

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

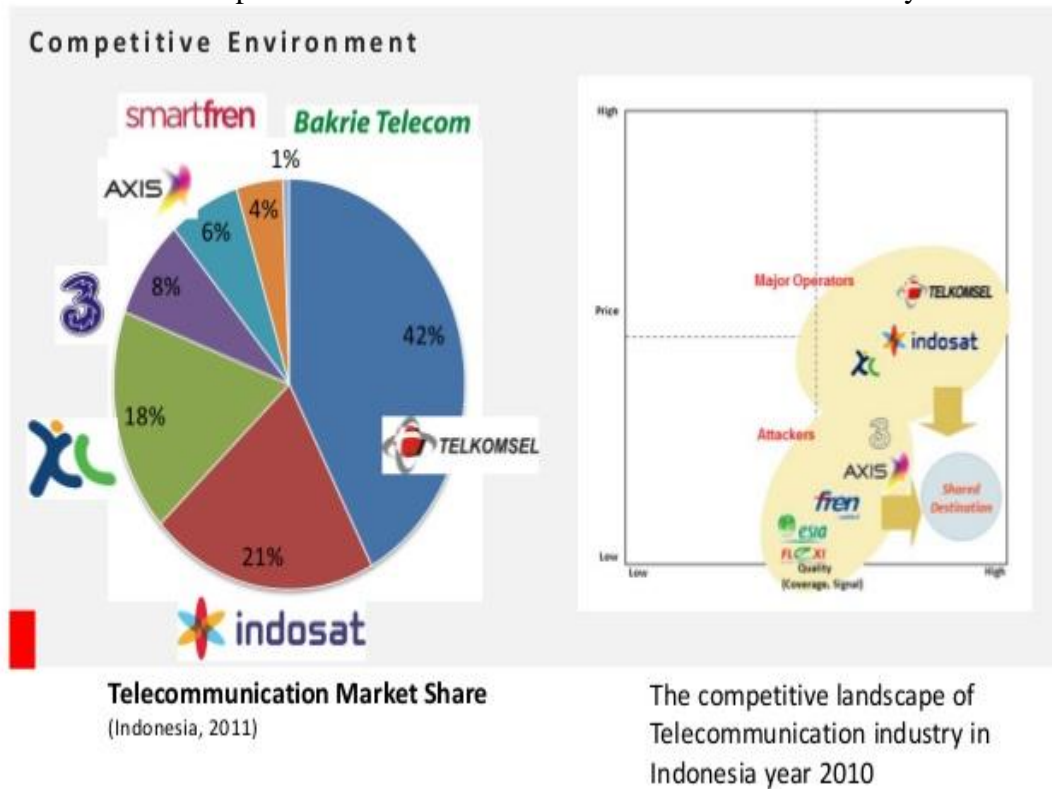
On June 2016, PT Indosat Tbk Ooredoo issued a complaint that PT Telkomsel conduct monopolistic practices in markets outside Java island. It is a potentially serious accusation, which will not only drop Telkomsel, but also will impact the Indonesian telecommunications industry.¹ This issue has the damage among the parties of cellular operator company, and the consumers will get the impact too.² 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;

¹ 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.

² Herning 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



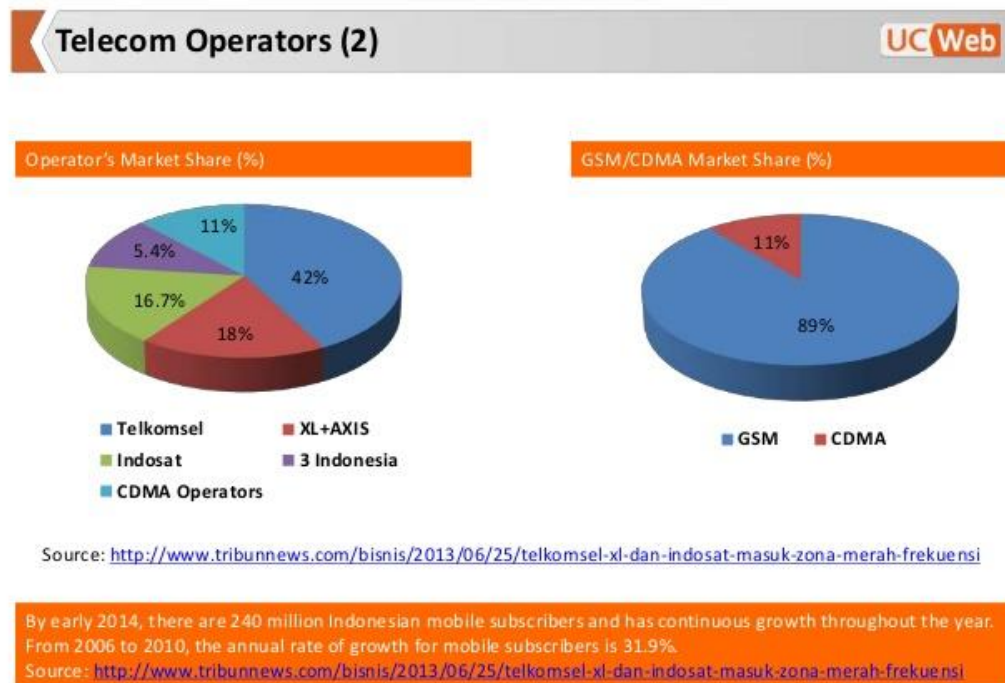
Source:<http://swa.co.id/swa/trends/tanggapan-pakar-soal-tudingan-monopoli-Telkomsel>

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%.³ 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;

³ 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.⁴

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

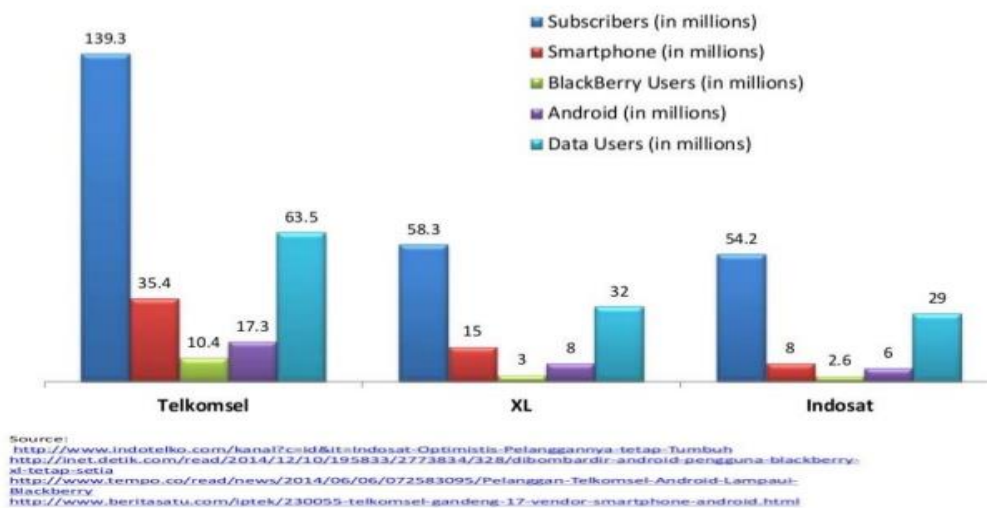
TELECOMUNICATION OPERATOR END OF 2014

Table 1.2



⁴ 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.⁵ 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.

⁵ 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.⁶

- 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.⁷ 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.⁸

⁶ 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.

⁷ Herning Bani Restu, "Tanggapan Pakar Soal Tudingan Monopoli Telkomsel" <http://swa.co.id/swa/trends/tanggapan-pakar-soal-tudingan-monopoli-telkomsel>, Accessed on Fryday, Oktober 14, 2016, 09:35 WIB

⁸ *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.⁹

(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

⁹ Telkom Indonesia, "Klausul Berlangganan"
<http://www.telkomsel.com/klausulberlangganan>, Accessed on Friday, 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.¹⁰

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

¹⁰ 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.¹¹ 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

¹¹ 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.

are set 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.¹²

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 4.074.¹³

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.

¹²Herning 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

¹³Syakur 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 active as 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.

1. 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 assumed as predatory pricing practice, because Indosat sells 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.¹⁴

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 gets 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

¹⁴ 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.

capital strength of the parent company (Ooredoo), the possibility of the holding company (Ooredoo) will subsidize tariffs in order to cover the lost 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.¹⁵

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.

¹⁵ 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.

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

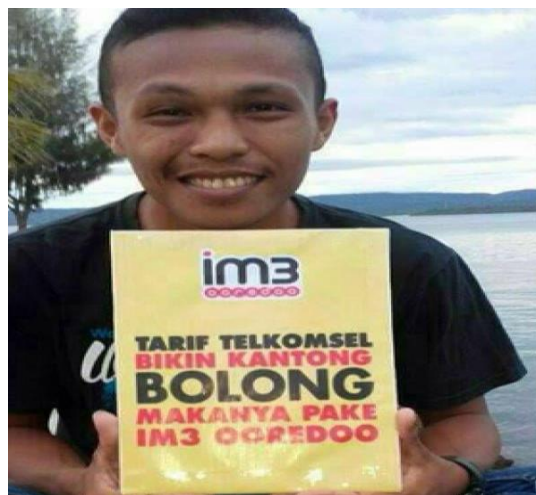
The Banner and Poster by Indosat Conduct Negative Campaign



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 operators will give consumers 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.¹⁶

¹⁶ 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.

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 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.¹⁷

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.

¹⁷ Article 20 Law Number 5 of 1999 on the prohibition monopolistic practice and unfair business competition.

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 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 / Secfor 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.¹⁸

¹⁸ 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.

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 network rental to Telkom difficult outside Java.¹⁹ 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

¹⁹ 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.

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 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 executor²⁰ 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 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.

²⁰ Article 44 Law Number 36 of 1999 on Telecommunication

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 1999.²¹

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 1999.²²

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 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

²¹ Article 38 paragraph 1, Law Number 5 of 1999 Concerning on the Prohibition Monopolistic Practice and Unfair Business Competition.

²² Article 38 paragraph 2, Law Number 5 of 1999 Concerning on the Prohibition Monopolistic Practice and Unfair Business Competition.

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.