JURIDICAL OVERVIEW OF ALLEGATION OF PREDATORY PRICING PRACTICE IN ONLINE APPLICATIONS OF PUBLIC TRANSPORTATION IN INDONESIA

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Abstract: Developing technologies have now changed the way of thinking, working and also mobility of our society. Technology sector is becoming a revolution of industry which have developed in society. However, technology development is not supported by public policy and government regulation to anticipate such change. In law sector, the existing policy and government regulation is not functionate in harmony There is an inequality when technology's presence cannot go along due to the different point of view with the existing laws and regulations.

Upon such technology development, the technology transportation services have now come up. The presence of online transportation has caused legal problems to arise. One of them that will be discussed in this paper is Predatory Pricing practice allegedly conducted by applicator businessmen in the field of online public transportation company. The implementation of predatory pricing allegedly conducted by applicator online transportation company has caused businessmen in the relevant market closed down and has caused barrier to entry to the online transportation which causes unfair competition. In practice, Rule of Reason approach in this predatory pricing is difficult to prove due to the investigation process and deep economic analysis. The role of regulation in business competition is unable to protect small and medium enterprises in transportation field to keep exist and compete in facing this predatory pricing practice as the purpose of this regulation. The presence of online transportation has to be controlled as it might caused a very low price to be applied by applicator of online transportation which fulfilled the element of prohobited activites based on Law No.5 of 1999 Article 20 concerning Predatory Pricing. In its impelementation, such activity cannot be proceed by KPPU, while unfair business competition continues to occured in practice. This has shown that such regulation is not effective to protect business competition, eventually online transportation technology is becoming a threat to the sustainability of conventional transportation. Therefore, the predatory pricing regulation in the Law of Unfair Business Competion in Indonesia needs to be reassessed and its implementing regulation which put forward mitigation needs to be renewed to become a legal basis to KPPU to act so that it can create fair business competition, legal certainty and justice by creating the same level playing field in the public transportation in Indonesia.

Keywords : Predatory Pricing, Transportation Online

I. INTRODUCTION

The development of science and technology has changed the world as the first generation of industrial revolution that had begun since the end of the 18th century with the invention of the steam engine give rise to history when human and animal power was replaced by the appearance of machines. The second-generation of revolution was marked by the emergence of power plants, this invention triggered the emergence of telephone sets, cars, airplanes that changed the face of the world significantly. Furthermore, the third-generation of industrial revolution was marked by the emergence of digital technology and the internet that played a role in the development of computerization and automation. Nowadays, the world has entered the fourth phase of the industrial revolution history, this phase is often referred to as "Industrial Revolution 4.0". The 4.0 industrial revolution occurred around the 2010s through intelligence engineering and the internet of things as the backbone of human and machine movement and connectivity.[i]

Facing the entry of the Industrial Revolution 4.0 in Indonesia, the online transportation business has become a challenge for Indonesia in terms of regulatory readiness in the field of business competitions. Predatory Pricing is one of the activities prohibited in Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competitions (Law No. 5 of 1999).

Competition in the business world is a condition *sine qua non* or an absolute requirement for the implementation of market economy, although it is recognized that business competition could be fair or unfair.[ii] One form of anti-competitive business behavior which is a concern in Law no. 5 of 1999 is to sell loss or set prices very low with a view to getting rid of or shutting down competitors in the relevant market or Predatory Pricing.[iii] In the short run, selling loss or Predatory Pricing can be profitable because consumers enjoy low prices for goods or services. But in the long run, after competitors are knocked out from the market, the predatory business actors will again raise the price of goods or services. Thus, the practice of Predatory Pricing can lead to monopolistic practices and/or unfair business competitions.[iv]

Online-based public transport application companies in Indonesia currently involve at least 2 (two) leading companies (one of which is a unicorn in Indonesia), namely Go-Jek and Grab, previously Uber was one of the online transportation applicator companies but in development merged with Grab.

Legal issues in the field of online transportation business competitions in Indonesia started from the accusation that their presence was considered illegal, because it did not meet the rules of organizing public transportation. The online transportation does not have an Indonesian legal entity, does not have a public transportation business permits, and there is no obligation to conduct a feasibility test (KIR). As a result, they do not pay taxes, so online taxis are able to offer more easily. This makes online taxi penetration within a short time able to erode the conventional taxi market. The government has not yet prepared regulations that can reach the presence of such online-based business models that have social and fiscal impacts.

Socially there is a sharp friction between the old and the new business actors. Ironically, the old business actors involved the poor, such as conventional taxi drivers. Fiscal impact, the government loses potential income tax from online-based business actors, because there are no legal rules to protect it.[v]

II. RESEARCH METHOD

This study applies a type of juridical-empirical research to examine the validity and effectiveness of the law. The approach used in this research is: socio-legal approach. This approach is undertaken with a sociolegal study that is the textual study of articles in legislation and policies to be critically analyzed and explained their meaning and implications for the person (legal subject). Sources of data are obtained from several sources, namely: primary legal materials used consist of: UU No. 5 of 1999, UU No. 22 of 2009, PP No. 74 of 2014, PM No. 118 of 2018, KPPU Regulation No. 6 of 2011, and the Director General of Land Transportation Regulation No. SK.3244/AJ.801/DJPD/2017

Data collection technique used in this research is literature study, observation is done by using online applications to collect and compare the pricing data of each application providers (Uber, Grab, and GoJek) for trips with a certain distances and times compared to regular taxi transportations. Interviews were also conducted, the interviewees are including the Chair of The Business Competition Supervisory Commission (KPPU), the Legal Division of the KPPU, academics and experts in the field of business competitions, DPP Organda

III. FINDINGS AND DISCUSSION

Related to the results of the study, the researcher corroborates that opinion. The implementation of the online application-based transportation, the researchers considered unfair business competition. Researchers identified the occurrence of Predatory Pricing in Online Transportation in Indonesia. Based on the elements contained in Article 20 of Law No. 5 of 1999 identification of alleged predatory pricing can be aimed at proving the occurrence of "very low prices" and "intending to get rid of or kill the competitors".[vi] This proof requires an economic analysis of prices (price and cost rule) to determine the calculation of very low prices or below the market price (below market price) by comparing prices in the relevant market.This action must also result discharge or death of competitors and or prevent new business actors in the relevant market to enter the market and compete fairly.

The next identification is to see whether after the competitors leave the relevant market, the business actor suspected of undertaking predatory pricing is able to recoupment or recover his loss by increasing the monopoly price so that theyget greater profits from the losses they suffered when undertaking predatory pricing to other business actors re-enter the market.

It should be noted that the industrial revolution 4.0 can shift the notion of recoupment not necessarily by increasing monopoly prices in the same line of business. Online transportation business actors in fact have diversification of the Internet-based business of Thing and Fintech which is become the source of loss recovery and even greater profits so that it can be a cross subsidy in the online transportation business sector that is still losing money. Article 20 of Law No. 5 of 1999 regulates that business actors are prohibited from supplying goods and/or services by way of selling loss or setting very low prices with a view to getting rid of or shutting down competitors businesses in the relevant market so as to result in monopolistic practices and/or unfair business competitions.

This clause is categorized using the Rule of Reason approach where the actions must be analyzed and evaluated in advance to see the effects that they have on competition by proving Based on the results of research conducted, researchers describe one by one of the elements contained in the behavior of predatory pricing which is allegedly undertaken by business actors of online transportation as stipulated in Article 20 of Law No. 5 of 1999 as follows:

The element Business Actor	Go-Jek, Grab, and Uber fulfill the elements as business actors because the all three are legal entities that are established and or

	conduct business activities in Indonesia.
Element Supply of Goods/Services	The three companies providing online transportation applications (Go-jek, Grab, and Uber) also fulfill the element as the party providing supply of services in the form of online information technology-based application facilities, to provide public transportation/public transportation services
The element Selling Loss	the price is not fair as a definition of selling-loss. Price unfairness occurs if the business actor intentionally supplies goods/services at a price that causes the business actor to endure any loss, while the objective of the business actor to do business is to make a profit so that the business actor can increase the production of the supply of goods/services.
The element With the intention to get rid of or kill the business of competitors	The data present that within a year since the entry of online transportation and imposed rates far below the taxi transport regulation rates, then as much as 31% of the total number of taxi transport vehicles that were previously able to operate even experienced an increase from 2013 to 2014 no longer able to be operated by business actors. This number continues to decline until a total of 37% does not operate at the end of 2016.
The element Setting a very low price	Go-Jek and Grab have the ability to be able to cover or subsidize losses in the field of online transportation despite imposing a sale at a very low tariff compared to competitors and or business actors in the same market in long period of time.

In general, the practice of selling-loss is aimed at 5 (five) main objectives, namely:[vii]

1. Shutting down competing business actors in the same relevant market;
2. Limiting competitors by applying the selling-loss price as an entry barrier;
3. Getting big profits in the future;
4. Reducing losses that have occurred in the past; or
5. It is a promotional price as an effort to introduce new products as a marketing strategy tool.

In accordance with the objectives of the business actors, the behavior prohibited in Article 20 of Law No. 5 of 1999 to supply goods or services by way of selling-loss with the intention to get rid or shut down competitors businesses in the relevant market so that it can result in monopolistic practices or unfair business competition. Business actors who sell loss with these objectives, then at least the first three goals (goals number 1 to 3) will be achieved at once. Objectives number 4 and 5 are not prohibited in Law No. 5 of 1999.

Based on observations, data, and surveys which have been done, researchers can state that the indications of selling-loss by business actors in the field of online transportation providers are very strong, so, this initial indication must be continued by conducting surveys and analyzes by the competent authority in overseeing business competition, namely KPPU.

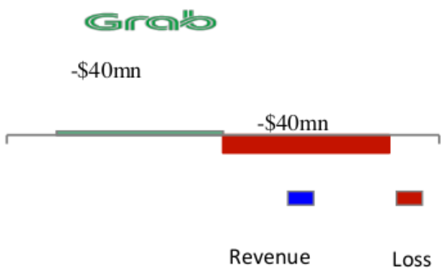
Based on the results of an interview with the Chairperson of the Commissioner of KPPU, Kurnia Toha, stated that proof of selling-loss in predatory pricing behavior is very difficult to do, because in a fairmarket it is almost impossible for business actors to sell loss.

It will take a long time to get competitors in the relevant market out of the market or die, while this time the perpetrators of loss and sale continue to be in a state of suffering (suffering losses), but if there is a reality that the business actors posted negative finance (loss) and the tendency to continue to suffer losses, this is an early indication of the practice of selling-loss.

Based on Bloomberg data, in the early days of online transportation spreading in Indonesia in

2014/2015, it was stated that Uber continued to accumulate losses until the end of 2016 to 3 billion US Dollars, although revenue increased from 1.326 billion US Dollars at the end of the year 2015 to be 5,046 billion US Dollars at the end of 2016.

While Grab suffered losses during the period of 2014 and 2015 amounting to 4 billion US Dollars as the data below:



Although the researcher did not get GoJek financial data because it is not a public company, but based on statements in several reports, Gojek's Founder and Chief Executive, Nadiem Makarim, August 20, 2018 stated that: "We see a lot of offline appeal to online on all our businesses, and we almost made a profit, except the transportation segment, "Nadiem told Reuters, quoted on Monday, August 20, 2018.[viii] In the world of ride sharing, investors who invest are not focused on profits, but growth.[ix] In 2018, Go-Jek has a total Gross Transaction Value (GTV) of more than $19 billion. GTV is not revenue, but the total value of transactions processed by Go-Jek from their users from Go-Jek services, such as Go-Ride, Go-Food, Go-Pay, and others.[x]

Based on these data and information, a strong indication that the company providing online transportation has undertaken the practice of selling-loss in the field of online transportation services, which is proven that still record losses in the field of online transportation services from the beginning of operations up to now. The researcher is of the opinion that with the persistence of funds from these investors, Go-Jek and Grab have the ability to be able to cover or subsidize losses in the field of online transportation despite imposing a sale at a very low tariff compared to competitors and or business actors in the same market in long period of time. Therefore, the approach with analysis number 1 is the ability of the business actor to cover losses in a sufficiently long period of time.

Based on the results of a survey conducted by researcher in November 2017 through an online application, a comparison of the application of prices between online transportation and regular taxi transport that services can also be ordered using the online application shows that:

- Go Jek, Grab, and Uber fares on weekdays (Non-Peak Hour) are cheaper than regular taxis by 21%, while during peak hours (Peak Hour) Go Jek, Grab and Uber rates are 11.5% more expensive;
- Go Jek, Grab, and Uber fares on weekends and Sundays (Non-Peak Hour) are cheaper than regular taxis by 40%, while during peak hours (Peak Hour) Go Jek, Grab, and Uber fares are still cheaper 12%.

Director General of Land Transportation Regulation No. SK.3244/AJ.801/DJPD/2017 which is effective from 30 June 2017 concerning the Upper Limit and Special Rental Lower Limit Rates (which in this study are called online transportation/online taxis) in Clause 2 determine that the amount of the Special Rental Transport tariff in region I, namely Sumatra, Java and Bali, is the upper limit tariff of Rp.6,000 / km and the lower limit tariff of Rp.3,500 -/km.

Based on the results of a survey through an online application in February 2018, it was found that the average minimum tariff under a per meter of online transportation was Rp.3,433/km on weekdays and Rp.2,958 / km on Saturdays and Sundays, this does not consider the promos given by Go Jek, Grab, and Uber so that the average tariff is 20% to 30% lower than the regulated regular taxi fare.

The results of random surveys of researcher in March, April and August 2018 on the average application of online transportation rates in non-peak hours (Non-Peak Hour) are 14% to 60% cheaper than regular taxi fares, even in August 2018 until now (2019) still applies to pay Rp.1, - (one Rupiah) for users of initial payment through OVO to ride Grab.

In addition to these facts, during rush hour and traffic especially rainy weather it turns out that online transportation applies very high tariffs up to about 177% more expensive than regular taxi fares, and this also violates the tariff limits under the Dirjen Regulations so that the losers are user community.

On the other hand, the application of very low prices by online application provider companies apparently also affected the welfare of the online transportation driver's own partners. According to the results of a survey on the welfare of online transportation drivers conducted by INSTRAN on 300 online transportation driver partners, it was obtained data that one of the causes of the decline in income of drivers of Special Rent (ASK) or online transportation by 20.4% answered that it was caused by low tariffs per kilometer. From the current rupiah per kilometer rate, as many as 90.7% of online transportation driver partners are of the opinion that the tariff is not yet economical, and the ideal tariff is more than Rp.3,000 up to less than or equal to Rp.6,000 per kilometer. Thus, the implementation of very low prices does not only affect competing business actors, but also affects the online transportation driver's own partners.

Thus, based on consideration of the results of surveys and analyzes conducted by researcher, then the element of setting a very low price is met.

IV. CONCLUSION

Case of predatory pricing lawsuit which in essence is to meet the element of selling-loss, then the conditions must be met that:

a. Sales price is the price below the cost of production
b. Competitors must be able to demonstrate that they have the ability to recover profits or costs lost when selling below the price

The plaintiff must also be able to prove that:

a. The selling price below the production price will be able to result in competitors in the form of expelling competitors from the market or forcing competitors to raise their prices
b. It is possible that the sell-loss scenario will one day result in a price above the competitive price with the form of compensating for losses when selling losses

In the era of the industrial revolution 4.0 boundaries and even the definition of recoupment itself does not have to come from businesses that are undertaken at a selling-loss, so also the definition of the relevant market also shifts. For example, Grab and GoJek run their businesses not only in the field of online transportation. They do selling-loss by implementing tariffs below the relevant public transport market prices by implementing various promotions and discounted rates even today, with the aim of more application users. With the continued increase in users of new applications, the company's value increases, and the company's other business products can make a profit. Like GoPay and GrabPay is one of the diversification of their business in the field of payment systems based on Financial Technology (Fintech) and this is precisely their focus for making money, the wider the user, the more their payment system will be used, and this is seen by investors as the rapid development for technology companies like them is therefore investors continue to pour out their funds, and are used to continue to do selling-loss in the field of online transportation, as a means to increase its market value. So, according to the researcher, the predatory process of prices/tariffs in the field of online transportation itself has occurred and continued to occur today and this continues to have an impact on the public transport market, while their recoupment is not by making money from the same business but other businesses that sourced from Fintech.

Efficiency which is the main element of the failure of accusations of predatory pricing by online application providers is actually not applicable in analyzing comparisons between online application providers and public transport companies in a relevant market such as regular taxi companies. The tariff set by the online application provider is not the result of production efficiency, because the vehicle used to run online transportation is not an asset of the application provider company, but is owned by an individual or cooperative where all maintenance, insurance, and cost obligations for the vehicle are borne by the vehicle owner. While the taxi company calculates the tariff of operating expenses with all assets and management is its responsibility, including insurance. Based on this the researcher believes that the application company applies prices/tariffs not based on the results of the production efficiency that can be done, but by providing price subsidies, as the data explained earlier, this is why the term ‘burn money’ occurs in online transportation businesses, and it is recognized that these subsidies making their services especially in the transportation sector segment to date has not yet yielded profit.

Based on KPPU's decision data obtained from the KPPU's official website, it was recorded from the time the KPPU was established in 2000 until the end of 2018 that the KPPU had issued a total of 302 decisions, and of that number none of the case decisions regarding predatory pricing.

Based on information obtained from the Secretary General of the DPP Organda that the DPP Organda sent a letter to KPPU on January 24, 2017 under UM.208/DPP ORGANDA/EX/I/2017 regarding: Alleged Unhealthy Competition Practices in the Land Passenger Transportation Industry in Indonesia, but to date there have been no results from the report. KPPU Commissioner Chair and Study, Policy and Advocacy Director, Plt. Deputy Commission for Prevention of KPPU, in an interview that predatory pricing is indeed very difficult to prove and takes a long time because the approach must go through a rule of reason, primarily to prove the selling-loss element and the element with the intent as well as selling-loss, it is almost impossible to do business actors because it must have a very large capital and survive losses during the predator.

KPPU as the Commission which has the authority as regulated in Article 36 of Law No. 5 of 1999, has access to examine the financial reports of business actors who are reportedly suspected of having prohibited activities even though the company is a private company, this cannot be done by competitors. If the burden of proof is on the plaintiff, then forever it will be very difficult to prove predatory pricing because the acquisition of information and surveys requires huge funds and a long time, if this must be done by business actors who are victims of predatory pricing behavior, it means that the company is in a condition If it has left the market or closed down its business, this business actor will be very heavy burdened. Even if the position is finally proven, the benefits of the struggle for this report will no longer be meaningful for the reporting business actor because the company has also died.

Article 20 of Law No. 5 of 1999 has become ineffective in protecting fair business competition, as long as it does not mean that any indication that may originate from the existence of an incoming report to the KPPU is followed up with the aim of preventing the occurrence of Predatory Pricing rather than providing a requirement for the plaintiff to prove the existence of such action. By looking at the side of prevention, each report of alleged predatory pricing actions is used to actively call on the relevant business actors, explore, and analyze from various sources, to be able to provide input to the government through line ministry, specifically this research can provide input to the ministry Transportation and the Ministry of Communication and Information, for how to establish rules that provide the same level (same level playing field) for business actors in the field of transportation in the relevant market, thus the alleged allegations do not actually occur and business actors can still compete fairly. According to the researcher, this is called protecting fair business competition as the goal of business competition law.

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