intended to classify prohibited selling as an unlawful act, this is needed considering the legal certainty that needs to be supported by the right and appropriate legal substance, in this case the elements determined are in accordance with the value of efficiency and effectiveness to be achieved with proper and straightforward law enforcement, and not too much to consider a business competition activity that has the potential to provide benefits, as Hawk and Denaeijer's view is related “analysis of the competitive effects (benefits and harms) of a practice

necessarily introduces some legal uncertainty. It is probably fair to say that the more refined/robust the inquiry into the actual competitive effects and justifications of a practice, the greater the uncertainty"(Broulík, 2022) stated that the more considerations related to the impact of a form of competition behavior is beneficial or not creates greater legal uncertainty, and the paradigm of law enforcement officers hinders the effectiveness of competition law enforcement. "While competition authorities often frame their mission within the consumer welfare paradigm, it is not always clear how the adverse effects on consumer welfare should be measured, in particular when there is no adverse effect on prices"(Bernatt, 2024).

Based on this explanation, it needs to be understood that providing strict limits does not mean limiting innovation or avoiding a positive impact, but based on Predatory pricing cases that have occurred, it can be considered that a loss-making activity when entering the predation stage has a negative impact that is more dominant than positive. "The Practice is sometime harmful, sometimes neutral, and sometimes beneficial, but the aggregate between of harm and beneficial, harm far outweigh benefit"(Susanti Adi Nugroho, 2012), based on these conditions, it is sufficient to prove that the Legal Construction of Predatory pricing Regulation in digital business can apply the principle of Per Se Illegal, in the form of a clear, firm, and absolute prohibition on the Per se Illegal approach in terms of providing certainty for business actors(Aryadiputra et al., 2022).

The application of the Per Se Illegal Principle may be applied to certain conditions, such as in Predatory pricing practices in digital business can be seen by the discovery of Bright line evidence and Indirect evidence that can be assessed based on simple logic that can lead to unfair business competition, the simple "logic" standard referred to is the size of the "reasonableness" factor that considers several factors, namely:(Susanti Adi Nugroho, 2012)

1. Effects in markets and competition
2. Business considerations underlying the action
3. Market power, and
4. Less restrictive alternative,
5. Objectives

The so-called 'reasonableness' theory in tort and criminal law is applied in cases where several events could have caused a single particular outcome (ie, an anti-competitive effect)(von Ingersleben-Seip & Georgieva, 2021). The assumption that the results will always lead to unfair business competition is certainly based on several cases of predatory pricing that can be used as a reference and reason, such as PT Conch South Kalimantan Cement as well as the case of Standard Oil Company and American Tobacco Company, that selling losses that meet several indicators, namely selling losses carried out by dominant business actors and carried out over a long period of time, will always lead to unfair business competition that directly or indirectly eliminates or kills the business of its competitors and affects market competition standards leading to selling losses for competitive strategies.

Reasonableness is possible to be determined by KPPU, as KPPU's authority in assessing and determining activities or abuse of dominant position based on Article 35 letters (b) and (c) of UULPM, also the establishment of guidelines is possible in this case regarding Reasonableness on Predatory pricing to support the enforcement of business competition law in accordance with the provisions of letter (f) in the article. Furthermore, the indicators that produce bright line evidence can be applied as strict limitations through legal construction based on the per se illegal approach.

In line with this statement, selling loss based on Reasonableness, which was previously explained that in practice and development, selling loss is more detrimental to consumers (deadweight loss) by affecting market conditions affected by selling loss, rather than providing profits (wealth maximization), because in essence it only provides profits in the short term, and losses in the long term, the Per se Illegal Approach needs to be applied.

It is known that the use of the Rule of reason or Per se illegal principle is not a fixed price or a standard rule to be applied to certain articles, such as the United States which allows the assessment of the use of principles in certain articles to be changed or combined(Susanti Adi Nugroho, 2012).Based on the development of business competition law enforcement in Indonesia, a combination of the two principles of approach has been carried out in handling cases of Honda and Yamaha cartel cases in Indonesia, while still applying proportional portions, in this case cartel cases that usually apply the Per se illegal approach can be assisted by the Rule of reason approach.

The Rule of reason approach is not used to justify anti-competitive behavior because it is reasonable, but is used to strengthen the charges by adding further economic analysis evidence hard line evidence, by applying a similar approach model that combines the two principles of the approach simultaneously with an ideal and proportional portion that can be seen in the Legal Construction Scheme against the regulation of Predatory pricing in digital business. (see figure 4)

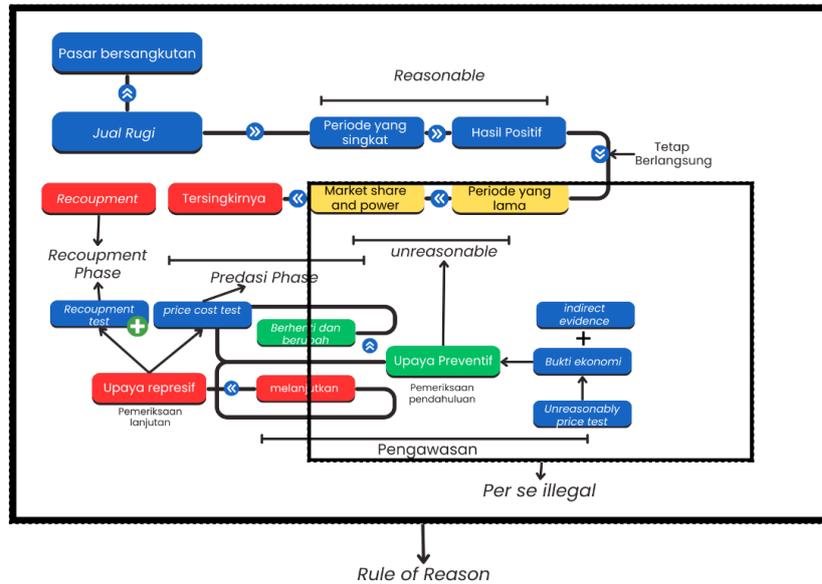


Figure 4. Scheme of Legal Construction of Predatory pricing Practices in digital business based on the Principles of Business Competition

Based on the scheme, the legal construction model of Predatory pricing regulation that has been reconstructed by applying indicators that make it possible to apply two approaches at once to be combined and cover the shortcomings of each other, does not require a large amount of time and resources to study a matter with basic logic, which is ideal for preventive efforts on Predatory pricing.

Rule of reason approach remains the main approach considering that competition activities of selling loss still have a positive impact at certain stages, and Per se illegal is in charge of providing strict limits related to certain behavior when meeting the indicators in the yellow column has led to indications of anti-competitive behavior and is a violation, but the competition law in Indonesia still provides an opportunity for business actors to change behavior so that if business actors ignore, the rule of reason approach plays a role in supporting economic evidence in further examination.

The application of Per se illegal, provides convenience to law enforcement officers so that legal officers do not require knowledge of economic theory and advanced economic data collection, which allows one of the judges to prove only by assessing indications of a business behavior affecting competition, and there is business certainty, efficiency in the procedural law process and as a tool to prevent the impact of unfair business competition (Susanti Adi Nugroho, 2012).

Reviewing the legal construction model can increase the effectiveness and efficiency related to Predatory pricing law enforcement, without eliminating the essence of the legal construction that has existed before with the Rule of reason approach, the reconstruction considers the value, utility and efficiency of resources as the purpose of Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and unfair business competition, to maintain an effective and efficient business competition climate, which has implications for consumer welfare (wealth maximizing) and avoid consumer losses with the destruction of the business competition climate (deadweight loss).

CONCLUSION

Predatory pricing practices in digital business, viewed through the perspective of the Rule of Reason Principle, focuses on the prohibition against harmful selling practices based on economic analysis as stipulated in Commission Regulation (Perkom) Number 6 Year 2011. Nonetheless, there are several obstacles in law enforcement that indicate a low level of efficiency. The application of analytical methods used today is not fully in accordance with the principles of value, utility, and efficiency in the theory of economic analysis of law. One example of this discrepancy is the placement of the recoupment test in the preliminary evidence requirement. In essence, loss-making activities that have entered the recoupment stage actually show that business actors have succeeded in controlling the market, which means that it is not appropriate to be used as an indicator of preliminary evidence. Therefore, it is necessary to reconstruct the application of the test by repositioning and adding other indicators that can support the strengthening of preliminary evidence.

The appropriate legal approach to regulate predatory pricing in digital business is to use Rule of Reason, which is based on the theory of economic analysis of law. Through this reconstruction, it is possible to apply the Per Se Illegal approach based on the standard of reasonableness, which will strengthen the application of the law and provide legal certainty regarding the strict limits on the practice of selling at a loss. To achieve maximization of happiness for consumers, it is necessary to make improvements in preventive efforts in order to reduce the possibility of eliminating business actors, which can cause losses to consumers (deadweight loss). This can ultimately lead to an increase in consumer welfare (wealth maximization). Given the development of institutions authorized to apply this legal approach, proper application based on analysis of related factors and conditions, such as predatory pricing business behavior in the context of digital business, is needed. This is because, under certain conditions, such behavior is more likely to harm rather than benefit market performance.

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