

CHAPTER IV

FINDING AND DISCUSSION

A. Legal Analysis of Indihome Program PT. Telekomunikasi Indonesia Based on Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition

The allegation of KPPU on Telkom's violations is based on the customer allegation in terms of tying agreement, abuse of monopolistic practice and abuse of dominant position. Tying agreement is one of form of unfair business competition. Basically a tying in agreement is an agreement in which the seller sells the product to the buyer by establishing the requirement by which the buyer must purchase another product from the seller. The product of the buyer need is the tying product, and another product is tied product.³⁸ Article 15 paragraph (2) about tying agreement Law No. 5 of 1999 on prohibition of monopolistic practice and unfair business competition stated that:

“Entrepreneur is prohibited from making any conduct with other parties which impose terms by which the parties who receive certain goods and or service must be willing to purchase goods and or other service from the supplier company”.

³⁸ Draft Guidelines of Implementations article 15 Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

From this explanation, it is clear that the seller make the agreement if the buyer wants to buy the goods or service from the seller, then another goods or service must be purchased. Of course the seller already violated the law, and the seller can get the sanction.

To prove the practice of tying agreement conducting by Telkom through Indihome Triple Play, per se illegal approach can be used. This approach does not need proof of the impact from the action. One of the proofs, that only uses the elements of the article. If the elements are fulfilled, the action was regarded commit violation.³⁹

1. From the explanation of article 15 paragraph (2), the elements contained in article 15 paragraph (2) which must be proven are as follows:
 - a. Entrepreneur

Article 1 point 5 stated that entrepreneur is an individual person or a company, in the form of legal or non legal entity established and domiciled or engaged in activities within the legal territory of the Republic of Indonesia who conduct various kinds of business activities in economic sector through contracts, both individually and collectively.

PT. Telekomunikasi Indonesia is a State-Owned Enterprises which is engaged in the field of telecommunications and networks in Indonesia. With this explanation, Telkom fulfilled this element

³⁹ Sutrisno Iwantono, 2011, "Perse Illegal dan Rule of Reason Dalam Hukum Persaingan Usaha", available at <https://serambihukum.wordpress.com/2011/01/16/perse-illegal-dan-rule-of-reason-dalam-hukum-persaingan-usaha/>, accessed on Tuesday, August 1st, 2017 at 22.16 pm.

b. Contract

Based on Article 1 point 7 contract is an action by one or more entrepreneurs to bind themselves with one or more other entrepreneur under any name, either made in writing or not.

Telkom as a business actor does not enter into agreements with any other business actors requiring that customers have to use their products. So, it can be concluded that Telkom does not fulfill this element.

c. Goods

Article 1 point 16 stated that goods is any object, both tangible, movable or immovable, that can be traded, used, utilized, or taken advantaged by the consumers or entrepreneurs.

Indihome Triple Play is a form of service provided to customers. Indihome Triple Play consists of 3 products TV, Internet, and Phone. The Commission assumes that Telkom set requirements to which the customer is required to use all three at once, the determination of these requirements is a violation of the prohibition and Article 15 paragraph (2).

2. Practice deeds

In applying the service, customers are given the freedom to decide whether the customer wants to use Indihome Triple Play, or

Dual Play. Triple Play consists of 3 products (Phone, TV, and Internet) while Dual Play (TV and Internet, or Phone and Internet). But, customers who only want to use 1 product should be served, 1 product (Phone only, internet only, or TV).⁴⁰

Customers who only want to use one of them can directly visit the plaza Telkom. If the customer wants or agrees to use Triple Play or Dual Play from Indihome, customers can come directly to Plaza or customers can easily download *myindihome* application on gadget. The procedure to subscribe Indihome of the prospective customers can initially started by registering at *myindihome* service. The steps are:

- a. Checking network availability;
- b. Select a payment plan and method;
- c. Location validation;
- d. View the subscription contract;
- e. Upload ID & Signature;
- f. Survey;
- g. Network withdrawal;
- h. Installation;
- i. Indihome is active.

After the customer has started several stages of the procedure, the Telkom will contact by phone to ensure further.

⁴⁰ Direct interview with Mr. Mutohar Qodri as the Manager Marketing and Customer Care of PT. Telekomunikasi Indonesia WITEL in Yogyakarta, held on the Office of marketing division in PT. Telekomunikasi Indonesia WITEL in Yogyakarta on May, 19th 2017, 09:00 am.

3. Contract

Article 1338 Civil Code explains about freedom of contract. It can be concluded that freedom of contract is all the contract which is made legitimately as a law for the parties who made it. So, the customer and Telkom bind each other in a contract, and the contract became the law for the customer and Telkom.

Telkom gives an option for the customer, such as Indihome Triple Play, Dual Play or one Play. Customers are given freedom to choose what they need. So, to subscribe the Indihome, there is no coercion to the customers to use 3 (three) products at once.

So, the analysis based on per se illegal approach shows that the PT. Telekomunikasi Indonesia do not abuse the provision of Article 15 paragraph (2) Law No. 5 of 1999.

The second allegation of KPPU on Telkom is an allegation of monopoly through Indihome Triple Play because Telkom require customers to use three product of Indihome Triple Play at once. This method is considered to potentially eliminate opportunities for other business actors who offer similar services. It also prevents customers from using other service options according to what they need.⁴¹ Monopoly which regulated in Article 17 Law No. 5 of 1999, this article stated that:

⁴¹Anonymous, 2017, "Dugaan Praktik Monopoli Indihome Memasuki Babak Baru", available at <http://techno.okezone.com/read/2017/02/22/207/1625573/dugaan-praktik-monopoli-indihome-masuki-babak-baru>, accessed on Friday, August 4th, 2017 at 12.00 am.

1. Entrepreneurs are prohibited from controlling any production and or marketing of goods and or services that can cause monopolistic practices and or unfair business competition;
2. Entrepreneurs can be suspected or considered as controlling production and or marketing of goods and or services as referred to under paragraph (1) of this article if:
 - a. The goods and or services don't have substitutions at that time; or
 - b. It causes other entrepreneurs to not be able to enter business competition for the same type of goods and or services; or
 - c. One entrepreneur or one grup of entrepreneurs controls more than 50% (fifty percent) of the marketing share of one type of certain goods or services.

Based on Draft Guidelines of Implementation the Article 17 Law No. 5 of 1999 to proof this allegation used by Rule of Reason approach. Rule of Reason approach is an approach used by the competing authority to make an evaluation of the effect of a particular contract or business activity, to determine whether the contract or activity is inhibiting or supporting the competition.⁴² To analyze this allegation, the approach of Rule of Reason is used, the steps that must be done in this analyzing are as follows:

⁴² Anonymous, 2010, "Pentingnya Prinsip "Per se" dan "Rule of Reason" di Undang-Undang Persaingan Usaha", available at <http://www.hukumonline.com/klinik/detail/lt4b94e6b8746a9/pentingnya-prinsip-per-se-dan-rule-of-reason-di-uu-persaingan-usaha>, accessed on Sunday, September 17th, 2017 at 5.25 pm.

1. Relevant market

Article 1 point 17 stated that relevant market is a market related to the range or certain marketing area of the entrepreneur for the same kind or type of goods and or service or substitutes of the goods and or services. Markets related to a particular range or marketing area in competition law are known as geographic markets. While the same or similar goods or services or substitutes of goods and or services are known as product markets.⁴³

a. Product market analysis aims to determine the type of goods and or services of a kind but is a substitute that competes with each other in a case. To analyze this, the product should be seen from several aspects, among:

1) Advantages

In general, compared to other telecommunication services, the use of Indihome Triple Play has the same utility as competitors, ie to conduct voice communications via Telephone, access data through available Internet network, and also as a means of Entertainment, education through Usee TV provided by Telkom. There is no fundamental difference between different competitors offering the same product.

⁴³ Draft Guidelines of Implementation article 15 Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

2) Characteristic

There is no fundamental difference between Indihome Triple Play and fellow business actors, but each of the competitors has different internet speeds, different phone bonuses, and also accessible channels. Each business actor also has different cities that can access the service.

3) Price

In terms of price, it is certain that every business actor has bargaining power from different price aspect. The difference emerges to give consideration to the customer in determining her or his choice.

b. Geographic Market

Basically, the market based on the geographical aspect is determined by several aspects, including the company policy, the cost of transportation, the duration of travel, the tariff and the rules that restrict the traffic between the cities or regions. These factors will determine the extent and scope of the territory of the marketed product.

In marketing Indihome's products, it is the company's policy that has the authority to determine which areas will be targeted in marketing its products. Thus the tariff of Indihome products in each region also difference.

So, from these statements, it is proven that Telkom has the same competitors in marketing its products. Thus, it can be concluded that Telkom did not violate Article 17 paragraph (2) point a.

2. The position of monopoly

PT. Telekomunikasi Indonesia is a State Owned Enterprise (BUMN). A state-owned company is granted exclusive rights by the government, and exclusive rights are rights granted to certain business actors that cannot be obtained by other business actors, such as sole agents, single importers, and single buyers. In general, this is related to the production and or marketing of goods and or services that affect the livelihood of the people in accordance with Article 33 paragraph (2) and the important production branch for the State. However, there are exceptions to this exclusive right. One of them is Telkom.

Telkom in the monopoly position will not automatically empower its monopoly power, except, when Telkom abuses the monopoly position to monopoly practice for maintaining and improving the monopoly position. Telkom Indonesia has 151.9 million subscribers consisting of cellular (Telkomsel) more than 125 million in which Telkom provides a variety of other communication services including interconnection services of telephone networks, multimedia, data and services related to internet communications, satellite transponder leases, subscription lines, pay television and VoIP services. Telkom dominates over 60 percent of Indonesia's

broadband market share of more than 19 million subscribers.⁴⁴ 1.52 million of them are customers of Indihome Triple Play. In 2017, Indihome reached 2 million customers, up 34.2 percent from 2016 as many as 1.5 million subscribers.⁴⁵

The data above shows that the customer of PT. Telekomunikasi Indonesia has an increase. The growth of Telkom's subscribers is Telecommunication which has a broadband market share of 60 percent, meaning that in broadband market or Indihome Triple Play, Telkom has 60 percent market share compared to other competitors. Thus PT. Telekomunikasi Indonesia may be classified as the holder of a monopoly position based on Article 17 paragraph (2) point c.

3. Monopolistic Practice

Although PT. Telekomunikasi Indonesia has a monopoly position in the market, Telkom is not necessarily violating Article 17 regulation of KPPU. However, it must be remembered that Article 51 of Law No. 5 of 1999 stipulates that the monopoly and or concentration of activities related to the production and or marketing of goods and or services affecting the livelihood of the public and the

⁴⁴PT. Telekomunikasi Indonesia, 2013, "Bisnis Kami adalah T.I.M.E.S", available at <http://www.telkom.co.id/bisnis-kami-adalah-t-i-m-e-s.html>, accessed on Saturday, August 5th, 2017 at 8.34 am.

⁴⁵ Royke Sinaga, 2017, "Pendapatan bisnis digital Telkom tembus Rp27,12 triliun", available at http://www.antaraneews.com/berita/643300/pendapatan-bisnis-digital-telkom-tembus-rp2712-triliun?utm_source=fly&utm_medium=related&utm_campaign=news, accessed on Friday, August 4th, 2017 at 7.38 pm.

production branches which are important to the State shall be regulated by law and shall be conducted by a State-Owned Enterprise or an Institution Established or appointed by the Government.

Regardless of that, Law No. 5 of 1999 Article 51 excludes that not all state-owned companies have exclusive rights, one of the exceptions are PT. Telekomunikasi Indonesia. Thus, Telkom has an equal position with other private companies, ie no exception and must comply with existing regulations.

With the products of Indihome Triple Play, Dual Play, and 1 Play, Telkom gives freedom to the customer to choose which products they need, means that Telkom does not conduct coercive to customers by requiring customers to use three products at once ie, phone, TV, and Internet . In other words, although they do not need these stuffs, but they have to buy them. So that means, Telkom does not make inhibition to other competitors to enter into the same market. Due to the fact that if customers only want to use Telephone and Internet only from Telkom, it is possible if customers use TV service products owned by competitors. Thus, it can be concluded that Telkom did not violate Article 17 paragraph (2) point b.

From the analysis above based on Rule of Reason approach, Telkom through Indihome Triple Play is not fulfil the Article 17 paragraph (2), which is in this article is the criteria of violation of

Article 17. So, can be concluded that Telkom doesn't do monopolistic practice such as the allegation of KPPU.

The third allegation of KPPU on Telkom is that Telkom has committed abuse of dominant position, namely violation of Article 25 paragraph 1 point a and c. The allegation is suspected to occur in terms of complicating the process of unsubscribing. In this case, Telkom subscribers who are already using Indihome Triple Play, are suspected of getting inhibitions when they want to unsubscribe.

Abuse of Dominant Position is an act that is prohibited by Law no. 5 of 1999. Dominant position is the situation when the business actor excels in the relevant market and this becomes one of the business actors to win the competition.⁴⁶ One of the practices that can be classified as a form of abuse of dominant position is closed agreement,⁴⁷ allegation of KPPU, that the practice of tying agreement by Telkom also has an impact on abuse of dominant position.

Actually, the dominant position is not prohibited. As the dominant position should be achieved in a fair competition. Article 25 paragraph (1), states that:

⁴⁶ Hanif Nur Widhiyanti, 2015, "Pendekatan Per se Illegal dan Rule of Reason dalam Hukum Persaingan (Perbandingan Indonesia-Malaysia)", (Fakultas Hukum Universitas Brawijaya), p. 394.

⁴⁷ Ahmad Ramadhan, Persaingan pada Usaha Menara Telekomunikasi (Kajian terhadap Dampak Peraturan Menteri Komunikasi dan Informatika No. 02/PER/M.KOMINFO/3/2008), (Jakarta: Komisi Pengawas Persaingan Usaha), p.21.

1. Entrepreneur are prohibited from taking advantage of their dominant position, either directly or indirectly, in order to:
 - a. Impose trade terms with the intention to prevent and or hamper the consumers to acquire competitive goods and or service, both in prices or quality;
 - b. Restrict the market and technology development;
 - c. Inhibit other entrepreneurs having the potential to become their competitors to enter the relevant market.

To prove the allegation of dominant position conducted by Telkom through Indihome Triple Play is to use the Rule of Reason approach which is divided into 3 step process. This step is usually used by KPPU as a proof of allegation abuse of dominant positions conducted by business actors, as follows:

1. Relevant market

Article 1 point 13 stated that relevant market is a market related to the range or certain marketing area of the entrepreneur for the same kind or type of goods and or service or substitutes of the said goods and or services. Markets related to a particular range or marketing area in competition law are known as geographic markets, while the same or similar goods or services or substitutes of goods and or services are known as product markets.

Based on explanation before on the proven of Relevant Market in the Monopolistic practice that the criteria of product market, is

Phone, TV, and the Internet is a service from Telkom. Each of these products has different markets and competitors. In fact not only that, the difference lies in the advantages, weaknesses, and tariffs offered between competitors fellow products. Basically Telephone, TV, and Internet have competitors that can be distinguished for their characteristics, and quality. Then for the Geographic Market determine the extent and scope of the territory of the marketed product.

2. Proof of dominant position

Article 1 point 4 stated that dominant position is a situation where an entrepreneur does not have any significant competitor in the relevant market with regard to the market share being controlled, or the entrepreneur is in the highest position among its competitors in the relevant market with regard to its financial capability, ability to have access to the suppliers or sales, and ability to adapt to the supply and demand of certain goods or services.

In conducting its business, Telkom has 151.9 million subscribers consisting of cellular (Telkomsel) more than 125 million where Telkom provides a variety of other communication services including interconnection services of telephone networks, multimedia, data and services related to internet communications, satellite transponder leases, subscription lines, pay television and VoIP services. Telkom dominates over 60 percent of Indonesia's broadband

market share of more than 19 million subscribers.⁴⁸ 1.52 million of them are customers of Indihome Triple Play. In 2017, Indihome reached 2 million customers, up 34.2 percent from 2016 as many as 1.5 million subscribers.⁴⁹

These data show that the customer of Telkom Indonesia has an increase. Customer growth makes Telkom as a company in the field of Telecommunications broadband has a market share of 60 percent, meaning the market broadband or Indihome Triple Play, Telkom has a 60 percent market share compared to other competitors. Thus PT. Telekomunikasi Indonesian can be classified as holders of dominant monopoly positions, in which article 25 paragraph (2) point a is fulfilled.

3. Proof of abuse of dominant position

In verifying the abuse of dominant position, Telkom as a business actor suspected to abuse the dominant position must contain some criteria, based on Article 25 paragraph (1):

“Entrepreneurs are prohibited from taking advantage of their dominant position, either directly or indirectly, in order to:

⁴⁸ PT. Telekomunikasi Indonesia, 2013, “Bisnis Kami adalah T.I.M.E.S”, available at <http://www.telkom.co.id/bisnis-kami-adalah-t-i-m-e-s.html>, accessed on Saturday, August 5th, 2017 at 8.34 am.

⁴⁹ Royke Sinaga, 2017, “Pendapatan bisnis digital Telkom tembus Rp27,12 triliun”, available at http://www.antaraneews.com/berita/643300/pendapatan-bisnis-digital-telkom-tembus-rp2712-triliun?utm_source=fly&utm_medium=related&utm_campaign=news, accessed on Friday, August 4th, 2017 at 7.38 pm.

- a. Impose trade terms with the intention to prevent and or inhibit the consumers to acquire competitive goods and or service, both in prices or quality;
- b. Restrict the market and technology development;
- c. Inhibit other entrepreneurs having the potential to become their competitors to enter the relevant market.”

From the analysis, in applying services to customers, customers are given the flexibility to choose which services they need, Indihome Triple Play, Dual Play, or 1 Play. Telkom does not enforce requiring customers to use the three products at once (Indihome Triple Play), meaning that customers have to choose the product that will be used by other providers, and not inhibit the opportunity of other providers to enter into the market. Therefore, Telkom is not proven to abuse the dominant position in accordance with article 25 paragraph (1) point a and c.

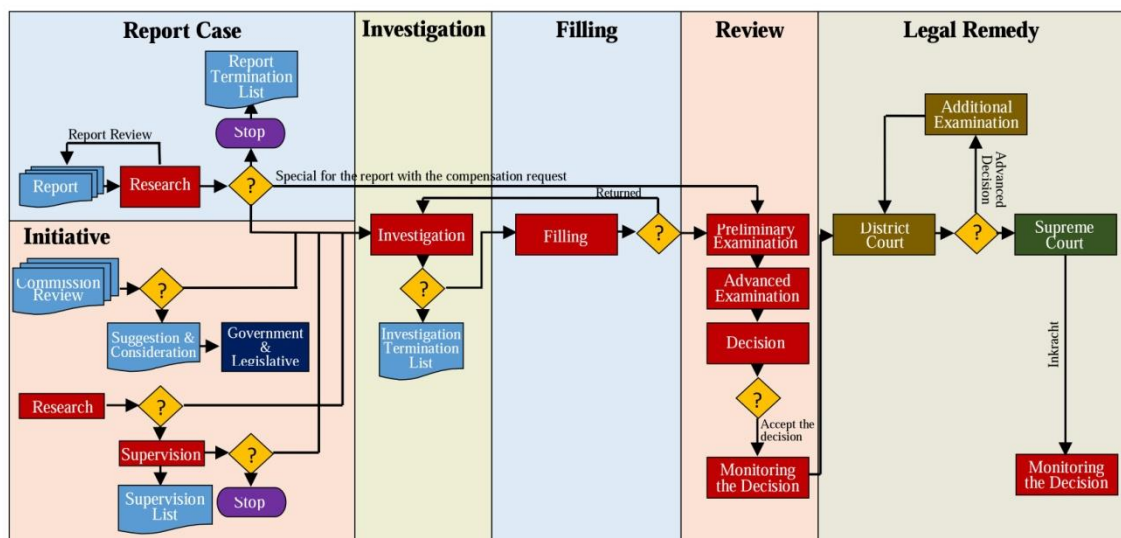
B. The Settlement of Case of Indihome Package from PT. Telekomunikasi Indonesia by the Commission for the Supervision of Business Competition (KPPU)

Regarding this matter, the customers who feel aggrieved with Indihome Triple Play finally complain. KPPU as an independent institution authorized by Law No. 5 of 1999 concerning the prohibition of

monopolistic practices and unfair business competition, handle business competition cases. The handling of business competition cases by KPPU can be done with the initiative of KPPU or after receiving a complaint or written report from the public.⁵⁰ So, KPPU can handle business competition case because KPPU's initiative is supported by many complaints from community or with written report given by community directly to KPPU.

Figure 4.1

This is the scheme of case handling process



Source: Website KPPU <http://www.kppu.go.id> accessed on Wednesday, April 12th, 2017 at 1.38 pm.

⁵⁰ Rachmadi Usman, 2013, *Hukum Acara Persaingan Usaha di Indonesia*, Jakarta, Sinar Grafika, p. 120.

Article 40 paragraph (1) Law no. 5 of 1999 concerning the prohibition of monopolistic practices and unfair business competition states that: “The Commission may conduct investigation of the entrepreneurs if there is an alleged violation to this law even though no report is submitted.”

Indihome Triple Play case is handled by the initiative KPPU, that’s the case no. 10/KPPU-I/2016. KPPU handled this case without any report of society,⁵¹ but KPPU handled this case based on data and information.⁵² Data or information can be sourced at least from:

1. Results of the Study;
2. Some mass media;
3. Results of supervision;
4. Incomplete report;
5. Results of the hearings conducted by KPPU;
6. Findings in the examination;
7. Other sources that can be accounted for.⁵³

⁵¹ Direct interview with Mr. Dendy R. Sutrisno as the Head of Law Firm, Public Relation, and Cooperation in KPPU, held on the Office in KPPU, on April, 5^h 2017, 13:00 m.

⁵² Article 7 of the Regulation of Commission for the Supervision of Business Competition (KPPU) No. 1 of 2006 on the process of handling case in KPPU.

⁵³ Rachmadi Usman, *Op.Cit.*, p. 127.

This is the process of case handling by KPPU related Indihome Triple Play, that is:

1. Study

Before KPPU take the Indihome Triple Play case into investigation, KPPU formed a Study Team. This study aimed to find clarity and completeness about whether or not unfair business competition existed, which contains:

- a. Collecting data and information, with stages:
 - 1) Conduct literature study;
 - 2) Invite stakeholders;
 - 3) Conduct field research;
 - 4) Conduct Focus Group Discussion (FGD).
- b. Perform data processing and information obtained
- c. Conduct industry and policy analysis
- d. Identify potential and alleged violations of Law No. 5 of 1999
- e. Compile the results of the study.

The Regulation of KPPU No. 1 of 2010 article 19 confirms that the report of the study can be included into the investigation stage if it fulfil:

- a. There is alleged violation of Law No. 5 of 1999;
- b. There is an alleged industry performance, a declining market or a potential alleged that could harm consumers.⁵⁴

2. Research

In the initiative case, the report to be directed not only came from the results of the study but it could have come from the research results. The research here is conducted by the working unit that handle the monitoring of business actors who allegedly violated the competition law provisions to obtain preliminary evidence in order to be continued in the next stage.⁵⁵

In order to obtain preliminary evidence, the working unit in charge of conducting the research should go through several series, including:

- a. Collecting data from Businesses, government and or other parties;
- b. Conducting a market survey;
- c. Conducting local survey;

⁵⁴ Rachmadi Usman, *Op.Cit.*, p. 127-128.

⁵⁵ Rachmadi Usman, *Op.Cit.*, p. 129.

- d. Receipt the letters and or information related to the allegation of violations of competition law provisions.⁵⁶

After the unit conducted a series of these activities, working units report directly to the commission what they found,⁵⁷ whether there are clauses which proves that PT. Telecommunications violate the provisions of competition law or no. So, the initial stage of handling cases on the basis of the initiative of the study team or work unit is very determined, because if they find any clumsiness, the allegation case will proceed to the next stage. But otherwise, if it is not found then the allegation case will be stopped and declared of having no violations.

3. Supervision of Business Actor

After the unit finds out the results of the research, the unit then submits to the commission what they get in order to be followed up by the supervision of the business actor, but the report of the research must fulfill several criteria in order to be upgraded to the next stage of supervision. The criteria are as follows:

- a. 1 (one) business actor or one group of business actors owning market share of more than 50% (fifty percent);

⁵⁶ Article 21 of the Regulation of Commission for the Supervision of Business Competition (KPPU) No. 1 of 2010 on the process of handling case.

⁵⁷ Rachmadi Usman, *Loc. Cit.*

- b. 2 or 3 business actors or groups of business actors have a market share of more than 75% (seventy five percent); and or
- c. Potentially violate Law no. 5 of 1999.⁵⁸

However, if the business actor has reached the criteria, KPPU may decide to follow up the supervision stages and then put into the supervision list because Telkom allegedly commit a violation. The forms of supervision of the business actors are as follows:

- a. Price and supply monitoring;
- b. Interview;
- c. Meeting with the relevant business actor;
- d. Periodic reports of business actors every 6 (six) months;
- e. Asking for information from competing business actors; And or
- f. Asking for information from the government.

The next thing to do is to submit the results of supervision to the KPPU to be determined to follow up.⁵⁹

⁵⁸ Article 22 paragraph (3) of the Regulation of Commission for the Supervision of Business Competition (KPPU) No. 1 of 2010 on the process of handling case.

⁵⁹ Rachmadi Usman, *Op.Cit.*, p. 130-132.

4. Case Investigation

Based on Article 36 of Law No. 5 of 1999, KPPU is authorized to conduct investigation and or examination on the allegation cases of monopolistic practices and or unfair business competition reported by the public or by business actors or found by the Commission as a result of their research.⁶⁰ Not only that, but KPPU also has the authorities to give the decision about monopolistic practice and unfair business competition done by business actor. So, KPPU can be called as investigator, prosecutor, and judges to decide a case. But, the roles and authorities of KPPU are given by Law No. 5 of 1999 only in administrative sanction.⁶¹

To obtain efficient evidence to complete the study of team's assessment, the Commission followed up the case of Indihome Triple Play to the investigation.⁶² The investigative unit commissioned an investigator to conduct an investigation, through the following steps:

- a. Asking the information of the reported party, business actor, and other related parties;
- b. Asking the witness statements;
- c. Request expert opinion;

⁶⁰ Article 36 paragraph (2) Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

⁶¹ Suyud Margono, 2009, *Hukum Anti Monopoli*, Jakarta, Sinar Grafika, p. 154.

⁶² Rachmadi Usman, *Op.Cit.*, p. 133-134.

- d. Obtain letters and or documents;
- e. Conduct a local examination;
- f. Analyze the information, letters, and / or documents and the results of the local examination.⁶³

The next step by the investigator is to create and sign the investigation report and coordinate with the investigation unit in conducting the investigation of Indihome Triple Play case. Furthermore, the work unit handling the investigation assessed the clarity and completeness of the allegation of violation the Law No. 5 of 1999 in the form of a report of the results of the investigation.⁶⁴ The report should contain:

- a. The identity of a business actor allegedly committing an offense;
- b. Provisions of Law No. 5 of 1999 allegedly violated;
- c. Have fulfilled the minimum requirements of 2 evidences.⁶⁵

Investigation unit shall submit to the Commission the development of the results of the investigation no later than 60 (sixty)

⁶³ Article 31 paragraph (2) of the Regulation of Commission for the Supervision of Business Competition (KPPU) No. 1 of 2010 on the process of handling case.

⁶⁴ Rachmadi Usman, *Op.Cit.*, p. 134-136.

⁶⁵ Article 37 paragraph (3) of the Regulation of Commission for the Supervision of Business Competition (KPPU) No. 1 of 2010 on the process of handling case.

days from the commencement of the investigation, and can be extended for 30 (thirty) days.⁶⁶

5. Case filing

Filing is a series of activities carried out by the unit that handles the filing and case management to re-examine the results of the investigation report to draft the report alleged violations to do the report title.⁶⁷ Filing activity is an activity to assess the feasibility report of the investigation to do the title of the report. Reports of investigations that are considered eligible for the report are drawn up in draft alleged infringement reports. Reports assessed as ineligible will be returned to the unit handling investigations for improvement.⁶⁸

Filing and handling case team of violating allegation give a draft report to the commission to do the title of the report.⁶⁹ After the commission has the hearing on the report, then the commission meeting would complete or approve the draft report into reports of violating allegation. If it has been approved, then the Chairman of

⁶⁶ Article 38 of the Regulation of Commission for the Supervision of Business Competition (KPPU) No. 1 of 2010 on the process of handling case.

⁶⁷ Article 1 point 7 of the Regulation of Commission for the Supervision of Business Competition (KPPU) No. 1 of 2010 on the process of handling case.

⁶⁸ Dewi Sri Hadrianingsih, 2013, "Efektifitas Peraturan Komisi Pengawasan Persaingan Usaha No. 1 tahun 2010 tentang Tata Cara Penanganan Perkara", Fakultas Hukum Universitas Hasanuddin, p. 38.

⁶⁹ Binoto Nadapdap, 2009, *Hukum Acara Persaingan Usaha*, Jakarta, Jala Permata Aksara, p. 40.

KPPU will determine a preliminary examination, which is also submitted to the reported party.⁷⁰

The period of time in filing of the investigation report shall be no later than 14 (fourteen) days, if within 14 (fourteen) days it is not returned the result of the investigation report shall be considered complete and clear, and for the title of the report shall be executed no later than 7 (seven) days since the result of the investigation report is considered complete and clear.⁷¹

6. The Trial of the Commission Council

a. Formation of the Commission Council

In order to bring the case to trial, KPPU previously formed the Commission Council, in which the Commission Council consists of at least 3 people, one of them is as the chairman of the commission council and others is member.⁷² Based on Article 5 paragraph (2) of Regulation of the Commission for the Supervision of Business Competition No. 1 of 2010 concerning Procedures for Case Handling, the Commission Council task is:

- 1) Conduct a preliminary examination;
- 2) Conduct a further examination;

⁷⁰ Rachmadi Usman, *Op. Cit.*, p. 137-138.

⁷¹ Article 41 of the Regulation of Commission for the Supervision of Business Competition (KPPU) No. 1 of 2010 on the process of handling case.

⁷² Article 42 paragraph (2) of the Regulation of Commission for the Supervision of Business Competition (KPPU) No. 1 of 2010 on the process of handling case.

- 3) Examine, make a conclusion, and decided
- 4) Impose the sanctions;
- 5) Read the KPPU's decision.

Based on the provisions of Article 5 paragraph (3) of Regulation of the Business Competition Supervisory Commission No. 1 of 2010 concerning Procedures for Case Handling, the Commission Council has the authority to cover:

- 1) Conduct preliminary examination and further examination;
- 2) Request information from government institutions;
- 3) Study and examine the letters, documents, or evidence in the reports of violate allegation;
- 4) Obtain the letters, documents or other evidences;
- 5) Request to the police investigator to bring the reporter, witness, expert and any person who know the violation, but they not willing to give the information;
- 6) Provide an opportunity to the reported party to submit a defense related to the violate allegation;
- 7) Study and examine all examination results;

- 8) Determine the time of trial of the council for examination and reader of KPPU's decision;
- 9) Sign the KPPU's decision;
- 10) Provide recommendations to the KPPU's chairman to provide suggestion and consideration to the government;
- 11) Impose sanctions in the form of administrative actions to business actors violating the provisions of Law No. 5 of 1999.

b. Trial of Commission

This Commission is to examine whether or not evidence of violation to conclude and decided whether or not violations happen, and to impose the sanctions in the form of administrative sanctions by the trial. The trial of Indihome Triple Play case is open to the public. It based on the regulation of KPPU No. 1 of 2010 article 43 paragraph (1), and according to article 43 paragraph (2) stated that, to get the facts in the trial done by:

- 1) Examining and asking the information to the reported;
- 2) Examining and asking the information to the informer;
- 3) Examining and asking the information to the witnesses;
- 4) Asking the expert opinion;
- 5) Asking the information from the government agencies;
- 6) Asking, getting and examining the letters, documents, or other evidences;

7) Examining the activity related to the violate allegation.

c. Preliminary Examination

The KPPU's regulation about the procedures for handling cases in article 1 paragraph 8 stated that:

“The preliminary examination is the series of activity which is done by the commission against the violating allegation report to make conclusion whether or not the violation is proven.”

The aims of preliminary examination are to get the recognition from the reported person and or can get the evidences related to the case.⁷³

After the investigation process and filing, finally the KPPU decided to increase the case of Indihome Triple Play from investigation process to examination process on Tuesday, 11th, 2016. This step was taken by the KPPU after conducting the process of investigation, in which the KPPU has allegations that Indihome Triple Play required all the customers to use these service, containing Internet Fiber or High Speed Internet, Interactive TV (UseeTV) and Phone.

In the investigation, there are at least 3 (three) issues experienced by KPPU. Telkom through Indihome Triple Play is suspected to practice tying agreement requiring customers to use 3

⁷³ Binoto Nadapdap, *Op.Cit.*, p. 42.

(three) services such as Internet Fiber or High Speed Internet, Interactive TV (UseeTV) and Phone, and allegedly abuse the dominant position of PT Telekomunikasi Indonesia which controls the fixed service market Line (PSTN). On the other hand, the presence of Indihome Triple Play is suspected to have an impact on the decreasing market share of competing business actors.⁷⁴

Preliminary examination can be started after KPPU issued a letter of determination or decision about the commencement of preliminary examination. Article 39 paragraph (1) of Law No. 5 1999 determines that the preliminary examination period is 30 (thirty) days from the date of the determination letter commencement of a preliminary examination, in the case of Indihome Triple Play, the preliminary examination period is calculated from the date of letter the determination of the Commission Council to start a preliminary examination.⁷⁵

d. Advanced Examination

The Advanced Examination is a continuation of previous processes, where in the advanced examination the commission is obliged to conduct examination on the reported business actor.

⁷⁴ KPPU RI, 2016, “KPPU Tingkatkan Penanganan Kasus Telkom Indihome ke Tahap Pemeriksaan”, available at <http://www.kppu.go.id/blog/2016/10/kppu-tingkatkan-penanganan-kasus-telkom-indihome-ke-tahap-pemeriksaan/>, accessed on Wednesday, May 31st 2017 at 2.37 pm.

⁷⁵ Andi Fahmi Lubis, Anna Maria Tri Anggraini, etc, 2009, *Hukum Persaingan Usaha Antara Teks dan Konteks*, Jakarta, Published and Printed with support of Deutsche Gesellshacft fur Techinsche Zusammenarbeit (GTZ) GmbH, p. 326-327.

This is in accordance with the provisions of article 39 paragraph (2) of Law No. 5 of 1999.⁷⁶ Advanced examination shall be conducted by the commission if there is any indication of monopolistic practice or unfair business competition, the duration of the advanced examination shall be 60 (sixty) days since the end of the preliminary examination, and may be extended for 30 (thirty) days.

Business actors being examined by the commission have different legal status depending on the type of case. The Indihome Triple Play case is a case based on the initiative of KPPU, so the business actor (PT. Telekomunikasi Indonesia) examined is referred to as a witness.⁷⁷ Advanced examination in the case Indihome Triple Play being in the examination of the witness, where the witness was presented by the Director of PT MNC Kabel Mediacom on April 12th, 2017,⁷⁸ and then on May 10th, 2017 continued the examination of witnesses by investigators, to the next agenda would be determined by Commission Council in trial.

⁷⁶ I Ketut Karmi Nurjaya, "Peran KPPU Dalam Menegakkan Undang-undang No. 5 tahun 1999 tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat", *Dinamika Hukum*, IX, (January 2009), p. 87.

⁷⁷ Andi Fahmi Lubis, Anna Maria Tri Anggraini etc., *Op. Cit.*, p. 327.

⁷⁸ KPPU's Twitter, April 12th 2017, accessed on Saturday, July 1st, 2017 at 9:16 am.

e. Decision

Commission for the Supervision of Business Competition (KPPU) conduct a trial verdict on the case number 10/KPPU-I/2016 on the allegation of violation article 15 paragraph (2), article 17 and article 25 paragraph (1) point a and c Law No. 5 of 1999 in the field of Telecommunication related to PTSN, internet service, and Usee TV service in Indonesia by PT. Telekomunikasi Indonesia on Friday, September 29th, 2017.

In the trial of verdict stated that the object of the case *a quo* on this decision is service in the field of Telecommunication related to PTSN, internet service, and Usee TV service. Related to the relevant market, the Commission Council examine that product market in this case is fixed line service, that is the product of technology that has not been enjoyed by the customer and product which needed by the customer is an internet service and examine the geographic market. Geographic market in this case is all the territory of Indonesia. Then, the Commission Council give the explanation related to the tying agreement, based on the result of trial and the evidence submitted by each party related to the tying agreement. Within which based on the article 1 point 7 stated that contract is an action by one or more entrepreneurs to bind themselves with one or more another entrepreneur under any name, either made in writing or not. In addition, investigator submits the

evidence of Indihome contract which provided by the reported party through various access for Indihome subscription registration. Commission Council considered that the evidence was submitted by the investigator is not enough to prove the price increase effort for Indihome Triple Play.

In the process of trial, the Commission Council received information from the competitor of the reported party, namely PT MNC Kabel Mediacom, PT MNC Sky Vision and PT First Media. Basically, each competitor delivers about the internet services market is still potential growth. Besides, the Commission Council also did not find sufficient evidence Reported actions that can be categorized as exploitation.

In the fact, the high market share owned by the Reported Party for fixed line products, actually not proven to have the ability to be used by the Reported Party in forcing consumers to buy the products of internet services it sells, the fact is that fixed line products do not have a high bargaining value so they are not proven to have the potential to be misused in *a quo* case. So, the Commission Council considers there is insufficient evidence of coercion exercised by the Party in product marketing. The Commission Council considered that the customers still have the option because it is possible to buy products from the Reported Party separately.

So, Commission Council decides and states that the Reported Party is not proven to violate Article 15 paragraph (2), Article 17, and Article 25 paragraph (1) point a and c Law No. 5 of 1999.⁷⁹

⁷⁹ KPPU RI, 2017, “Putusan KPPU Perkara Nomor 10/KPPU-I/2016”, available at <http://www.kppu.go.id/id/blog/category/press-release/>, accessed on Saturday, October 7th, 2017 at 10.34 am.