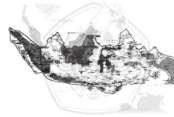




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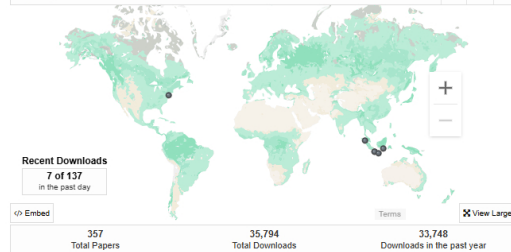


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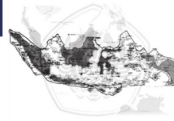




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RESEARCH ARTICLE

Antitrust in Practice: Case-Based Comparative Analysis of Predatory Pricing Enforcement in Indonesia and the United States

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ABSTRACT

Business entities employ predatory pricing as a strategy primarily aimed at eliminating competitors. The regulation and detection of predatory pricing are complex processes, and each country adopts distinct mechanisms to address the issue. The scientific contribution of this study lies in its comparative analysis of two different legal systems—Indonesia’s civil law and the United States’ common law—in addressing predatory pricing practices under competition law. It examines how differing legal frameworks influence the methods of proof, the application of the rule of reason principle, and the pattern of sanctions imposed on business actors. In addition, this study adopts an interdisciplinary approach that integrates law and economics by elaborating on the application of the rule of reason principle through market-based economic analysis. This includes the use of the recoupment test, the price-cost test, and assessments of market share and market concentration calculations to evaluate the anti-competitive effects of low-price strategies. The primary contribution of this study lies in the integration of normative legal analysis with the examination of two concrete cases: KPPU Decision No. 03/KPPU-L/2020 (PT Conch South Kalimantan Cement) in Indonesia and Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. in the United States. In the United States, this case illustrates that although both countries apply the rule of reason approach, their legal outcomes may differ due to variations in evidentiary systems, the structure of supervisory institutions, and the emphasis placed on economic considerations within the legal process.

Keywords: alleged practices, competition, predatory pricing

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1. Introduction

The risk of exploitation by dominant business entities becomes more pronounced in situations of uneven economic concentration. To prevent such outcomes, the presence of a supervisory authority is crucial in promoting dynamic and competitive market conditions that support sustainable economic development. This authority is also responsible for formulating policies that foster fair business competition, ultimately aiming to achieve an efficient market structure. The legal foundation for ensuring these aspects is established in Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter referred to as Law 5/1999).

Customer satisfaction, a critical component of business success, requires attention to several key factors, including market growth, technological advancements, price stability, and revenue allocation aligned with market performance and marginal productivity.¹ The objectives of Law No. 5 of 1999 are closely tied to the prohibition of monopolistic practices and unfair competition in the business sector. This legislation plays a pivotal role in regulating conduct that may give rise to unfair or unlawful competition, thereby upholding the principles of equity and integrity in the economic system.²

Competition, as a fundamental aspect of economic dynamics, produces both positive and negative outcomes. Favorable outcomes signify a healthy market environment, whereas adverse outcomes indicate an unhealthy one. The provision of goods and services through predatory pricing constitutes a form of unfair competition.³ In executing predatory pricing, business actors strategically set prices below what is considered reasonable concerning their average variable costs. However, accurately determining average variable costs presents inherent challenges. Such pricing practices are generally viable only when the business actor holds a dominant market position. Such dominance allows business actors to endure short-term losses with the strategic aim of eliminating competitors and ultimately consolidating their market position.⁴ The prohibition of predatory pricing is not absolute; it requires evidence that the pricing conduct has the potential to result in unfair competition. Normative ambiguity arises from the lack of clear criteria for identifying predatory pricing practices that may lead to unfair business competition.

This involves assessing whether the conduct results in monopolistic characteristics or gives rise to unbalanced and unfair business practices. By emphasizing the actual effects of predatory pricing on competition, this approach enables a more nuanced, context-specific analysis and a fairer determination of its legality.⁵ The significance of antitrust laws becomes especially evident when countries seek to prevent economic activities marked by adverse market conditions and widespread fraudulent competition.⁶ Moreover, antitrust laws also play a crucial role in safeguarding individual freedom, a principle embedded within the broad scope of antitrust regulation in the United States.⁷ The history of monopoly regulation, both internationally and in Indonesia, underscores the global recognition of the need for antitrust measures. Although Indonesia codified its antitrust

¹ Andi Fahmi Lubis et al., "Hukum Persaingan Usaha: Buku Teks," 2017, 37.

² Frederic Jenny, "Competition Law Enforcement and the COVID-19 Crisis: Business As (Un)Usual?," *SSRN Electronic Journal*, 2020, 317–345, <https://doi.org/10.2139/ssrn.3606214>.

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⁴ Pim Jansen and Wouter Devroe, "Industrial Policy, Competition Policy and Strategic Autonomy," in *EU Industrial Policy in the Multipolar Economy* (Edward Elgar Publishing, 2022), 80–121, <https://doi.org/10.4337/9781800372634.00008>.

⁵ Susanti Adi Nugroho, *Hukum Persaingan Usaha Di Indonesia* (Prenada Media, 2014), 28.

⁶ Cristoforo Osti, "Antitrust: A Heimlich Manoeuvre," *European Competition Journal* 11, no. 1, 2015, 221–64, <https://doi.org/10.1080/17441056.2015.1033212>.

⁷ S H Rachmadi Usman, *Hukum Persaingan Usaha Di Indonesia* (Sinar Grafika, 2022), 17.

laws later than many other countries, awareness of their significance has grown, aligning the nation with global efforts to promote fair competition and economic justice.⁸

The United States, in particular, has a long-standing commitment to combating monopolistic practices and unfair competition through legislative measures. Even prior to the formal enactment of antitrust laws, U.S. courts applied common law principles to address monopolistic behavior. The United States has been a pioneer in this field, becoming the first country to enact a competition law in 1890. Consequently, it has played a central role in shaping modern antitrust practices and has served as a model for other nations in developing effective competition regulation⁹. Emphasizing the prevention of unfair pricing, monopolization, and other anti-competitive practices, both federal and state governments in the United States actively enforce antitrust laws. These laws, aimed at promoting fair competition and preventing the concentration of economic power, form a dynamic and evolving legal framework. Key federal statutes governing antitrust matters in the United States include the Sherman Act, the Clayton Act (as amended by the Robinson-Patman Act), and the Federal Trade Commission Act. Together, these laws establish a comprehensive legal framework to promote competition, prevent anti-competitive behavior, and address monopolistic and unfair trade practices. The Robinson-Patman Act plays a pivotal role in addressing discriminatory practices in commercial activities.

As an amendment to the Clayton Act, the Robinson-Patman Act prohibits not only price discrimination but also other forms of discriminatory practices, including unequal advertising discounts and improper payments to intermediaries. The Sherman Antitrust Act, formally titled “An Act to protect trade and commerce against unlawful restraints and monopolies,” was enacted on July 2, 1890, and further reinforced by the Federal Trade Commission Act of 1914.¹⁰ The Sherman Antitrust Act, enacted on July 2, 1890, aims to protect trade and commerce from unlawful monopolistic restraints. Unfair competition compels businesses entities or individuals to engage in illicit practices, which may result in legal consequences and various forms of sanctions. For example, a commercial entity found guilty of entering into an unlawful contract or engaging in a conspiracy may be fined up to \$10,000,000. Likewise, an individual involved in such activities may face a fine of up to \$350,000 and/or a prison sentence of up to three years.

The severity of these penalties highlights the significant impact such violations can have on a company’s internal operations and its position within the competitive landscape. According to Ernest Gellhorn and William Kovacic, the purpose of U.S. antitrust law is “to control the exercise of profit-motivated economic power by preventing monopolies, punishing cartels, and otherwise protecting competition.”¹¹ Antitrust laws are fundamentally intended to prevent businesses from acquiring and abusing market power, thereby limiting their ability to compel consumers to pay inflated prices for goods and services.^{12,13}

Hence, it is evident that any entity engaging in monopolistic practices, attempting to do so, or conspiring with others for such purposes is guilty of a felony. The prescribed penalties include fines of up to \$10,000,000 for corporations and \$350,000 for individuals, as well

⁸ Dina I. Waked, “Antitrust as Public Interest Law: Redistribution, Equity, and Social Justice,” *The Antitrust Bulletin* 65, no. 1, 2020, 87–101, <https://doi.org/10.1177/0003603X19898624>.

⁹ Brett Christophers, *The Great Leveler: Capitalism and Competition in the Court of Law* (Harvard University Press, 2016), 310.

¹⁰ Gregory J. Werden, “Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act: What Is the Intelligible Principle?,” *SSRN Electronic Journal*, 2023, 1–47, <https://doi.org/10.2139/ssrn.4448795>.

¹¹ Alizedney M. Ditucalan, “The Philippine Competition Law Dilemma: US–EU Fusion to Tension?,” in *Research Handbook on Asian Competition Law* (Edward Elgar Publishing, 2020), 121–122, <https://doi.org/10.4337/9781785361838.00027>.

¹² Crispin Niebel, “The Impact of the General Data Protection Regulation on Innovation and the Global Political Economy,” *Computer Law & Security Review* 40, 2021, 105523, <https://doi.org/10.1016/j.clsr.2020.105523>.

¹³ Seokbeom Kwon and Alan C. Marco, “Can Antitrust Law Enforcement Spur Innovation? Antitrust Regulation of Patent Consolidation and Its Impact on Follow-on Innovations,” *Research Policy* 50, no. 9, 2021, 104295, <https://doi.org/10.1016/j.respol.2021.104295>.

as imprisonment for up to three years. These sanctions are stipulated under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.¹⁴ This section clearly delineates the legal consequences for individuals or entities that violate fair competition standards.¹⁵

The background section highlights the key issues that motivate this research, namely: (1) the similarities and differences in the regulation of predatory pricing and the role of competition authorities in Indonesia and the United States; and (2) the application of predatory pricing prohibitions in the KPPU-RI Decision No. 03/KPPU-L/2020” and the case of “Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.”

2. Predatory pricing under competition Law in Indonesia and the United States

2.1. Predatory pricing under Law No. 5/1999

Pursuant to Article 20 of Law No. 5/1999, the sale of goods or services at a loss is expressly prohibited. The provision deems it unlawful for business entities to offer goods and/or services at a loss or at unreasonably low prices with the intent to eliminate or undermine competitors in the relevant market. Such practices may constitute monopolistic behavior or unfair business competition. The essence of this legal provision lies in the prohibition of selling goods and/or services at a loss with the intent to eliminate competitors, as such actions may distort market prices. The practice of loss selling, as regulated by the law, is characterized by a deliberate attempt to manipulate pricing dynamics within the market.

Perpetrators engaging in loss selling seek to establish market dominance, with the ultimate goal of securing substantial profits.¹⁶ Article 20 of Law No. 5/1999, which governs market trading practices by business actors, enumerates and prohibits such activities based on the following elements: business actors, supply, goods, services, setting of excessively low prices, elimination or destruction, and competitors.

Article 17 of Law No. 5 of 1999 prohibits business actors from controlling production and/or services in a manner that results in monopolistic practices or unfair competition. Such practices are deemed to occur when the goods and/or services have no substitutes, preventing other business actors from competing in the market, or when a single business actor or group controls more than 50% of the market share for specific goods or services.

2.2. Sale and forfeiture regulations in the United States

In addressing predatory pricing, the United States has established the FTC as a regulatory body. Additionally, the U.S. possesses a long-standing legal framework to govern predatory pricing, notably Section 2 of the Sherman Act, which has been in effect for over a century. If a business entity violates these provisions, it may be fined up to USD 1 million, while individuals may face fines up to USD 100,000. Additionally, companies found in breach of the Sherman Act may be subject to imprisonment for up to three years.¹⁷ Entities possessing monopoly power may violate Section 2 of the Sherman Act by

¹⁴ Michael Flynn, Kirk Buffington, and Richard Pennington, *Legal Aspects of Public Procurement* (Routledge, 2020), 39.

¹⁵ Eric A Posner, *How Antitrust Failed Workers* (Oxford University Press, 2021), 21.

¹⁶ Rezmia Febrina, “Dampak Kegiatan Jual Rugi (Predatory Pricing) Yang Dilakukan Pelaku Usaha Dalam Perspektif Persaingan Usaha,” *Journal of Selat* 4, no. 2, 2017, 5, <https://doi.org/https://ojs.umrah.ac.id/index.php/selat/article/view/194/203>.

¹⁷ Francesco Giumelli and Michal Onderco, “States, Firms, and Security: How Private Actors Implement Sanctions, Lessons Learned from the Netherlands,” *European Journal of International Security* 6, no. 2 (2021): 190–209, <https://doi.org/10.1017/eis.2020.21>.

engaging in predatory pricing. Predatory pricing constitutes an anti-competitive practice prohibited under Section 2 of the Sherman Act,¹⁸ which forbids monopolization or attempts to monopolize. To establish a violation for attempted monopolization under Section 2, two elements must be demonstrated: first, that the company has a genuine opportunity to monopolize the market, and second, that it abuses this market power through prohibited conduct such as predatory pricing.

Enacted in 1914, the Clayton Antitrust Act sought to clarify ambiguities present in the Sherman Act. Uniquely, the Clayton Act explicitly addresses predatory pricing as a distinct concern. In evaluating the legality of predatory pricing, the U.S. Congress drew parallels to practices by large multinational corporations that employ predatory pricing in isolated markets to financially weaken competitors and establish monopoly power. By the 1930s, the focus shifted toward protectionism, leading to amendments of the Clayton Act that resulted in the Robinson-Patman Act. This amended legislation specifically prohibits price discrimination that can affect competitive power and seeks to prevent monopolization, as well as to protect fair competition among businesses from harm or obstruction.¹⁹ It is noteworthy that the United States and the European Union adopt different approaches in their evaluation of predatory pricing practices.²⁰

In this scenario, significant chain stores posed a challenge for small, locally owned businesses. In response, the Robinson-Patman Act was introduced in 1936 to amend the provisions of the Clayton Act with the aim of “protecting” small stores from the impacts of predatory pricing employed by larger retailers. The amendment by the Robinson-Patman Act, Section 2a of the Clayton Act was modified to address this issue. Therefore, the Robinson-Patman Act serves to shield competitors from seller discrimination, a phenomenon known as primary-line injury. Additionally, the Act extends protection to customers, addressing what is termed secondary-line injury.²¹ To counter allegations of unlawful predatory pricing, the Robinson-Patman Act provides two affirmative defences. Firstly, in Section 2a, the defence of cost justification is outlined. If the seller can demonstrate that the price difference aligns with the variance in the cost of goods sold, it cannot be deemed predatory pricing. Secondly, Section 2b introduces a confluence of competition defences. If a lower price is offered to match (but not surpass) an equally low-price set by another competitor, then the resulting price difference is considered legitimate.

In the context of prohibiting monopolistic practices and unfair business competition, one of the prohibited activities is the supply of goods and/or services through predatory pricing. Predatory pricing primarily aims to eliminate existing competitors from the market and hinder potential competitors from entering the same market. This strategy involves temporarily reducing prices to levels unsustainable for competitors, thereby forcing them to exit the market. By successfully driving out competitors and impeding the entry of new players, the business engaging in predatory pricing can subsequently raise prices and maximize profits. Similarly, the regulation of predatory pricing in the United States aligns with the broader framework of American antitrust laws, which prohibit conduct and agreements restricting trade. The overarching goal of these antitrust laws is to safeguard competitive markets. A pivotal piece of legislation in this context is the Sherman Antitrust

¹⁸ John B. Kirkwood, “Predation and Discrimination,” in *Research Handbook on Abuse of Dominance and Monopolization* (Edward Elgar Publishing, 2023), 140–61, <https://doi.org/10.4337/9781839108723.00017>.

¹⁹ Herbert Hovenkamp, “The Text of the Antitrust Laws,” *SSRN Electronic Journal*, 2022, 13–80, <https://doi.org/10.2139/ssrn.4277914>.

²⁰ Andrew I. Gavil, “Private Enforcement under US Antitrust Law: Origins and Contemporary Context,” in *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar Publishing, 2023), 52–80, <https://doi.org/10.4337/9781800377523.00009>.

²¹ Roger D. Blair and Christina DePasquale, “Antitrust’s Least Glorious Hour: The Robinson-Patman Act,” *The Journal of Law and Economics* 57, no. S3 (2014): S201–16, <https://doi.org/10.1086/675783>.

Act of 1890, extensively utilized during the administrations of Theodore Roosevelt and William Howard Taft.

The Sherman Antitrust Act prohibits any actions by private companies that hinder the regulatory functioning of the U.S. market system. It aims to foster a market system characterized by numerous rivals in each industry, thereby promoting robust competition. Contrary to the misconception that the Act is designed to protect competitors from a business' success or prevent businesses from gaining a legitimate advantage over consumers, its primary objective is to preserve a competitive market. In doing so, the Sherman Act aims to protect consumers from the adverse effects of predatory pricing practices that can distort the market and harm consumer welfare.

2.3. Legal approach to predatory pricing in Indonesia

In antitrust laws, certain clauses employ the term “prohibited,” yet penalties are not uniformly imposed, and some illegal business practices are assessed under the rule of reason.²² This underscores the need for further research to determine whether specific behaviors by market participants may lead to monopolistic practices and/or unfair business competition within the relevant market. Without such investigation, even if traders in the relevant market grow in size and influence, the prohibitions outlined in antitrust laws may not be applicable.²³ The rule of reason approach reflects a nuanced evaluation that considers the overall impact on competition, emphasizing the importance of thorough analysis in determining legal implications for business conduct.²⁴ Increased concentration levels over time may indicate anti-competitive behavior.

The rule of reason approach involves an examination of the underlying causes of a business entity's conduct or behavior. Its application necessitates not only legal knowledge but also an understanding of economic principles.²⁵ This approach acknowledges that certain negative behaviors may have positive economic effects on competition. According to the philosophy of the rule of reason, a business or business actor engaging in activities that violate the law will have a negative impact. If this impact is substantial and includes elements that impede competition, legal action is warranted. However, the rule of reason approach has its drawbacks, one of the most significant being its reliance on judges and prosecutors possessing knowledge of economic theory and the ability to interpret complex economic data. This requirement can be challenging, as not all legal professionals possess the expertise to fully comprehend and utilize such intricate economic information in making well-informed decisions.²⁶

Competition authorities employ the rule of reason legal approach to evaluate the impact of a specific agreement or business action, determining whether it hinders or promotes competition. In the context of Law No. 5/1999, a clause that is open to varied interpretations stipulates that an act must be proven in its entirety, meeting the conditions outlined in the law, before it can be conclusively determined whether it constitutes an unfair trade competition practices. The Rule of Reason, which allows courts to assess competitive circumstances and decide whether trade barriers are reasonable, prohibits

²² Phillip E Areeda et al., *Antitrust Analysis: Problems, Text, and Cases* (Aspen Publishing, 2021). p. 76.

²³ Ariel Ezrachi, *Competition and Antitrust Law: A Very Short Introduction* (Oxford University Press, 2021). p. 59.

²⁴ Anna Maria Tri Anggraini et al., “ENSURING JUSTICE AND UTILITY: Addressing Alleged Monopolistic Practices in Ibu Kota Nusantara,” *Jurisdictie: Jurnal Hukum Dan Syariah* 15, no. 2 (January 3, 2025): 274–308, <https://doi.org/10.18860/j.v15i2.28765>.

²⁵ Anggraini et al., “Ensuring Justice and Utility,” 274–308.

²⁶ Anna Maria Tri Anggraini, Ahmad Sabirin, and Yoel Nixon A Rumahorbo, “The Form and Pattern of Business Actors Requirements in Exclusive Dealing: A Rule of Reason Approach,” *Yustisia Jurnal Hukum* 12, no. 2 (2023): 107, <https://doi.org/10.20961/yustisia.v12i2.73316>.

certain actions, including predatory pricing. It is used to evaluate whether the challenge effects, interferes with, or inhibits the competitive process.

This method utilizes economic analysis to determine whether the conduct inhibits or promotes competition. The application of the rule of reason requires a measurement process that begins with defining the relevant market parameters. If the designated market is small and a company holds a larger market share in that market, it may be deemed dominant—particularly if the dominant position is abused. According to the Rule of Reason approach, even if a business actor's conduct satisfies all the elements of the relevant legal provisions, it is not necessarily considered unlawful if there are legitimate justifications. The Rule of Reason approach must consider several factors, including fairness, efficiency, and economic factors.

A business actor's justification for engaging in potentially anti-trade activities may be deemed reasonable or unreasonable based on several considerations, including: whether the activity shows indications of reduced production or increased prices of goods and/or services, warranting further examination; whether the activity is direct (considered unlawful) or merely ancillary (permissible); whether the business actor holds market power that can be abused; whether there are high market entry barriers—since even with market power, the absence of such barriers facilitates new entrants; whether the action creates substantial efficiency and improves the quality of products, services, or innovation—if not, the action is prohibited; whether the action is truly necessary to achieve efficiency and innovation—requiring proof that is the best available alternative; and the application of a balancing test to measure the benefits of the business actor's conduct against its negative impacts—if the benefits outweigh the losses, the action may be justified.²⁷

Economic analysis is a benefit of the rule of reason, as it helps maximize efficiency and ensures that business decisions impact the market. In other terms, these guidelines determine whether a particular activity is pro- or anti-competitive: “. . . *economic values, that is, with the maximization of consumer want satisfaction through the most efficient allocation and use of resources. . .*”²⁸ Conversely, engaging in potentially harmful activities remains unlawful. Despite the flexibility of the rule of reason approach, it has certain drawbacks. A major concern is that for judges and juries to apply it effectively, they must be familiar with economic theory and capable of navigating complex economic facts. Judges often have limited capacity and experience in handling intricate legal proceedings, which can hinder the consistent and accurate application of the rule of reason in complex cases.

2.4. Legal approach to predatory pricing in the United States

Some approaches used to assess pricing practices that harm competition include: the Price-Cost Test, which, although not definitively indicate that a business actor is selling goods below cost, indicates potential market harm when the main objective is market dominance rather than monopoly creation, provided price still covers production costs; the Areeda-Turner Test, which compares the average variable costs with the price of a product or service and concludes that prices below average variable costs are anticompetitive, as they do not cover fixed costs and are financially unsustainable; Average Total Cost Test, which calculates the average total costs incurred by a firm and is commonly combined with the average variable cost approach to assess per unit production costs; the Average

²⁷ WE McIlroy and BE Maki, “Preferred Placement of the Feet during Quiet Stance: Development of a Standardized Foot Placement for Balance Testing,” *Clinical Biomechanics* 12, no. 1 (1997): 66–70, [https://doi.org/10.1016/S0268-0033\(96\)00040-X](https://doi.org/10.1016/S0268-0033(96)00040-X).

²⁸ Xun Xu, “How Do Consumers in the Sharing Economy Value Sharing? Evidence from Online Reviews,” *Decision Support Systems* 128, (2020): 113–162, <https://doi.org/10.1016/j.dss.2019.113162>.

Avoidable Cost Test, a modification of the Areeda-Turner Test that excludes sunk costs and only considers avoidable costs within time frame when the firm is incurring losses; and the Recoupment Test, which evaluates whether loss-making practices are employed to deter competitors and eliminate competitors from the relevant market.²⁹

In summary, the regulation of predatory pricing exhibits similarities, including the utilization of tests during evidentiary hearings and the integration of economic principles in law enforcement. However, distinctions exist in the regulatory approaches, which can be outlined as follows:

Table 1. Similarities and differences as well as the application of loss selling arrangements in Indonesia and the United States.

No	Similarities/ Differences	Indonesia	United States of America
1	The law governing Sales and Losses	– Article 20 of Law Number 5 of 1999	– Section 2 of the Sherman Act – Section 2(a) of the Clayton Antitrust Act
2.	Supervisory Institution	– Business Competition Supervisory Commission (KPPU) as stipulated in Article 30 paragraph (1) of Law Number 5 of 1999.	– The FTC (Federal Trade Commission) is regulated under the Federal Trade Commission Act – Department of Justice (DOJ)
3.	Procedures for Submitting Reports/Complaints	– The report is addressed directly to the Chairman of KPPU with the subject of the Report or Complaint by including the identity of the reporter and the reported party (name, address, and telephone number), Chronological Explanation of Events, Alleged Articles violated, Supporting Documents, and the identity of witnesses.	– Send a report to the antitrust division via email/official telephone stating: the name of the reported party, the alleged violation and the article of alleged violation, details of the act of violation, the products/services affected by the reported violation, the role of the reporter in the case and a list of victims of the violation.
4.	Considerations in Proving Sales and Losses	– First, consider market characteristics, such as the concentration of sellers and the conditions for entry into the market, as indicated by the existence of market power. – Second, ensure that the price level imposed is unreasonable by evaluating the comparison between the price set by the predatory business and the cost of production.	– First, the plaintiff must show that the defendant set the price below the cost price. – Second, the plaintiff must establish the likelihood of damages: “a reasonable prospect” or “dangerous probability” that the defendant will “reimburse its investment at a price below cost.”
5.	Obligation to Report	– Based on the Implementation Guidelines of Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition issued by KPPU: “Any person or party who feels aggrieved and knows that there has been or should be suspected of having been selling at a loss or setting a very low	– There is no public reporting requirement, but agencies in the United States are required by 41 U.S.C.3707 and 10 U.S.C.2305(b)(9) to report to the Attorney General any offer or proposal evidencing a violation of the antitrust laws.

(Continued)

²⁹ Herbert Hovenkamp, “The Areeda–Turner Test for Exclusionary Pricing: A Critical Journal,” *Review of Industrial Organization* 46 (2015): 209–28, <https://doi.org/https://doi.org/10.1007/s11151-015-9456-1>.

Table 1. Continued.

No	Similarities/ Differences	Indonesia	United States of America
		price, can report in writing to KPPU with clear information about the violation, by including the identity of the reporter to the address below. Any identity of the reporter who feels aggrieved and knows that there has been or should be suspected of having been a sale at a loss or setting a very low price will be kept confidential by KPPU.”	
	Application of Sanctions	<ul style="list-style-type: none"> – With the enactment of PP 44/2021 (post Job Creation Law), the provisions of administrative sanctions that can be imposed refer to Article 118 of Law No. 6/2023 on Job Creation Law jo. Article 12 (1) of PP 44/2021. – The enactment of GR 44/2021 also annuls Article 48 and Article 49 of Law 5/1999 because KPPU does not have the authority to impose criminal sanctions (principal and additional). 	<ul style="list-style-type: none"> – Section 2 of the Sherman’s Act: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both such penalties, in the discretion of the court.” – The Clayton Act has no criminal penalties, but it is possible to award “punitive damages” of up to 3 times the plaintiff’s damages. – The Clayton Act has no criminal penalties, but it is possible to award “punitive damages” capped at 3 times the loss suffered by the plaintiff.”
7.	Remedies for the reported party	– After the hearing, if the reported party does not accept the KPPU decision, the reported party can file an objection through the Commercial Court.	After the trial, a “jury” decision will be issued, if the reported party does not accept the jury’s decision, then the reported party can request a court decision from the Supreme Court.

Source: processed from Law Number 5 Year 1999, KPPU Official Website <kppu.go.id>, Sherman Act, Clayton Act, and FTC Official Website <www.ftc.gov> .

3. Application of violation of prohibition of predatory pricing practices in KPPU Decision No. 03/KPPU-L/2020 and Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.

3.1. The decision of Number 03/KPPU-L/2020

KPPU received a report on the alleged violation of Article 20 of Law No. 5 Year 1999 related to efforts to sell at a loss and/or set excessively low prices in the sale of cement in the South Kalimantan region, conducted by PT Conch South Kalimantan Cement as the

Reported Party.³⁰ This case originated from a public report and raised allegations of a violation of Article 20 of Law No. 5/1999. The Investigator Team deemed the case appropriate to enter the Preliminary Examination stage through Commission Determination Number 16/KPPU/Pen/VI/2020 concerning the Preliminary Examination of Case Number 3/KPPU-L/2020. Based on the data collected, the Commission issued a Commission Panel through Commission Decision Number 32/KPPU/Kep.3/VI/2020 concerning the Assignment of Commission Members as Commission Panel for the Preliminary Examination of Case Number 3/KPPU-L/2020.

The Alleged Violation Report used as the basis by the Investigator included, among others, the following: a. The Respondent entered the market in 2014 with a market share of 2% to conduct market testing and began effective production and sales activities in 2015.³¹ In that year, the Reported Market Share increased to 44%, attributed to large-volume sales at very low prices. By the third quarter of 2019, this share had further increased to 46%. In 2014, the Reported Party entered the cement market in South Kalimantan with a small volume of cement products traded, accounting for approximately 2% of total cement sales in the region, as stated in Decision No.03/KPPU-L/2020, 2021.

Based on PT Conch South Kalimantan Cement's 2015 financial statements, the company incurred losses as a result of these actions. Additionally, the discovery of very low prices serves as evidence that the average selling price of PT Conch South Kalimantan Cement was lower than that of its competitors for Portland Composite Cement (PCC) cement in the South Kalimantan region. From 2015 to 2019, the reported price of PT Conch South Kalimantan Cement for 40 kg PCC cement was lower than that of PT Semen Gresik (Persero), Tbk, with price differences ranging from Rp10,000.00 to Rp14,000.00. For 50 kg PCC cement during the same period, the price differences ranged from Rp19,000.00 to Rp23,000.00. Furthermore, compared to another competitor, PT Indocement Tunggal Prakarsa, Tbk, the price for 40 kg PCC cement from 2015 to 2017 differed by Rp3,000.00 to Rp6,000.00.

The average selling price of PT Conch South Kalimantan Cement was higher than that of PT Indocement Tunggal Prakarsa Tbk in 2018 and 2019, with a price difference ranging from Rp.400.00 to Rp 1,600.00. For PCC type cement in 50 kg packages from 2015 to 2019, the price difference ranges from Rp 5,000.00 to Rp 16,000.00. The case highlights a significant price disparity between the competing business actors and the reported PT Conch South Kalimantan Cement, as noted in Decision No.03/KPPU-L/2020, 2021.

The Complainant's entry into the South Kalimantan cement market significantly altered the market structure and caused a decline in the market share of several competitors. PT Indocement's share decreased from 36.25% in 2014 to 19.99% in 2019; PT Solusi Bangun Indonesia fell from 9.38% to 0.06% and ceased operations in 2020; PT Semen Gresik declined from 27.52% to 15.99%; PT Semen Tonasa dropped from 22.43% to 17.40%; PT Semen Bosowa Maros decreased from 4.42% to 0.28% and exited the market in 2019; PT Cemindo Gemilang operated only in 2015 with a 0.66% share; PT Jui Shin Indonesia operated from 2015 to 2017; and PT Semen Jawa was active during 2016–2017, as documented in Decision No. 03/kppu-l/2020. 03/KPPU-L/2020.

The panel of judges concluded that PT Conch Kalimantan Selatan violated Article 20 of Law No. 5/1999. The approach adopted by the panel was the rule of reason, incorporating

³⁰ Fitri Novia Heriani, "Berita Terbukti Monopoli Perusahaan Semen Ini Didenda KPPU Rp22 Miliar," *Hukumonline*, July 3, 2021, <https://www.hukumonline.com/berita/a/terbukti-monopoli--perusahaan-semen-ini-didenda-kppu-rp22-miliar-lt60054c1973109/>. Accessed on April, 12 2023.

³¹ Hartini Diah Setiowati, "Analisis Rule Of Reason Dalam Jual Rugi Dan/Atau Menetapkan Harga Yang Sangat Rendah Pada Perkara Kppu Nomor 3/Kppu-L/2020 Dalam Mencapai Kepastian Hukum" (Fakultas Syariah dan Hukum Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2021), <https://repository.uinjkt.ac.id/dspace/handle/123456789/62447>.

the Bright Line Evidence Theory and Hard-Line Evidence Theory. According to the Bright Line Evidence Theory,³² a business actor is deemed to have engaged in monopolistic practices and/or unfair business competition when sufficient evidence demonstrates the absence of competition in the relevant market.³³ In contrast, the Hard-Line Evidence Theory holds that monopolistic practices and/or unfair business competition are established through proof obtained *visa* economic analysis.³⁴

The process of selling at a loss was substantiated by evidence showing that the average selling price for PCC cement sales in the South Kalimantan region was lower than the cost of goods sold. The KPPU's decision in Case No. 03/KPPU-L/2020, announced on January 15, 2021, focused on alleged attempts by PT Conch South Kalimantan Cement to sell at a loss and/or set excessively low prices. The decision highlighted that the company operated in the red zone in 2015 and consistently maintained very low prices from 2015 to 2019.

The Commission Panel also found that PT Conch South Kalimantan Cement is owned and controlled by Anhui Conch Cement Company Limited, the principal parent of a multinational company with strong financial capabilities and a substantial global influence in the cement industry. Supported by this backing, PT Conch South Kalimantan Cement had the financial capacity and strategic ability to implement comprehensive business strategies, including pricing practices that placed its products below market standards and/or the prices of competitors.

3.2. *The decision of Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*

Cigarettes manufacturing in the United States has, in recent years, been dominated by six companies: Philip Morris, Inc., R.J. Reynolds Tobacco Corporation, Brown & Williamson, Lorillard, Inc., American Tobacco Company, and the Brooke Group (Liggett). In 1980—commonly known as Liggett—pioneered the economy market segment by introducing a line of generic cigarettes priced approximately 30% lower than branded products. As a highly concentrated industry, cigarette manufacturing is controlled by a small number of firms, including the two principal parties in this case. Liggett accused Brown & Williamson Tobacco Corp of engaging in predatory pricing practices. Brown & Williamson Tobacco Corp was allegedly successful in driving smaller competitors out of the market.³⁵

By 1984, generic cigarettes had captured 4% of total market sales, at the expense of branded cigarettes. The issues arose when Brown & Williamson entered the economy segment of the cigarette market and sold generic cigarettes at a price lower than Liggett's net price. In the same year, Brown & Williamson introduced its own brand of “black and white” cigarettes, undercutting Liggett's prices and becoming Liggett's sole competitor in the “black and white” cigarette market.³⁶ This posed a significant problem, as both companies' targeted price-sensitive consumers. In response to declining sales, Liggett lowered its prices, triggering a price war between Liggett and Brown & Williamson.

In the summer of 1986, a pattern of biannual prices increases for both generic and branded cigarettes was established. The dollar amounts of these increases were identical

³² Koki Arai, *Law and Economics in Japanese Competition Policy* (Springer, 2019), 66.

³³ Jorge Marcos Ramos, *Firm Dominance in EU Competition Law: The Competitive Process and the Origins of Market Power* (Kluwer Law International BV, 2020), 73.

³⁴ Graeme B Dinwoodie and Mark D Janis, *Trademarks and Unfair Competition: Law and Policy* (Aspen Publishing, 2018), 21.

³⁵ Catur Septiana Rakhmawati, “Implementasi Peraturan Menteri BUMN Nomor PER-15/MBU/2012 Tentang Pedoman Umum Pengadaan Barang Dan Jasa BUMN Dalam Perspektif Hukum Persaingan Usaha,” 2016, <https://dspace.uui.ac.id/handle/123456789/32832>.

³⁶ Merlin Stone et al., “The Evolution of Business Models of Information and Communication Technology Suppliers,” *The Bottom Line* 34, no. 1 (February 18, 2021): 1–19, <https://doi.org/10.1108/BL-08-2020-0051>.

across both categories, resulting in a narrowing of the price gap from 38% in 1984 to 27% in 1989. Liggett subsequently alleged that Brown & Williamson sold its generic products at artificially low prices, constituting “predatory pricing”. Liggett filed a lawsuit, alleging, among other claims, that Brown & Williamson’s volume-based profits for wholesalers amounted to price discrimination with a reasonable likelihood of injuring competition in violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.³⁷ Liggett argued that the undercutting of selling prices was central to a predatory pricing scheme in which Brown & Williamson set prices below cost to compel Liggett to raise the selling price of its generic cigarettes, thereby restraining the economic growth of the segment and maintaining Brown & Williamson’s supra-competitive advantage in the branded cigarette market.

The trial began in the fall of 1989. By that time, all six cigarette companies had entered the economy segment. The economy segment was the fastest growing segment of the cigarette market, increasing from approximately 4% of the market in 1984 to 15% by the start of the trial. Liggett’s total sales volume had increased significantly.³⁸ However, prices for all cigarettes, including generic cigarettes, had increased and the popularity of “black and white” cigarettes had declined in market share as consumers shifted back to branded cigarettes. Liggett presented compelling and nearly indisputable evidence on a crucial point: that the price at which B&W sold its cigarettes remained below its average variable cost for a sustained period, specifically, at least eight to ten months. Liggett’s trial expert illustrated that the wholesale net price per carton of black and white cigarettes was 30% below the average variable cost, amounting to more than \$14 million over eighteen months.

After an extensive trial spanning approximately 1150 days, incorporating nearly 3,000 exhibits, and numerous witnesses, the trial jury delivered a verdict favoring Liggett’s petition. Using a special verdict form, the jury concluded that Brown & Williamson had participated in price discrimination with a reasonable likelihood of harming competition in the overall domestic cigarette market. As a result, the jury granted Liggett \$49.6 million in compensatory damages, a figure subsequently tripled to \$148.8 million by the District Court. Unlike in Indonesia, where a verdict becomes final before the filing of another legal appeal, the American legal system distinguishes between two types of verdicts in jury cases: jury verdicts and legal verdicts (courts). In response to the jury’s decision, Brown & Williamson rejected it and subsequently requested a court ruling. The District Court, considering three grounds, ruled in favor of Brown & Williamson, and granted judgment as a matter of law. This grounds included: lack of evidence of injury to competition, lack of evidence of Liggett’s antitrust injury, and absence of a causal connection between the discriminatory rebates and Liggett’s alleged injury.³⁹

For the first time, the Court’s opinion in Brooke Group established two important requirements that a plaintiff must satisfy in a “predatory pricing” claim. First, the plaintiff must demonstrate that the defendant set prices below cost, with courts requiring a “precise” measure of cost. Second, the plaintiff must establish the likelihood of damages—either “a reasonable prospect” or “dangerous probability” that the defendant will “reimburse its investment at a price below cost.” The plaintiff can establish damages by demonstrating either the ex-ante possibility of obtaining damages or the actual realization of damages.

³⁷ Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* (Harvard Business School, 2019). p. 33.

³⁸ James A Henderson Jr, Aaron D Twerski, and Douglas A Kysar, *Products Liability: Problems and Process* (Aspen Publishing, 2020). p. 9.

³⁹ Michael E Solimine and James L Walker, “The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954–1976,” *Case W. Res. L. Rev.* 72 (2021): 909, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/cwrlrv72&div=48&id=&page=>.

Irrespective of the evidence presented in court, the Supreme Court ruled that the predatory pricing conducted by Brown & Williamson Tobacco Corp did not contravene the provisions of business competition law. In its deliberation, the court determined that consumers were not adversely affected by the defendant's predatory pricing. This assessment considered both the predation period—characterized by low prices and was perceived as beneficial for consumers due to significantly reduced prices—and the post-predation period, which was also deemed non-detrimental to consumers. The judge characterized Brown & Williamson Tobacco Corp actions as a legitimate business strategy, and the elimination of competitors from the market was viewed as a natural outcome of business competition.

Business competition cases are a type of legal case that is challenging to handle. Economic analysis is needed in the evidentiary process of such cases. A clear distinction of competition law from other legal fields is its integration of law and economics. By combining the two fields, competition law aligns to the economic field, aiming not only to create public order but also to promote economic efficiency by maintaining conducive business competition.⁴⁰

Cooter and Ulen state that “the interaction between jurists and economists has led to a wide range of competition law and other types of economic policy. Furthermore, economic analysis of law is an interdisciplinary subject of interest not only to legal scholars but also to economists and public policy scholars. Therefore, in trials to try loss-making practices, both Indonesia and the United States generally engage economic experts to help analyze the case. Several tests may be employed, including the Price-Cost Test, Areeda-Turner Test, Average Total Cost Test (ATC Test), Average Avoidable Cost Test (AAC Test), and Recoupment Test. The similarity in evidentiary methods is that the Commission Panel, in determining that PT Conch legally and convincingly engaged in predatory pricing, applied a Rule of Reason approach—conducting a comprehensive investigation to assess whether the conduct resulted in monopolistic practices and/or unfair competition that hampers competition. Both cases use the “Recoupment Test” to analyze whether a violation of the article on selling at a loss has occurred. In the case a quo, the Commission Panel applied an evidentiary theory to evaluate the loss-selling practice conducted by PT Conch, namely:

- a. Bright Line Evidence Theory: This theory explains that the actions of economic actors that can be declared to result in monopolistic practices and/or unfair business competition can be shown to no longer be competitive or cause competition in the relevant market to become unfair.
- b. Hard-Line Evidence Theory: This theory explains that the behaviour of business actors that may lead to monopolistic practices and/or unfair competition can be shown through economic analysis.

It can be observed that there are 2 (two) variables used in conducting an economic analysis of the practice of selling losses carried out by PT Conch, including:

- a. Market Share: This variable assesses whether PT Conch, through the predatory pricing practice, experiences a gain in market share.
- b. Market Concentration: This variable examines whether the predatory pricing practice results in PT Conch obtaining an increased market share, leading to the elimination of competing business actors and a rise in market concentration.

⁴⁰ Siti Fazilah Abdul Shukor et al., *Regulating Fair Competition Toward Sustainable Development Goals* (IGI Global, 2023). 285.

The Commission Panel has substantiated that, due to the predatory pricing strategy employed by PT Conch, the average selling price of PT Conch was below the cost of goods sold, causing a loss of Rp 67,630,000,000.00 in 2015. This aggressive pricing approach led to a substantial increase in PT Conch's market share and even resulted in the elimination of five competing business actors from the relevant market in the South Kalimantan region. Similarly, the verdict in the case of *Brooke Group Ltd. v Brown Williamson Tobacco Corp.* involved the application of article 2 of the Sherman Act and section 2(a) of the Clayton Act as amended by the Robinson-Patman Act—both of which employ a Rule of Reason approach.

- a. The evidence scrutinized by the judges includes evaluating whether the respondent's production costs exceeded some measure of costs, typically average market costs.
- b. The determination hinges on whether there was a "dangerous probability" that the respondent could recoup its investment through prices set above cost in the post-predation period.

These criteria serve as the foundation for establishing whether predatory pricing has occurred. In the United States, courts must initially evaluate whether the business actor's economic activity may produce both procompetitive and anti-competitive effects, considering its impact on commercial competitors and consumer welfare. The difference lies in the fact that, although the same approach is used, the outcome of the two trials is different. This is because in the case of *Brooke Group Ltd. v Brown Williamson Tobacco Corp.*, the Court explicitly downplayed the significance of below-cost pricing by stating that it "encourages some inefficient substitution of products sold at prices lower than their cost". Second, the Court justified the addition of the substitution requirement on the basis that Congress enacted antitrust law for the "protection of competition, not competitors". This differs from the KPPU decision, which acknowledges that predatory pricing directly leads to unfair competition by distorting the average market price. Thus, in KPPU-P Decision No. 03/KPPU-L/2020, the Panel more conclusively demonstrated that predatory pricing is not a typical practice in fair business competition.

Regarding sanctions, both Indonesia and the United States impose threats of civil and criminal sanctions. In Indonesia, compensation penalties have a minimum and maximum limit. Article 47 of Law No. 5 Year 1999 stipulates administrative sanctions in the form of: orders to cease activities causing monopolistic practices and/or unfair business competition and/or public harm, compensation payments, and/or fines ranging from Rp 1,000,000,000.00 (one billion rupiah) to Rp 25,000,000,000.00 (twenty-five billion rupiah). In contrast, the Sherman Act prescribes fines not exceeding \$100,000,000 (one hundred million dollars) for corporations, and up to \$1,000,000 (one million dollars) for individuals.

In the United States, civil (administrative) and criminal fines are combined under a single article. The provision includes fines of up to \$100 million for corporations or \$1 million for individuals. This provision is absolute for cases of predatory pricing. The Clayton Act, meanwhile, only addresses compensation based on the plaintiff's claim. In contrast, Indonesia distinguishes between administrative penalties and criminal offense of selling at a loss, fines range from Rp 5,000,000,000.00 to Rp 25,000,000,000.00, or imprisonment in place of a fine for a maximum of 5 months as a substitute for unpaid fines. In the United States, the Sherman Act only allows for the imposition of fines and imprisonment simultaneously. However, it does not include additional criminal penalties such as the revocation of business licenses or prohibition against business actors—measures found in Indonesia under Law No. 5/1999 in Indonesia, which include banning violators from serving as directors or commissioners for a period of 2 (two) to 5 (five) years, or terminating specific activities that cause harm to other parties.

In Decision No. 03/KPPU-L/2020, the Panel imposed a fine of Rp 22,352,000,000.00 on PT Conch, to be deposited into the State Treasury as revenue from fines for violations in the field of business competition under the KPPU work unit, as stipulated by Article 20 of Law No. 5/1999. The legal basis for this penalty is outlined in Article 47 of the same law. However, the decision lacks transparency regarding the methodology used to determine the fine amount. In fact, according to PT Conch's audited financial statements, the company reported profits during the period it engaged in loss-selling practices—Rp388,243,000,000.00 in 2016 and Rp199,490,585,000.00 in 2019. If the total profit obtained by PT Conch in these 2 (two) years amounted to IDR 587,733,585,000.00, it raises concerns about the proportionality of the imposed fine, as it seems disconnected from the actual losses suffered by eliminated competitors or the findings established during the trial.

In the case of *Brooke Group Ltd. v Brown & Williamson Tobacco Corp.*, the jury initially awarded Liggett damages of \$49.6 million, which the district court later tripled to \$148.8 million. The calculation of punitive damages was based on Liggett's actual losses and the plaintiff's claims, aligning with the sanction regime outlined in the Clayton Act. This approach emphasizes punitive damages at the plaintiff's request, providing a clear basis for determining the award.

4. Conclusion

Both Indonesia and the United States regulate predatory pricing practices through legislation. In Indonesia, this practice is governed by Law No. 5 Year 1999, specifically Article 20, which explicitly prohibits selling at a loss. This provision is strengthened by implementing regulations such as those issued by the Business Competition Supervisory Commission (KPPU), which serves as an operational guideline. Meanwhile, in the United States, predatory pricing is regulated under Section 2 of the Sherman Act and Section 2(a) of the Clayton Antitrust Act, which adopt a broader approach through the common law system. The main difference lies in the level of specification: Indonesia explicitly prohibits "selling at a loss," whereas competition law in the United States relies on judicial interpretation and precedent to determine whether an act constitutes predatory pricing. Both jurisdictions apply the rule of reason approach, as demonstrated in KPPU Decision No. 03/KPPU-L/2020 in Indonesia and the *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* case in the United States, which emphasized the importance of proportionality and contextual analysis in assessing the legality of pricing strategies. However, Indonesia continues to face challenges in applying this approach, mainly due to limited jurisprudential guidance and the insufficient integration of economic analysis in competition law enforcement. Therefore, as a strengthening measure, Indonesia should develop more structured economic standards and testing tools—such as the Areeda-Turner Test or the Recoupment Test applied in the United States—to provide legal certainty, improve the quality of KPPU's analysis, and ensure that anti-competitive pricing practices are effectively and consistently addressed.

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RESEARCH ARTICLE

Antitrust in Practice: Case-Based Comparative Analysis of Predatory Pricing Enforcement in Indonesia and the United States

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ABSTRACT

Business entities employ predatory pricing as a strategy primarily aimed at eliminating competitors. The regulation and detection of predatory pricing are complex processes, and each country adopts distinct mechanisms to address the issue. The scientific contribution of this study lies in its comparative analysis of two different legal systems—Indonesia's civil law and the United States' common law—in addressing predatory pricing practices under competition law. It examines how differing legal frameworks influence the methods of proof, the application of the rule of reason principle, and the pattern of sanctions imposed on business actors. In addition, this study adopts an interdisciplinary approach that integrates law and economics by elaborating on the application of the rule of reason principle through market-based economic analysis. This includes the use of the recoupment test, the price-cost test, and assessments of market share and market concentration calculations to evaluate the anti-competitive effects of low-price strategies. The primary contribution of this study lies in the integration of normative legal analysis with the examination of two concrete cases: KPPU Decision No. 03/KPPU-L/2020 (PT Conch South Kalimantan Cement) in Indonesia and Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. in the United States. In the United States, this case illustrates that although both countries apply the rule of reason approach, their legal outcomes may differ due to variations in evidentiary systems, the structure of supervisory institutions, and the emphasis placed on economic considerations within the legal process.

Keywords: Alleged practices, Competition, Predatory pricing

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1. Introduction

The risk of exploitation by dominant business entities becomes more pronounced in situations of uneven economic concentration. To prevent such outcomes, the presence of a supervisory authority is crucial in promoting dynamic and competitive market conditions that support sustainable economic development. This authority is also responsible for formulating policies that foster fair business competition, ultimately aiming to achieve an efficient market structure. The legal foundation for ensuring these aspects is established in Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition (hereinafter referred to as Law 5/1999).

Customer satisfaction, a critical component of business success, requires attention to several key factors, including market growth, technological advancements, price stability, and revenue allocation aligned with market performance and marginal productivity.¹ The objectives of Law No. 5 of 1999 are closely tied to the prohibition of monopolistic practices and unfair competition in the business sector. This legislation plays a pivotal role in regulating conduct that may give rise to unfair or unlawful competition, thereby upholding the principles of equity and integrity in the economic system.²

Competition, as a fundamental aspect of economic dynamics, produces both positive and negative outcomes. Favorable outcomes signify a healthy market environment, whereas adverse outcomes indicate an unhealthy one. The provision of goods and services through predatory pricing constitutes a form of unfair competition.³ In executing predatory pricing, business actors strategically set prices below what is considered reasonable concerning their average variable costs. However, accurately determining average variable costs presents inherent challenges. Such pricing practices are generally viable only when the business actor holds a dominant market position. Such dominance allows business actors to endure short-term losses with the strategic aim of eliminating competitors and ultimately consolidating their market position.⁴ The prohibition of predatory pricing is not absolute; it requires evidence that the pricing conduct has the potential to result in unfair competition. Normative ambiguity arises from the lack of clear criteria for identifying predatory pricing practices that may lead to unfair business competition.

This involves assessing whether the conduct results in monopolistic characteristics or gives rise to unbalanced and unfair business practices. By emphasizing the actual effects of predatory pricing on competition, this approach enables a more nuanced, context-specific analysis and a fairer determination of its legality.⁵ The significance of antitrust laws becomes especially evident when countries seek to prevent economic activities marked by adverse market conditions and widespread fraudulent competition.⁶ Moreover, antitrust laws also play a crucial role in safeguarding individual freedom, a principle embedded within the broad scope of antitrust regulation in the United States.⁷ The history of monopoly regulation, both internationally and in Indonesia, underscores the global recognition of the need for antitrust measures. Although Indonesia codified its antitrust

¹ Andi Fahmi Lubis et al., "Hukum Persaingan Usaha: Buku Teks," 2017, 37.

² Frederic Janny, "Competition Law Enforcement and the COVID-19 Crisis: Business As (Un)Usual?," *SSRN Electronic Journal*, 2020, 317-329, <https://doi.org/10.2139/ssrn.3606214>.

³ Richard Adam, "Predatory Pricing for E-Commerce Businesses from a Business Competition Law Perspective," *Journal of Law and Sustainable Development* 11, no. 8, 2023, 1-22, <https://doi.org/10.55908/sdgs.v11i8.1438>.

⁴ Pim Jansen and Wouter Devroe, "Industrial Policy, Competition Policy and Strategic Autonomy," in *EU Industrial Policy in the Multipolar Economy* (Edward Elgar Publishing, 2022), 80-121, <https://doi.org/10.4327/9781800372634.00008>.

⁵ Susanti Adi Nugroho, *Hukum Persaingan Usaha Di Indonesia* (Prenada Media, 2014), 46.

⁶ Cristoforo Osti, "Antitrust: A Heimlich Manoeuvre," *European Competition Journal* 11, no. 1, 2015, 221-64, <https://doi.org/10.1080/17441056.2015.1033212>.

⁷ S H Rachmadi Usman, *Hukum Persaingan Usaha Di Indonesia* (Sinar Grafika, 2022), 17.

laws later than many other countries, awareness of their significance has grown, aligning the nation with global efforts to promote fair competition and economic justice.⁸

The United States, in particular, has a long-standing commitment to combating monopolistic practices and unfair competition through legislative measures. Even prior to the formal enactment of antitrust laws, U.S. courts applied common law principles to address monopolistic behavior. The United States has been a pioneer in this field, becoming the first country to enact a competition law in 1890. Consequently, it has played a central role in shaping modern antitrust practices and has served as a model for other nations in developing effective competition regulation⁹. Emphasizing the prevention of unfair pricing, monopolization, and other anti-competitive practices, both federal and state governments in the United States actively enforce antitrust laws. These laws, aimed at promoting fair competition and preventing the concentration of economic power, form a dynamic and evolving legal framework. Key federal statutes governing antitrust matters in the United States include the Sherman Act, the Clayton Act (as amended by the Robinson-Patman Act), and the Federal Trade Commission Act. Together, these laws establish a comprehensive legal framework to promote competition, prevent anti-competitive behavior, and address monopolistic and unfair trade practices. The Robinson-Patman Act plays a pivotal role in addressing discriminatory practices in commercial activities.

As an amendment to the Clayton Act, the Robinson-Patman Act prohibits not only price discrimination but also other forms of discriminatory practices, including unequal advertising discounts and improper payments to intermediaries. The Sherman Antitrust Act, formally titled "An Act to protect trade and commerce against unlawful restraints and monopolies," was enacted on July 2, 1890, and further reinforced by the Federal Trade Commission Act of 1914.¹⁰ The Sherman Antitrust Act, enacted on July 2, 1890, aims to protect trade and commerce from unlawful monopolistic restraints. Unfair competition compels businesses entities or individuals to engage in illicit practices, which may result in legal consequences and various forms of sanctions. For example, a commercial entity found guilty of entering into an unlawful contract or engaging in a conspiracy may be fined up to \$10,000,000. Likewise, an individual involved in such activities may face a fine of up to \$350,000 and/or a prison sentence of up to three years.

The severity of these penalties highlights the significant impact such violations can have on a company's internal operations and its position within the competitive landscape. According to Ernest Gellhorn and William Kovacic, the purpose of U.S. antitrust law is "to control the exercise of profit-motivated economic power by preventing monopolies, punishing cartels, and otherwise protecting competition."¹¹ Antitrust laws are fundamentally intended to prevent businesses from acquiring and abusing market power, thereby limiting their ability to compel consumers to pay inflated prices for goods and services.^{12,13}

Hence, it is evident that any entity engaging in monopolistic practices, attempting to do so, or conspiring with others for such purposes is guilty of a felony. The prescribed penalties include fines of up to \$10,000,000 for corporations and \$350,000 for individuals, as well

⁸ Dina I. Waked, "Antitrust as Public Interest Law: Redistribution, Equity, and Social Justice," *The Antitrust Bulletin* 65, no. 1, 202, 447-101, <https://doi.org/10.1177/0003603X19898624>.

⁹ Brett Christophers, *The Great Leveler: Capitalism and Competition in the Court of Law* (Harvard University Press, 2016), 310. Gregory J. Werden, "Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act: What Is the Intelligible Principle?," *SSRN Electronic Journal*, 2023, 1-47, <https://doi.org/10.2139/ssrn.4448795>.

¹¹ Alizedney M. Ditucalan, "The Philippine Competition Law Dilemma: US-EU Fusion to Tension?," in *Research Handbook on Asian Competition Law* (Edward Elgar Publishing, 2020), 121-122, <https://doi.org/10.4337/9781785361838.00027>.

¹² Crispin Niebel, "The Impact of the General Data Protection Regulation on Innovation and the Global Political Economy," *Computer Law & Security Review* 40, 2021, 105523, <https://doi.org/10.1016/j.clsr.2020.105523>.

¹³ Seokbeom Kwon and Alan C. Marco, "Can Antitrust Law Enforcement Spur Innovation? Antitrust Regulation of Patent Consolidation and Its Impact on Follow-on Innovations," *Research Policy* 50, no. 9, 2021, 104295, <https://doi.org/10.1016/j.respol.2021.104295>.

as imprisonment for up to three years. These sanctions are stipulated under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.¹⁴ This section clearly delineates the legal consequences for individuals or entities that violate fair competition standards.¹⁵

The background section highlights the key issues that motivate this research,¹² namely: (1) the similarities and differences in the regulation of predatory pricing and the role of competition authorities in Indonesia and the United States; and (2) the application of predatory pricing prohibitions in the KPPU-RI Decision No. 03/KPPU-L/2020⁴ and the case of “Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.”

2. Predatory pricing under competition Law in Indonesia and the United States

2.1. Predatory pricing under Law No. 5/1999

Pursuant to Article 20 of Law No. 5/1999, the sale of goods or services at a loss is expressly prohibited. The provision deems it unlawful for business entities to offer goods and/or services at a loss or at unreasonably low prices with the intent to eliminate or undermine competitors in the relevant market. Such practices may constitute monopolistic behavior or unfair business competition. The essence of this legal provision lies in the prohibition of selling goods and/or services at a loss with the intent to eliminate competitors, as such actions may distort market prices. The practice of loss selling, as regulated by the law, is characterized by a deliberate attempt to manipulate pricing dynamics within the market.

Perpetrators engaging in loss selling seek to establish market dominance, with the ultimate goal of securing substantial profits.¹⁶ Article 20 of Law No. 5/1999, which governs market trading practices by business actors, enumerates and prohibits such activities based on the following elements: business actors, supply, goods, services, setting of excessively low prices, elimination or destruction, and competitors.

Article 17 of Law No. 5 of 1999 prohibits business actors from controlling production and/or services in a manner that results in monopolistic practices or unfair competition. Such practices are deemed to occur when the goods and/or services have no substitutes, preventing other business actors from competing in the market, or when a single business actor or group controls more than 50% of the market share for specific goods or services.

2.2. Sale and forfeiture regulations in the United States

In addressing predatory pricing, the United States has established the WTO as a regulatory body. Additionally, U.S. possesses a long-standing legal framework to govern predatory pricing, notably Section 2 of the Sherman Act, which has been in effect for over a century. If a business entity violates these provisions, it may be fined up to USD 1 million, while individuals may face fines up to USD 100,000. Additionally, companies found in breach of the Sherman Act may be subject to imprisonment for up to three years.¹⁷ Entities possessing monopoly power may violate Section 2 of the Sherman Act by

¹⁴ Michael Flynn, Kirk Buffington, and Richard Pennington, *Legal Aspects of Public Procurement* (Routledge, 2020), 39.

¹⁵ Eric A Posner, *How Antitrust Failed Workers* (Oxford University Press, 2021), 21.

¹⁶ Rezmia Febrina, “Dampak Kegiatan Jual Rugi (Predatory Pricing) Yang Dilakukan Pelaku Usaha Dalam Perspektif Persaingan Usaha,” *Journal of Selat* 4, no. 2, 2017, 5, <https://doi.org/https://ojs.umrah.ac.id/index.php/selat/article/view/194/203>.

¹⁷ Francesco Giunelli and Michal Onderco, “States, Firms, and Security: How Private Actors Implement Sanctions, Lessons Learned from the Netherlands,” *European Journal of International Security* 6, no. 2 (2021): 190–209, <https://doi.org/10.1017/eis.2020.21>.

engaging in predatory pricing. Predatory pricing constitutes an anti-competitive practice prohibited under Section 2 of the Sherman Act,¹⁸ which forbids monopolization or attempts to monopolize. To establish a violation for attempted monopolization under Section 2, two elements must be demonstrated: first, that the company has a genuine opportunity to monopolize the market, and second, that it abuses this market power through prohibited conduct such as predatory pricing.

Enacted in 1914, the Clayton Antitrust Act sought to clarify ambiguities present in the Sherman Act. Uniquely, the Clayton Act explicitly addresses predatory pricing as a distinct concern. In evaluating the legality of predatory pricing, the U.S. Congress drew parallels to practices by large multinational corporations that employ predatory pricing in isolated markets to financially weaken competitors and establish monopoly power. By the 1930s, the focus shifted toward protectionism, leading to amendments of the Clayton Act that resulted in the Robinson-Patman Act. This amended legislation specifically prohibits price discrimination that can affect competitive power and seeks to prevent monopolization, as well as to protect fair competition among businesses from harm or obstruction.¹⁹ It is noteworthy that the United States and the European Union adopt different approaches in their evaluation of predatory pricing practices.²⁰

In this scenario, significant chain stores posed a challenge for small, locally owned businesses. In response, the Robinson-Patman Act was introduced in 1936 to amend the provisions of the Clayton Act with the aim of “protecting” small stores from the impacts of predatory pricing employed by larger retailers. The amendment by the Robinson-Patman Act, Section 2a of the Clayton Act was modified to address this issue. Therefore, the Robinson-Patman Act serves to shield competitors from seller discrimination, a phenomenon known as primary-line injury. Additionally, the Act extends protection to customers, addressing what is termed secondary-line injury.²¹ To counter allegations of unlawful predatory pricing, the Robinson-Patman Act provides two affirmative defences. Firstly, in Section 2a, the defence of cost justification is outlined. If the seller can demonstrate that the price difference aligns with the variance in the cost of goods sold, it cannot be deemed predatory pricing. Secondly, Section 2b introduces a confluence of competition defences. If a lower price is offered to match (but not surpass) an equally low-price set by another competitor, then the resulting price difference is considered legitimate.

In the context of prohibiting monopolistic practices and unfair business competition, one of the prohibited activities is the supply of goods and/or services through predatory pricing. Predatory pricing primarily aims to eliminate existing competitors from the market and hinder potential competitors from entering the same market. This strategy involves temporarily reducing prices to levels unsustainable for competitors, thereby forcing them to exit the market. By successfully driving out competitors and impeding the entry of new players, the business engaging in predatory pricing can subsequently raise prices and maximize profits. Similarly, the regulation of predatory pricing in the United States aligns with the broader framework of American antitrust laws, which prohibit conduct and agreements restricting trade. The overarching goal of these antitrust laws is to safeguard competitive markets. A pivotal piece of legislation in this context is the Sherman Antitrust

¹⁸ John B. Kirkwood, “Predation and Discrimination,” in *Research Handbook on Abuse of Dominance and Monopolization* (Edward Elgar Publishing, 2023), 140–61, <https://doi.org/10.4337/9781839108723.00017>.

¹⁹ Herbert Hovenkamp, “The Text of the Antitrust Laws,” *SSRN Electronic Journal*, 2022, 13–80, <https://doi.org/10.2139/ssrn.4277914>.

²⁰ Andrew I. Gavil, “Private Enforcement under US Antitrust Law: Origins and Contemporary Context,” in *Research Handbook on Private Enforcement of Competition Law in the EU* (Edward Elgar Publishing, 2023), 52–80, <https://doi.org/10.4337/9781839100377.00009>.

²¹ Roger D. Blair and Christina DePasquale, “Antitrust’s Least Glorious Hour: The Robinson-Patman Act,” *The Journal of Law and Economics* 57, no. S3 (2014): S201–16, <https://doi.org/10.1086/675783>.

Act of 1890, extensively utilized during the administrations of Theodore Roosevelt and William Howard Taft.

The Sherman Antitrust Act prohibits any actions by private companies that hinder the regulatory functioning of the U.S. market system. It aims to foster a market system characterized by numerous rivals in each industry, thereby promoting robust competition. Contrary to the misconception that the Act is designed to protect competitors from a business' success or prevent businesses from gaining a legitimate advantage over consumers, its primary objective is to preserve a competitive market. In doing so, the Sherman Act aims to protect consumers from the adverse effects of predatory pricing practices that can distort the market and harm consumer welfare.

2.3. Legal approach to predatory pricing in Indonesia

In antitrust laws, certain clauses employ the term "prohibited," yet penalties are not uniformly imposed, and some illegal business practices are assessed under the rule of reason.²² This underscores the need for further research to determine whether specific behaviors by market participants may lead to monopolistic practices and/or unfair business competition within the relevant market. Without such investigation, even if traders in the relevant market grow in size and influence, the prohibitions outlined in antitrust laws may not be applicable.²³ The rule of reason approach reflects a nuanced evaluation that considers the overall impact on competition, emphasizing the importance of thorough analysis in determining legal implications for business conduct.²⁴ Increased concentration levels over time may indicate anti-competitive behavior.

The rule of reason approach involves an examination of the underlying causes of a business entity's conduct or behavior. Its application necessitates not only legal knowledge but also an understanding of economic principles.²⁵ This approach acknowledges that certain negative behaviors may have positive economic effects on competition. According to the philosophy of the rule of reason, a business or business actor engaging in activities that violate the law will have a negative impact. If this impact is substantial and includes elements that impede competition, legal action is warranted. However, the rule of reason approach has its drawbacks, one of the most significant being its reliance on judges and prosecutors possessing knowledge of economic theory and the ability to interpret complex economic data. This requirement can be challenging, as not all legal professionals possess the expertise to fully comprehend and utilize such intricate economic information in making well-informed decisions.²⁶

Competition authorities employ the rule of reason legal approach to evaluate the impact of a specific agreement or business action, determining whether it hinders or promotes competition. In the context of Law No. 5/1999, a clause that is open to varied interpretations stipulates that an act must be proven in its entirety, meeting the conditions outlined in the law, before it can be conclusively determined whether it constitutes an unfair trade competition practices. The Rule of Reason, which allows courts to assess competitive circumstances and decide whether trade barriers are reasonable, prohibits

²² Phillip E Areeda et al., *Antitrust Analysis: Problems, Text, and Cases* (Aspen Publishing, 2021). p. 76.

²³ Ariel Ezrachi, *Competition and Antitrust Law: A Very Short Introduction* (Oxford University Press, 2021). p. 59.

²⁴ Anna Maria Tri Anggraini et al., "ENSURING JUSTICE AND UTILITY: Addressing Alleged Monopolistic Practices in Ibu Kota Nusantara," *Jurisdictio: Jurnal Hukum Dan Syariah* 15, no. 2 (January 3, 2025): 274–308, <https://doi.org/10.18860/j.v15i2.28765>.

²⁵ Anggraini et al., "Ensuring Justice and Utility," 274–308.

²⁶ Anna Maria Tri Anggraini, Ahmad Sabirin, and Yoel Nixon A Rumahorbo, "The Form and Pattern of Business Actors Requirements in Exclusive Dealing: A Rule of Reason Approach," *Yustisia Jurnal Hukum* 12, no. 2 (2023): 107, <https://doi.org/10.20961/yustisia.v12i2.73316>.

certain actions, including predatory pricing. It is used to evaluate whether the challenge effects, interferes with, or inhibits the competitive process.

This method utilizes economic analysis to determine whether the conduct inhibits or promotes competition. The application of the rule of reason requires a measurement process that begins with defining the relevant market parameters. If the designated market is small and a company holds a larger market share in that market, it may be deemed dominant—particularly if the dominant position is abused. According to the Rule of Reason approach, even if a business actor's conduct satisfies all the elements of the relevant legal provisions, it is not necessarily considered unlawful if there are legitimate justifications. The Rule of Reason approach must consider several factors, including fairness, efficiency, and economic factors.

A business actor's justification for engaging in potentially anti-trade activities may be deemed reasonable or unreasonable based on several considerations, including: whether the activity shows indications of reduced production or increased prices of goods and/or services, warranting further examination; whether the activity is direct (considered unlawful) or merely ancillary (permissible); whether the business actor holds market power that can be abused; whether there are high market entry barriers—since even with market power, the absence of such barriers facilitates new entrants; whether the action creates substantial efficiency and improves the quality of products, services, or innovation—if not, the action is prohibited; whether the action is truly necessary to achieve efficiency and innovation—requiring proof that is the best available alternative; and the application of a balancing test to measure the benefits of the business actor's conduct against its negative impacts—if the benefits outweigh the losses, the action may be justified.²⁷

Economic analysis is a benefit of the rule of reason, as it helps maximize efficiency and ensures that business decisions impact the market. In other terms, these guidelines determine whether a particular activity is pro- or anti-competitive: “. . . *economic values, that is, with the maximization of consumer want satisfaction through the most efficient allocation and use of resources. . .*”²⁸ Conversely, engaging in potentially harmful activities remains unlawful. Despite the flexibility of the rule of reason approach, it has certain drawbacks. A major concern is that for judges and juries to apply it effectively, they must be familiar with economic theory and capable of navigating complex economic facts. Judges often have limited capacity and experience in handling intricate legal proceedings, which can hinder the consistent and accurate application of the rule of reason in complex cases.

2.4. Legal approach to predatory pricing in the United States

Some approaches used to assess pricing practices that harm competition include: the Price-Cost Test, which, although not definitively indicate that a business actor is selling goods below cost, indicates potential market harm when the main objective is market dominance rather than monopoly creation, provided price still covers production costs; the Areeda-Turner Test, which compares the average variable costs with the price of a product or service and concludes that prices below average variable costs are anticompetitive, as they do not cover fixed costs and are financially unsustainable; Average Total Cost Test, which calculates the average total costs incurred by a firm and is commonly combined with the average variable cost approach to assess per unit production costs; the Average

²⁷ WE McLroy and BE Maki, “Preferred Placement of the Feet during Quiet Stance: Development of a Standardized Foot Placement for Balance Testing,” *Clinical Biomechanics* 12, no. 1 (1997): 66–70, [https://doi.org/10.1016/S0268-0033\(96\)00040-X](https://doi.org/10.1016/S0268-0033(96)00040-X).

²⁸ Xun Xu, “How Do Consumers in the Sharing Economy Value Sharing? Evidence from Online Reviews,” *Decision Support Systems* 128, (2020): 113–162, <https://doi.org/10.1016/j.dss.2019.113162>.

Avoidable Cost Test, a modification of the Areeda-Turner Test that excludes sunk costs and only considers avoidable costs within time frame when the firm is incurring losses; and the Recoupment Test, which evaluates whether loss-making practices are employed to deter competitors and eliminate competitors from the relevant market.²⁹

In summary, the regulation of predatory pricing exhibits similarities, including the utilization of tests during evidentiary hearings and the integration of economic principles in law enforcement. However, distinctions exist in the regulatory approaches, which can be outlined as follows:

Table 1. Similarities and differences as well as the application of loss selling arrangements in Indonesia and the United States.

No	Similarities/ Differences	Indonesia	United States of America
1	The law governing Sales and Losses	- Article 20 of Law Number 5 of 1999	- Section 2 of the Sherman Act - Section 2(a) of the Clayton Antitrust Act
2.	Supervisory Institution	- Business Competition Supervisory Commission (KPPU) as stipulated in Article 30 paragraph (1) of Law Number 5 of 1999.	- The FTC (Federal Trade Commission) is regulated under the Federal Trade Commission Act - Department of Justice (DOJ)
3.	Procedures for Submitting Reports/Complaints	- The report is addressed directly to the Chairman of KPPU with the subject of the report or Complaint by including the identity of the reporter and the reported party (name, address, and telephone number), Chronological Explanation of Events, Alleged Articles violated, Supporting Documents, and the identity of witnesses.	- Send a report to the antitrust division via email/official telephone stating: the name of the reported party, the alleged violation and the article of alleged violation, details of the act of violation, the products/services affected by the reported violation, the role of the reporter in the case and a list of victims of the violation.
4.	Considerations in Proving Sales and Losses	- First, consider market characteristics, such as the concentration of sellers and the conditions for entry into the market, as indicated by the existence of market power. - Second, ensure that the price level imposed is unreasonable by evaluating the comparison between the price set by the predatory business and the cost of production.	- First, the plaintiff must show that the defendant set the price below the cost price. - Second, the plaintiff must establish the likelihood of damages: "a reasonable prospect" or "dangerous probability" that the defendant will "reimburse its investment at a price below cost."
5.	Obligation to Report	- Based on the Implementation Guidelines of Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition issued by KPPU: "Any person or party who feels aggrieved and knows that there has been or should be suspected of having been selling at a loss or setting a very low	- There is no public reporting requirement, but agencies in the United States are required by 41 U.S.C.3707 and 10 U.S.C.2305(b)(9) to report to the Attorney General any offer or proposal evidencing a violation of the antitrust laws.

(Continued)

²⁹ Herbert Hovenkamp, "The Areeda-Turner Test for Exclusionary Pricing: A Critical Journal," *Review of Industrial Organization* 46 (2015): 209-28, <https://doi.org/https://doi.org/10.1007/s11151-015-9456-1>.

Table 1. Continued.

No	Similarities/ Differences	Indonesia	United States of America
		price, can report in writing to KPPU with clear information about the violation, by including the identity of the reporter to the address below. Any identity of the reporter who feels aggrieved and knows that there has been or should be suspected of having been a sale at a loss or setting a very low price will be kept confidential by KPPU.”	
	Application of Sanctions	<ul style="list-style-type: none"> - With the enactment of PP 44/2021 (post Job Creation Law), the provisions of administrative sanctions that can be imposed refer to Article 118 of Law No. 6/2023 on Job Creation Law jo. Article 12 (1) of PP 44/2021. - The enactment of GR 44/2021 also annuls Article 48 and Article 49 of Law 5/1999 because KPPU does not have the authority to impose criminal sanctions (principal and additional). 	<p>43</p> <ul style="list-style-type: none"> - Section 2 of the Sherman's Act: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both such penalties, in the discretion of the court." - The Clayton Act has no criminal penalties, but it is possible to award "punitive damages" of up to 3 times the plaintiff's damages. - The Clayton Act has no criminal penalties, but it is possible to award "punitive damages" capped at 3 times the loss suffered by the plaintiff."
7.	Remedies for the reported party	- After the hearing, if the reported party does not accept the KPPU decision, the reported party can file an objection through the Commercial Court.	After the trial 27 "jury" decision will be issued, if the reported party does not accept the jury's decision, then the reported party can request a court decision from the Supreme Court.

Source: processed from Law Number 5 Year 1999, KPPU Official Website <kppu.go.id>, Sherman Act, Clayton Act, and FTC Official Website <www.ftc.gov> .

3. Application of violation of prohibition of predatory pricing practices in KPPU Decision No. 03/KPPU-L/2020 and Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.

3.1. The decision of Number 03/KPPU-L/2020

KPPU received 6 report on the alleged violation of Article 20 of Law No. 5 Year 1999 related to efforts to sell at a loss and/or set excessively low prices in the sale of cement in the South Kalimantan region, conducted by PT Conch South Kalimantan Cement as the

Reported Party.³⁰ This case originated from a public report and raised allegations of a violation of Article 20 of Law No. 5/1999. The Investigator Team deemed the case appropriate to enter the Preliminary Examination stage through Commission Determination Number 16/KPPU/Pen/VI/2020 concerning the Preliminary Examination of Case Number 3/KPPU-L/2020. Based on the data collected, the Commission issued a Commission Panel through Commission Decision Number 32/KPPU/Kep.3/VI/2020 concerning the Assignment of Commission Members as Commission Panel for the Preliminary Examination of Case Number 3/KPPU-L/2020.

The Alleged Violation Report used as the basis by the Investigator included, among others, the following: a. The Respondent entered the market in 2014 with a market share of 2% to conduct market testing and began effective production and sales activities in 2015.³¹ In that year, the Reported Market Share increased to 44%, attributed to large-volume sales at very low prices. By the third quarter of 2019, this share had further increased to 46%. In 2014, the Reported Party entered the cement market in South Kalimantan with a small volume of cement products, accounting for approximately 2% of total cement sales in the region, as stated in Decision No.03/KPPU-L/2020, 2021.

Based on PT Conch South Kalimantan Cement's 2015 financial statements, the company incurred losses as a result of these actions. Additionally, the discovery of very low prices serves as evidence that the average selling price of PT Conch South Kalimantan Cement was lower than that of its competitors for Portland Composite Cement (PCC) cement in the South Kalimantan region. From 2015 to 2019, the reported price of PT Conch South Kalimantan Cement for 40 kg PCC cement was lower than that of PT Semen Gresik (Persero), Tbk, with price differences ranging from Rp10,000.00 to Rp14,000.00. For 50 kg PCC cement during the same period, the price differences ranged from Rp19,000.00 to Rp23,000.00. Furthermore, compared to another competitor, PT Indocement Tunggal Prakarsa, Tbk, the price for 40 kg PCC cement from 2015 to 2017 differed by Rp3,000.00 to Rp6,000.00.

The average selling price of PT Conch South Kalimantan Cement was higher than that of PT Indocement Tunggal Prakarsa Tbk in 2018 and 2019, with a price difference ranging from Rp.400.00 to Rp 1,600.00. For PCC type cement in 50 kg packages from 2015 to 2019, the price difference ranges from Rp 5,000.00 to Rp 16,000.00. The case highlights a significant price disparity between the competing business actors and the reported PT Conch South Kalimantan Cement, as noted in Decision No.03/KPPU-L/2020, 2021.

The Complainant's entry into the South Kalimantan cement market significantly altered the market structure and caused a decline in the market share of several competitors. PT Indocement's share decreased from 36.25% in 2014 to 19.99% in 2019; PT Solusi Bangun Indonesia fell from 9.38% to 0.06% and ceased operations in 2020; PT Semen Gresik declined from 27.52% to 15.99%; PT Semen Tonasa dropped from 22.43% to 17.40%; PT Semen Bosowa Maros decreased from 4.42% to 0.28% and exited the market in 2019; PT Cemindo Gemilang operated only in 2015 with a 0.66% share; PT Jui Shin Indonesia operated from 2015 to 2017; and PT Semen Jawa was active during 2016–2017, as documented in Decision No. 03/kppu-l/2020. 03/KPPU-L/2020.

The panel of judges concluded that PT Conch Kalimantan Selatan violated Article 20 of Law No. 5/1999. The approach adopted by the panel was the rule of reason, incorporating

³⁰ Fitri Novia Ariani, "Berita Terbukti Monopoli Perusahaan Semen Ini Didenda KPPU Rp22 Miliar," *Hukumonline*, July 3, 2021, <https://www.hukumonline.com/berita/a/terbukti-monopoli-perusahaan-semen-ini-didenda-kppu-rp22-miliar-lt60054c1973109/>. Accessed on April, 12 2023.

³¹ Hartini Diah Setiowati, "Analisis Rule Of Reason Dalam Jual Rugi Dan Bagaimana Menetapkan Harga Yang Sangat Rendah Pada Perkara Kppu Nomor 3/Kppu-L/2020 Dalam Mencapai Kepastian Hukum" (Fakultas Syariah dan Hukum Universitas Islam Negeri Syarif Hidayatullah Jakarta, 2021), <https://repository.uinjkt.ac.id/dspace/handle/123456789/62447>.

the Bright Line Evidence Theory and Hard-Line Evidence Theory. According to the Bright Line Evidence Theory,³² a business actor is deemed to have engaged in monopolistic practices and/or unfair business competition when sufficient evidence demonstrates the absence of competition in the relevant market.³³ In contrast, the Hard-Line Evidence Theory holds that monopolistic practices and/or unfair business competition are established through proof obtained via economic analysis.³⁴

The process of selling at a loss was substantiated by evidence showing that the average selling price for PCC cement sales in the South Kalimantan region was lower than the cost of goods sold. The KPPU's decision in Case No. 03/KPPU-L/2020, announced on January 15, 2021, focused on alleged attempts by PT Conch South Kalimantan Cement to sell at a loss and/or set excessively low prices. The decision highlighted that the company operated in the red zone in 2015 and consistently maintained very low prices from 2015 to 2019.

The Commission Panel also found that PT Conch South Kalimantan Cement is owned and controlled by Anhui Conch Cement Company Limited, the principal parent of a multinational company with strong financial capabilities and a substantial global influence in the cement industry. Supported by this backing, PT Conch South Kalimantan Cement had the financial capacity and strategic ability to implement comprehensive business strategies, including pricing practices that placed its products below market standards and/or the prices of competitors.

3.2. The decision of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*

Cigarettes manufacturing in the United States has, in recent years, been dominated by six companies: Philip Morris, Inc., R.J. Reynolds Tobacco Corporation, Brown & Williamson, Lorillard, Inc., American Tobacco Company, and the Brooke Group (Liggett). In 1980—commonly known as Liggett—pioneered the economy market segment by introducing a line of generic cigarettes priced approximately 30% lower than branded products. As a highly concentrated industry, cigarette manufacturing is controlled by a small number of firms, including the two principal parties in this case. Liggett accused Brown & Williamson Tobacco Corp of engaging in predatory pricing practices. Brown & Williamson Tobacco Corp was allegedly successful in driving smaller competitors out of the market.³⁵

By 1984, generic cigarettes had captured 4% of total market sales, at the expense of branded cigarettes. The issues arose when Brown & Williamson entered the economy segment of the cigarette market and sold generic cigarettes at a price lower than Liggett's net price. In the same year, Brown & Williamson introduced its own brand of "black and white" cigarettes, undercutting Liggett's prices and becoming Liggett's sole competitor in the "black and white" cigarette market.³⁶ This posed a significant problem, as both companies' targeted price-sensitive consumers. In response to declining sales, Liggett lowered its prices, triggering a price war between Liggett and Brown & Williamson.

In the summer of 1986, a pattern of biannual price increases for both generic and branded cigarettes was established. The dollar amounts of these increases were identical

³² Arai, *Law and Economics in Japanese Competition Policy* (Springer, 2019), 66.

³³ Jorge Marcos Ramos, *Firm Dominance in EU Competition Law: The Competitive Process and the Origins of Market Power* (Kluwer Law International BV, 2020), 73.

³⁴ Graeme B Dinwoodie and Mark D Janis, *Trademarks and Unfair Competition: Law and Policy* (Aspen Publishing, 2018), 21.

³⁵ Catur Septiana Rakhmawati, "Implementasi Peraturan Menteri BUMN Nomor PER-1/2012/2012 Tentang Pedoman Umum Pengadaan Barang Dan Jasa BUMN Dalam Perspektif Hukum Persaingan Usaha," 2016, <https://dspace.uui.ac.id/handle/123456789/32832>.

³⁶ Merlin Stone et al., "The Evolution of Business Models of Information and Communication Technology Suppliers," *The Bottom Line* 34, no. 1 (February 18, 2021): 1–19, <https://doi.org/10.1108/BL-08-2020-0051>.

across both categories, resulting in a narrowing of the price gap from 38% in 1984 to 27% in 1989. Liggett subsequently alleged that Brown & Williamson sold its generic products at artificially low prices, constituting “predatory pricing”. Liggett filed a lawsuit³⁷ alleging, among other claims, that Brown & Williamson’s volume-based profits for wholesalers amounted to price discrimination with a reasonable likelihood of injuring competition in violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.³⁷ Liggett argued that the undercutting of selling prices was central to a predatory pricing scheme in which Brown & Williamson set prices below cost to compel Liggett to raise the selling price of its generic cigarettes, thereby restraining the economic growth of the segment and maintaining Brown & Williamson’s supra-competitive advantage in the branded cigarette market.

The trial began in the fall of 1989. By that time, all six cigarette companies had entered the economy segment. The economy segment was the fastest growing segment of the cigarette market, increasing from approximately 4% of the market in 1984 to 15% by the start of the trial. Liggett’s total sales volume had increased significantly.³⁸ However, prices for all cigarettes, including generic cigarettes, had increased and the popularity of “black and white” cigarettes had declined in market share as consumers shifted back to branded cigarettes. Liggett presented compelling and nearly indisputable evidence on a crucial point: that the price at which B&W sold its cigarettes remained below its average variable cost for a sustained period, specifically, at least eight to ten months. Liggett’s trial expert illustrated that the wholesale net price per carton of black and white cigarettes was 30% below the average variable cost, amounting to more than \$14 million over eighteen months.

After an extensive trial spanning approximately 1150 days, incorporating nearly 3,000 exhibits, and numerous witnesses, the trial jury delivered a verdict favoring Liggett’s petition. Using a special verdict form, the jury concluded that Brown & Williamson had participated in price discrimination with a reasonable likelihood of harming competition in the overall domestic cigarette market. As a result, the jury granted Liggett \$49.6 million in compensatory damages, a figure subsequently tripled to \$148.8 million by the District Court. Unlike in Indonesia, where a verdict becomes final before the filing of another legal appeal, the American legal system distinguishes between two types of verdicts in jury cases: jury verdicts and legal verdicts (courts). In response to the jury’s decision, Brown & Williamson rejected it and subsequently requested a court ruling. The District Court, considering three grounds, ruled in favor of Brown & Williamson, and granted judgment as a matter of law. This grounds included: lack of evidence of injury to competition, lack of evidence of Liggett’s antitrust injury, and absence of a causal connection between the discriminatory rebates and Liggett’s alleged injury.³⁹

For the first time, the Court’s opinion in Brooke Group established two important requirements that a plaintiff must satisfy in a “predatory pricing” claim. First, the plaintiff must demonstrate that the defendant set prices below cost, with courts requiring a “precise” measure of cost. Second, the plaintiff must establish the likelihood of damages—either “a reasonable prospect” or “dangerous probability” that the defendant will “reimburse its investment at a price below cost.” The plaintiff can establish damages by demonstrating either the ex-ante possibility of obtaining damages or the actual realization of damages.

³⁷ Julia Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* (Harvard Business School, 2019). p. 33.

³⁸ James A Henderson Jr, Aaron D Twerski, and Douglas A Kysar, *Products Liability: Problems and Process* (Aspen Publishing, 2020). p. 9.

³⁹ Michael H. Mine and James L Walker, “The Strange Career of the Three-Judge District Court: Federalism and Civil Rights, 1954–1976,” *Case W. Res. L. Rev.* 72 (2021): 909, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/cwrlrv72&div=48&id=&page=>.

Irrespective of the evidence presented in court, the Supreme Court ruled that the predatory pricing conducted by Brown & Williamson Tobacco Corp did not contravene the provisions of business competition law. In its deliberation, the court determined that consumers were not adversely affected by the defendant's predatory pricing. This assessment considered both the predation period—characterized by low prices and was perceived as beneficial for consumers due to significantly reduced prices—and the post-predation period, which was also deemed non-detrimental to consumers. The judge characterized Brown & Williamson Tobacco Corp actions as a legitimate business strategy, and the elimination of competitors from the market was viewed as a natural outcome of business competition.

Business competition cases are a type of legal case that is challenging to handle. Economic analysis is needed in the evidentiary process of such cases. A clear distinction of competition law from other legal fields is its integration of law and economics. By combining the two fields, competition law aligns to the economic field, aiming not only to create public order but also to promote economic efficiency by maintaining conducive business competition.⁴⁰

Cooter and Ulen state that “the interaction between jurists and economists has led to a wide range of competition law and other types of economic policy. Furthermore, economic analysis of law is an interdisciplinary subject of interest not only to legal scholars but also to economists and public policy scholars. Therefore, in trials to try loss-making practices, both Indonesia and the United States generally engage economic experts to help analyze the case. Several tests may be employed, including the Price-Cost Test, Areeda-Turner Test, Average Total Cost Test (ATC Test), Average Avoidable Cost Test (AAC Test), and Recoupment Test. The similarity in evidentiary methods is that the Commission Panel, in determining that PT Conch legally and convincingly engaged in predatory pricing, applied a Rule of Reason approach—conducting a comprehensive investigation to assess whether the conduct resulted in monopolistic practices and/or unfair competition that hampers competition. Both cases use the “Recoupment Test” to analyze whether a violation of the article on selling at a loss has occurred. In the case a quo, the Commission Panel applied an evidentiary theory to evaluate the loss-selling practice conducted by PT Conch, namely:

- a. Bright Line Evidence Theory: This theory explains that the actions of economic actors that can be declared to result in monopolistic practices and/or unfair business competition can be shown to no longer be competitive or cause competition in the relevant market to become unfair.
- b. Hard-Line Evidence Theory: This theory explains that the behaviour of business actors that may lead to monopolistic practices and/or unfair competition can be shown through economic analysis.

It can be observed that there are 2 (two) variables used in conducting an economic analysis of the practice of selling losses carried out by PT Conch, including:

- a. Market Share: This variable assesses whether PT Conch, through the predatory pricing practice, experiences a gain in market share.
- b. Market Concentration: This variable examines whether the predatory pricing practice results in PT Conch obtaining an increased market share, leading to the elimination of competing business actors and a rise in market concentration.

⁴⁰ Siti Fazilah Abdul Shukor et al., *Regulating Fair Competition Toward Sustainable Development Goals* (IGI Global, 2023). 285.

The Commission Panel has substantiated that, due to the predatory pricing strategy employed by PT Conch, the average selling price of PT Conch was below the cost of goods sold, causing a loss of Rp 67,630,000,000.00 in 2015. This aggressive pricing approach led to a substantial increase in PT Conch's market share and even resulted in the elimination of five competing business actors from the relevant market in the South Kalimantan region. Similarly, the verdict in the case of *Brooke Group Ltd. v Brown Williamson Tobacco Corp.* involved the application of article 2 of the Sherman Act and section 2(a) of the Clayton Act as amended by the Robinson-Patman Act—both of which employ a Rule of Reason approach.

- a. The evidence scrutinized by the judges includes evaluating whether the respondent's production costs exceeded some measure of costs, typically average market costs.
- b. The determination hinges on whether there was a "dangerous probability" that the respondent could recoup its investment through prices set above cost in the post-predation period.

These criteria serve as the foundation for establishing whether predatory pricing has occurred. In the United States, courts must initially evaluate whether the business actor's economic activity may produce both procompetitive and anti-competitive effects, considering its impact on commercial competitors and consumer welfare. The difference lies in the fact that, although the same approach is used, the outcome of the two trials is different. This is because in the case of *Brooke Group Ltd. v Brown Williamson Tobacco Corp.*, the Court explicitly downplayed the significance of below-cost pricing by stating that it "encourages some inefficient substitution of products sold at prices lower than their cost". Second, the Court justified the addition of the substitution requirement on the basis that Congress enacted antitrust law for the "protection of competition, not competitors". This differs from the KPPU decision, which acknowledges that predatory pricing directly leads to unfair competition by distorting the average market price. Thus, in KPPU-P Decision No. 03/KPPU-L/2020, the Panel more conclusively demonstrated that predatory pricing is not a typical practice in fair business competition.

Regarding sanctions, both Indonesia and the United States impose threats of civil and criminal sanctions. In Indonesia, compensation penalties have a minimum and maximum limit. Article 47 of Law No. 5 Year 1999 stipulates administrative sanctions in the form of: orders to cease activities causing monopolistic practices and/or unfair business competition and/or public harm, compensation payments, and/or fines ranging from Rp 1,000,000,000.00 (one billion rupiah) to Rp 25,000,000,000.00 (twenty-five billion rupiah). In contrast, the Sherman Act prescribes fines not exceeding \$100,000,000 (one hundred million dollars) for corporations, and up to \$1,000,000 (one million dollars) for individuals.

In the United States, civil (administrative) and criminal fines are combined under a single article. The provision includes fines of up to \$100 million for corporations or \$1 million for individuals. This provision is absolute for cases of predatory pricing. The Clayton Act, meanwhile, only addresses compensation based on the plaintiff's claim. In contrast, Indonesia distinguishes between administrative penalties and criminal offense of selling at a loss, fines range from Rp 5,000,000,000.00 to Rp 25,000,000,000.00, or imprisonment in place of a fine for a maximum of 5 months as a substitute for unpaid fines. In the United States, the Sherman Act only allows for the imposition of fines and imprisonment simultaneously. However, it does not include additional criminal penalties such as the revocation of business licenses or prohibition against business actors—measures found in Indonesia under Law No. 5/1999 in Indonesia, which include banning violators from serving as directors or commissioners for a period of 2 (two) to 5 (five) years, or terminating specific activities that cause harm to other parties.

In Decision No. 03/KPPU-L/2020, the Panel imposed a fine of Rp 22,352,000,000.00 on PT Conch, to be deposited into the State Treasury as revenue from fines for violations in the field of business competition under the KPPU work unit, as stipulated by Article 20 of Law No. 5/1999. The legal basis for this penalty is outlined in Article 47 of the same law. However, the decision lacks transparency regarding the methodology used to determine the fine amount. In fact, according to PT Conch's audited financial statements, the company reported profits during the period it engaged in loss-selling practices—Rp388,243,000,000.00 in 2016 and Rp199,490,585,000.00 in 2019. If the total profit obtained by PT Conch in these 2 (two) years amounted to IDR 587,733,585,000.00, it raises concerns about the proportionality of the imposed fine, as it seems disconnected from the actual losses suffered by eliminated competitors or the findings established during the trial.

In the case of *Brooke Group Ltd. v Brown & Williamson Tobacco Corp.*, the jury initially awarded Liggett damages of \$49.6 million, which the district court later tripled to \$148.8 million. The calculation of punitive damages was based on Liggett's actual losses and the plaintiff's claims, aligning with the sanction regime outlined in the Clayton Act. This approach emphasizes punitive damages at the plaintiff's request, providing a clear basis for determining the award.

4. Conclusion

Both Indonesia and the United States regulate predatory pricing practices through legislation. In Indonesia, this practice is governed by Law No. 5 Year 1999, specifically Article 20, which explicitly prohibits selling at a loss. This provision is strengthened by implementing regulations such as those issued by the Business Competition Supervisory Commission (KPPU), which serves as an operational guideline. Meanwhile, in the United States, predatory pricing is regulated under Section 2 of the Sherman Act and Section 2(a) of the Clayton Antitrust Act, which adopt a broader approach through the common law system. The main difference lies in the level of specification: Indonesia explicitly prohibits "selling at a loss," whereas competition law in the United States relies on judicial interpretation and precedent to determine whether an act constitutes predatory pricing. Both jurisdictions apply the rule of reason approach, as demonstrated in KPPU Decision No. 03/KPPU-L/2020 in Indonesia and the *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.* case in the United States, which emphasized the importance of proportionality and contextual analysis in assessing the legality of pricing strategies. However, Indonesia continues to face challenges in applying this approach, mainly due to limited jurisprudential guidance and the insufficient integration of economic analysis in competition law enforcement. Therefore, as a strengthening measure, Indonesia should develop more structured economic standards and testing tools—such as the Areeda-Turner Test or the Recoupment Test applied in the United States—to provide legal certainty, improve the quality of KPPU's analysis, and ensure that anti-competitive pricing practices are effectively and consistently addressed.

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