UNIVERSITAS ISLAM INDONESIA
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No : 675/Dekan/FH/XII/2013 Yogyakarta, December 17, 2013
Matter : Request letter for becoming Speaker

Dr. Siti Anisah, S.H., M.Hum.
Lecturer of Faculty of Law
Universitas Islam Indonesia

Dear Madam,

Due to the arrival plan of Prof. Thomas Jefrey and Dr. Tamas Fezer to UII on January 2014 and the organizing plan for the international seminar held by UII, we would like to ask for your willingness to be one of the speakers on **"International Seminar Tort Law in Various Legal Systems: Indonesia, Hungary, and United States of America"**, which will be held on:

Date : Thursday, January 16, 2014
Time : 8 a.m. – 3 p.m.
Place : Inna Garuda Hotel, Yogyakarta, Indonesia

On the seminar, we want to ask you to give explanation about the Tort Law rules based on the Indonesian Civil Law, doctrine development, and interesting cases that have ever occured. Please check the Terms of Reference (TOR) as enclosed in this email.

Relating to this seminar preparation, we hope you can send us the materials that you have prepared (via email : dodiksetiawan@gmail.com, a week before the date of the seminar). If you have anything to ask about this seminar, please contact us. See at attachment

Thank you for your attention.

You sincerely,

Dean Faculty of Law
Islamic University of Indonesia

Dr. Rusli Muhammad S.H, M.H

Head Committee

Dodik Setiawan NH,SH, MH

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SURAT TUGAS

No : 1.2 /Dek-ST/60/Div.URT/H/I/2014

Bismillaahirrahmaanirrahiim

Dengan ini Pimpinan Fakultas Hukum Universitas Islam Indonesia Yogyakarta menugaskan saudara yang namanya tersebut dibawah ini sebagai Narasumber pada acara Seminar Internasional "Tort Law in Various Legal Systems : Indonesia, Hungary, and United States of America" yang diselenggarakan oleh FH UII di Hotel Inna Garuda, Yogyakarta pada tanggal 16 Januari 2014 :

Nama	: Siti Anisah, Dr., SH., M.Hum
Jabatan	: Lektor Kepala
Pekerjaan	: Dosen tetap Fakultas Hukum UII Yogyakarta

Surat tugas ini disampaikan kepada yang bersangkutan, untuk diketahui dan dipergunakan sebagaimana mestinya.

Yogyakarta, 09 Januari 2014
Dekan,

Dr. Rusli Muhammad, SH., MH

The Development of Unlawful Act Laws in Indonesia[1]

Siti Anisah[2]

Introduction

According to Rosa Agustina, the formulation of Article 1365 of the Indonesian Civil Code or ICC (*Burgerlijk Wetboek* or abbreviated as "BW") is based more on a structure of norms than substance of what would qualify as a comprehensive law. Because of that very reason, to extract substantives out of Article 1365 ICC usually would require materialization outside of the ICC itself.[3] J. Satrio elaborated that after the enactment of ICC, lawmakers have configurated numerous subjective rights that are constellated in respective Laws, or Acts, that is outside the actual ICC.[4]

In several Laws that have emerged after the ICC, the normative of "unlawful act" is very colourful in the sense that there are many definitions of it, but none that felt complete or holistic, because such definitions only define unlawful act from a vantage point that is very specific to a specific Law, and even this is without resulting in any specific definition or further ellaboration of it. For example is Law No. 5 of 1999, Indonesia's Antitrust Law. This Law specifically attaches the term "unlawful" as an element of "unfair competition practices", but definitions of what unlawful act is can not be found here.

Besides that, the material content regulated through Law No. 5 of 1999 are of acts committed by persons or entities that causes negative repercussions to consumers or cause negative impacts on people in general. However, this Law does not regulate how consumers or society can demand compensation; how to actually prove that there has been loss inflicted upon them; and what are the forms of compensation to loss that can be claimed to the Offender.

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[1]Presented in International Seminar "Tort Law in Various Legal Systems: Indonesia, Hungary, and United State of America," Inna Garuda Hotel, Faculty of Law Universitas Islam Indonesia, Yogyakarta 16th January 2014.

[2]Lecturer in Faculty of Law Universitas Islam Indonesia, Yogyakarta, Indonesia.

[3]Rosa Agustina, *Perbuatan Melawan Hukum*, Jakarta: Fakultas Hukum Universitas Indonesia, 2003, p. 3.

[4]J. Satrio, *Hukum Perikatan, Perikatan yang Lahir dari Undang-Undang, Bagian Pertama*, Bandung: Citra Aditya Bakti, 2001, p. 142.

Based on those thoughts, this short article will be discussing the nature of an unlawful act or a tort, and the developments of laws regulating it including its implementation.

Regulating Unlawful Act in BW and Its Implementations

An unlawful act (*onrechtmatige daad*) in the context of private law regulated in Article 1365 ICC. In precisely Book III of ICC, in the part "on obligations that aries in virtues of law". Article 1365 states that "every unlawful act, that brings damage to other person, obliges the other person by whose fault causing such loss, to compensate such loss."[5]

The elements that can be extracted from Article 1365 ICC is the existence of an action, and such action must be unlawful or against the law (onrechtmatig), where the tortfeasor fulfill the element of "being in the fault", and that action inflicts a loss.[6]

1. The Presence of an Action

J. Satrio ellaborated that Article 1365 ICC regulates unlawful "action" that is active, while Article 1366 regulates "unlawful act" that happens as a result of negligence so that it is passive – doing nothing, ignoring, and as a result allowing something to proceed. However, in line with the broadned developments of thought on unlawful act, then it is seen that acts both active and passive, have conclusively been covered in Article 1365. In other words, the word "action" must be given broad definitions, both active and passive actions.[7] Mariam Daruz Badrulzaman believes that this action, both positive and negative, means that it covers the act of doing and not doing.[8]

2. The Action Must Be Unlawful (*onrehtmatig*)

Being unlawful (*onrechtmatig*) can have a narrow and a broad definition. The narrow definition is that it is an action that breaches subjective rights that has

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[5]R. Subekti dan R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata*, Jakarta: Pradnya Paramita, 2008, p. 346.

[6]J. Satrio,*op. cit.*, p. 139.

[7]*Ibid.*, p. 140.

[8]Abdulkadir Muhammad, *Hukum Perikatan*, Bandung: Alumni, 1982, p. 142 – 143; Mariam Daruz Badrulzaman, *Kitab Undang-Undang Hukum Perdata Buku III tentang Perikatan dan Penjelasannya*, Bandung: Alumni, 1983, p. 146; Wirjono Prodjodikoro, *Perbuatan Melawan Hukum Dipandang dari Sudut Hukum Perdata*, Bandung: Mandar Maju, 2000, p. 2. Mariam Daruz Badrulzaman, et. al. *Kompilasi Hukum Perikatan*, Badung: Citra Aditya Bakti, 2001, p. 106; Ridwan Khairandy, *Hukum Kontrak Indonesia dalam Perspektif Perbandingan (Bagian Pertama)*, Yogyakarta: FH UII Press, 2013, p. 303 – 304.

been protected by certain Laws (*wettelijk subjektiefrecht*) or an action that contradicts the legal obgligations of the tortfeasor as regulated in the Laws.[9]

According to Rosa Agustina, in a broad definition there are 4 categories of unlawful, which are:[10]

a. Against with the tortfeasor's legal obligations;
b. Against with other people's subjective rights;
c. Against morality norms;
d. Against appropriateness and morality of action, accuracy, and circumspection that someone should posses in interacting with the community or towards other people's property.

The first and second criteria as an absolute criteria that is related to written laws, while the third and fourth criteria as an alternative criteria that is related to unwritten law.[11]

The meaning of being against the legal obligations of the tortfeasor is to act or behave in a way that is against a Law that in character is commanding or prohibiting. So, the norm can be read in the related Law. Laws in this sense can mean both formal and material. With that, all that violates the provisions in Criminal Law –seen from a private law point of view– is againts the law or unlawful. However, for certain unlawful act, in order to be considered as Criminal Law violation, it needs to satisfy the element of "intentionally (*opzet*)."[12]

According to van Apeldoorn, subjective rights is a provision that is connected with specific people and in that way becomes a kind of authority, or from another vantage point, an obligation. In other words, subjective rights is an authority that is based on objective law. This authority is not only under "one" authority, but in some occurences under a "group" of authorities. Subjective rights are directed at the freedom to act that is given by private laws to

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[9]J. Satrio, *Hukum Perikatan, Perikatan yang Lahir dari Undang-Undang, Bagian Pertama*, Bandung: Citra Aditya Bakti, 2001, p. 142. The narrow definition have been influenced by legism tradition. This tradition changed in 1919 in *Cohen v. Lindenboum*, it is familiar with *Drukkers Arrest*. In this case, the anlawful act became broader, not only breach the Law, but also unwriten Law. Rosa Agustina, *op. cit.*, p. 5 - 6.

[10]Rosa Agustina, *op. cit.*, p. 19.

[11]Setiawan, *Aneka Masalah Hukum dan Hukum Acara Perdata*, Cetakan Kesatu, Bandung: Alumni, 1992, p. 252.

[12]J. Satrio,*op. cit.*, p. 172.

individuals in a certain environment that enables a sense of authority-decision to members of the community, that can uphold and take care of their interests. Subjective rights is divided into personal rights (*persoonlijkheidsrechten*), and property rights (*vermogenrechten*). Property rights is divided into two; absolute and relative. Property rights that are absolute is further divided into two, which are posession rights and other absolute property rights (such as rights upon immaterial properties).[13]

In a more simpler way put, subjective rights refer to a set of rights given by law to a person to specifically protect their interest. Essential subjective rights that are related to unlawful act and is recognized by the jurisprudence are among them personal rights, such as freedom, reputation and honor, also property rights.[14]

Considering that human interest is unlimited and very variable, so that not all of their interest can be covered by the law, only some can be regulated in the Laws in the form of subjective rights. On that note, the term unlawful act must be defined in broad sense. The definition of unlawful act also covers action or behavior that is against the unwritten laws, which are morality and appropriateness in considering personal interest and other people's property within communal interaction.[15] This is actually the broad definition of unlawful act.

An action that is against morality (*goede zeden*) is unlawful, however it is not as simple as stating that there are morality norms that have been violated, but it needs to be proven, that such morality norms have indeed been indicted as part of legal norms.[16] If someone in upholding their rights ignore and allow someone else's rights to be violated, then that person have committed indicent acts (*onbetamelijk*), and therefore have been unlawful (*onrechtmatig*).[17]

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[13] *Ibid.*, p. 163.

[14] Rachmat Setiawan, *Tinjauan Elementer Perbuatan Melawan Hukum*, Bandung: Alumni, 1982, p. 17.

[15] J. Satrio, *op. cit.*, p. 150 dan 155. See also Rosa Agustina,*op. cit.*, p. 19.

[16] *Ibid.*, p. 175.

[17] *Ibid.*, p. 177.

3. The Tortfeasor is "Fault"

The definition of "fault" have been objectified in a way that is has become a very abstract and general scale, which is whether humans in normal circumstances can be concluded as fault in their action or can they be responsible for it.[18]

Article 1365 ICC is an element that must be present in relation to compensation claims, not to decide whether an unlawful act have been committed. Fault (*schuld*) is something considered as despicable, something that can be a cause of blame, something related to behaviour and loss, and because of that is claimable to the Offender. In other words, behavior and the repercussions of such behavior that is *onrechtmatig* must be blamed to the Offender.[19] The word "*schuld*" is therefore, two dimensional, which refers to fault "behaviour – that determines the element of a violation – and which refers to "the Offender", or the element of responsibility.[20]

With that, in relation to Article 1365 BW, then the element of "behaviour" must already be clear and/or certainly classified as unlawful (*onrechtmatig*), and it is required that there is the element of "faultl" (and a form of loss) –meaning that is can be blamed to the Offender--- in order to claim compensation.[21] The fact that someone is proven to have committed an unlawful act, is not satisfactory reason to claim compensation. But, it is still necessary to be proven, that such action and such loss is can indeed be blamed at the Offender.[22]

If the Offender and the victim both take part in the fault that leads to the loss, then the repercussions of such loss must both be shared among them based on a scale of how much they contributed to the loss respectively.[23]

The question is; if someone's action have satisfied the parameters of what can be classified as unlawful act, but that person holds a justifiable reason to

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[18]Purwahid Patrik, *Dasar-dasar Hukum Perikatan (Perikatan yang Lahir dari Perjanjian dan dari Undang-Undang)*, Bandung: Mandar Maju, 1994, p 82.

[19]J. Satrio, *op. cit.*, p. 221 - 222.

[20]*Ibid.*, p. 223 dan 230.

[21]*Ibid.*, p. 231.

[22]*Ibid.*, p. 241.

[23]*Ibid.*, p. 249.

commit such action (*rechtsvaardigingsgrond*), can their actions still be deemd as *rechtmatig*? Justifiable reasons held by Offender covers:[24]

a. Impossibility (*overmacht*); the circumstances have caused something to arise which forcefully made the Offender commit such unlawful act. The parameters of such condition is not only limited to "a condition in which a person simply can not avoid/prevent" (like an *Act of God*), but also referring to conditions where a person have tried to avoid/prevent such forceful circumstances up until the point where they do not need (or can no longer) avoid/prevent things from happening (hardship or impracticality).
b. Forced Self-Defense (*noodweer*); a person forcefully violates the law in order to defend their body, soul, honor, even wealth.
c. By order of provision or law and/or command responsibility (*ambtelijk bevel*). People who act under the order of the Law and under command responsibility cannot be classified as having committed an unlawful act, as long as they have not committed an abuse of authority.
d. A consent given by the victim to the Offender to commit such unlawful act, can also be considered as justification.

The actions above is considered as actions that are *onrechmatig*, however the very character of it being considered as *onrechmatig* is eliminated because it is trumped by other reasons, which by law is considered more virtuous so that it can create a bypass.

Besides that, there are times when a person that committed certain actions that are unlawful, then caused loss to other people, but the element of "fault" is not in this person, because there are reasons that eliminate the element of "fault" (including but not limited to "psychological disorders"). With the existence of justifications of offense (*schulduitsluitingsgrond*), an action that is unlawful can not loose its element of "against the law", only that the Offender can not be deemed to hold responsibility for the fault and the loss that has arisen, and

[24] *Ibid.*, p. 247 - 248. See also R. Setiawan, *Pokok-Pokok Hukum Perikatan,* Bandung: Bina Cipta, 1979, p. 85; Rachmat Setiawan, *op. cit.*, p. 21.

because of that cannot be claimed upon compensation based on Article 1365 BW.[25]

4. The action causes a form of loss

An unlawful act can cause loss, be it material or immaterial.[26] BW in this case is not comprehensive in the way it regulates how to compensate losses caused by unlawful act. Because of that, Article 1246 – 1248 BW can be applied through means of analogy in cases of compensation claims due to loss on the basis of unlawful act. Some claims for compensation that can be submitted on the basis of unlawful act are:[27]

a. Compensation in the form of money upon the loss that arise;
b. Compensation in the form of restoring things to the initial condition;
c. Statement that the action committed is indeed unlawful;
d. Prohibition of certain act.

Article 1365 - 1380 BW is then substantials regarding the forms of responsibility that may arise as a consequence of unlawful act, that are divided into:[28]

1. Responsibility that is not limited to unlawful act they committed, but also unlawful act done by others (vicarious liability) and the objects that are under their supervision.
   a. Responsibility to other's actions.
      1) Responsibility towards an action that is done by someone that in general is under a person's supervision in general;
      2) Responsibility of parents and guardians to juveniles (parameters based on Article 1367 (2) BW);
      3) Responsibility of employer and a person who deputize their affairs to people they employ (parameters based on Article 1367 (3) BW);
      4) Responsibility of a school teacher towards their students, and a foreman towards their workers (parameters based on Article 1367 (4) BW).

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[25] *Ibid.* See also Gunawan Widjaja dan Kartini Muljadi, *Perikatan yang Lahir dari Undang-Undang*, Jakarta: RajaGrafindo Persada, 2003, p. 146 – 156.

[26] *Ibid.*, p. 271.

[27] Rosa Agustina, *op. cit.*, p. 16; Purwahid Patrik, *op. cit.*, p. 84; R.M. Suryodiningrat, *Perikatan-Perikatan Bersumber Undang-Undang*, Bandung: Tarsito, 1980, p. 48. Ridwan Khairandy, *op. cit.*, p. 311 – 312.

[28] Rosa Agustina, *op. cit.*, p. 15 – 16; Rosa Agustina, et. al., *Hukum Perikatan (Law of Obligations)*, Bali: Pustaka Larasan, 2012, p. 15 - 17.

b. Responsibility towards objects that are under a person's supervision.
    1) Responsibility to an object in general terms (Article 1367 (1) BW);
    2) Responsibility towards animals (Article 1368 BW);
    3) Responsibility of an owner towards their warehouse(s) (Article 1369 BW).
2. Unlawful act inflicted towards the body and soul of a human (Article 1370 BW).
3. Unlawful act towards a reputation (Article 1372 – 1380 BW).

One interesting thing to point out in the light of unlawful act is the result of the research that has been conducted by Rosa Agustina.[29] The promise to enter into a civil union that is marriage made by a man was once sued under the premises of an unlawful act, regardless of the fact that Article 58 of BW states that "promises to marry does not cause a right to sue in front of a judge...". In *Masudiaji v. Gusti Lanang Rejeg,* Case No. 3191 K/Pdt/1984, the Supreme Court believed that not fulfilling the promise to marry can be categorized as a violation of morality norms within a society, and therefore can be considered as an unlawful act. In *Pasi cs. v. Hendrikus cs.*, Case No. 11/Pdt/G/1988/PN.Kef. The Supreme Court believed that the Defendant have committed unlawful act by violating the cultural norms of "*Pualeu Manleu*" that based on Biboki indigenous laws can have double meanings. In *Roberta Sen v. Yohanes Sipa cs.*, No. 772 K/Pdt/1992, the Supreme Court decided that the actions of a man who seduced and promised to marry a girl up until he impregnated her and gave birth can be categorized as an unlawful act, because it violates unwritten norms; morality and appropriateness. In *Melina v. Kadarusman,* Case No. 935K/Pdt/1998, the Supreme Court stated that the act of avoiding responsibility from the consequences of sexual intercourse that has led to the birth of an offspring outside of marriage is seen as a violation of principles of morality within the society, causing both material and immaterial loss. The Supreme Court decided that the Defendant should provide adequate housing to the Applicant and their child equal to the amount of Rp161.000.000.

[29]Rosa Agustina, *op. cit.*, p. 203 - 220.

Developments of Provisions Regarding Unlawful Act Outside of BW and its Implementations

Law No. 5 of 1999 is taken as an example in this paper based on two reasons. Firstly, Law No. 5 of 1999 specifically has the term "unlawful" entailed as an element of "unfair business competition". Even when this "unlawful" must be proven in order to be accounted as a violation using the *rule of reason* approach,[30] the definition of what "unlawful" is not stated in this law.

Secondly, Article 47 (2) letter f states that Commission for the Supervision of Business Competition (Komisi Pengawas Persaingan Usaha or KPPU) holds the authority to issue administrative sanctions in the form of compensation to losses. Such authority is indeed limited to "issuing (the decision that commands provision of) compensation to losses", in several KPPU decisions, compensation is calculated and given to business actors that have been found in violation of Law No. 5 of 1999. But actually, Law No. 5 of 1999 does not regulate how consumers or people in general that have been affecte by the actions of the business actors can claim for compensations of losses, how to prove such loss have been inflicted upon, and what are the acceptable forms of compensation that can be claimed.

1. The Element of "Unlawful" in Law No. 5 of 1999

According to Knud Hansen, business competition that is against the law, or unlawful, is business that is in violation of Law(s). Prohibition from Law(s) are all the provisions in the Law(s) that prohibits a specific behaviour imperatively. The character of a prohibition in a provision can often be concluded through the formulation of the said provision. For example, the term banned or not allowed can show that there are provisions that lead to prohibition. Provisions regarding prohibitions are often regulated in Criminal Law, making it necessary to intrepret in order to decide whether a provision allows or disallows a certain action or behaviour.[31] This can be said as parallel to the meaning of "unlawful" as an element of unlawful act as ellaborated earlier.

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[30] *Rule of reason approach* is a kind of approach which is used by the competition authority to evaluate and determine does the consequence of the contract contradict with the fair competition or not. Andi Fahmi Lubis, et. al., *Hukum Persaingan Usaha antara Teks & Konteks*, Jakarta: Gtz kerjasama dengan KPPU, 2009, p. 55.

[31] Knud Hansen et. al., *Undang-Undang Larangan Monopoli dan Persaingan Usaha Tidak Sehat*, Jakarta: Katalis, 2001, p. 68.

That is due to the fact that in many cases of competition law, there is an element of private legal event in it, such as the existence of an agreement or contract between competing business actors. However such private law relationship is actually part of an antagonistic conspiracy (such as cartel). Such conspiracy causes disadvantage to the public (consumers in massive numbers) or to other competitors, so that at least it can be classified that such private law event is one that have caused disadvantage to other private subject. Meanwhile, if there is a case where it seems like there is private law friction among parties, but it is actually not because of a private law relationship (an agreement or a contract), but more of a business competition relationship, then if it is not considered as part of private law, then it is considered as unlawful act (*onrechmatige daad*). Even for several unfair competition practice like cartel (agreement or contract among all competitors in a product market) that is caused by its element of malevolence/crime (causing loss) to the public (consumer in massive numbers) that is so strong, then some cartels in some countries can actually be considered as a form of criminal act.[32]

Based on such argumentation, lawmakers should already decide to regulate "unlawful act" as part of competition law in a clear and consistent manner. With that then it enables the separation of what qualifies as "unlawful act" that is part of private law, criminal law, and competition law.

During the observation by the author, the element of "unlawful" in KPPU's decisions regarding tender conspiracies, it has been indicated that such practices are against the Laws that regulate tendering, especially the ones that regulate on tenders for procurement of goods and/or services by the government. Meanwhile, in many violations of other articles that uses the *rule of reason* approach, (besides Article 22 regarding tender conspiracy), the element of "unlawful" can not be postulated and proven in specific terms

[32]HMBC Rikrik Rizkiyana, et. al., "Catatan Kritis terhadap Hukum Acara Persaingan Usaha di Indonesia," Disampaikan dalam Lokakarya Penelitian Komisi Hukum Nasional RI Tahun 2011 *"Penegakan Hukum Persaingan Usaha: Kajian terhadap Hukum Acara dan Pelaksanaan Putusan KPPU"* Jakarta, 20 Oktober 2011, p. 6.

2. Behaviour of Business Actors can Bring Impact to Consumers or the Community

Law No. 5 of 1999 is built around the focus to regulate the behaviour of business actors in phases of production and/or marketing their goods and services. However, it can not be denied that the behaviour of business actors may also have impact towards consumers or community in general. Regardless of the presence of Law No. 5 of 1999, the concept of "loss" that may be experienced by consumers that is caused by business actors is not regulated, except in the cases of the SMS cartel and the Cooking Oil cartel. KPPU actually issued a decision that the loss experienced by the consumers were indeed caused by the cartel agreements made by the business actors.

In the case of the SMS cartel, KPPU calculations show that consumers were disadvantaged as an effect of the agreement between telecommunications operators up to the amount of Rp. 2.827 trillion.

> In KPPU decision No. 26/KPPU-L/2007, PT Telekomunikasi Selular (Telkomsel) and PT Telekomunikasi Indonesia Tbk (Telkom) was proven in violation of Law No. 5 of 1999, which is committing the action of price fixing upon the product *short message service* (SMS) with several other operators. Telkomsel was fined Rp.25 billion, and Telkom was fined Rp.18 billion.
>
> Besides Telkomsel and Telkom, four other telecommunications operators was reported in Case No. 26/KPPU-L/2007 which was also deemed guilty by KPPU, and they are PT Excelcomindo Pratama Tbk (XL), PT Bakrie Telecom (Btel), PT Mobile-8 Telecom Tbk (Mobile-8) and PT Smart Telecom (Smart). XL was fine Rp25 billion, Btel Rp 4 billion, and Mobile-8 Rp. 5 billion. Smart was not given a fine because the company owned Group Sinar Mas was considered as a new entrant and the last one to enter the market, so they were deemed as having a weak bargaining position. Meanwhile, the other three reported parties was not found guilty by the KPPU. They are PT Indosat Tbk, PT Hutchison CP Telecommunication (Operator 3), and Natrindo Telepon Seluler (NTS).
>
> The case started from a report coming from the Indonesian Telecommunications Body (BRTI) that found there is unfair competition in the telecommunications industry. The form of competition unfairness is in the price fixing of price rates for SMS between operators (*off-net*).
>
> During the process of investigation, the KPPU Investigative Team stumbled upon facts of how there are deviations from Law No. 5 of 1999. Among those facts are; between the period of 1994 to 2004, there have been three telecommunications operators in Indonesia and that the price of per SMS is uniform; Rp. 350. However at the time, it was not found that a cartel among operators actually existed. The reason being that such price emerged from the oligopoly market structure. After that, the period between 2004 to 2007 the cellular telecommunications industry received new incoming operators. The condition sparked a price competition among competitors. The SMS tariff for services between operators (*off-net*) ranged from Rp. 250 to Rp. 350. During the period, the KPPU Investigative Team found several clauses indicating price fixing for SMS tariff by XL and Telkomsel that stated tariffs

may not go below Rp. 250. Such clause was found to be inserted in the Cooperative Agreements (PKS) in Interconnections between operators, as shown in the Tariff Fixing Clause Matrix (MKPT) for SMS services in Interconnections agreements.

The Council of the Commission was convinced that the motive behind XL and Telkomsel inserted such clause in the Interconnections agreements is to pre-emptively circumvent *spamming* that may be done by the *new entrant* operators, instead of to actually form a cartel. This was seen as an off-spin resulting from the government not regulating how to calculate the composition within an SMS tariff. Due to that very reason Telkomsel felt the need to self-regulate. However, the Council of the Commission saw that the concerns held by XL and Telkomsel should not have been inserted in the form of a price fixing clause in the agreements.

In June of 2007, based on meetings held by BRTI with the Indonesian Cellular Phone Association (ATSI), ATSI released an appeal letter to all their members to annul the SMS price fixing. The appeal was taken in consideration by the members. The Investigative Team saw that there has been no difference in the *off-net* SMS tariffs in the market. With the unhinged SMS tariffs, the Investigative Team deemd that the SMS tariffs were still effective as of April 2008, when basic *off-net* SMS tariffs started to get reduced.

As a result of the cartel, the Council of the Commission identified that such agreements have cause loss to the consumers that can be calculated based on the aggregate between the cartel tariff and the off-net competitive tariff. Such aggregate came to a number of Rp. 2.8 trillion. However the KPPU does not hold an authority to claim compensation of damages on behalf of consumers. The consumer loss is actually in the form of a loss of an opportunity to access a lower SMS tariff, having to use the SMS service at a constant tariff, and other intangible consumer loss. This was topped with the fact that consumer's available choices were very limited during the period of 2004 to April 2008.

Consumer Loss Calculations Table
*** Based on Offending Operator's Market Share)**

Tahun	Telkomsel	XL	Mobile-8	Telkom	Bakrie Telecom	Smart	Total
2004	311,8	53,4	2,6	12,2	5,8		385,8
2005	446,3	62,4	10,2	30,6	7,8		557,4
2006	615,5	93,7	15,9	59,3	17,5		801,9
2007	819,4	136,4	23,6	71,2	31,8	0,1	1.082,5
Total	**2.193,1**	**346**	**52,3**	**173,3**	**62,9**	**0,1**	**2.827,7**

Source: KPPU Decision * (in billion Rupiahs)

Different with consumers, the telecommunications operators are actually put in a major advantage from this cartel practice. Base on financial reports from the 6 reported operators that was submitted to the KPPU, the total income of the six operators in the period of 2004 to 2007 reached an astronomical Rp. 133,8 trillion.

Income of Operators Committing Cartel Practices Table (in billion Rupiah)

Tahun	Telkomsel	XL	Mobile-8	Telkom	Bakrie Telecom	Smart	Total Pendapatan Industri
2004	14.765,08	2.528,46	124,91	575,4	275,03	n.a	**18.268,91**
2005	21.132,91	2.956,38	482,6	1.449,7	369,06	n.a	**26.390,65**
2006	29.145,19	4.437,17	751,19	2.806,2	829,36	n.a	**37.969,1**
2007	38.799	6.459,77	1.117,74	3.372,39*	1.503,39	4	**51.856,29**
Total	**103.842,18**	**16.381,81**	**2.476,44**	**8.203,69**	**2.976,84**	**4**	**133.884,95**

Source: KPPU Decision *calculated from ARPU multiplication with total amount of consumers (Telkom Annual Report 2007).

Based on the Council of Commission, by not having specific regulations regarding SMS tariffs, it has led to a situation where operators take iniciative in regulating in the sake of market balance and SMS traffic between operators through the instrument of pricing. Telkomsel as the operator with the largest market share initiated self-regulatory policies.. Unfortunately, Telkomsel's actions is in violation of Law No. 5 year 1999. Such unlawful act committed by Telkomsel is then followed by XL. The actions of both Telkomsel and XL is attached as an integral part of the Interconnections agreements between operators, and that was deemed to have caused the *new entrant* operators in not having much of a choice besides to abide by the fixing of the minimum price of Rp. 250 per SMS.

The next case that should be shed some light into is the Cooking Oil Cartel, in which based on KPPU calculations such actions have costed consumers a reported loss of Rp. 1,27 trillion from packaged cooking oil products and Rp. 374,3 billion from bulk cooking oil products.

In KPPU decision No. 24/KPPU-I/2009 regarding the violation against Article 4, Article 5, and Article 11 of the Law No. 5 of 1999, it was discovered that the practice of pricing cartels that have beem done by 20 cooking oil companies have caused loss in the amount of Rp. 1.5 trillion in 2008. The 20 companies was fined in the toal amount of Rp. 290 billion. KPPU identified that there are 8 groups in Indonesia's palm-oil industry, which are Wilmar Group that consist of Multimas Nabati Asahan, Sinar Alam Permai, Wilmar Nabati Indonesia, Multi Nabati Sulawesi dan Agrindo Indah Persada. Then the Musimas Grup that that consists of Musim Mas, Intibenua Perkasatama, Megasurya Mas, Agro Makmur Raya, Nikie Oleo Nabati Industri, dan Indo Karya Internusa; then Permata Hijau Grup that covers Permata Hijau Sawit dan Nubika Jaya; then Sinarmas Grup covers Smart Tbk; the Salim Grup through Salim Ivomas Pratama; the Sungai Budi Grup through Tunas Baru Lampung Tbk; the Best Grup Berlian through Eka Sakti Tangguh; and the HAS Grup among them are Pacific Palmoil Industri, Asian Agro Agung Jaya and Bina Karya Prima.

The producers was proven to have communicated regarding price in the beginning of 2008. KPPU attained some facts that consumer loss between April to December 2008 is at least Rp. 1,27 trillion for packaged cooking oil and is at least Rp. 343,3 billion for bulk cooking oil. KPPU calculated the consumer loss by calculating the aggregate of the aveage cooking oil sales price with the average intake price of Crude Palm Oil (CPO) of each of the reported. In the period of April to December 2008, there have been price reductions of CPO that was not responded proportionally by the reporteds in fixing a cooking oil price both packaged (branded) and bulk. The unresponsive price movements of the cooking oil that was fixed by the reporteds in conjunction with the reduction of CPO price have resulted in loss for consumers that could have access to a lower price, which should have been the case considering that CPO is the main raw material, 87% of the production cost of cooking oil is in fact for acquiring the CPO, and if CPO prices went down, consequently the final product price should go down too. KPPU stated that the pricing cartel practice, or called *paralel pricing* was committed by the 20 companies. This was seen from the *homogenity of varians* test done by KPPU in order to find whether *price parallelism* happened or not. Based on the probablity values, the Council of Comission believes that there have been facts of *price parallelism* practive in both packaged and bulk cooking oil prices, and that probability value is above 5%.

Closing Remarks

Article 1365 ICC does not substantially regulate unlawful act. Such normative can become a stimulant for legal finding in Indonesia's law enforcement. Four examples of Court Decisions shows that; unlawful act have touched actions that are regulated in Book I of ICC. Even when Article 58 ICC states that "promises to a civil union of marriage does not cause rise to the right to sue in front of a judge...", judges may intrepret "unlawful" in very broad terms, so that the Offender can even be convicted as in violation of Article 1365 ICC.

The materialization of "unlawful"in specific Laws outside of the ICC (Law No. 5 of 1999 is an example), is actually similar with ICC, where there is no specific regulations to define "unlawful" that differentiates it with other specific Laws. Based on the two examples, the implications of "unlawful"; consumer disadvantage should be considered as sanctionable actions that must be paid for by the Offender.

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No : 23 /Dekan/FH/I/2014
Matter : Letter of thank

Yogyakarta, January 16th, 2014

To : Dr. Siti Anisah SH,M.Hum

Lecturer, Faculty of Law
Islamic University of Indonesia, Yogyakarta

Assalamu'alaikum Wr.Wb

Dear madam,

We would like to thank for your precious time to be our speaker on "International Seminar" **Tort Law in Various Legal Systems: Indonesia, Hungary, and United States of America,** which has been hold on:

Date : Thursday, January 16th , 2014

Time : 8 a.m. – 3 p.m.

Place : Inna Garuda Hotel, Yogyakarta, Indonesia

It was valuable experience for our campus and its have a productive seminar discussion, especially to our campus Faculty of Law Islamic University of Indonesia.

We also thankful for your time to be our speaker and give time to exchange opinions in this seminar. Hope its develop our knowledge and experience for us. Thank you for your kindly.

Wa*ssalamu'alaikum Wr.Wb*

Acknowledge by:

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Head of the Committee

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FACULTY OF LAW, ISLAMIC UNIVERSITY OF INDONESIA

Mendut Room, Inna Garuda Hotel, 16 January 2014

UNIVERSITAS ISLAM INDONESIA ★ YOGYAKARTA ★ FAKULTAS HUKUM

Dean

(Dr. Rusli Muhammad, SH., M.H.)