

**THE DISPUTE SETTLEMENT ON UNFAIR BUSINESS COMPETITION CASE
OF CELLULAR OPERATOR:
A CASE STUDY BETWEEN TELKOMSEL AND INDOSAT
UNDERGRADUATE THESIS**



This Undergraduate Thesis is submitted as one of the requirements to obtain the degree of
Bachelor of Law at Faculty of Law

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ABSTRACT

In the recent Telecommunication has become a central part in human life which thig competition among cellular operator. Especially, in June 2016 there is a case of business competition between Telkomsel and Indosat (the big Three Cellular operator in Indonesia). In Indonesia there are two Institutions that maintain business telecommunication and business competition namely Indonesian Telecommunication Regulatory Body (BRTI) has mandate by Law number 36 of 1999 and Business Competition Supervisory Commission (KPPU) by Law Number 5 of 1999. The research aims at know how the regulation regarding the dispute settlement on unfair business competition of cellular operator and to know the role of Indonesian Telecommunication Regulatory Body (BRTI) and Business Competition Supervisory Commission (KPPU) settle this case. The study is normative legal research with statute and case approach, by using juridical qualitative approach. The result of this research are, first to know the regulations regarding dispute settlement on unfair business competition of cellular operator. Second, to shows the dispute settlement on unfair business competition case of cellular operator by Indonesian Telecommunication Regulatory Body (BRTI) and Business Competition Supervisory Commission (KPPU) regarding with Law Number 36 of 1999 on Telecommunication and Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competition.

Keywords: *Unfair Business Competition, Cellular Operator, Dispute settlement, KPPU, BRTI.*

APPROVAL PAGE

THE DISPUTE SETTLEMENT ON UNFAIR BUSINESS COMPETITION

CASE OF CELLULAR OPERATOR:

A CASE STUDY BETWEEN TELKOMSEL AND INDOSAT

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I hereby declare that the Undergraduate Thesis which is entitled “**THE DISPUTE SETTLEMENT ON UNFAIR BUSINESS COMPETITION CASE OF CELLULAR OPERATOR: A CASE STUDY BETWEEN TELKOMSEL AND INDOSAT**” its content is truly the work of my own and I did not do plagiarism or quotation in ways that are inconsistent with the prevailing ethnic in the scientific community. On this statement, I am ready to bear the risk/any sanctions imposed to me in accordance with applicable regulations, if in the future found a breach of scientific ethnics, I am willing to accept the sanctions.

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MOTTO

إَجْهَدْ وَلَا تَكْسَلْ وَلَا تَكُ غَافِلًا فَنَدَامَةَ الْعُقْبَى لِمَنْ يَتَكَاسَلُ

Really Mean it, do not be lazy, and do not be careless, because it's regret over those lazing.

لَهُ، مَعْقِبَتٌ مِّنْ بَيْنِ يَدَيْهِ وَمِنْ خَلْفِهِ، يَحْفَظُونَهُ، مِنْ أَمْرِ اللَّهِ إِنَّ اللَّهَ
لَا يُغَيِّرُ مَا بِقَوْمٍ حَتَّى يُغَيِّرُوا مَا بِأَنْفُسِهِمْ وَإِذَا أَرَادَ اللَّهُ بِقَوْمٍ سُوءًا فَلَا
مَرَدَّ لَهُ، وَمَا لَهُمْ مِنْ دُونِهِ مِنْ وَالٍ ﴿١١﴾

For each one is successive [angels] before and behind him who protect him by the decree of Allah. Indeed, Allah will not change the condition of a people until they change what is in themselves. And when Allah intends for a people ill, there is no repelling it. And there is not for them besides Him any patron.

(QS. AR-Ra'd:11)

مَنْ جَدَّ وَ جَدَّ

Whoever sincerely does, will get.

DEDICATION

This undergraduate Thesis is dedicated to

My Lord, Allah SWT

My Prophet Muhammad SAW

My beloved Grand Mother and Grand Father Sukatmi and Muhajir, My parent

Sardji and Siti Quroisin, My Sister Laila Rois Rahmawati, Farida Isnaini

Roismawati and My little Sister Fatimatuz Zahra Nur'aini.

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Diana Setiawati

TABLE OF CONTENTS

ABSTRACT.....	i
APPROVAL PAGE.....	ii
ENDORSEMENT PAGE.....	iii
DECLARATION PAGE.....	iv
MOTTO.....	v
DEDICATION.....	vi
ACKNOWLEDGEMENT.....	vii
TABLE OF CONTENTS.....	x
LIST OF STATUTES.....	xii
CHAPTER ONE. INTRODUCTION.....	1
A. Research Background.....	1
B. Research Problems.....	6
C. Research Objective.....	6
D. Research Benefits.....	6
CHAPTER TWO. LITERATURE REVIEW.....	8
A. Overview of business competition and unfair business competition.....	8
1. Business competition.....	8
2. Unfair Business competition.....	9
3. The urgency of the regulation on fair and unfair business competition.....	9
4. The importance of approaches the rule of reason and per se illegal in the business competition.....	10
B. Overview of Prohibited Contracts and Banned Activities.....	11
1. Prohibited Contracts.....	11
2. Banned Activities.....	15
C. Overview of business competition supervisory commission (KPPU) and over view of Indonesian Telecommunication Regulatory Body (BRTI).....	19
1. Overview of business competition supervisory commission (KPPU).....	19
2. Over view of Indonesian Telecommunication Regulatory Body (BRTI).....	33
D. Overview of Telecommunication and Cellular operator.....	36
E. Overview of telecommunication industry related with this cases.....	40

CHAPTER THREE. RESEARCH METHOD.....	43
A. The Type of Research.....	43
B. Types of Data and Legal Materials.....	43
C. The Legal Research Approach and the Data Collection	46
D. Technique of Collecting Data	47
E. Technique of Data Analysis	47
CHAPTER FOUR. RESULTS AND DISCUSSIONS	48
A. The regulations regarding dispute settlement on unfair business competition of cellular operator	48
1. Legal Analysis of the Violation of Law No. 5 of 1999 by PT.Telkomsel.Tbk..	48
2. Legal Analysis on the Violation of Law Number 5 of 1999 by PT. Indosat	66
B. The Business Competition Supervisory Commission (KPPU) and Indonesian Telecommunications Regulatory Body (BRTI) Settle the Unfair Business Competition Case of Cellular Operator	80
1. The Business Competition Supervisory Commission (KPPU) Settle the Unfair Business Competition Case of Cellular Operator.....	82
2. The Indonesian Telecommunications Regulatory Body (BRTI) Settle the Unfair Business Competition Case of Cellular Operator.....	88
CHAPTER FIVE. CONCLUSIONS AND SUGGESTIONS.....	93
A. Conclusion	93
B. Suggestion	96

LIST OF STATUTES

Indonesia

Law Number 05 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition

Law No 36/1999 on Telecommunication

The Government Regulation Number 52/2000 on Telecommunication.

The Communication and Information Minister Regulation (Menkominfo) Number 1/PER/M.KOMINFO/01/2010 on the dated 25 January 2010 on Telecommunication Provider.

The Decision from Minister of Transportation Number KM.21/2001 on Telecommunication Provider which already changed to the Regulation of the Minister of Information and Informatics Number 31/PER/M.KOMINFO/09/2008 on the Third Changes of the Decisions of Minister of Transportation Number KM.21/2001 on Telecommunication Provider

The Decision of the Minister of Transportation Number KM. 33/2004 Concerning Supervision of Healthy Competition in the fixed Network and the Basic Telephone Services Provider.

The Decision of the Minister of Transportation Number KM.4/2001 on the dated 16 January 2001 on Determining of the Basic Plant in National Technical of 2000 development of National Telecommunication which already changed to the Regulation of the Minister of Information and Informatics Number 09/PER/M.KOMINFO/06/2010 on the dated 9 June 2010 on the six changes of the Decisions from Minister of Transportation Number KM.4/2001 on Determining of the Basic Plant in National Technical of 2000 Development of National Technical.

Business Competition Supervisory Commission Decree (KPPU) Number 1 of 2006 Concerning the Guidelines to settle the case in KPPU

Business Competition Supervisory Commission Degree (KPPU) Number 01 of 2010 Concerning Dispute Settlement Procedure.

Business Competition Supervisory Commission Decree (KPPU) Number 06 of 2010 Concerning on the Guidelines for the Implementation of Article 25 on Abuse of Dominant Position.

Business Competition Supervisory Commission Decree (KPPU) Number 03 of 2011 Concerning the Guidelines for the Implementation of Article 19D on Discrimination Practice.

Business Competition Supervisory Commission Decree (KPPU) Number 04 of 2011 Concerning the Guidelines for the Implementation of Article 5 on price fixing.

Business Competition Supervisory Commission Decree (KPPU) Number 06 of 2011 Concerning the Guidelines for the Implementation of Article 20 on Predatory pricing.

Business Competition Supervisory Commission Decree (KPPU) Number 11 of 2011 Concerning the Guidelines for the Implementation of Article 17 on Monopolistic practice.

Business Competition Supervisory Commission Decree (KPPU) Number 1 of 2006 Concerning the Guidelines to settle the case in KPPU.

LIST OF ABBREVIATION

KPPU	Komisi Pengawas Persaingan Usaha
BRTI	Badan Regulasi Telekomunikasi Indonesia
TELKOMSEL	Telekomunikasi Seluler
INDOSAT	Indonesian Satellite Corporation
KOMINFO	Menteri Komunikasi dan Informasi
MENHUB	Menteri Perhubungan
Truebex	True Broadband Experience
ICSA	Indonesian Customer Satisfaction Award
LPPMI	Lembaga Pengembangan Pemberdayaan Masyarakat Indonesia

CHAPTER ONE

INTRODUCTION

A. Research Background

The telecommunication industry is engaged in the service industry and is currently the most developed in the last 10 years in Indonesia. Government has regulated telecommunication on Act Number 36 of 1999; this Act gives significant impact on the development of the telecommunications industry in Indonesia. Telecommunication is a strategic industry, and it was instrumental in opening the isolation, improving the quality of education, economic development, social development, environmental conservation, and meeting the needs of modern lifestyles. Nowadays cellular has become a primary need for people because the function is very important, so people are dependent on telecommunication.¹

Since the deployment of GSM technology in 1995, the development of cellular users is growing rapidly. As key drivers, cellular users are able to change direction and to push the economic development of the nation. Cellular users in Indonesia develop continuously. This time the number has exceeded 300 million cellular users. That means the development of the market is already saturated, even exceeding the population. In big cities such as Jakarta,

¹ Uday Rayana, "Data dan Fakta Industri Selular, Kemegahan Vs Kerapuhan" 10 September 2015 09:00, <http://selular.id/kolom/2015/09/data-dan-fakta-industri-selular-kemegahan-vs-kerapuhan/>, Accessed on Mon, Sep 20, 2016, 14:01 WIB.

Medan and Surabaya, the number of cellular user, already exceeds 200 percent.²

Cellular operator has a big impact on the development in Indonesia. The current number of cellular operator companies has been more than one and has possibility to lead competition between other cellular operators. And in 2010, it was known there were 7 cellular operator in Indonesia, namely: Telkom, XL, Indosat, Axis, three 3, Cellular-8 and Bakrie Telecom. And this time there are three major service provider companies (the big three), namely Telkomsel, Indosat and XL Axiata. If compared to other countries, the number of cellular operators in Indonesia is the numerous one.³ Furthermore, in 2014, Alex Sinaga, the President Director of PT.Telkomsel stated that competition in telecommunication industry has reached saturation position, where there was a Zero Sum Game. This is indicated by the amount of penetration of the telecommunication market in Indonesia, which has more than 200 million customers.

In order to get customers, the cellular operator companies should have the creative strategic on marketing programs, starting from the promotion to the addition of innovative features or programs. Moreover, with the number of cellular operator companies in Indonesia, it makes the new operators have spirit to compete with other cellular operator companies. Actually, when compared to other conditions in developed countries, like Australia only has 3

² *Ibid.*

³ Didik Purwanto, "Menkominfo Komentari Antara Telkomsel dan Indosat" www.Tekno.kompas.com//menkominfo-komentari-antara-Telkomsel-Indosat, Accessed on Monday, September 20, 2016, 16:01 WIB.

cellular operators company. It would be more effective than in Indonesia which has more than three cellular operator companies.⁴

The competition between cellular operators will create competition on the market share for all of cellular operator, and there are three (the big three) cellular operator companies which had mastered no less than 75% market share, and now rake in 125 million customer. XL has 50 million customers while Telkomsel and Indosat has 55 million customers. Even per July 2015, Tri Huthcinson the directors of Indosat claimed to have 50 million subscribers.⁵ Because of the number of cellular operator, the governments has made the regulation that can regulate the competition between cellular operator companies and can create healthy business competition.

In the middle of the liberalization of the telecommunications industry, the development of cellular operator companies growing rapidly, and the competition among operator cellular companies become more competitive. This has led to unfair business competition. June 2016, PT Indosat Tbk Ooredoo complaint that PT Telkomsel conduct monopolistic practices in markets outside Java. This potentially serious accusation does not only drop Telkomsel, but can also impact the Indonesian telecommunications industry.⁶

⁴ Resty Wahyu Pertiwi, 2015, "Analisis Faktor-Faktor yang Mempengaruhi Ketidakpuasan Pelanggan dan Implikasinya terhadap Minat Churn Indosat" Skripsi Sarjana tidak diterbitkan, Fakultas Ekonomika dan Bisnis Universitas Diponegoro, hlm 1

⁵ Uday Rayana, *Loc.cit*

⁶ Fahmy Radhi, "Monopoli Telkomsel, Benarkah?" <http://koran.bisnis.com/read/20160711/251/564737/monopoli-Telkomsel-benarkah>, Accessed on Fryday, September 22, 2016, 08:35 WIB.

This issue has the damage among the parties of cellular operator companies, and the consumers would get the impact too.⁷

The complaint of Indosat to Telkomsel is very serious, because Telkomsel assume conducts monopolistic practice. The complaint can be proved by the data obtained in 2012; it is known that Telkomsel which dominate the market amounted to 48.10% and followed by Indosat amounted to 21.55%, while in the following year, in 2013 Telkomsel is still the market leader.⁸ In 2016 it is known that Tekomsel still dominates the market outside of Java amounted to 80%. Based on the data that is the foundation of Indosat to propose that Telkomsel has conducted monopolistic practice. And Indosat assume that Telkomsel has violated Article 17 and 19b of Law Number 5 of 1999 on the prohibition of monopolistic practices and unfair business competition. Articles 17 paragraph 1 stated that, “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”, meanwhile article 19b explains “the prohibition for businessman does not allow some action that could lead to a monopoly practice and unfair business competition”. If proven, it will be penalized in accordance with the Act Number 5 of 1999 on the prohibition of monopolistic practices and unfair business Competition.⁹

⁷Herning Bany Restu, “Tanggapan Pakar tentang Tudingan Monopoli Telkomsel”, <http://swa.co.id/swa/trends/tanggapan-pakar-soal-tudingan-monopoli-Telkomsel>, Accessed on Fryday, September 22, 2016, 08:35 WIB.

⁸ *Ibid.*

⁹ *Ibid.*

On the other hand, Indosat issued a new product that is called Freedom Tariff Rp1/second to all operators, and the tariffs are set below the market price that has been determined by the government. Because of that, Indosat is assumed to have violated Article 20 Law Number 5 of 1999, by conducting predatory pricing practiced.¹⁰ Indosat is doing campaign with an intention to promote the freedom tariff Rp1/s program, but the campaign injured Telkomsel. This negative campaign has been successful to make Telkomsel has angry because Indosat has put the name of Telkomsel in their promotional banner. This negative campaign action is violating the advertisement ethic.

So, Muhammad Syarkawi Rauf, the Business Competition Supervisory Commission (KPPU) Chairman, explained both operators are violated the ethics of competition. So the Commission will schedule to call both parties, to then conduct an investigation into the case. Business Competition Supervisory Commission (KPPU) is an independent agency that regardless of the influence and power of the Government and other parties,¹¹ and the function is to oversee the implementation of Law Number 5 of 1999 concerning the prohibition of monopoly practice and unfair business competition. Therefore when there are some cases related to business competition, the commission which has been mandated by law can settle the case.

¹⁰ Priyanto Sukandar, "Tarif Rp1/detik Murah atau Predatory Pricing", http://www.kompasiana.com/psukandar/tarif-rp-1-detik-murah-atau-predatory-pricing_576b669164afbdbf04d8f892, Accessed on Friday, Oktober 14, 2016, 09:35 WIB.

¹¹ Article 30 point (2) of law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competition

Those cases have led to the attention of the researcher to conduct further study regarding “the dispute settlement on unfair business competition case of cellular operator: a case study between Telkomsel and Indosat”.

B. Research Problems

Considering the research background above, the writer has formulated two questions to be answered; namely:

1. How are the Provisions and their implementation regarding dispute settlement on unfair business competition of cellular operator?
2. How does the Business Competition Supervisory Commission (KPPU) and Indonesian Telecommunications Regulatory Body (BRTI) settle the unfair business competition case of cellular operator?

C. Research Objective

The objective of this research is to know the regulations regarding dispute settlement on unfair business competition of cellular operator and to know the role of Business Competition Supervisory Commission (KPPU) settle the unfair business competition case.

D. Research Benefits

The advantages which could be taken from this research are:

1. Theoretical Benefits

This research gives benefits to the theoretical testing on the dispute settlement on unfair business competition of cellular operator case regarding Law Number 5 of 1999 on the prohibition of monopolistic practice and

unfair business competition and regarding law Number 36 of 1999 on telecommunication.

2. Practical Benefits

This research develops the understanding on how the KPPU and BRTI settle the unfair business competition of cellular operator case.

CHAPTER TWO

LITERATURE REVIEW

A. Overview of business competition and unfair business competition

1. Business competition

In economics, competition is the rivalry among sellers trying to achieve such goals as increasing profits, market share, and sales volume by varying the elements of the marketing mix: price, product, distribution, and promotion. Merriam-Webster defines competition in business as "the effort of two or more person for the same object."¹² And Khemani defines business competition as "a situation where firm or sellers independently strive for buyer's patronage in order to achieve a particular business objective. For examples; profit, sales or market share. Competitive rivalry may take price in term of price, quantity, service, or combination of these and other factors that customer may value"¹³

With the terminology of "competition" that has been explained, we can get the conclusion that every competition has the characteristic such as:

1. There are two or more parties that are involved in that efforts to surpass each other.
2. There are ambitions between the parties to achieve the same goal

¹² Merriam "Competition", <http://www.merriam-webster.com/dictionary/competition>. Accessed on Fryday, Oktober 14, 2016, 09:35 WIB

¹³ R.Shyam Khemani, 1999, *Objective Of Competition Policy, Competition Law Policy*, Shouth Western Publishing Company, Chalifornia P.1

2. Unfair Business competition

Unfair business competition is a competition between businessmen in running production and or marketing of goods and or services done by dishonesty or against the law or to hold up competition efforts. And the other definition of unfair business competition is unfair competition and dishonest business practice, meaning that action does not in line with Good Faith principle's and this is unlawful act or against the law. Therefore dishonest business practices are prohibited by the law.¹⁴

3. The urgency of the regulation on fair and unfair business competition

When the financial crisis revealed that Indonesia lacked sound policy for determining what constitutes fair and unfair business competition, the government realized that Indonesia also lacked any mechanism for systematically dealing with business actors whose practices go against the principles of free and fair competition. In order to solve the crisis, the government of Indonesia signed Letter of Intent (LOI) as part of an International Monetary Fund (IMF) loan-rescue program in January 1998. Among the fifty points outlined in the accompanying Memorandum of Understanding, the Indonesian government undertook a program of government deregulation.

The government's plans for deregulation were incorporated in Seven Presidential Decrees, three Government Decrees, and six Presidential Instruction. Part of the IMF-ordered deregulation prohibits

¹⁴ Usman Rachmadi, 2013, *Hukum Persaingan Usaha di Indonesia*, Jakarta, Sinar Grafika, P.88.

the Indonesian government from protecting the “cronies” that cause marked distortions. As part of the commitment stated in the LOI, the Government of Indonesia agreed to enact a law to ensure free and fair business competition, which resulted in the Law Number 5 Years 1999 that came into effect in March 2000. As in other countries with competition laws, Indonesia has adopted the notion that competition law is a means to preserve and maintain a competitive economy that will encourage efficiency and increase consumer welfare.

4. The importance of approaches the rule of reason and per se illegal in the business competition

a. Rule of reason

Rule of reason approach is an approach used by competition authorities' agency to make an evaluation of the impact of agreement or certain business activities, in order to determine whether an agreement or activity inhibits or promotes competition. This approach allows the court to interpret the Act such as competitive factors to consider and establish whether or not the parties do a trade barrier. This is because the contract as well as business activities are included in the law Number 5 of 1999 on the prohibition of monopolistic practice and unfair business competition it does not everything can lead to monopolistic practices or unfair business competition.

b. Per se illegal

Per se illegal approach declares any treaty or certain business activities as illegal, without further evidence on the impact of the agreement or the business activities. Activities that are considered as per se illegal typically includes collusive pricing fixing on certain products, as well as setting the resale price. Behavior type classified as per se illegal is the behaviors in the business activity that are almost always anti-competitive nature, and almost always never bring social benefits. Per se illegal approach terms of the administrative process are easy. This is because this method allows the court to refuse to perform a detailed investigation, which usually sometime takes a long time and is expensive for the facts in the relevant market.

B. Overview of Prohibited Contracts and Banned Activities

1. Prohibited Contracts

Prohibited contracts regulated in Chapter III Article 4-16 Act Number 5 of 1999. And the definition of Contract is an action by one or more entrepreneurs to bind themselves with one or more other entrepreneurs under any name, either made in writing or not. And there are so many kind of prohibited contracts based on Act No 5 of 1999, namely:

- 1) Oligopoly

Entrepreneurs are prohibited from making any contracts with other entrepreneurs with the intention to jointly control the production and/or the marketing of goods and services that can cause monopolistic practices and/or unfair business competition.¹⁵

2) Price Fixing

Entrepreneurs are prohibited from making any contract with other business competitors in order to fix prices on certain goods and/or services to be borne by the consumers or clients in the same relevant market.¹⁶

3) Area Distribution

Entrepreneurs are prohibited from making any contract with other business competitors with the intention to divide the marketing areas or market allocation of the goods and/or services that can cause monopolistic practices and/or unfair business competitions.¹⁷

4) Boycotting

Entrepreneurs are prohibited from making any contract with other business competitors, which could hamper other

¹⁵ Article 4 Paragraph 1 Law Number 5 year 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competition

¹⁶ Article 5 Paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competition

¹⁷ Article 9 Paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competition

entrepreneurs in engaging in the same type of business, either for domestic or export purposes.¹⁸

5) Cartel

Entrepreneurs are prohibited from making any contract with other business competitors with the intention to influence the price by determining production and/or marketing of goods and/or services that can cause monopolistic practices and/or unfair business competition.¹⁹

6) Trust

Entrepreneurs are prohibited from making any contract with other entrepreneurs in a form of joint cooperation by combining the companies into a bigger holding company or larger limited liability, by keeping and maintaining the continuation of each subsidiary or member company, with the intention to control production and/or marketing of goods and/or services, thus causing monopolistic practices and/or unfair business competition.²⁰

7) Oligopsonies

Entrepreneurs are prohibited from making any contract with other entrepreneurs with the intention to jointly control the buying or receiving of supplies in order to control prices of the goods

¹⁸ Article 10 paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competition

¹⁹ Article 11 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competition

²⁰ Article 12 paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competition

and/or services in the relevant market that can cause monopolistic practices and/or unfair business competition.²¹

8) Vertical Integration

Entrepreneurs are prohibited from making any contract with other entrepreneurs with the intention to control production of several products belonging to a chain of certain goods and/or services production in which each chain of production is a result of the continued process, either in one direct or indirect chain, which can cause unfair business competition and/or damages to the public.²²

9) Closed Contract

Entrepreneurs are prohibited from making any contract with other entrepreneurs who imposes terms by which the parties receiving the goods and/or services shall or shall not resupply the said goods and/or services to certain parties and/or at certain places.²³

10) Contract with Foreign Parties

²¹ Article 13 Paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competition

²² Article 14 Law Number 5 year 1999 on the Prohibition of Monopolistic Practice and Unfair business Competition

²³ Article 15 Paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competition

Entrepreneurs are prohibited from making any contract with other parties overseas which imposes provisions that can cause monopolistic practices and/or unfair business competition.²⁴

2. Banned Activities

Banned Activities are regulated in Chapter IV Article 17-24 Act No 5 of 1999. And the definition of Banned Activities is an action by one or more entrepreneurs who do not to be honest and did not obey the regulation, and there are so many kind of Banned Activities based on Act No 5 of 1999, namely:

1). Monopoly

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.²⁵ And the definition of Monopoly is the control of production and/or marketing of certain goods and/or use of services by one entrepreneur or a group of entrepreneurs.²⁶ Monopolistic practices is the centralization of economic power by one or more entrepreneurs causing the control of production and/or marketing of certain goods and/or services, resulting in an unfair business competition and can cause damage to the public interests. Based

²⁴ Article 16 Paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Bussines Competition

²⁵ Article 17 Paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Bussines Competition

²⁶ Article 1 Paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Bussines Competition

on the Greek explanation, monopoly (from Greek μόνοςμόνος ("alone" or "single") and πωλεῖνπῶλεῖν ("to sell")) exists when a specific person or enterprise is the only supplier of a particular commodity (this contrasts with a monopsony which relates to a single entity's control of a market to purchase a good or service, and with oligopoly which consists of a few entities dominating an industry).²⁷

Monopolies are thus characterized by a lack of economic competition to produce the good or service, a lack of viable substitute goods, and the possibility of a high monopoly price well above the firm's marginal cost that leads to a high monopoly profit.²⁸ The verb Monopolistic refers to the process by which a company gains the ability to raise prices or exclude competitors. In economics, a monopoly is a single seller. In law, a monopoly is a business entity that has significant market power, that is, the power to charge overly high prices.²⁹ Although monopolies may be big businesses, size is not a characteristic of a monopoly. A

²⁷ Milton Friedman. *"VIII: Monopoly and the Social Responsibility of Business and Labor"*. Capitalism and Freedom (paperback) (40th anniversary ed.). The University of Chicago Press. p. 208. ISBN 0-226-26421-1.

²⁸ Blinder, Alan S; Baumol, William J; Gale, Colton L (June 2001). *"11: Monopoly"*. *Microeconomics: Principles and Policy* (paperback). Thomson South-Western. p. 212. ISBN 0-324-22115-0. A pure monopoly is an industry in which there is only one supplier of a product for which there are no close substitutes and in which is very difficult or impossible for another firm to coexist

²⁹ Orbach, Barak; Campbell, Grace (2012). *"The Antitrust Curse of Bigness"*. Southern California Law Review.

small business may still have the power to raise prices in a small industry (or market).³⁰

2) Monopsony

Entrepreneurs are prohibited from controlling the supplies receiving or being the sole buyers of goods and/or services in the relevant market which can cause monopolistic practices and/or unfair business competition.³¹

3) Market Controlling

Entrepreneurs are prohibited from conducting one or more activities, either separately or jointly with other entrepreneurs, which can cause monopolistic practices and/or unfair business competition by:³²

- a) Refusing and/or hampering certain entrepreneurs from conducting the same type of business in the relevant market; or
- b) Hampering the consumers or clients of their company's competitors from conducting any business contact with those company's competitors; or
- c) Restricting distribution and/or selling of the goods and/or services in the relevant market; or

³⁰ *Ibid.*

³¹ Article 18 Paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice And Unfair Bussines Competition

³² Article 19 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Bussines Competition

d) Conducting discrimination practices against certain entrepreneurs.

4) Predatory pricing

Entrepreneurs are prohibited from supplying goods and/or services by selling without making any profits or by setting a very low price with the intention to eliminate or end their competitors' business in the relevant market, thus causing monopolistic practices and/or unfair business competition.³³

5) Conspiracy

Entrepreneurs are prohibited from conspiring with other parties to arrange and/or determine the winner of the tender thus causing unfair business competition. And Entrepreneurs are prohibited from conspiring with other parties to obtain information of their competitor's business activities classified as company's secret thus causing unfair business competition.³⁴

³³ Article 20 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice And Unfair Bussines Competition

³⁴ Article 23 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Bussines Competition

**C. Overview of business competition supervisory commission (KPPU)
and over view of Indonesian Telecommunication Regulatory Body
(BRTI)**

There are two institution will be able to handle this cases. Related with this cases, In Indonesia has two Institution which one is focusing on maintaining the Telecommunication industry namely Indonesian Telecommunication Regulatory Body (BRTI) and other institution focusing on maintaining the business competition activity namely Business Competition Supervisory Commission. These two Institutions will be work together to create the good environmental business competition on telecommunication industry. Both Institution has their own authority that regulate in law number 36 of 1999 on Telecommunication and Telecommunication ministry decree number 31 of 2003 on Indonesian Telecommunication Regulatory Body and law number 5 of 1999 on the prohibition of monopolistic practice and unfair business competition.

**1. Overview of business competition supervisory commission
(KPPU)**

Business Competition Supervisory Commission (KPPU) was formed with the aim to prevent and follow up monopolistic practices and to create a climate of healthy competition to businesses in Indonesia. It is mentioned in article 30 of Act Number 5 of 1999 concerning prohibition of monopolistic practices

and unfair business competition that the KPPU are an independent agency that regardless of the influence and power of the government and other parties and is responsible directly to President.³⁵ In its journey for more than 13 years, KPPU is able to answer the challenge to oversee the implementation of Act Number 5 of 1999 concerning prohibition of monopolistic practices and unfair business competition and prevent monopolistic practices and unfair business competition in various sectors of the Indonesian economy, but there are still major constraints faced by the KPPU in institutional aspects.

The positions and status of the KPPU's institution are still questionable for various parties in spite of 13 years of standing. Not infrequently these institutional problems hinder the KPPU to develop into a fully independent state institutions in handling and settling disputes related to monopolistic practices and unfair business competition in Indonesia. KPPU is a special organ which has dual tasks, hat is to create healthy competition and served to maintain conducive competition.³⁶

Although KPPU has in particular law enforcement functions on Competition Law, KPPU is not a judicial institution on specialized competition. Thus, KPPU is not authorized to impose civil and criminal penalties. Position of KPPU over an

³⁵ Suyud Margono, 2009, *Hukum Anti Monopoli*, Sinar Grafika, Jakarta, h. 136.

³⁶ *Ibid*

administrative agency for the authority attached to it is the administrative authority, so that sanctions are imposed on administrative sanctions. KPPU was given observer status on the implementation of Act Number 5 of 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition. Its legal status as an institution that is independent from the influence and control of the government and other parties as mentioned in article 30 of Act Number 5 of 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition.³⁷

a. Roles and Privileges of KPPU

Roles and privileges of the KPPU under Article 35 and Article 36 of Act Number 5 of 1999 concerning prohibition of monopolistic practices and unfair business competition are as follows:

- 1) To conduct an assessment of the agreements, which can result in monopolistic practices and or unfair business competition;
- 2) To conduct an assessment of the business activities and business actors or actions which may result in monopolistic practices and or unfair business competition;

³⁷ Andi Fahmi Lubis et.a.l, 2009, *Hukum Persaingan Usaha Teks dan Konteks*, ROV Creative Media, Jakarta, p. 331.

- 3) To conduct an assessment of whether there is any abuse of dominant position which may result in monopolistic practices and or unfair business competition;
- 4) To take action in accordance with the authority of the KPPU;
- 5) To provide advice and opinion Concerning Government policies related with monopoly practice and or unfair business competition;
- 6) To develop guidelines and or publications related to this Act;
- 7) To provide regular reports on the results of its work to the President and the House of Representatives.

Furthermore, the authority of KPPU includes:³⁸

- 1) To receive reports from the public or from businesses about the alleged monopolistic practices and or unfair business competition;
- 2) To conduct research on allegations Concerning the business activities and business actors or actions which may result in monopolistic practices and or unfair business competition;
- 3) To conduct an investigation or examination of cases of alleged monopolistic practices and or unfair business competition reported by the public or by businesses or found by the Commission as a result of its research;

³⁸ Suyud Margono, *op.cit*, p.145.

- 4) To conduct the investigation or examination of the presence or absence of monopolistic practices and or unfair business competition;
- 5) To call businessmen alleged to have committed a violation of the provisions of this law;
- 6) To call and bring the witnesses, expert witnesses and any person who is considered knowing violation of the provisions of this Act;
- 7) To asking for help investigators to bring businesses, witnesses, expert witnesses, or any person referred to letters e and f, which is not willing to meet the call of the Commission;
- 8) To request information from the government agency in connection with the investigation or examination to businesses which violate the provisions of this Act;
- 9) To acquire, analyze, and or rate letters, documents or other evidence to an inquiry or investigation;
- 10) To determine and establish the presence or absence harm to other businesses or the public;
- 11) To inform the Commission's decision to businesses suspected monopolistic practices and or unfair business competition;
- 12) To impose sanctions in the form of administrative measures to businesses that violate the provisions of this Act.

Although one of the KPPU's functions is to directly provide regular reports on their work to the President and the House of

Representatives Commission, KPPU remains independent and free from the influence and control of the Government and other parties. Efforts to maintain the independence of KPPU from other parties at least can be seen from the eligibility criteria set out in Article 32i, which is that members of the KPPU are not affiliated with an entity. So, the independence and neutrality of the KPPU's agency is guaranteed by law, both structurally and functionally the KPPU is independent.³⁹

b. Dispute Settlement Procedure

The judicial procedure in the Commission shall be fully in Commission Decision No. 05 / KPPU / Kep / IX / 2000 on Procedures for Submission of Reports and Handling Alleged Violation of Law 5 Year 1999. This decision shows that the Commission can also act as a self-regulatory body, whose provisions are binding on members of the community. The process of a dispute settlement case in the Commission passed several stages, which can be classified as follows:

2. gathering phase indication;
3. the stage of preliminary examination;
4. phase advanced inspection;
5. imposition stage of the decision;
6. the execution phase verdict.

³⁹ Ayuda D. Prayoga et.al., 1999, *Persaingan Usaha dan Hukum yang Mengaturnya di Indonesia*, Elips, Jakarta, h. 119.

A case can be generated from public reports (usually businesses harmed competitor) or based on the observation of the Commission itself. So, other than on the basis of the report, the Commission may initiate a case on its own initiative. Indications of violation of Law No. 5, 1999 is stated in a written report in Indonesian language, with evidence (letters and other supporting documents), followed by filling a report addressed to the chairman.

By the Chairman, the report and the file are forwarded to the Secretariat. The Sekretariat will check for completeness. If not complete, the report shall be returned to the complainant within 10 working days. Working days here are Monday to Friday. Rapporteur was given 10 working days of notification of incompleteness to add what is still lacking in the report.

If, within 10 working days of the complainant is not informed, it is assumed that the report is complete. In such case, the Secretariat then create memos to the Chairman of the Commission and based on the memorandum, the Chairman then make arrangements for starting the preliminary examination. The commencement of the preliminary examination be notified to the complainant.

Preliminary investigation conducted by a team of inspectors in the trial (meeting) in the commission. In the preliminary examination stage, the Commission has been able to summon the complainant and reported for questioning. The output of this preliminary examination there are

two possibilities. First, otherwise there is enough initial evidence so that it can be forwarded to a further examination, or both, otherwise there is no sufficient preliminary evidence that the problem is considered finished. The whole process of this preliminary examination takes 30 working days since the file is transferred from the Chairman to the Commission.

Stage further investigation lasts for 60 working days. If necessary, this period may be extended for a maximum of 30 working days. In this phase, the assembly commission established by the Chairman of the Commission can ask for help from investigators or working group (Expert Team). The goal is that the quality of the investigation and analysis of the decision can be more assured.

Assembly Commission (typically 3 to 5 people) has broad authority at this stage. They can call reported party, witnesses, expert witnesses, and other parties deemed to know of cases. All identities and information during the inspection is recorded in the investigation report. They can also ask for submission of certain documents, which in some cases even classified as confidential.

Unlike the judges in the judiciary who are prohibited from commenting on the case or the verdict of their own, it was not so with the Commission. Assembly Commission is authorized to provide information to the mass media with regard to the report being dealt with. Even so, the identity of the complainant shall remain confidential.

Whenever the party reported being questioned, counsel concerned is always entitled to accompany his client. Further examination of this bear on the decision. A decision shall be given within 30 working days from the completion of further investigation. This verdict is read in a hearing open to the public. This ruling must be submitted to the reported party.

If found guilty, the parties may be penalized reported certain administrative actions. Within 30 working days of receipt of notification of the decision, reported party shall implement the verdict. Implementation of the decision is reported to the Commission. There are 14 days from the notification of the decision for the parties reported to accept or raise objections. Legal remedy of appeal is filed with the District Court clerkships. If the period of time has passed, the decision already stated has permanent legal force. In this case the Commission will apply for the determination of execution to the District Court. If the reported party is still unwilling to run the executable, the Commission may submit the Commission's decision to the investigator (police) to do the investigation in accordance with the provisions of the law (criminal) applies.

As stated above, within 14 days of notification of the decision, reported party is also entitled to appeal the decision to the District Court. According to Article 45 of Law No. 5, 1999, the District Court must examine objections businesses within 14 days of receipt of the objection

petition. Own decisions have to be out within 30 days from the commencement of the examination object. Fast-paced process that is in practice actually cause problems. One of them is related to the procedures for calling, especially if the parties are domiciled abroad. Civil law (HIR) states thus calling is done through the Embassy, and it could take three months.

The objection petition is filed in the District Court of the applicant's place of domicile. In the event that the objection is filed by more than one business actors of different domiciles, then the Commission may submit a written request to the Supreme Court to appoint a District Court which will examine the objections. The Commission will also forward the petition to the court, transfer all the effort that objection, so that they all have to stop the first hearing of the case until the Supreme Court appointment. There were 14 days for the Supreme Court to determine the District Court to be in charge of examining the case.

For the District Court that is not appointed, it is required to submit the case files to the District Court appointed. Within 7 days if includes the rest of the court fee already paid. Court-appointed subsequently begins examining this objection petition within 30 days of receiving the files. District Court which takes over the case would request the documents that have been in the hands of the Commission (submitted on the first day of the trial), raised the question about the identity of the

complainant, and give the Commission's regulations mandate that ensures confidentiality. Until now the Commission insisted with the opinion that the files that must be submitted shall not include the identity of the complainant, because, in this case, the parties in conflict are the Commission itself with entrepreneurs applicant objected.

District Court directly examines this request without offering mediation. What is the object of a district court is limited to the Commission's decision and the case file. This means, the District Court is no longer required to present new evidence beyond those already decided upon or contained in the file submitted by the Commission. This restriction is necessary so that the deadline given by the legislation can be achieved. However, if deemed necessary, the judges in the District Court can issue interlocutory decision requesting the Commission performs additional checks. In the event that the case is returned for additional screening the rest of objection examination in the District Court is suspended. District Court shall forward the hearing no later than 7 days after the Commission submits additional investigation file. The rest of the time due to the suspension that remains will be taken into account by the Court in order that a deadline of 30 working days remain unfulfilled.

After the District Court passed its decisions, there is still another remedy for the parties objecting (not received), which is appealing to the Supreme Court. Efforts to appeal can be done within 14 days

(interpreted since the parties accept the verdict), and the Supreme Court are given 30 days to give a verdict since cassation accepted. The procedure for filing cassation is subject to the applicable provisions like other cases in general. Determining application of execution of the decision that has been screened through the procedure proposed by the Commission's objections to the District Court. However, for cases that are not checked through the procedures, determination of execution is submitted to the District Court at the place of domicile businesses.⁴⁰

c. Sanction

Based on Article 47 law number 5 of 1999 on the prohibition monopolistic practice and unfair business competition, is stated that KPPU has the authority to give Administrative Sanctions to any parties who violate this regulation, such as:

The Commission is authorized to impose administrative sanctions to the entrepreneurs who have violated the provisions in this law. Administrative sanctions as referred to under Paragraph (1) of this article shall be:

- 1) to revoke contracts as referred to in Articles 4 through 13, Article 15; and/or
- 2) to order the entrepreneurs to end vertical integration as referred to under Article 14; and/or

⁴⁰ Shidarta, "Prosedure Beracara di KPPU"
<http://businesslaw.binus.ac.id/2013/01/20/prosedur-beracara-di-kppu-komisi-pengawas-persaingan-usaha/>, Accessed on Saturday, December 24,2016, 15:44WIB.

- 3) to order the entrepreneurs to stop activities proven to have caused monopolistic practices and/or unfair business competition and/or damages to the public; and/or
- 4) to order the entrepreneurs to end the abuse of their dominant position; and/or
- 5) to revoke the merger of the companies and acquisition of shares as referred to under Article 28; and/or
- 6) to impose compensation for damages; and/or
- 7) to impose a fine at the lowest in the amount of Rp. 1,000,000,000 (one billion rupiah) and at the highest in the amount of Rp. 25,000,000,000 (twenty five billion rupiah).

Based on Article 48 law number 5 of 1999 on the prohibition monopolistic practice and unfair business competition, it is stated that the authority KPPU has the authority to give Criminal Punishment to the parties who violate this regulation, such as:

- (1) Violations to the provisions in Article 4, Articles 9 through 14, Articles 16 through 19, Article 25, Article 27 and Article 28 of this law is subject a criminal fine in the amount of at least Rp. 25,000,000,000 (twenty five billion rupiah) and in the amount of Rp. 100,000,000,000 (one hundred billion rupiah) at the most, or imprisonment at a maximum period of 6 (six) months.

- (2) Violations to the provisions under Article 5 through 8, Article 15, Articles 20 through 24, and Article 26 of this law is subject to a criminal fine in the amount of at least Rp. 5,000,000,000 (five billion rupiah) and in the amount of Rp.25,000,000,000 (twenty five billion) rupiah at the most, or imprisonment at a maximum period of 5 (five) months.
- (3) Violations to the provisions under Article 41 of this law is subject to a criminal fine in the amount of at least Rp. 1,000,000,000 (one billion rupiah) and at in the amount of Rp. 5,000,000,000 (five billion rupiah) at the most, or imprisonment at maximum period of (three) months.

Based on Article 49 Law number 5 of 1999 on prohibition of monopolistic practice, there are some additional criminal punishment, with reference to the provisions under Article 10 of the Criminal Code concerning crime as referred to under Article 48, additional criminal punishment might be added in the form of:

- a. revocation of business permit; or
- b. prohibition for the entrepreneurs who are proved to have violated this law to hold position as director or commissioner at least within a period of 2 (two) years and at the longest within a period of 5 (five) years; or
- c. termination of certain activities or actions that cause damage to other parties

2. Over view of Indonesian Telecommunication Regulatory Body (BRTI)

Indonesian Telecommunication Regulatory Body is an institution that serves as a telecommunication regulatory agency in Indonesia. Seventeen years ago the Indonesian telecommunications entered the new history. Through Law Number 36/1999 on Telecommunications, the sector is officially stripped privileged monopoly to immediately transition to the competition era. New competitors are invited to enter into operator networks and services in this sector. Various parties are happy to welcome the telecommunications legislation. Especially in 1999 the government made Law Number 5/1999 concerning prohibition of monopolistic practices and unfair business competition.

However, apparently telecommunication competitions keep growing. Many parties ask for the establishment of an independent regulatory body. Independent Regulatory Body which is expected to protect the public interest (telecommunications users) and to support and protect the telecommunications business competition to become healthy, efficient and attractive to investors. July 11, 2003 the government finally issued Decree Number 31/2003 on the establishment of the Indonesian Telecommunication Regulatory Body (BRTI). Indonesian Telecommunications Regulatory Body is expected to eventually become an ideal Regulatory Agency.

a. Authority

Actually Indonesian Telecommunication Regulatory Body does not have authority as the executor on the telecommunication cases; the main function is to maintain the telecommunication industry competition. If the telecommunication cases are just on the administrative field, the cases will be settled by Indonesian Telecommunication Regulatory Body, and Indonesian Telecommunication Regulatory Body can give the administrative punishment. However, if the case is related to criminal case, this case would be settled by the Executor like on the penal code. According to the Telecommunication Ministry Decree Number 67 of 2003, the Authority of Indonesian Telecommunications Regulatory Body includes:

- 1) Controlling the implementation of operating performance telecommunications networks and services were competitively.
- 2) Controlling the operation of services of business competition and telecommunications networks in competition.
- 3) Supervising the use of tools and operation of telecommunications networks and services were competitively.

- 4) Facilitating the settlement of disputes.
- 5) Monitoring the implementation of service standards.
- 6) Reporting any problems according to the quality of service.

b. Dispute settlement procedure

Actually BRTI does not has authority to examine the cases, BRTI just can only give the remainder letter and administrative sanction, because based on the regulation BRTI does not get the executor mandate, but BRTI can facilitate the dispute settlement by giving some report based on the fact that has been gathered. Based on Article 14 of transportation ministry decree number 31 of 2003 on the determination of Indonesian Regulatory Body, paragraph 1 states that each committee can give the decisions collegially.

c. Sanction

Article 45 Law Number 36 of 1999 on telecommunication states that the sanctions for those who violate this regulation are as follows: Violation of Article 16 (1), Article 18 (2), Article 19, Article 10 paragraph 21, Article 25 (2), Article 26 (1), Article 29 (1) (2), Article 33 (1 and (2)), Article 34 (2)(2), subject to administrative sanction of license revocation.

And article 46 Law Number 36 of 1999 on telecommunication states that: (1) the administrative sanction referred to in Article 45 shall be in the form of license of

revocation. (2) License revocation as referred to in Paragraph 1 shall be carried out after giving writing warning.

D. Overview of Telecommunication and Cellular operator

1. Telecommunication

Telecommunication is a central part in human life. Telecommunication is dynamic and always changing following the development of the era and technology. The Indonesian Government through Law Number 36 of 1999 regarding Telecommunication, has stated that Monopolistic era in telecommunication has to be left behind; this is also to cope the public demand for the convenience for of telecommunicating.⁴¹ The law number 36 of 1999 on Telecommunication gives a positive impact to the business competition on Telecommunication Industry in Indonesia. This Act will give the guidelines for all cellular operators to compete in a healthy competition. This Act also regulates the prohibition for all of the unfair business competition practices and monopolistic practices and other activities that can lead to unfair business competition.

Telecommunication is transmitting and receiving information in the form of signs, signals, writing, images, sounds, and sounds by wire, optical, radio or other electromagnetic systems.⁴² Telecommunication occurs when the exchange of information between communication

⁴¹ Eva, "Badan Regulasi Telekomunikasi Indonesia dalam latar belakang", <http://www.brti.or.id/>, Accessed on Fryday, Oktober 14, 2016, 09:35 WIB

⁴² Article 1 of Law No 36 of 1999 Concerning Telecommunication

participants includes the use of technology. It is transmitted either electrically over physical media, such as cables, or via electromagnetic radiation.⁴³ Telecommunications organized based on the principle of benefit, fair and equitable, rule of law, security, partnership, ethics and self-confidence.⁴⁴ Telecommunication is organized with the aim to support national unity, to improve the welfare and prosperity of the people in a fair and equitable, economic and life support government activities, and to improve international relations.⁴⁵

2. Cellular Operator

Cellular operator is a provider of wireless communication service that owns or controls all the elements necessary to sell and deliver services to an end user including radio spectrum allocation, wireless network infrastructure, back haul infrastructure, billing, customer care, provisioning computer systems and marketing and repair organizations.

In addition to obtaining revenue by offering retail services under its own brand, a Cellular Network Operator (MNO) may also sell access to network services at wholesale rates to cellular virtual network operators. A key defining characteristic of a cellular network operator is that an MNO must own or control access to a radio spectrum license from a regulatory or government entity. A second key defining characteristic of an MNO is that an MNO must own or control the elements of the

⁴³ Haring, John 2008 "Telecommunication". Oxford Dictionaries. Oxford University Press. Accessed on Friday, 28 Oktober 2016.

⁴⁴ Article 2 of Law No 36 of 1999 Concerning Telekomunikation

⁴⁵ Article 3 of Law No 36 of 1999 Concerning Telekomunikation

network infrastructure necessary to provide services to subscribers over the licensed spectrum.

A cellular network operator typically also has the necessary provisioning, billing and customer care computer systems and the marketing, customer care and engineering organizations needed to sell, deliver and bill for services. However, an MNO can outsource any of these systems or functions and still be considered a cellular network operator. In 2010, it is known that the companies engaged in telecommunications and cellular operators are as much as 7 companies in Indonesia, that is Telkom, XL, Indosat, Axis, three 3, Cellular-8, Bakrie Telecom. And this time there are three major service provider companies (the big three), namely Telkomsel, Indosat and XL Axiata.

Telkomsel is a brand name of a GSM and UMTS Cellular phone network operator which operates in Indonesia. It was founded in 1995, and is a subsidiary of Telkom Indonesia. The company currently has 122 million subscribers. Telkomsel Operates in Indonesia with GSM 900-1800 MHz, 3G network, and internationally, through 323 international roaming partners in 170 countries (end of September 2008). The company provides its subscribers with the choice between three prepaid cards-simPATI, Loop and Kartu As, or the post-paid kartuHalo service, as well as a variety of value-added services and programs. As of March 31, 2015, Telkomsel has the leading cellular market share in Indonesia with 46.0% of the total Number of cellular customers.

PT Indosat Tbk. (commonly referred to as Indosat Ooredoo, formerly Indosat) is one of the telecommunications services and network providers in Indonesia.⁴⁶ The company offers communication services for cellular-phone users, both for prepaid and postpaid, under the brands Matrix Ooredoo, MentariOoredoo and IM3 Ooredoo. The company also provides fixed-voice services (including international direct dialing) and multimedia, Internet, and data communication services.

In 2011, Indosat Ooredoo owned 21% of the market share.⁴⁷ In 2013, the company had 58.5 million cellular phone subscribers.⁴⁸ In 2015, the Number of subscribers increased to 68.5 million, or up by 24.7% compared with 54.9 million in 2011.⁴⁹ In February 2013, the Qatari telecommunications company at the time known as Qtel, which owned 65% of Indosat's shares, was rebranded as Ooredoo and planned to rebrand all its subsidiaries in the Middle East, Africa, and Southeast Asia in 2013 or 2014.⁵⁰ On November 19, 2015, Indosat was finally renamed to Indosat Ooredoo.⁵¹

⁴⁶Rusli, "Indosat Indonesia Investments". www.indonesia-investments.com. Accessed on Sunday, Oktober 2016

⁴⁷ Rusli, "Investing in Indonesia | Indonesia Investments". Indonesia.investments.com. Accessed on Sunday, Oktober 2016

⁴⁸Rusli, "Indosat's profit plunges 52.5 pct". www.antaraneews.com. Accessed On Sunday, Oktober 2016

⁴⁹ Rusli, "Indosat: Kami Operator Nomor Dua di Indonesia | Indotelko". www.indotelko.com. Accessed on Sunday, Oktober 2016

⁵⁰ Rahmat, "Qtel rebrands as Ooredoo - - ITP.net". www.ITP.net, Accessed On Sunday, Oktober 2016.

⁵¹ Andi, "Indosat Ganti Nama jadi Indosat Ooredoo". www.CNNIndonesia.com, Accessed On Sunday, September 2016.

E. Overview of telecommunication industry related with this cases

Telecommunication Industry in Indonesia is one of the strategic industries and provide a huge advantage to entrepreneurs engaged in telecommunication. The amount of the market shares in Indonesia and potential market is not maximized for cultivation because of limited infrastructure and Indonesian geographical conditions. Therefore, do not be surprised if many investors both from domestic and from other countries are interesting to invest in Indonesia; it is also caused by the effects of the liberalization of the telecommunication industry. This development can lead to some problem that must be faced by the Telecommunications Industry in Indonesia, and one of them is about the competition. This Competition can directly invite the investor to invest and join in the telecommunication industry and run their business; it certainly causes competition among cellular operators.

Amid competition in the telecommunications industry, in Indonesia, it is known that there are three major players market share ranking authorities has shifted since 2013. Following the Indonesian telecommunication industry market share in 2012 to 2014 version of the Marketeers magazine:

Table 1.1

Market Share on Telecommunication Industry 2012-2014

Tahun	Telkomsel	Indosat	XL
2012	10%	21,55%	18,40%
2013	80%	16,40%	16,50%
2014	04%	22,01%	26%

Resource: Marketeers Magazine volume Desember 2013, 2014

From the perspective of the structural conditions of the market, the mobile telecommunications industry in Indonesia is characterized by an oligopolistic market structure with 3 (three) major telecom operators which are in virtual control of 100% (one hundred percent) market share in Indonesia. All three operators are using the technology platform Global System for Mobile Communication (GSM) and Code Division Multiple Access (CDMA), namely Telkomsel as the largest operator by subscribers, Indosat and Excelcomindo. Meanwhile, the market structure of the telecommunication industry in Indonesia is also characterized by the presence of factors barrier to entry in terms of regulation, namely: (i) arrangements regarding the use of frequencies is limited, which in turn limits the number of operators; and (ii) the universal service obligation (universal service obligation / USO) as regulated by Transportation Minister Decree No. 34 of 2004, namely the obligation to open up the

telecommunications access to villages and districts that have not covered by telecommunication services.

In addition, there are some other obstacles that are natural, such as the need for large capital (high capital intensive) to build a telecommunication network infrastructure, economies of scale and differences in production costs and the production of distinctive properties. Considering the structure of the market for cellular telecommunications services in Indonesia whose characteristics oligopoly, then the argument / postulates is mainly: in a market in which there are only a few market players, then there is interdependence of such a magnitude among the market players. Therefore, each seller will consider rival reactions when specifying how the amount of production and the prices charged. This means the oligopoly will not lower the price to increase market share because the benefits will be deleted immediately if a competitor is doing 'reprisals' (retaliation) in the form of discount / price cuts similar.

Therefore, the oligopoly will be focused on actions coordinate and anticipation. Industries characterized by product homogeneity, the production cost structure that is similar between the firm oligopoly, as well as the high level of barriers to entry (entry barriers) is likely to bring competition to act of collusion and generate monopoly together when there is one operator that is more dominant than the other, which will lead to unfair business competition.

CHAPTER THREE

RESEARCH METHOD

A. The Type of Research

This study is normative legal research which focuses on a process to find a legal rule, and doctrines of law in order to address the legal issues. This study explores the literature regarding the factors that cause on unfair business competition of cellular operator case (Telkomsel and Indosat) and the role of KPPU and BRTI to settle unfair business competition of cellular operator case which is in Conformity with Law Number 05 of 1999 on the prohibition of monopoly practices and Law Number 36 of 1999 on Telecommunication.

B. Types of Data and Legal Materials

The types of data of this study or research are secondary data.⁵² The data are gathered from library research means of reviewing legal material. Legal materials as research material were taken from the literature in the form of primary legal material, secondary legal material and tertiary legal material.⁵³

1. The primary legal materials are regulations on the telecommunication, Monopoly and healthy business competition. Those regulations are taken from:

- a. Law Number 05 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition

⁵² Noeng Muhadjir, 2011, *Metodologi Penelitian*, Yogyakarta, Rake Sarasin, P.162.

⁵³ Bambang Sugiono, 2015, *Metodologi Penelitian Hukum*, Jakarta, Raja Grafindo Persada, P.52.

- b. Law No 36/1999 on Telecommunication
- c. The Government Regulation Number 52/2000 on Telecommunication.
- d. The Communication and Information Minister Regulation (Menkominfo) Number 1/PER/M.KOMINFO/01/2010 on the dated 25 January 2010 on Telecommunication Provider.
- e. The Decision from Minister of Transportation Number KM.21/2001 on Telecommunication Provider which was already changed to the Regulation of the Minister of Information and Informatics Number 31/PER/M.KOMINFO/09/2008 on the Third Changes of the Decisions of Minister of Transportation Number KM.21/2001 on Telecommunication Provider
- f. The Decision of the Minister of Transportation Number KM.33/2004 Concerning Supervision of Healthy Competition in the fixed Network and the Basic Telephone Services Provider.
- g. The Decision of the Minister of Transportation Number KM.4/2001 on the dated 16 January 2001 on Determination of the Basic Plant in in 2000 National Telecommunication which was already changed to the Regulation of the Minister of Information and Informatics Number 09/PER/M.KOMINFO/06/2010 dated 9 June 2010 on the six changes of the Decisions from Minister of Transportation Number KM.4/2001 on Determination of the Basic Plant in National Technical of 2000 Development of National Technical.

- h. Business Competition Supervisory Commission Decree (KPPU) Number 1 of 2006 Concerning the Guidelines to settle the case in KPPU
- i. Business Competition Supervisory Commission Decree (KPPU) Number 01 of 2010 Concerning Dispute Settlement Procedure.
- j. Business Competition Supervisory Commission Decree (KPPU) Number 06 of 2010 Concerning on the Guidelines for the Implementation of Article 25 on Abuse of Dominant Position.
- k. Business Competition Supervisory Commission Decree (KPPU) Number 03 of 2011 Concerning the Guidelines for the Implementation of Article 19D on Discrimination Practice.
- l. Business Competition Supervisory Commission Decree (KPPU) Number 04 of 2011 Concerning the Guidelines for the Implementation of Article 5 on price fixing.
- m. Business Competition Supervisory Commission Decree (KPPU) Number 06 of 2011 Concerning the Guidelines for the Implementation of Article 20 on Predatory pricing.
- n. Business Competition Supervisory Commission Decree (KPPU) Number 11 of 2011 Concerning the Guidelines for the Implementation of Article 17 on Monopolistic practice.
- o. Business Competition Supervisory Commission Decree (KPPU) Number 1 of 2006 Concerning the Guidelines to settle the case in KPPU

2. Secondary legal materials are materials that are closely associated with the primary legal material which is helpful during the process of analysis⁵⁴,

namely:

- a. The related scientific books
- b. journals and related literature
- c. The results of related studies
- d. The doctrine, opinions and testimony from legal experts both written and unwritten

3. Tertiary legal materials are in the form of dictionaries and encyclopedias.

C. The Legal Research Approach and the Data Collection

The legal research approach used in this research or study is case approach⁵⁵ namely to analyze the case between Telkomsel and Indosatunfair business competition case. Another approach used is approach which made to various laws or regulations related to the prohibition of monopolistic practice and unfair business competition. The legal materials including primary, secondary and tertiary materials in this study are taken from:

1. Various libraries
2. Printed media and electronic media

⁵⁴ Muri Yusuf, 2014, *Metode Penelitian Kuantitatif, Kualitatif dan Gabungan*, Jakarta, Prenada Media Group, P.391

⁵⁵ Mukti Fajar, Yulianto Achmad, 2007, *Dualisme Penelitian Hukum*, Yogyakarta, Fakultas Hukum UMY, P.135

D. Technique of Collecting Data

Legal materials used in this normative legal research consist of primary, secondary, and tertiary legal materials. The technique used in collecting these legal materials is documentary study. Documentary study is the review of some documents related to the legal rules or documents that already exist.

E. Technique of Data Analysis

In this study, the researcher uses qualitative prescriptive analysis in which the researcher analyzes and gives interpretation or disclosure of subject and object of research undertaken. This study also uses case approach in order to analyze the issues between Telkomsel and Indosat on unfair business competition case, and the role of Commission's (KPPU) in handling the monopoly case which is conformity with the Law Number 5 of 1999 on the prohibition of monopoly case and unfair business competition. In this study, the researcher did not do any justification.

CHAPTER FOUR

RESULTS AND DISCUSSIONS

A. The regulations regarding dispute settlement on unfair business competition of cellular operator

1. Legal Analysis of the Violation of Law No. 5 of 1999 by PT.Telkomsel.Tbk

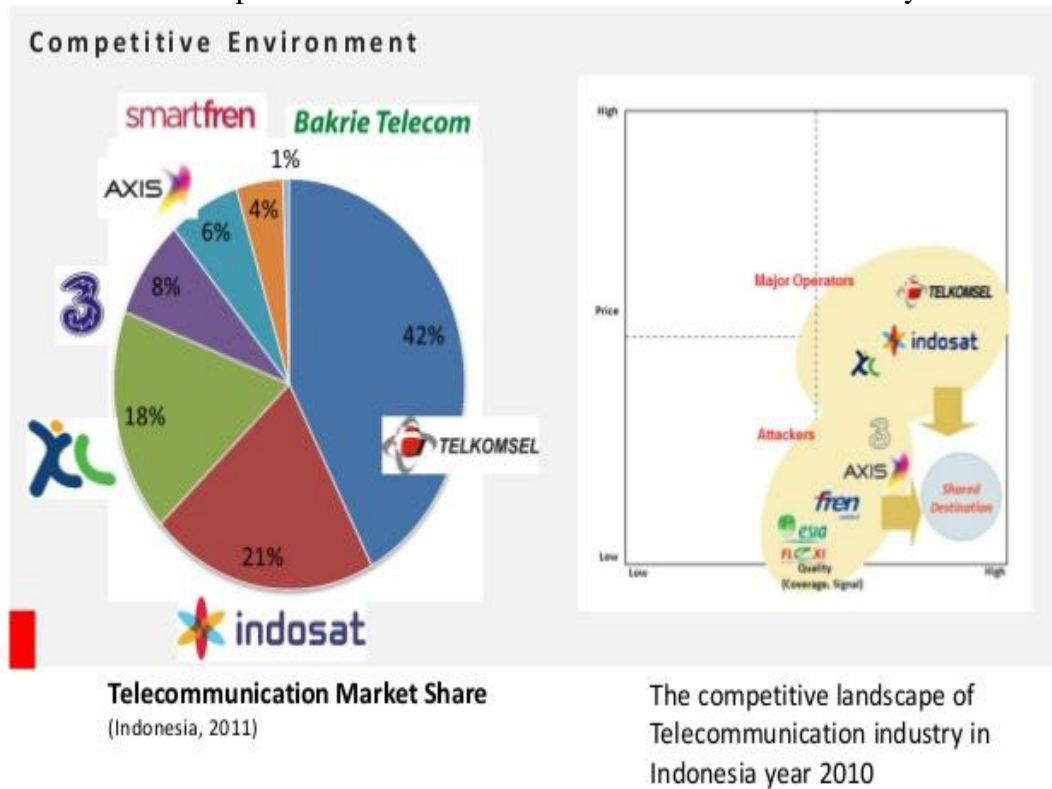
On June 2016, PT Indosat Tbk Ooredoo issued a complaint that PT Telkomsel conduct monopolistic practices in markets outside Java island. It is a potentially serious accusation, which will not only drop Telkomsel, but also will impact the Indonesian telecommunications industry.⁵⁶ This issue has the damage among the parties of cellular operator company, and the consumers will get the impact too.⁵⁷ The complaint can be proven by the data in 2010-2011 by which it is known that Telkomsel dominate the market by amounted to 42% and followed by Indosat by amounted to 21%. Proven by this table;

⁵⁶ Fahmy Radhi, "Monopoli Telkomsel, Benarkah?" <http://koran.bisnis.com/read/20160711/251/564737/monopoli-Telkomsel-benarkah>, Accessed on Friday, September 22, 2016, 08:35 WIB.

⁵⁷ Hening Bany Restu, "Tanggapan Pakar tentang Tudingan Monopoli Telkomsel", <http://swa.co.id/swa/trends/tanggapan-pakar-soal-tudingan-monopoli-Telkomsel>, Accessed on Friday, September 22, 2016, 08:35 WIB.

Table 1.1

Competitive environment on Telecommunication Industry



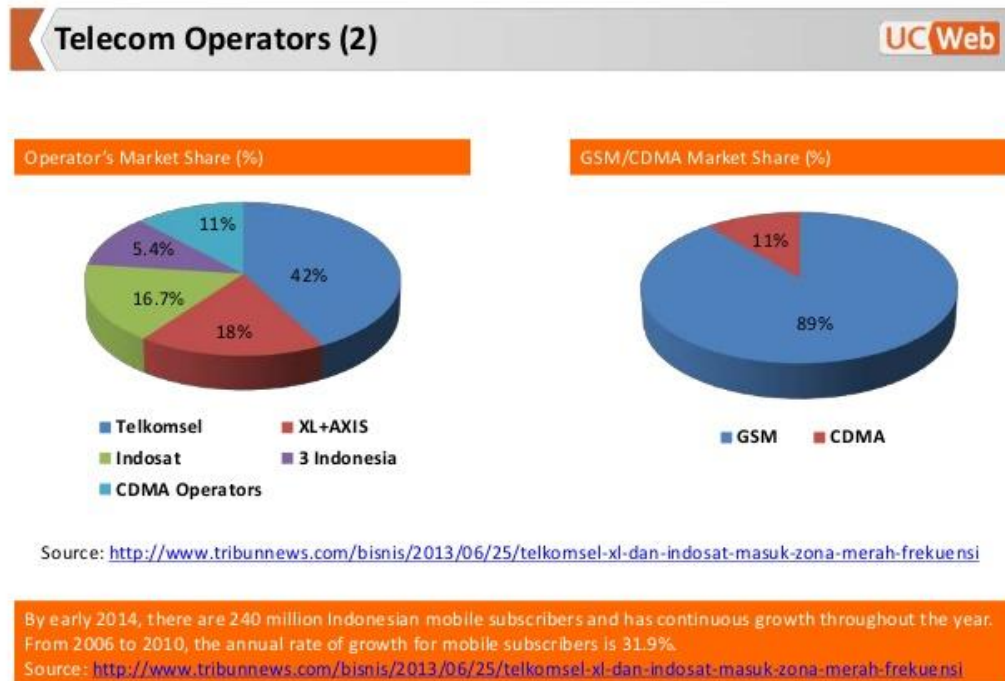
Source:<http://swa.co.id/swa/trends/tanggapan-pakar-soal-tudingan-monopoli-Telkomsel>

In addition, in 2012 and 2013 it is known that Telkomsel still dominated the market by amounted to 48.10% and followed by Indosat amounted to 21.55%.⁵⁸ And in 2014 Telkomsel had increased the market share and dominated the market by 42% and followed by XL 18% and Indosat 16,7%. Proven by this table;

⁵⁸ Herning Bany Restu, "Tanggapan Pakar tentang Tudingan Monopoli Telkomsel", <http://swa.co.id/swa/trends/tanggapan-pakar-soal-tudingan-monopoli-Telkomsel>, Accessed on Fryday, September 22, 2016, 08:35 WIB.

Table 1.2

Telecom Operators



Then, on 2016 it is known that Telkomsel has dominated the market outside of Java amounted to 80%. PT.Indosat.Tbk propose that PT.Telkomsel.Tbk has conducted monopolistic practice because Telkomsel has dominating market outside Java by more than 50%. Indosat assumes that Telkomsel has violated Article 17 and 19b of Law Number 5 of 1999 on the prohibition of monopolistic practices and unfair business competition. Article 19b explains “the prohibition for businessman does not allow some action that could lead to a monopoly practice and unfair business competition”. If proven, it will be penalized in accordance with

the Act Number 5 of 1999 on the prohibition of monopolistic practices and unfair business competition.⁵⁹

Generally, year by year Telkomsel has been increasing not only on their market share but also on the amount of subscribers, starting from the year 2010 until 2014 Telkomsel continuously has been increasing on the amount of subscribers. as stated in the table below:

Table 1.1

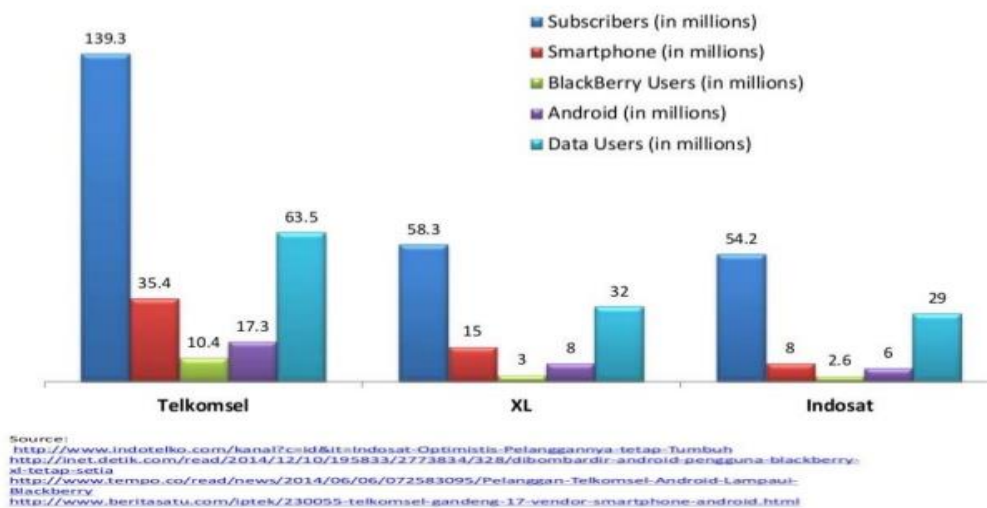
TELECOMUNICATION OPERATOR END OF 2014

Table 1.2



⁵⁹ Herning Bany Restu, "Tanggapan Pakar tentang Tudingan Monopoli Telkomsel", <http://swa.co.id/swa/trends/tanggapan-pakar-soal-tudingan-monopoli-Telkomsel>, Accessed on Fryday, September 22, 2016, 08:35 WIB.

Finally, On 2016 Telkomsel get the largest subscribers reaching 156 million and followed by Indosat which reached 69 million subscribers and XL Axiata which reached 42 million subscribers.⁶⁰ Based on data and facts that have been described above, the Author will analyze the regulations regarding dispute settlement on unfair business competition of cellular operator in Indonesia, while the analysis will use per se Illegal Approach and rule of reason Approach.

a. Analysis based on Per se Illegal Approach

Per se illegal approach declares any treaty or certain business activities as illegal, without further evidence on the impact of the agreement or the business activities. It could be said that Per se Illegal approach is similar to the concept of "formal offense" in criminal Law. In criminal Law, "formal offense" is considered when the offense can fulfill the elements in the regulations that have been decided without looking further to the effect that has been done. So, in this case if Telkomsel can fulfill the offense element then Telkomsel can be punished as stated in Law Number 5 of 1999 and other regulations governing monopoly practice. So, based on per se illegal approach, the Author will analyze whether Telkomsel can fulfill the offense elements that have been decided in regulations or not.

⁶⁰ Amal Nur Ngaziz, "Teori ini Jelaskan tentang tudingan Indosat Soal Monopoli Telkomsel", <http://www.viva.co.id/haji/read/792352-teori-ini-jelaskan-tudingan-indosat-soal-monopoli-telkomsel>, Accessed on Monday, Desember 5, 2016, 21:11 WIB.

1) Law Number 36 of 1999 on Telecommunication

Based on Article 10 Law Number 36 of 1999 on Telecommunication, monopoly is prohibited action; (1) in operating telecommunications it is prohibited to carry out activities which may cause the occurrence of monopolistic practices and unfair business competition among telecommunications operators. (2) The prohibition referred to in paragraph (1) shall be in accordance with Prevailing statutory regulations. The meaning on Prevailing statutory regulations is Law Number 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition as well as the implementation regulations were already decided in Business Competition Supervisory Commission decree Number 11 of 2011 stated on Guidelines for the Implementation of Article 17 (Monopoly) Act Law Number 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition.

2) Law Number 5 of 1999

Based on Article 17 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competition, 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 said goods and/or services do not have substitutions at that time; or

Based on this Article, Telkomsel does not fulfill this element, because Telkomsel is not the only one who holds the market, but many other operators also participate to compete in the telecommunication industry such as Telkom, XL, Indosat, Axis, three 3, Cellular-8, Bakrie Telecom.

- b) It causes other entrepreneurs to not be able to enter business competition for the same type of goods and/or services; or

Based on this article, Telkomsel also does not fulfill this element, because Telkomsel no effort by design to prevent competitors to enter the market in the telecommunications industry in Indonesia. There are many potential competitors are no barriers to entry and to sell similar products on the market, including Telkom, XL, Indosat, Axis, three 3, Cellular-8, Bakrie Telecom. On a national scale, Telkomsel currently holds the largest market reaching 156 million subscribers. However, its competitors also control a large enough market, including Indosat which amount 69 million subscribers, followed by Tri

with customers amount to 55 million and XL Axiata amounted to 42 million.⁶¹

- c) One entrepreneur or one group of entrepreneurs controls more than 50% (fifty percent) of the marketing share of one type of certain goods or services.

Based on this Article, Telkomsel also does not fulfill this element. Actually, Telkomsel dominates 80% market share outside Java.⁶² Based on the data that some researchers obtained that Indosat has proposed that Telkomsel has conducted monopolistic practice because Telkomsel dominated 80% market share outside Java. However, these 80% market share outside Java, while according to the provisions of Law Number 5 of 1999 on the prohibition of monopolistic practices and Unfair Business Competition, what constitutes to be monopolistic practice are if the market share is more than 50% on national scale. While in the fact the market share held by Telkomsel nationally no more than 50%, but about 45% and the rest of market share are held by other operator.⁶³

⁶¹ Amal Nur Ngaziz, "Teori ini Jelaskan tentang tudingan Indosat Soal Monopoli Telkomsel", <http://www.viva.co.id/haji/read/792352-teori-ini-jelaskan-tudingan-indosat-soal-monopoli-telkomsel>, Accessed on Monday, Desember 5, 2016, 21:11 WIB.

⁶² Herning Bani Restu, "Tanggapan Pakar Soal Tudingan Monopoly Telkomsel" <http://swa.co.id/swa/trends/tanggapan-pakar-soal-tudingan-monopoli-telkomsel>, Accessed on Fryday, Oktober 14, 2016, 09:35 WIB

⁶³ *Ibid.*

Rather, Telkomsel is assumed to have violate article 17 of Law Number 5 of 1999, Telkomsel is also assumed to have violate article 19b law Number 5 of 1999, stated that; “hampering the consumers or clients of their company’s competitors from conducting any business contact with those company’s competitors”. Based on this article, the Business Competition Supervisory Commission still tries to find the evidence and as soon as possible precede this case.

3) Business Competition Supervisory Commission Regulation Number 11 Year 2011 on the Implementation of Article 17 of Law No. 5 of 1999

The translation elements of Article 17 in the Business Competition Supervisory Commission setting No. 11 Year 2011 on the Implementation of Article 17 of Law No. 5 of 1999 are as follows:

(a) Entrepreneur

In accordance with Article 1 Point 5 in the General Provisions of Law No. 5/1999, Entrepreneur are “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, conducting various kinds of business activities in economic sector through contracts, both individually or collectively”

In this paper, the entrepreneur in the mean is PT.Telkomsel.Tbk and Pt Indosat.Tbk.

(b) Controlling

"What is meant by the Controlling is real control on a relevant market by one or more businesses so as to determine and control the prices of goods and or services on the market". Based on the facts described above, Telkomsel can not be said to dominate the market because there are many other competitors of the cellular operator that also compete in the Indonesian market.

(c) Goods

Based on Article 1 Paragraph 16 of the General Provisions Law Number 5 of 1999, "Goods is any object, both tangible or intangible, movable or immovable, that can be traded, used, utilized, or taken advantaged by the consumers or entrepreneurs."

(d) Service

Based on Article 1 Paragraph 17 Law Number 5 of 1999. "Services are any service in the form of work or performance traded in the society to be used by the consumers or entrepreneurs". Telecommunication Cellular Services "is a telecommunication service provided by Telkomsel in accordance with the licensing applicable consisting of the provision of services (i)kartu HALO, (ii)"HELLO?Fit", (iii) package TELKOMSEL Flash, (iv) package TELKOMSEL

BlackBerry Internet Services, (v) packages TELKOMSEL iPhone and other telecommunication services that can be developed by TELKOMSEL from time to time and may have one or a combination of these services, such as 4G Lte, etc.⁶⁴

(e) Monopolistic Practice

In accordance with Article 1 paragraph 2 in the General Provisions of Law Number 5 and 1999, "The practice of monopoly is the concentration of economic power by one or more businesses resulting in the control of production and / or marketing of goods and / or services giving rise to unfair competition and may harm the public interest."

Based on the facts, that the market share held by Telkomsel does not exceed 50% of the appropriate provisions contained in Article 17 paragraph 3 of Law No. 5 of 1999. So, Telkomsel did not fulfill this article.

(F) Unfair Business Competition

Based on Article 1 paragraph 6 of the appropriate provisions of Law Number 5 of 1999, "Unfair business competition is the competition among entrepreneurs in conducting their production activities and/or in marketing goods and/or services, conducted in a manner which is unfair

⁶⁴ Telkom Indonesia, "Klausul Berlangganan"
<http://www.telkomsel.com/klausulberlangganan>, Accessed on Fryday, Desember 16, 2016, 3:23 WIB.

or contradictory to the Law or hampering business competition.”

It is not only Telkomsel which has been assumed to conduct monopolistic practice, but also Indosat. Indosat has been assumed to conduct unfair business competition practice by issuing a policy, namely a decrease in price below the market price; Indosat Ooredoo freedom Rp1/s. The new policy issued by indosat was assumed to have violating article 20 (predatory pricing) of Law 5 of 1999.

b. Analysis based on Rule of Reason

Rule of reason approach is an approach used by competition authorities' agency effort to make an evaluation of the impact the agreement or certain business activities, in order to determine whether an agreement or activity is inhibit or promote competition. This approach allows the court to interpret the Act such as competitive factors to consider and establish whether or not the parties do a trade barrier. This is because the contract as well as business activities are included in the Law Number 5 of 1999 on the prohibition of monopolistic practice and unfair business competition it does not everything can lead to monopolistic practices or unfair business competition.

In the rule of reason approach, the judges to consider some factors, namely:

1) Background undertook such actions

The case between Indosat and Telkomsel that have been assumed doing monopolistic practices should be reviewed with the facts and the data. Market domination by Telkomsel outside Java is achieved through a long process and downs outstanding since its establishment in 1995. Telkomsel spirit is to unite the country, which at that time another operator is more focused on building on Java and the big cities for the business is more profitable. Year by year Telkomsel continues to improve its service quality by expanding the network throughout the Indonesian region, while other operators will not build network in Indonesia, whereas Telkomsel has its commitment to build and expand the network in Java island and outside Java island. Telkomsel began to improve the service quality, marketing strategy and increase in other service, until today Telkomsel can reap the rewards of it.

Telkomsel is always consistent to develop their network service outside of Java. Based on the capital expenditure (capex), to develop the network service outside of Java is more expensive because the production

and operational costs higher than in Java. However Telkomsel keep building, because this is part of the commitment to build throughout Indonesia, which is manifested in the modern licensing, as mandated in Law No. 36 of 1999 on Telecommunication. Until now Telkomsel is the only operator that is committed to develop the cellular telecommunication infrastructure in around Indonesian area, in order to open access to telecommunications for the Indonesian people. This was evident from the roll-out 116,000 BTS Telkomsel spread throughout Indonesia. Network Figures consistently add an average of 25 percent per year.⁶⁵

Known in the year 2015, Telkomsel marketing strategy to improve customer satisfaction is through Truebex (True Broadband Experience). Telkomsel conducted this marketing strategy to improving the quality of network service. "The quality of the network not only to roll out the network everywhere, but also modernized the existing network," said Heruseon when the awards night Indonesia Customer Satisfaction Award 2015 in Jakarta.

Then another step taken is easier to purchase internet packages. "We analyzed some customer complaints

⁶⁵ Syakur Usman, "Bantah Monopoli Ini Alasan Telkomsel Mendominasi di Luar Jawa" <https://www.merdeka.com/teknologi/bantah-monopoli-ini-alasan-telkomsel-mendominasi-di-luar-jawa.html>, Accessed on Tuesday, Desember 6, 2016, 22:07 WIB.

that say the purchase package is quite complicated, so we fix the structure of the menu * 363 # to be simpler and easier for the customer to understand," said Heruson. In addition, the customer experience when using Telkomsel services is also a concern in maintaining satisfaction. Heruseon revealed, "This year, Telkomsel improve page notification when the customer already at the threshold, we will receive a clear and transparent notification of his Internet usage."

Not only from improved product quality, but also the interaction between Telkomsel with its customers has now reached approximately 140 million people in Indonesia. Heruseon stated that customers will be educated through many channels to get the services of Telkomsel. They do not have to go to Grapari, but they can also get in from social media. In one month in Telkomsel's Facebook page there are 800 thousand traffics with an orderly distribution system that can be handled.⁶⁶ The results of a series of Telkomsel's program increased traffic which could boost data services, growing payload of 122% of customers in 30 broadband cities. This resulted in revenue growth of over 41.5% last year. Contributions of 30 broadband cities are set

⁶⁶ Syakur Usman, "Bantah Monopoli Ini Alasan Telkomsel Mendominasi di Luar Jawa" <https://www.merdeka.com/teknologi/bantah-monopoli-ini-alasan-telkomsel-mendominasi-di-luar-jawa.html>, Accessed on Tuesday, Desember 6, 2016, 22:07 WIB.

at 54% of revenue. Heruseon said that; Serve your customers with the best, and then your customers will voluntarily contribute by being an advertiser for your company.⁶⁷

This is evident from Telkomsel achievement in the award given by SWA magazine with Frontier Consulting Group research institute, Indonesia Customer satisfaction Award (ICSA), 2015. Telkomsel ranked first in the category of Internet Service Providers - Mobile with Telkomsel Flash brand that managed to get a score; first, in customer satisfaction with the quality of products / services amounted to 4.193, second, satisfaction with the price they pay amount to 3,973, third, beliefs regarding customer as the best brand amount to 4,186 and the last the expectations of future satisfaction up to 4.074.⁶⁸

So, based on the above explanation, it can be summarized that the reason of Telkomsel's get 80% market share outside Java, is because Telkomsel is always consistent to develop their network services and the quality of products, and to give the best service to the consumers.

⁶⁷Herning Bani Restu, "Tanggapan Pakar Soal Tudingan Monopoli Telkomsel"
<http://swa.co.id/swa/trends/tanggapan-pakar-soal-tudingan-monopoli-telkomsel>, Accessed on
Friday, Oktober 14, 2016, 09:35 WIB

⁶⁸Syakur Usman, "Bantah Monopoli Ini Alasan Telkomsel Mendominasi di Luar Jawa"
<https://www.merdeka.com/teknologi/bantah-monopoli-ini-alasan-telkomsel-mendominasi-di-luar-jawa.html>, Accessed on Tuesday, Desember 6, 2016, 22:07 WIB.

With the best service from the cellular operator companies, the public can choose which one has the best quality. If the services provided by Telkomsel can meet the consumer satisfaction, the consumer will prefer to use the products of telkomsel. In other words, we can call it a natural Monopoly.

2) Business reasons behind such actions

Business reasons behind this action are to get the profit. Although Telkomsel need a large amount of run to build the network throughout Indonesia, it will get the benefits which are in line with its effort in long run. According to the National ICT Council Member, Garuda Sugardo said the other cellular operator has intention to invest in the market outside of Java because in Java the business competition is already saturated. At two decades ago, investors and other operator celluler made fune of Telkomsel because Telkomsel develop network service in Eastern Indonesia. However, now almost all cellular operators want to build their network outside of Java. So, if today Telkomsel get the higher market share it is because Telkomsel is always consistent to build a network in all of Indonesian's area, including the area outside of Java. So, today Telkomsel can get the rewards of their struggle at that time when others did not want to build the network.

M. Ridwan Effendi, the former member of BRTI, said that when we was still activeas a regulator, indosat and XL always

refused to build network in the border area when requested. Only Telkomsel accepted the request to built the network at that time. Now all cellular operator are interested to invest in the border area, but they want to have a network sharing instead of building their own network. So it is not fair for Telkomsel and not fair too based on business competition perspective.

So, based on the above explanation, it can be concluded that Telkomsel can acquire up to 80% of the market share outside of Java because of Telkomsel is willing to take the risk to build network in all Indonesian area. If then Telkomsel is dominant outside Java, it is because other cellular operator do not want to build a network outside of Java. We could call this the Natural Monopolies. Monopoly happens naturally because the others do not build the network. In principle, the monopoly was not prohibited, the regulation is prohibited the practice of monopoly that led to anti-competition.

1) The suspect position in a certain industry

The position of Telkomsel is Cellular phone network operator service which operates in Indonesia. Telokomsel a brand name of a GSM and UMTS Cellular phone network operator. It was founded in 1995, and is a subsidiary of Telkom Indonesia. The company currently has 122 million subscribers. Telkomsel Operates in Indonesia with GSM 900-1800 MHz, 3G network, and

internationally, through 323 international roaming partners in 170 countries (end of September 2008). The company provides its subscribers with the choice between three prepaid cards-simPATI, Loop and Kartu As, or the post-paid kartuHalo service, as well as a variety of value-added services and programs. As of March 31 2015, Telkomsel has the leading cellular market share in Indonesia with 46.0% of the total number of cellular customers.

2. Legal Analysis on the Violation of Law Number 5 of 1999 by PT. Indosat.

This problem began in June 2016 when Indosat accuse Telkomsel to conduct Monopoly practice outside Java. Actually not only Telkomsel assume violate the regulation on the prohibition monopolistic practice and unfair business competition, but Indosat also assume violate this regulation with conducting a negative campaign and also Predatory pricing. If this action can be proven that Indosat violate the regulation, so Indosat will be punish based on Law No. 5 of 1999.

The first problem is Indosat assumed to conduct predatory pricing. This is because Indosat promote the new product named Indosat Ooredoo freedom free telephone for all of operator with only Rp1/s for voice services in areas outside Java. Based on jendral secretary for Policy Studies and Regulation of Telecommunications, M Ridwan Effendi,said that Indosat Ooredoo freedom products is assume as predatory pricing practice, because Indosat sell their product below cost of production. This obviously

could damage the competition in the cellular market. One characteristic of predatory pricing is selling below the price of production to eliminate the competitors. And these actions can damage cellular business competition in Indonesia in the long term.

Based on the financial memo belonging to the three major operators, Telkomsel, Indosat and XL, in the first quarter of 2016, revenue per minute of voice services to Indosat up to Rp136,7 / min. Meanwhile, Telkomsel amounted Rp168,5 / min, and XL for Rp213,4 / min. If Indosat applied the Rp1/s rates, the price will be Rp60/minute to other operator (of net) and for the Indosat network (on net). To apply tariff Rp1/s to all operators, Indosat is expected to bear the loss of Rp190 / minute, due to retail tariff under the interconnection charge which is amounted to Rp250 / minute.⁶⁹

This condition has been going on since November 2015. Based on the opinion delivered by Secretary General and Policy Studies Center of the Telecommunication Regulatory ITB, M Ridwan Effendi, said that the Indosat Ooredoo freedom Rp1/s program should be analyzed comprehensively. The first quarter of 2016, Indosat get the profit from this Ooredoo freedom program amounted to Rp136.7, but with this amount, Indosat still not get the profit yet. nowadays Indosat are depend on the capital strength of the parent company (Ooredoo), the possibility of the holding company (Ooredoo) will subsidize tariffs in order to cover the lost

⁶⁹ Siti Syarifah, "Pengamat endus Predatory Pricing di Kampanye Rp1/s Indosat", <http://www.viva.co.id/haji/read/789920-pengamat-endus-predatory-pricing-di-kampanye-rp1-indosat>, Accessed on Thursday, Desember 8, 2016, 21.07 WIB.

from the Indosat freedom Rp1/s program. This activity has intention to eliminate the competitor out of the market. This activity is clearly incompatible with the principle of fair competition, so that the anti-competitive practices have to be observed by the Indonesian Regulatory body and the Business Competition Supervisory Commission.⁷⁰

The second problem is the negative campaign conducted by Indosat. Based on the opinion of the Secretary General and Policy Studies Center of the Telecommunications Regulatory ITB, M Ridwan Effendi, in Jakarta, Friday, June 24, 2016 he found that the background for the negative campaign conducted by Indosat is the effect of the application of tariff Rp1/sec which does not meet the target number of subscribers. Based on the facts, implementation of tariff freedom program Rp1/s has been running for about five months, but it seems a million customer acquisition plan expected by Indosat is not successful. So, Indosat held such a negative campaign to all customers. A negative campaign conducted by Indosat with the tariff scheme under the production tariff has led to an unhealthy competition outside Java. So the Business Competition Supervisory Commission Chairman Rauf Syarkawi Commission will analyze the implementation of Indosat Ooredoo freedom tariff Rp1/second program.

The poster used at the time of the negative campaign is clearly impolite, and this action is clearly violating the code of ethic on

⁷⁰ Siti Syarifah, "Pengamat endus Predatory Pricing di Kampanye Rp1/s Indosat", <http://www.viva.co.id/haji/read/789920-pengamat-endus-predatory-pricing-di-kampanye-rp1-indosat>, Accessed on Thursday, Desember 8, 2016, 21.07 WIB.

competition, these can actions injured other operator cellular specially Telkomsel. And this action also can impact the consumers. These are the poster that used by Indosat to do the negative campaign:

Image 2.1

The Banner and Poster by Indosat Conduct Negative campaign



Source:<http://www.cnnindonesia.com/teknologi/20160617161436-213-139004/tarif-mahal-telkomsel-diserang-indosat-apa-kata-menkominfo/>
Image 2.2

The Banner and Poster by Indosat Conduct Negative Campaign



Source:<http://www.cnnindonesia.com/teknologi/20160617161436-213-139004/tarif-mahal-telkomsel-diserang-indosat-apa-kata-menkominfo/>

Image 2.3

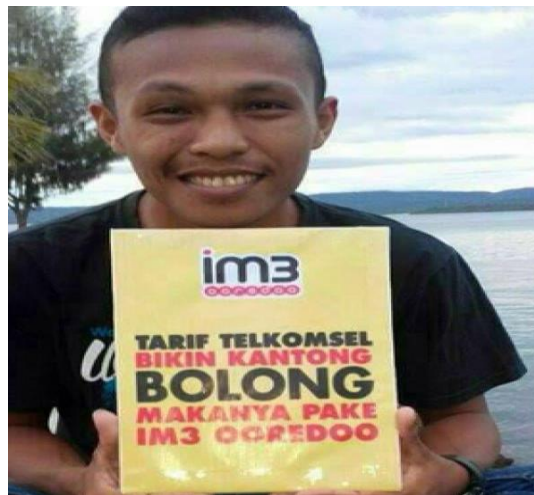
The Banner and Poster by Indosat Conduct Negative Campaign



Source:<http://www.cnnindonesia.com/teknologi/20160617161436-213-139004/tarif-mahal-telkomsel-diserang-indosat-apa-kata-menkominfo/>

Image 2.4

The Banner and Poster by Indosat Conduct Negative Campaign



Source:<http://www.cnnindonesia.com/teknologi/20160617161436-213-139004/tarif-mahal-telkomsel-diserang-indosat-apa-kata-menkominfo/>

From the poster above, we can see clearly that the negative campaign conducted by Indosat clearly harm the spirit of Law number 5 of 1999 to create a healthy competition. Promotion action should become an arena just to promote the product of operators cellular and provide choice to the public; the more number of cellular operator s will giveconsumers the opportunity to choose the service that they want

Based on the opinion of the Chairman of Institute for Information Society Development and Empowerment (LPPMI) Kamilov Sagala, he argued that the actions taken by Indosat against Telkomsel is Very unethical. Indosat and Telkomsel has become an overlap between a player or a regulator. This negative Campaigns conducted by Indosat is clearly wrong in advertisement ethics. About the issue of monopoly practice conducted by Telkomsel, actually Indosat should report directly only to the regulator (BRTI), but Indosat even brought the issue to the media in advance, so that it seems that Indosat wanted to influence public perspective on the lack of Telkomsel service.⁷¹

a. Analysis based on Per se Illegal Approach

Per se illegal approach declares any treaty or certain business activities as illegal, without further evidence on the impact of the agreement or the business activities. Behavior type classified as per se illegal is the behaviors in the business activity that are almost always

⁷¹ Susetyo Dwi Prihadi, “Sudah Bukan Zaman nya Lagi Operator Lakukan Kampanye Negatif”, <http://www.cnnindonesia.com/teknologi/20160621155253-213-139834/sudah-bukan-zamannya-lagi-operator-lakukan-kampanye-negatif/>, Accessed on Thursday, Desember 8,2016, 21.31 WIB.

anti-competitive in nature, and almost always never bring social benefits.

It could be said that Per se Illegal approach is similar to the concept of "formal offense" in criminal Law. In criminal Law "formal offense" is perceived when the parties can fulfill the elements in the regulations without seeing more impact of the action taken as a result. In this case Indosat applying the tariff Rp1/Sec for the entire operator, by applying the tariff Rp1 per second, Indosat will generate price Rp60/minute to other operators (off net). With the application of tariff Rp1/Seconds to all operators, Indosat can fulfill the Elements of predatory pricing that is already decided in the regulation. Therefore, the author would like to analyze whether the actions taken by Indosat is contrary to the regulation or not.

1) Law Number 5 of 1999

The new program of Indosat Ooredoo freedom apply the Special tariff rates Rp1/s for all of operator and outside of Java and this action can lead to predatory pricing. Predatory pricing is an activity that is prohibited by Law Number 5 of 1999, in article 20 Law number 5 of 1999 says that "Entrepreneurs are prohibited from supplying goods and / or services by selling without making any profits or by setting a very low price with the intention to Eliminate or end Reviews their competitors' business in the

relevant market, Thus causing monopolistic practices and / or unfair business competition”.

Based on Law Number 5 of 1999 has defined several elements of predatory pricing, and the author will analyze whether the acts conducted by Indosat can fulfill the elements that have been regulated by Law, while these elements are as follows:

a) Practice predatory pricing below production prices

On 2016, on the first quarter of financial report from the three major players (Telkomsel, Indosat, and XL), the action of applying the tariff Rp1/s is already assumed as predatory pricing and can damage cellular business in the long run. Based on the analysis conducted by using data from Indonesian Telecommunications Regulatory Body which received the information from the Memo-owned by the three major operators in the first quarter of 2016, revenue per minute of voice services to Indosat is Rp136,7 / min. Meanwhile, Telkomsel amounted Rp168,5 / min, and XL for Rp213,4 / min. If Indosat rates apply Rp1 / sec will result in the price of Rp60 / minute to other operators (off net), the same thing will happen for Indosat's call numbers (on net). To apply Rp1 rates to all operators, Indosat is expected should bear the loss of Rp190 / minute, due to retail tariff under the interconnection

charge which amounted to Rp250 / minute. So, Indosat decided the tariff under the production cost, and this action it is prohibited by the regulation.

- b) Setting a very low price with the intent to remove or turn off the business competitors in the market.⁷²

By lowering tariffs Rp1 / Sec for all of operators, it can be said that Indosat has bad intention to conduct predatory pricing to eliminate other competitors. This condition has been going on since approximately six months. From the above explanation, actually Telkomsel is not the one who sell their products with an expensive price, because based on data and facts, the tariffs applied by Telkomsel are still under XL. In conclusion, Telkomsel still have tariffs which are lower than XL eventhough it has developed network aroundIndonesia and holds 80% of the market share.

2. Business Competition Supervisory Commission Decree No. 6 of 2011 on Guidelines for Article 20 (Predatory Pricing) Act No. 5 of 1999

In connection with the prohibition of monopolistic practices and unfair business competition, one of the prohibited activity is the supply of goods or services by way of selling at a loss or assign

⁷² Article 20 Law Number 5 of 1999 on the prohibition monopolistic practice and unfair business competition.

a very low price with the intention to remove or turn off their competitors in the relevant market that may result in monopolistic practices and or unfair business competition.

By lowering tariffs to Rp1 / Sec for all these operators, it can be said that the Indosat was deliberately doing predatory pricing to turn off other cellular operator mobile carriers. Based on the financial statements belonged to the three major operators in the first quarter of 2016, revenue per minute of voice services to Rp 136.7 Indosat, Telkomsel (USD 168.5 / min), and XL (USD 213.4 / min). While the imposition of tariff Rp1 per second will generate a price of Rp 60 per minute to other operators (off net), the same is to call fellow Indosat numbers (on net). For the sake of Rp1 rates to all operators, Indosat is expected to be loss of Rp190 / minute for Indosat provides retail rate under the interconnection cost of Rp 250 / minute.

The practice of selling at a loss with the aim of getting rid of or off of their competitors in the market in a competitive context is an attitude of businesses that generally have a dominant position in the market; in this case Indosat the Big Three cellular operator in Indonesia. By applying tariff Rp1 / Sec to all operators this can be harmful to the economy over a long period of time long enough. This strategy can lead its competitors out of the market concerned and or impede other businesses to enter the market.

In the short term, tariffs Rp1 / Sec by Indosat is able to benefit consumers, but after eliminating a competitor from the market and inhibiting prospective new competitors, Indosat expects to raise prices significantly. In addition to these reasons Indosat also want to attract customers who have used Telkomsel service to switch to using the services by Indosat, The reason is Indosat prices are cheaper than telkomsel. Generally, price increases which be determined by Indosat is used to cover the loss of budgeting at the time, and the price is a monopoly price (higher) that could harm consumers. This practice is an attempt to maximize profits and cover losses incurred when doing predatory pricing. The business activities of this kind need to be assessed under Article 20 of Law No. 5 of 1999 by basing the analysis framework and economic considerations.

In addition to Article 20 of Law No. 5/1999, the ban on price fixing is also stipulated in Article 7 of Law No. 5/1999 regarding restrictions on pricing below market prices. However, Article 7 and Article 20 of Law No. 5/1999 will be applied differently by the Commission depending on the facts of the case by case basis. Article 7 of Law No. 5/1999 requires agreements with business competitors to set prices below the market price, whereas Article 20 of Law No. 5/1999 does not specify the terms of the agreement. And in this case based on the facts obtained that

between Telkomsel and Indosat did not enter into agreements for fixing prices below market prices, so Indosat could be charged under Article 20 of Law No. 5 of 1999 related to a prohibition on predatory pricing.

Some legislation on issues related to the topics discussed are Law Number 5 Year 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition, Article 7 states, that business agent is prohibited from making agreements with business competitors to set prices below the market price, which may result on the occurrence of unfair competition. "Law No. 36 Year 1999 on Telecommunication, Article 27 says; The composition of the tariffs of telecommunication network and provision of telecommunications services or rates are set by Government Regulation ". Article 28 reads; "The tariff of telecommunication networks and telecommunication services are set by the telecommunications network operator and telecommunication services on the basis of a formula set by the Government.

b. Analysis based on Rule of Reason

Rule of reason approach is an approach used by competition authorities' agency in an effort to make an evaluation of the impact on the agreement or certain business activities, in order to determine whether an agreement or activity inhibits or promotes competition. This approach allows the court to interpret the Act such as competitive

factors to consider and establish whether or not do a trade barrier. This is because the contract as well as business activities are included in the Law Number 5 of 1999 on the prohibition monopolistic practice and unfair business competition it does not everything can lead to monopolistic practices or unfair business competition.

In the rule of reason approach, the judges are require to consider some factors, namely:

1) Background undertook such actions

The background of applying tariff Rp1 / Sec in the opinion of the Director and CEO of Indosat Alexander Rusli on these actions make it clear that the application of tariff Rp1 / s is to make simplification in the market. According to another operator to make the tariff scheme is rather complicated, so Indosat try to give a simple tariff schemes and tariff policy by issuing Rp1 / s to all operators.⁷³

However, on June 20, 2016 after BRTI called Indosat, then Indosat explained to BRTI, that the background of these campaign activity because of the dominant position of Telkomsel, Indosat requested network sharing plan to Telkomsel which was rejected by Telkomsel. Another reason is the planned reduction in interconnection rates that do not match expectations, and

⁷³ Kemas Irawan Nurrachman, "Kisruh Tarif Rp1/detik"
<http://techno.okezone.com/read/2016/06/25/207/1425061/kisruh-tarif-rp1-detik>, Accessed on Fryday, Desember 9, 2016, 14.17 WIB.

network rental to Telkom difficult outside Java.⁷⁴ So that's what causes Indosat conduct predatory pricing and negative campaign.

2. Business reasons behind such actions

Business reasons behind tariff Rp1 / sec and negative campaign conducted by Indosat is solely for the benefit to be obtained later. In the short term, tariffs Rp1 / Sec by Indosat is able to benefit consumers, but after eliminating a competitor from the market and inhibit prospective new competitor Indosat can easily raise prices significantly. In addition to these reasons Indosat also want to attract customers who have used the service of Telkomsel to switch to using the services from Indosat, cause of Indosat proposing reason the Indosat prices are more cheaper than Telkomsel price, but not necessarily cheap. Generally, price increases will be determined by Indosat is to cover losses experienced when performing the decline in prices, and the price is a monopoly price (higher) that could harm consumers. This practice is an attempt to maximize profits and cover losses incurred when doing predatory pricing.

So that business activities in clear violation of Article 20 of Law No. 5 of 1999 by basing the analysis framework and

⁷⁴ Muhammad Iqbal, "Dipanggil BRTI Indosat Ooredoo soal Dominasi Telkomsel" <http://selular.id/fokus/2016/06/dipanggil-brti-indosat-ooredoo-soal-dominasi-telkomsel/>, Accessed on Fryday, Desember 9, 2016, 14.36 WIB.

economic considerations. And for the sustainability of these issues will be handled by the Commission.

2) Position Actors action in particular Industry

The position of Indosat is Cellular phone network operator service which operates in Indonesia. PT Indosat Tbk. (commonly referred to as Indosat Ooredoo, formerly Indosat) is one of the telecommunications services and network providers in Indonesia. The company offers communication services for cellular-phone users, both for prepaid and postpaid, under the brands Matrix Ooredoo, Mentari Ooredoo and IM3 Ooredoo. The company also provides fixed-voice services (including international direct dialing) and multimedia, Internet, and data communication services.

B. The Business Competition Supervisory Commission (KPPU) and Indonesian Telecommunications Regulatory Body (BRTI) Settle the Unfair Business Competition Case of Cellular Operator

There are two institution will be able to handle this cases. Related with this cases, In Indonesia has two Institution which one is focusing on maintaining the Telecommunication industry namely Indonesian Telecommunication Regulatory Body (BRTI) and other institution focusing on maintaining the business competition activity namely Business Competition Supervisory Commission. These two Institutions will be work together to create the good environmental business

competition on telecommunication industry. Both Institution has their own authority that regulate in law number 36 of 1999 on Telecommunication and Telecommunication ministry decree number 31 of 2003 on Indonesian Telecommunication Regulatory Body and law number 5 of 1999 on the prohibition of monopolistic practice and unfair business competition .

Actually, when there are cases on Telecommunication industry the Indonesian Regulatory body has mandate by the law to analysis the case, if the case is related with implementation of telecommunication industry BRTI can settle the case with give punishment like remain letter and administrative sanction, if the case is related with the business competition, the case given to Business Competition Supervisory Commission (KPPU) to settle/ examine the case, but when the case is related with criminal action, the case given to the executor⁷⁵ to settle the case, as like as in the penal code, Because BRTI didn't have executor function.

In the context of competition and a price competition between mobile operators, in Indonesia there are two institutions as a regulator of the Indonesian Telecommunications Regulatory Body (BRTI) and the Business Competition Supervisory Commission (KPPU). Indonesian Telecommunications Regulatory Body and the Commission refer to government rules that prohibit operators from abusing a dominant position. In March 2004, the MoC issued Decree No. 33/2004 (Regulation implementing Law No. 5/1999, antitrust and unfair competition), which

⁷⁵ Article 44 Law Number 36 of 1999 on Telecommunication

imposed restrictions on the abuse of a dominant position for network and service providers. Dominant providers are determined based on a number of factors such as business scope, coverage area of services and whether they control the market. However, Indonesian Telecommunications Regulatory Body and the Commission does not have more authority to determine the minimum limit tariff Mobile service. And here is the analysis of these two institutions the authority to handle the case.

1. The Business Competition Supervisory Commission (KPPU) Settle the Unfair Business Competition Case of Cellular Operator

a. Violations that done

1) Violations committed by Telkomsel

June 2016, PT Indosat Tbk Ooredoo complaint that PT Telkomsel conduct monopolistic practices in markets outside Java. Based on that data Telkomsel are dominated market outside of Java amounted to 80%. Indosat assume that Telkomsel violating Article 17 and 19b of Law Number 5 of 1999 on the prohibition monopolistic practices and unfair business Competition. Articles 19b explain “the prohibition for businessman does not allow some action that could lead to a monopoly practice and unfair business competition”. If proven will be penalized in accordance which the Act Number 5 of 1999 on the prohibition monopolistic practices and unfair business Competition.

So that the Commission based its authority can settle the case based on the violation on Article 17 and 19b Law Number 5 of 1999 on the prohibition of monopolistic practices and unfair business Competition.

2) Violations committed by Indosat

In addition to allegations against Telkomsel doing Monopoly turns of the company also did some alleged unfair business competition, one of which is to perform Predatory pricing practices. If the deed is done is proven that Indosat Indosat can be snared Punishment Due to violation of Article 20 (predatory pricing) Act No. 5 of 1999.

These allegations of predatory pricing begins at the time of Indosat campaign by offering a new product that Indosat Ooredoo freedom free telephone for all of operator with only Rp1 / s for voice services in areas outside Java. But the products on offer Indosat Ooredoo considered resulting in predatory pricing for Indosat to sell their services below cost of production. If this continues then the activity will adversely affect the business competition in Indonesia. One characteristic of predatory pricing that is selling below the price of production to shut down a competitor. And these actions can damage cellular business in Indonesia in the long term.

So that the Commission based its authority can settle the case based on the violation on Article 20 of Law Number 5 of 1999 on the prohibition of monopolistic practices and unfair business Competition.

b. Dispute settlement Process

In summary it can be said that the case handling procedures of competition by the Commission is as follows:

1) Report to the Commission

The report to the supervisory commission are divided into:

- (a) Third-party reports that it learned of the violation of Law No. 5 of 1999.⁷⁶

In this case the third party is a consumer, but until now there has been no report at all on the part of consumers who feel aggrieved.

- (b) those who feel aggrieved by the violation committed against Law No. 5 of 1999.⁷⁷

those who feel aggrieved are fellow operatorseluler in Indonesia, not only Telkomsel and Indosat only. however the case here starting from reports submitted by Indosat. In early June the Telecommunications industry were surprised by the two companies telecommunication rival, the second mobile

⁷⁶ Article 38 paragraph 1, Law Number 5 of 1999 Concerning on the Prohibition Monopolistic Practice and Unfair Business Competition.

⁷⁷ Article 38 paragraph 2, Law Number 5 of 1999 Concerning on the Prohibition Monopolistic Practice and Unfair Business Competition.

operator Indosat and Telkomsel, the case is initiated from PT.Indosat, Tbk, which reported that it was harmed by PT Telkomsel.Tbk for doing Monopoly practice outside Java, And then from Telkomsel also reported that they felt disadvantaged because of the negative campaigns that denigrate the name of Telkomsel and Indosat also alleged to have committed the practice of predatory pricing. After there are reports of both parties who feel aggrieved and the Commission performs the next process is the preliminary examination.

2) Preliminary

If there is a report letter on the violation of Law Number 5 of 1999, then KPPU should examine that case in order to determine that the parties have violated the regulation or not. The preliminary process takes 30 working days after the report letter is received. In this issue, the Business Competition Supervisory Commission (KPPU) can then proceed to the next process if it can prove that the parties have conducted unfair business competition. In this preliminary process, KPPU may bring witnesses if necessary.

Preliminary process is already starting by calling both parties in advance. On June 24, 2014, the Commission already succeeded in calling both parties for an investigation. The Commission has managed to get information from both sides. This investigation process was represented by Gopprera Panggabean as

enforcement director of the Commission. He said that they already received an explanation from both parties, Indosat and Telkomsel.

As an investigation result, it is known that Telkomsel dominance outside of Java was amounted to 80%. Based on Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, it is stated that any parties cannot hold more than 50% of market share. However, the amount of market share of more than 50% is seen based on national scale, not seen from Java or outside Java. While in fact, the market share held nationally by Telkomsel was not more than 50%, but just around 45%; whereas, the rest of market share was held by other operators.

On the other hand, Indosat applied the Ooredoo freedom program with tariff of Rp1/sec for all operators, and this tariff is far below the price of production; this can be proven by the financial memo owned by the big three major operators, Telkomsel, Indosat and XL, in the first quarter of 2016, revenue per minute of voice services to Indosat was Rp136,7/min. Meanwhile, Telkomsel amounted to Rp168,5/min, and XL for Rp213,4/min. If Indosat rates apply Rp1/sec, it will result in the price of Rp60/minute to other operators (off net), and the same thing will happen for Indosat's call numbers (on net). To apply Rp1 rates to all operators, Indosat is expected to bear the loss of Rp190 / minute due to retail tariff under the interconnection charge which is amounted to

Rp250/minute. Based on this fact, Indosat is in violation of Article 20 (predatory pricing) Law Number 5 of 1999.

3) Continued Examination

Further examination can be done by the Commission if it is known that there is a preliminary evidence in the preliminary investigation. In the further investigation, the team conducted an investigation of the letters and documents. The Examining Team also heard the reports of the Party and the Witnesses, as well as the certificate of the Government contained in the further investigation report. The further examination was conducted by the Commission 60 days after the preliminary investigation.

In the examination conducted by the Commission, preliminary evidence about the allegation undertaken by Indosat and Telkomsel had been obtained. However, in the follow-up examination, the Commission still had to conduct an examination of letters and documents from both sides, Indosat and Telkomsel. Examining Team also had to listen to the report from the parties and the witnesses, as well as to check the certificate of the Government contained in the further investigation report. Until now the Commission is still under further preliminary investigation.

c. Case decision

Giving decision on a competition case is not easy; the Commission should also see the evidence of some aspects that exist, one of which is

to consider the economic evidence. Using the foundation of Law Number 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, if compare with other legal matters, business competition cases are very complicated to settle because they need economic analysis to get the evidence. So, according to John E.W.Kwoka, Jr. and Lawrence J., economic experts have an important position to give the consideration of analysis on business competition cases.

However, until the month of November 2016, the Commission has not given the decision yet on this case because handling of this case must involve a lot of documents to be checked; even the number of the pages can be thousands of pages in total, and it would take time, effort, and costs to check it. The Act allows time for the Commission to resolve the competition level. The Commission can settle the unfair business competition case in less than five months. If the time is over, it will get the additional time that is already set in the regulation.

2. The Indonesian Telecommunications Regulatory Body (BRTI) Settle the Unfair Business Competition Case of Cellular Operator

a. Violations that have been done

Under Article 10 of Law Number 36 of 1999 on telecommunications, it is explained that in the implementation of the telecommunication, telecommunication operators are prohibited from conducting activities that may lead to monopolistic practices

and unfair business competition. In a preliminary investigation, the Commission has found preliminary evidence from both sides, Telkomsel and Indosat, and based on preliminary evidence it is obtained that Indosat has violated Article 20 of Law Number 5 of 1999, and has also violated points 1:20 on Ethics advertisement in Indonesia. On the other hand, Telkomsel has violated article 17 and 19b Law Number 5 of 1999. The authority that the Indonesian Telecommunication Regulatory Body has in handling the cases between Telkomsel and Indosat is restricted to supervision authority for the use of tools and operation of telecommunication networks and services on business competition. Violations committed by Telkomsel of alleged violations committing monopoly and Indosat in predatory pricing is left entirely to the Commission to deal with such cases. But the authority to handle the case of a negative campaign conducted by Indosat became the authority of Indonesian Telecommunication Regulatory Body.

Based on Policy Studies and Regulation of Telecommunications ITB, M Ridwan Effendi, said that Negative campaign conducted by Indosat Ooredoo tariff freedom Rp1 / s was already running about five months, but it seems a million acquisition plan expected Indosat customer is not successful. So we held such a negative campaign to all customers. With negative

campaign conducted by the attack Indosat tariff scheme has led to outside Java mobile industry excited with the action.

If the main goal of holding a negative campaign is for the acquisition of a million subscribers, Indosat can also be charged under Article 19 Law No. 36 tahun 1999 on telecommunication which states that telecommunication network operators are required to guarantee the freedom of users to select any telecommunication networks to meet the needs of telecommunication. But in this case KPPU needed more striking evidences. If indeed this is true, then Indosat may be punished in accordance with the provisions of Article 45 of Law No. 36 of 1999 which states that whoever violates the provisions of Article 16 paragraph (1), Article 18 paragraph (2), Article 19, Article 21, Article 25 paragraph (2), Article 26 paragraph (1), Article 29 paragraph (1), Article 29 paragraph (2), Article 33 paragraph (1), Article 33 paragraph (2), Article 34 paragraph (1) or Article 34 (2) is subject to administrative sanctions. And continued in Article 48 of Law Number 36 of 1999 which say that a telecommunication network operator who violates the provisions referred to in Article 19 shall be punished with imprisonment for a period of 1 (one) year or a fine of Rp 100,000,000.00 (one hundred million rupiahs).

b. Dispute settlement process

1) Report

As the regulatory body, BRTI has authority to control telecommunication industry in running telecommunication business. If there are a case, BRTI can used the initiative to check there are violation or not, on Law Number 36 on 1999 or other regulation has related. And BRTI also can get report from third party who feel aggrieved.

2). Preliminary

Preliminary process is already starting by calling both parties in advance. Monday, June 27, 2016. BRTI has collected some information from Indosat about the truth of the negative campaign conducted by Indosat. Harsyo, the member of BRTI, sees these cases as mild cases, and do not need to impose tough sanctions. So, BRTI did not impose the hard punishment.

c. Case Decision

Indonesian Telecommunication Regulatory Body (BRTI) claimed to have dropped a decision to respond to the chaotic between Indosat and Telkomsel. The finalized sanctions warning were posted by Indonesian Telecommunication Regulatory Body to Indosat on Monday, June 27, 2016. According to one member of Indonesian Telecommunication Regulatory Body, Indonesian Telecommunication Regulatory Body sees that these cases are mild

and do not need to impose tough sanctions. According to the Associated General the sanctions that will be given for the company is in the form of a warning because Indonesian Telecommunication Regulatory Body sees that this case of negative campaigning does not required severe sanctions, so Indonesian Telecommunication Regulatory Body only give remain letter to Indosat.

CHAPTER FIVE

CONCLUSIONS AND SUGGESTIONS

A. Conclusion

1. The Provisions and their implementation regarding dispute settlement on unfair business competition of cellular operator

Based on the previous discussion, we may conclude that Telkomsel did not conduct Monopolistic practice. Because regarding on Article 19b Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competition, Telkomsel did not fulfill the element of monopolistic practice. Although it is known that Telkomsel has dominated the market share outside of Java by 80%, and it does violate the terms above 50% that has been set by Law No. 5 of 1999 on the prohibition of monopolistic practices and unfair business competition. However, according to the Law, the intended amount of market share of more than 50% is seen overall on the national scale in Indonesia, and it should not be seen from the island of Java or outside Java Island. The fact shows that the market share held by Telkomsel nationally is not more than 50%, but about 45%, and the rest of the market share is controlled by other operators. So, Telkomsel does not comply with the laws on the elements needed to do monopolistic practices.

On the other hand, we also may conclude that Indosat conduct Predatory Pricing practice. Because based on the analysis of the author, Indosat has done predatory pricing which is prohibited under Article 20

of Law No. 5 of 1999. This is proven by the fact that Indosat Ooredoo applied freedom program with the tariff of Rp1/sec to all providers is indeed far below the production price. This action can be proven by the financial memo which belongs to the three major operators, namely Telkomsel, Indosat and XL, in the first quarter of 2016, which states that revenue per minute of voice services to Indosat is Rp136,7/min. Meanwhile, Telkomsel has amounted to Rp168,5/min, and XL for Rp213,4/min. If Indosat applies the rates of Rp1/sec, it will result in the price of Rp60/minute to other operators (off net), which is also the same for Indosat's call numbers (on net). To apply Rp1 rates to all operators, Indosat is expected to bear the loss of Rp190/minute due to retail tariff under the interconnection charge which is amounted to Rp250/minute.

Furthermore, Negative campaign conducted by Indosat is obviously a very unethical thing to do. And the negative campaign conducted by Indosat is a clear violation of point 1:20 of the Indonesian advertisement Ethics amendment 2014 edition which says that the operator should not degrade competitors' products. In fact, in its campaign, Indosat has clearly degrading the products of Telkomsel, which indirectly said those Indosat products are cheaper than Telkomsel products.

2. The Business Competition Supervisory Commission (KPPU) and Indonesian Telecommunications Regulatory Body (BRTI) settle the unfair business competition case of cellular operator.

Based on the previous discussion, we may conclude that The Business Competition Supervisory Commission has succeeded in calling both parties for investigation. Business Competition Supervisory Commission (KPPU) has investigated Indosat and Telkomsel. In this investigation, the Commission has managed to get information from both sides. Based on preliminary evidence it is known that Telkomsel does not fulfill the elements of Monopoly that has been regulated in article 19b of Law Number 5 of 1999, and Indosat alleged to have committed predatory pricing because it has set tariff below the price of production. However, until the month of November 2016, the Commission has not given the decision on this case yet. Eventhough, the regulation gives mandate to the Business Competition Supervisory Commission to settle the case.

On the other hand, Indonesian Telecommunications Regulatory Body (BRTI) already give decision to respond to the Indosat and Telkomsel cases. According to one member of Indonesian Telecommunication Regulatory Body sees that these cases are mild and do not need to impose serious sanctions. According to the Associated General the sanctions that will be

given for the company is in the form of a warning because Indonesian Telecommunication Regulatory Body sees that this case of negative campaigning does not required severe sanctions, so Indonesian Telecommunication Regulatory Body only give remain letter to Indosat.

B. Suggestion

1. Based on the conclusion as followed, the author will give Suggestion for the dispute settlement on unfair business competition of cellular operator

Based on the conclusion as followed, the authors propose to Amendment an Act or add a new chapter in Law Number 36 of 1999, which contains about limiting the number of cellular operator network construction. If the network construction has been limited by the regulation it is more give legal certainty. So, who has big capital market it does not mean can control the market. This solution can give legal certainty to other cellular operators or competitors to realize the healthy business competition.

Furthermore, the authors propose suggestions to the KPPU to give punishment to the Indosat, which stated on article 48 UU 5 of 1999. Based on the facts that have been found, Indosat is violated Article 20 (predatory pricing) law number 5 of 1999. Thus, it should give the punishment based on provisions contained in Law No. 5 of 1999 Article 48 Paragraph 2 which state that Violations to the provisions

under Article 5 through 8, Article 15, Articles 20 through 24, and Article 26 of this law is subject to a criminal fine in the amount of at least Rp. 5,000,000,000 (five billion rupiahs) and in the amount of Rp.25,000,000,000 (twenty five billion rupiahs) at the most, or imprisonment at a maximum period of 5 (five) months.

Suggestions related to the negative campaign conducted by Indosat are to add a new article about the tariffs. Implementation of tariff Rp1/sec is indeed related to the weakness of law Number 36 of 1999 because not regulate about tariff. Then setting tariff between Cellular Operators must be accommodated in Law No. 36 Year 1999 on Telecommunication. Article 7 of Law No. 5 of 1999 should be amended to add item concerning minimum rates set by the government or through government regulations and other provisions. Similarly, in article 27 or 28 of the Law number 36 of 1999, an item should also be added concerning the minimum rates set by the government or through government regulations and other provisions. It is expected to impact a stronger legal and binding, and ensure the safety of the competition between cellular operators in the market and also protect consumers.

2. The Business Competition Supervisory Commission (KPPU) and Indonesian Telecommunications Regulatory Body (BRTI) settle the unfair business competition case of cellular operator.

Based on the conclusion as followed, the authors give suggestion to both Institutions that they are can give the distinct punishment to both

parties. And also can settle the case on time as decided in the regulation, because as soon as possible is more better to give decision and it can give legal certainty to both of parties.

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