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.[1] 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”[2]

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.

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[1] Merriam “Competition”, http://www.merriam-webster.com/dictionary/competition. Accessed on Fryday, Oktober 14, 2016, 09:35 WIB

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

2. There are ambitions between the parties to achieve the same goal

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. [3]

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.

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

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 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 contacts 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.[4]

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.[5]

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.[6]

4) Boycotting

[4] Article 4 Paragraph 1 Law Number 5 year 1999 on the Prohibition of Monopolistic Practice and Unfair Business Competiton

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

[6] Article 9 Paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Bussines Competition

Entrepreneurs are prohibited from making any contract with other business competitors, which could hamper other entrepreneurs in engaging in the same type of business, either for domestic or export purposes.[7]

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.[8]

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.[9]

7) Oligopsonies

[7] Article 10 paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Bussines Competition

[8] Article 11 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Bussines Competition

[9] Article 12 paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Bussines Competition

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 and/or services in the relevant market that can cause monopolistic practices and/or unfair business competition.[10]

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.[11]

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.[12]

10) Contract with Foreign Parties

[10] Article 13 Paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Bussines Competition

[11] Article 14 Law Number 5 year 1999 on the Prohibition of Monopolistic Practice and Unfair business Competiton

[12] Article 15 Paragraph 1 Law Number 5 of 1999 on the Prohibition of Monopolistic Practice and Unfair Bussines 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.[13]

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.[14] 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.[15] 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

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

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

[15] 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 μόνοςmónos ("alone" or "single") and πωλεῖνpōleîn ("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).[16]

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.[17] 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.[18] Although monopolies may be big businesses, size is not a characteristic of a monopoly. A

[16] 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*.

[17] 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

[18] 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).[19]

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.[20]

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:[21]

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

[19] *Ibid.*

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

[21] 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.[22]

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.[23]

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

[23] 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.[24] 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.[25]

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

[24] Suyud Margono, 2009, *Hukum Anti Monopoli*, Sinar Grafika, Jakarta, h. 136.
[25] *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. [26]

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;

[26] 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:[27]

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;

[27] 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.[28]

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.

[28] 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.[29]

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

[29] 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,m 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 nothave authority as the executor on the telecommunicationcases; the main function is to maintain the telecommunication industry competition. If the telecommunication cases are just on the administrative field, the cases will be settledby 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 l0 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.[30] 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.[31] Telecommunication occurs when the exchange of information between communication

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

[31] Article 1 of Law No 36 of 1999 Concerning Telekomunication

participants includes the use of technology. It is transmitted either electrically over physical media, such as cables, or via electromagnetic radiation. [32] Telecommunications organized based on the principle of benefit, fair and equitable, rule of law, security, partnership, ethics and self-confidence.[33] 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.[34]

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

[32] Haring, John 2008 “Telecommunication". Oxford Dictionaries. Oxford University Press. Accessed on Friday, 28 Oktober 2016.
[33] Article 2 of Law No 36 of 1999 Concerning Telekomunication
[34] Article 3 of Law No 36 of 1999 Concerning Telekomunication

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.[35] 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.[36] In 2013, the company had 58.5 million cellular phone subscribers.[37] In 2015, the Number of subscribers increased to 68.5 million, or up by 24.7% compared with 54.9 million in 2011.[38] 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.[39]On November 19, 2015, Indosat was finally renamed to Indosat Ooredoo.[40]

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

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

[37]Rusli, "Indosat`s profit plunges 52.5 pct". www.antaranews.com. Accessed On Sunday, Oktober 2016

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

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

[40] Andi, "Indosat Ganti Nama jadi Indosat Ooredoo". www.CNN Indonesia.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 marketis 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 inIndonesia; 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 invitesthe investor to invest and join in the telecommunication industry and run their business; it certainly causes competition amongcellular 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 / postulatesismainly: 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.