

## **Predatory Pricing in Flash Sale Practices on E-Commerce Media in Review of Competition Law**

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### **Abstract**

The purpose of this study is to analyze flash sales related to predatory pricing activities prohibited by the Business Competition Law and to explain law enforcement related to predatory pricing activities. A flash sale can be said to be predatory pricing if it meets the elements in Law No. 5 of 1999, Article 20. In this study, the author uses normative legal research methods using an approach to law and a conceptual approach to the problem of whether flash sales are related to predatory pricing activities and how predatory pricing law enforcement is reviewed in business competition law. This paper provides a conceptual view as stated in the Business Competition Law as well as the implementation of the law. The results and discussion of the formulation are that flash sale activities are not related to predatory pricing activities because flash sales do not meet the elements of selling and loss activities, and enforcement of predatory pricing laws in business law is to provide criminal penalties and administrative penalties in accordance with the provisions of Law No. 5 concerning the Prohibition of Monopoly Practices and Unfair Business Competition.

**Keywords:** Flash Sale; Predatory Pricing; Unhealthy Business Competition

### **1. INTRODUCTION**

Today, internet technology has an important part in people's lives. Apart from being a means of communication, and entertainment, the internet also has a big role in business activities, especially in terms of marketing or buying and selling business activities. Many people in Indonesia do buying and selling business online, namely through e-commerce media such as Shopee, Lazada, bukalapak, Tokopedia and so on. the more widespread development of digitalization, the influence of e-commerce in marketing is considered an effective form of building relationships with consumers because with the existence of e-commerce consumers and business actors are easy to carry out buying and selling activities, on the internet using e-Commerce media, from ordering to payment consumer does not need to do face to face.<sup>1</sup>

The rise of the e-commerce industry certainly makes a lot of business competition between business actors in e-commerce media. this situation can be a positive thing if done with healthy competition. but on the contrary, it will have a negative impact if this business competition is carried out cunningly or unhealthily, hail on fish, causing other business actors to experience losses and destroying the national economy. e-commerce functions as a process of buying and selling a product which

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<sup>1</sup> Y. L.R Rehatalanit, 'The Role of E-Commerce in Business Development', *Journal of Industrial Technology*, 5.0 (2021), 62–69 <<https://doi.org/https://doi.org/10.35968/jti.v5i0.764>>.

is usually done offline both in the market and in stores and meeting directly, the ease of buying and selling business with the existence of e-commerce media makes sellers and buyers do not have to bother meeting to make buying and selling transactions because they carry out these activities through the internet. this makes many e-commerce business actors have to think creatively so that the products they sell remain in demand and known in the digital world. business actors must pay more attention to opportunities that can affect the increase in sales so that business actors can find out business strategies that can benefit them. the ease of buying and selling activities with e-commerce media makes many sellers/stores competing to provide discounts or promos so as to make consumers interested.

Usually, buying and selling activities with substandard price offers occur at certain celebrations by offering relatively low prices for a product or item as is often found in the provision of free shipping, cashback followed by discounts from item owners who provide interest in platform users who make online purchases. flash sales provide very low prices, and are very affordable. with this flash sale, many business actors use this strategy to make potential customers feel interested in buying a product and are able to dominate market share.<sup>2</sup> this flash sale strategy makes it feel unfair to business people who have just entered the world of e-commerce, this is influenced by the lack of business capital. therefore, there is a need for supervision of this flash sale strategy with regulations that allow price cuts but do not lower below the standard production price. Because if it is below the normal market price, actors with middle to lower standard capital cannot take part in buying and selling competition in market share, and of course make them not enter the business world, this can cause the business to die. Meanwhile, business actors with large capital will be able to master the business being run.

Flash sales are often carried out in conjunction with promo activities or excessive discounts on a product. the market price and the price offered during this flash sale activity are very different. this can cause sellers or business actors to carry out predatory pricing activities (selling and loss). "Law Number 5 of 1999 regulates the Prohibition of Monopoly Practices and Unfair Business Competition" where a business actor or seller is not allowed to conduct unfair business competition, namely by predatory pricing (selling and loss).

Article 20 of "Law Number 5 of 1999" explains the limits on flash sale offers that are attractive to all shopping platform users with tricks ranging from free shipping, discounts, and cashback, this will certainly be very popular with platform users who

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<sup>2</sup> Atika Ahmad Syauqi, Fauzi Arif Lubis, 'The Effect of Cashback, Flash Sale, Tagline "Free Shipping" on Impulse Buying of Generation Z Consumers on Shopee', *Journal of Accounting Management (JUMSI)*, 2 (2020), 734–49 <<https://doi.org/https://doi.org/10.36987/jumsi.v2i4.3122>>.

make purchases online. flash sales provide very low prices, perhaps even below the cost of production. In the law of buying and selling a product must exceed the loss during production. But what happens is that related parties (e-commerce companies) do not provide limits on sales at standard prices below production.

It thus differs from previous research, which discussed similarities and variations in selling and loss rules and competition authorities in Indonesia and the United States, as well as enforcement of unfair price bans.<sup>3</sup> this is also discussed in another article about "The probability of Predatory Pricing practices using the proceeds of crime as business capital in Indonesia. with the scope of the problem is the potential for business actors to practice predatory pricing because they have additional capital power sourced from criminal acts, which has happened in Pennsylvania in the case of" "Pizza Connection Case".<sup>4</sup> in another article, there is also a scope of discussion "Analysis of Law Enforcement Efforts Against Partnership Actions in the Perspective of Unfair Business Competition", competition between companies is not always profitable. The proportion of entrepreneurs in Indonesia is increasing from year to year, reaching 3.10% of the entire population. given the intense commercial competition in Indonesia, an entrepreneur uses a collaborative method, called a partnership. The purpose of this article is to analyze whether flash sales are related to predatory pricing activities prohibited by the business competition law, and to explain law enforcement related to predatory pricing activities based on competition law.

## 2. METHOD

In writing this article using normative legal studies where a researcher conducts research by reviewing library documents. the statue approach and the conceptual approach. the sculpture approach according to Peter Mahmud Marzuki is a statute approach carried out by studying all relevant laws on the issues handled. A conceptual approach is an approach that studies the viewpoints and doctrines of legal science that create understanding, concepts, and legal principles that are relevant to the problem at hand.<sup>5</sup> this paper uses qualitative data analysis techniques.

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<sup>3</sup> Erica Flora and Elfrida Ratnawati, 'Indications for Selling and Loss to Get Rid of Perpetrators on the Prohibition of Monopoly Practices and Business Competition', 6.1 (2023), 2764–70 <<https://doi.org/https://doi.org/10.31933/unesrev.v6i1.1052>>.

<sup>4</sup> Yep. Afdal Yanuar, 'The Probability of Predatory Pricing Practices in Business Activities by Using Crime Proceeds as Business Capital', *Journal of Business Competition*, 2.1 (2022), 77–87 <<https://doi.org/10.55869/kppu.v3i-.42>>.

<sup>5</sup> Peter mamhmud marzuki, *Legal Research* (Jakarta: Kencana Prenada Group, 2007).

### 3. RESULTS AND DISCUSSION

#### 3.1 Relationship of Flash Sale with the concept of predatory pricing

The ease of business transactions using e-commerce media makes many business actors compete to provide promos, one of which is flash sales. flash sale can also be interpreted as a promo with a short time that has been determined. to attract consumer attention to a product sold, business actors carry out flash sale activities, which result in high sales turnover while making the store / company famous. the purpose of these sales is to instill a sense of urgency in the audience. as a result, people will avail these discounts or offers before they expire.

The presence of excitement in this audience can result in huge sales figures in a short period of time; in addition, this urgency will inspire the audience to make impulse purchases of a given product or service.<sup>6</sup> Consumers will compete to acquire a product during a flash sale because the price offered is very low, the supply of goods is limited, and sales occur in a short time. flash sales are usually carried out at certain times or moments, for example before big days and every weekend, and in its implementation this is only done in a limited time such as 1-3 hours. in its activities, flash sales are suspected to cause predatory pricing activities (selling and loss). selling and losing techniques are often adopted by business actors for various reasons. Some use it to shift competitors, but others consider it an early promotion or to get out stock.<sup>7</sup>

In Law No. 5 of 1999 Article 20 explains that:

“Business actors are prohibited from supplying goods and or services by selling at a loss or setting very low prices with the intention of eliminating or shutting down the business of competitors in the relevant market so that it can result in monopolistic practices and / or unfair business competition”

So, restrictions are carried out in order to avoid selling products that are less than the price of goods of other business actors, implying that this is applied so that business actors can maintain their dominance position.

Every business activist (business actor) can be said to be selling at a loss or the business actor meets the elements of the requirements, namely: a. setting a low price of the production price compared to the price set by other business actors, meaning in this case the business actor sells his product below the standard price sold by rival business actors to make consumers interested in buying the products they sell; b. selling low prices for a very long time, meaning that business actors in

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<sup>6</sup> M.ichsan Medina, 'Flash Sale: What It Is, Advantages, Disadvantages, How to Do It', *Glints*, 2023 <<https://glints.com/id/lowongan/flash-sale-adalah/>> [accessed October 10, 2023].

<sup>7</sup> Moody Rizqy Syailendra Putra Chica Octa Andinda, Gunardi Lie, 'Analysis of Predatory Piercing In Flash Sale Practice With Live Streaming Feature On Tiktok Application', *Indonesian Scientific Journal*, 2.8.5.2017 (2022), 2003–5 <<https://doi.org/https://doi.org/10.36418/syntax-literat.v7i10.12915>>.

carrying out sales and losses are carried out every day or continuously until their business competitors exit the same market; c. has the aim of eliminating and shutting down its competitors, this can provide space for monopolists and make rivals exit the market concerned and make it difficult for other business actors to enter the market. this monopoly practice is regulated in "Article 17 of Law No.5 of 1999".

To find out whether these business actors are included in unfair business competition activities, namely through the rule of reason approach and per se illegal approach. in "article 20 of Law No. 5 of 1999" is classified as a Rule of reason approach, in this approach KPPU needs to analyze the causes and effects of selling and loss activities, because these activities cause a monopoly in market share and unfair business competition.

In determining, whether business actors are classified as predatory pricing indications (selling losses), there is a test to determine whether flash sales aim to kill or eliminate other business actors, these tests are: a. Above-Cost Test where a business actor can still be considered to have the intention to eliminate, destroy, and kill the business of his competitors even though he sets the selling price of his goods or services above the average production cost (ATC). But in general, the specified price is so low that it reduces the maximum profit in the short term.<sup>8</sup> b. Limit-pricing strategy a pricing strategy, also known as a limit-pricing strategy (limit a price) in accordance with the desire of business actors to protect their position by significantly reducing prices or increasing product output significantly. the purpose of this activity is not to provide opportunities or attractiveness for new business actors who will enter the market, so that business actors who have a monopoly can still maintain their dominant position.

When viewed from the purpose of holding flash sale activities, namely flash sales at very relatively low prices and a short time, in its activities flash sales are not carried out continuously but only carried out on the same date and month or can be called beautiful dates for example, the 3rd day of the 3rd month, the 4th of the 4th month with a limited duration that is only done a few hours not in a day and in this case all e-commerce media for example, Lazada, Tokopedia, shopee, Blibli, Bukalapak, JD.ID and so on also held flash sales on the same day, In addition, this flash sale activity is a means for e-commerce companies to increase the number of visitors and increase product sales turnover and with this flash sale activity, e-commerce usually provides facilities for other business actors to wash warehouses so that goods that have not been sold for a long time can be sold and business actors can make updates in a product. therefore, flash sale activities do not meet the elements

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<sup>8</sup> KPPU, *Business Competition Supervisory Commission Regulation No. 6 of 2011 concerning Guidelines for Article 20 of Sale and Loss Law No. 5 of 1999*, 2011.

of Law No. 5 of 1999 Article 20 concerning predatory pricing activities. because this flash sale can be said to be a gift or reward from an e-commerce company.

In reality, traders involved in unfair business competition are implicitly regulated in the Criminal Code in Article 382. however, it turns out that the laws and regulations of the Criminal Code concerning sanctions for business actors who commit fraudulent acts in order to harm participating business actors are not firm and still light, so that firmer and heavier sanctions for business actors who commit fraudulent acts separately outside the authority of the Criminal Code regulated in the Criminal Code are needed. nevertheless, it will be carried out independently or at the initiative of a sole trader. Setting prices below the market average or selling and losing is strictly prohibited, as mentioned in Article 20. due to tight market competition, business actors are competing to develop new concepts or variants on the goods or services being promoted.

Flash sale is one of the marketing tactics that offers significant discounts, by setting time limits and limits on the sale of products, assuming a price that is lower or less than the cost of production. this sales system benefits both business actors who supply electronic facilities or operate as intermediaries, apart from businesses that provide services, goods, and customers. then the benefits that are considered by business activists such as providing digital facilities so that young and crowded customers are interested in cheap sales and shopping on the platform. Increased awareness of stores or goods provides advantages for the executors of a business, both services and goods. customers profit from the ability to purchase goods at a much cheaper price than they would normally spend. as a result, flash sales can entice someone to shop because the prices presented are very attractive, and it is something that everyone looks forward to considering dynamic and not fixed market prices.<sup>9</sup>

Many e-commerce business actors driven by increasingly competitive business competition are engaged in marketing techniques, especially in attracting consumers and dominating the market, one of which is providing promotions to consumers who are interested in making payments for their e-commerce services. this is very similar to what traditional business actors do.<sup>10</sup> flash selling is one of the latest promotional strategies used by many e-commerce companies.

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<sup>9</sup> Vincentius Eric Sutanto, 'Analysis of Rules of Reason Approach in the Case of Predatory Pricing Practices (Case Study of Decision Number 03/KPPU-L/2020)', *Face of Law*, 7.1 (2023), 17 <<https://doi.org/10.33087/wjh.v7i1.1001>>.

<sup>10</sup> Rasyifa Syahla and Ratna Januarita, 'Allegations of Predatory Pricing in Promotional Practices with Flash Sale Method Connected with Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition', *Bandung Conference Series: Law Studies*, 2.1 (2022), 450–56 <<https://doi.org/https://doi.org/10.29313/bcsls.v2i1.880>>.

Basically, a price reduction is not prohibited if the price given remains in the fair price category or the price is appropriate; this statement is supported by Article 24 of the Minister of Trade Regulation Number 50 of 2020, which states that business actors who trade through electronic devices or e-commerce are allowed to offer price discounts as a form of convenience to consumers.<sup>11</sup>

### **3.2 Enforcement of Predatory Pricing Law Based on Business Competition Law**

In Law Number 5 of 1999 article 20, it can be known if a business actor is said to carry out predatory pricing activities (selling and loss) if the business actor meets the elements of the article, namely with the intent, getting rid of competitors in his business, carrying out monopoly activities, causing unhealthy business battles. It is said to carry out predatory pricing actions (selling and loss) if business actors carry out selling and loss activities for a long time, causing their business competitors to stop quitting the market and hinder new entrepreneurs who want to enter the market world. this makes these business actors in a dominant position, after being in a dominant position, business actors who sell at a loss will sell a product at a very high price, because they no longer have competitors in the market and become the only ones who sell a product they sell in the market.

When selling and loss activities are carried out, consumers will feel benefited because they get a product at a low price, but after the selling loss activity stops and makes competing business actors out of the market, consumers have no choice anymore in buying a product because there are no other sellers in the market, and at that time the price of a product increases in price for a long time. In "Article 48 paragraph 2 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition" regarding the practice of predatory pricing (selling and loss) states that:

"Violation of the provisions of Articles 5 to 8, article 15, articles 20 to 24, and article 26 of this law shall be punishable by a fine as low as Rp.5,000,000,000.00 (five billion rupiah) and as high as Rp.25,000,000,000.00 twenty-five billion rupiah, or imprisonment in lieu of a fine for a duration of 5 (five) months".<sup>12</sup>

With additional penalties related to article 48 above where the provisions are regulated in article 49 of Law Number 5 of 1999. because with the abolition or

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<sup>11</sup> Alfaro David Timotius and Ratih Kemala, 'The Linkage of the Predatory Pricing Concept in Price Discount Practices in the Clothing Convection Industry through E-Commerce Based on the Perspective of Business Competition Law', *Jurnal Sains Publika*, 10 (2022), 314-22 <<https://doi.org/http://dx.doi.org/10.33603/publika.v10i2.7635>>.

<sup>12</sup> *Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition* <<https://doi.org/10.54621/jiaf.v10i1.74>>.

replacement of criminal regulatory sanctions and fine provisions as contained in "Law Number 5 of 1999".<sup>13</sup> Law enforcement on predatory pricing is carried out by KPPU through the Rule of reason approach method, meaning that it must first be proven whether the business actor violates Article 20 of Law Number 5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition.<sup>14</sup> If there are elements with the intent, death or elimination, Monopoly Practices and Unfair Business Competition, then the business actor can be said to be carrying out a sale and loss action or predatory pricing. It is intended that this rule will make businesses exist and fair when conducting their activities in the economy, thus protecting consumers from harmful corporate practices.<sup>15</sup>

Because selling behavior and setting sales prices are vulnerable below average standards on the grounds of creating a monopoly situation or unfair competition between business actors, the establishment of predatory pricing procedures requires juridical analysis based on the law of reason.<sup>16</sup> in line with the fact that the determination of prices that are higher and below the limits of fairness is typical, it must be evaluated based on whether competitive business actors are required to price all products that are predominantly high or below the market standards of business actors.

This is also in line with ministerial regulations for the safety of local regional businesses, especially those entering the world of e-commerce, the government enforces Ministerial Regulation Number 119/PMK.010/2019, which regulates customs, excise, and taxes on imported goods. government protection for domestic business actors in the form of a de minimis reduction in the value of import tariffs on goods from USD 75 to USD 3 is welcomed by business actors. Previously, products with prices greater than USD 75 were subject to import fees.<sup>17</sup> however, with this arrangement, starting in early 2020, goods that have a price of more than USD 3 will be subject to import duties.

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<sup>13</sup> Firlli Wijaksana and Rosalinda Elsina, 'Implikasi Yuridis Strategi Flash Sale Oleh Pelaku Usaha E-Commerce', *Bureaucracy Journal : Indonesia Journal of Law and Social-Political Governance*, 3.1 (2023), 257–69 <<https://doi.org/10.53363/bureau.v3i1.179>>.

<sup>14</sup> adinda Suci Rahayu And Suherman Suherman, 'Analysis Of Alleged Practices Of Selling And Losing Imported Products Through Shopee E-Commerce Sites', *UNES Law Review*, 4.4 (2022), 430–48 <<https://doi.org/10.31933/unesrev.v4i4.264>>.

<sup>15</sup> Komaria Nur and others, 'The Role of the Business Competition Supervisory Commission in Response to Allegations of Predatory Pricing Practices in E-Commerce Peran Komisi Pengawas Persaingan Usaha Terhadap Adanya Dugaan Praktik Jual Rugi Pada e-Commerce', *Jurnal Geuthèë: Penelitian Multidisiplin (Multidisciplinary Research)*, 6.2 (2023), 175–82 <<https://doi.org/10.52626/jg.v%vi%i.249>>.

<sup>16</sup> Akhmad Farhan Nazhari and Naufal Irkham, 'Analysis of Alleged Predatory Pricing Practices and Abuse of Dominant Position in the E-Commerce Industry', *Journal of Business Competition*, 3.1 (2023), 19–31 <<https://doi.org/10.55869/kppu.v3i1.85>>.

<sup>17</sup> Syarif Hidayatullah and Ditha Wiradiputra, 'Weighing the Effectiveness of the Job Creation Law on Increasing Foreign Investment', *Jurnal Surya Kencana Satu : Dynamics of Law and Justice Issues*, 12.2 (2021), 112 <<https://doi.org/10.32493/jdmhkdmhk.v12i2.15861>>.



#### 4. CONCLUSION

Based on the results of the discussion above, it can be concluded that the relationship between flash sale and predatory pricing is a buying and selling business strategy that is implemented through e-commerce media, by offering low prices on an item that is sold and carried out in a short time with the aim of increasing sales and reducing old stock of goods and increasing visitors to an e-commerce. this flash sale activity is also carried out by all e-commerce on the same day, usually done when there is a big day or on the same date and month for example like the 3rd of the 3rd month. So the act of flash sale is not included in Predatory Pricing activities (selling and loss) this is in accordance with the position in business competition law because flash sales do not include elements of predatory pricing activities (selling and loss) in "Law No.5 of 1999 concerning the Prohibition of Monopoly Practices and Unfair Business Competition", so it is clear that law enforcement on predatory pricing provides benefits for fellow business actors inam melakukan aktivitas di pasar yang tidak mematikan usaha pegiat usaha lainnya.

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