

## NEWSLETTER

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# THE EIT LAW POCKET BOOK: A SOLUTION TO THE EIT LAW'S "CATCH-ALL" ARTICLES ON DEFAMATION?

## *An Overview*

The Ministry of Communications and Informatics (MOCI) recently issued a pocket book on the Implementation Guidelines of Certain Articles in the Law on Electronic Information and Transactions (**Pocket Book**). The Pocket Book seeks to clarify the application of certain articles in Law No. 11 of 2008 as amended by Law No. 19 of 2016 on Electronic Information and Transactions (**EIT Law**), which in practice have been interpreted and applied broadly. These articles are sometimes colloquially referred to as "catch-all" or "rubber" articles because they can be "stretched" to encompass any action.

The articles that the Pocket Book seeks to clarify are Articles 27, 28, 29, and 36 of the EIT Law, which concern prohibited acts under the EIT Law. According to the Prosecutor's Office, among the prohibited acts stipulated in the EIT Law, Article 27 (3) on defamation is one of the most frequently used articles.<sup>1</sup> In 2020 alone, defamation accounts for more than 35% out of approximately 4000 cybercrimes handled by the Cyber Crime Directorate of the National Police.<sup>2</sup> Our discussion in this article will be limited to clarifications the Pocket Book makes with respect to defamation under the EIT Law.

<sup>1</sup> <https://www.kejaksaan.go.id/berita.php?idu=28&id=17984>

<sup>2</sup> <https://www.cnnindonesia.com/nasional/20201229094838-12-587280/polri-tangani-4656-kasus-siber-pencemaran-nama-baik-dominan>



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## I. Clarifications in the Pocket Book

Since the issuance of the EIT Law in 2008, Article 27 (3) has been criticized for being too broad, which in practice led to it being misused by parties seeking to silence critics or curb freedom of opinion. When the EIT Law was amended in 2016, it included the addition of an elucidation to Article 27 (3). The elucidation merely stipulates that Article 27 (3) refers to defamation under the Indonesian Criminal Code. While it gave some clarity that defamation as meant in the EIT Law is the same as defamation as meant in the Indonesian Criminal Code, it does not provide more clarity on the applicable standard because the standard under the Indonesian Criminal Code is equally unclear. Thus, the issue of Article 27 (3) remained.

Recently, the MOCI issued the Pocket Book on the order of the President to ensure that the enforcement of the EIT Law can be done consistently while upholding freedom of opinion. The Pocket Book consists of four parts: (i) Joint Decree of the MOCI, Attorney General, and Head of the National Police on Guidelines on the Implementation of the EIT Law<sup>3</sup> (**EIT Law Guidelines**); (ii) the EIT Law; (iii) Head of the National Police Circular Letter No. SE/2/II/2021 Awareness of Ethical Culture to Create a Clean, Healthy and Productive Indonesian Digital Space (**Police Circular Letter**); and (iv) Guidelines of the Attorney General No. 7 of 2021 on Handling of Criminal Cases on the Electronic Information and Transactions at the Pre-Prosecution Stage (**Attorney General Guidelines**).

It should be noted that the Pocket Book (including its contents above) is not a law. As such, it does not supersede or amend the EIT Law; it merely seeks to make its implementation more consistent.

With respect to Article 27 (3) of the EIT Law, the EIT Law Guidelines provides, among other things:

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<sup>3</sup> Full name: Joint Decree of the Ministry of Communications and Informatics, Attorney General, and Head of the National Police No. 229 Year 2021; No. 154 Year 2021; No. KB/2/VI/2021 on Guidelines on the Implementation of Certain Article of Law No. 11 of 2008 on Electronic Information and Transactions as Amended by Law No. 19 of 2016 on Amendment to Electronic Information and Transaction Law No. 11 of 2008

1. Defamation as meant in Article 27 (3) refers to and cannot be separated from defamation under Articles 310 and 311 of the Indonesian Criminal Code. This has also been confirmed by the Constitutional Court through its decision No. 50 /PUUVI/2008.
2. Simple defamation (e.g., insults or unpleasant words) as meant in Article 315 of the Indonesian Criminal Code falls outside the scope of Article 27 (3).
3. “Judgment, opinion, evaluation result or a fact” does not constitute defamation under Article 27 (3).
4. If an alleged fact is the subject of a legal process, that fact must first be proven before law enforcement processes the defamation report.
5. Only individuals (and not institutions, corporations, professions, or offices) may be deemed as victims of defamation under Article 27 (3).
6. The focal point of Article 27 (3) is not the “feeling” of the victim, but the deliberate act of harming someone’s honor or reputation by alleging a certain fact with the intention to give publicity to it (Article 310 of the Indonesian Criminal Code).
7. The criteria of “known by the public” can be in the form of a post in a public social media account and a post in an open group where everybody can join, upload and share content.
8. Online content that is transmitted in a closed or limited group conversation does not amount to defamation.

The EIT Law Guidelines provide useful parameters of online defamation. First, the guidelines clarify that online content is not defamatory if it is an opinion or fact. Second, the guidelines clarify that not all online content can be deemed defamatory; the content needs to be made in a medium that is open to the public.

Having said this, the EIT Law Guidelines do not provide a clear standard of what constitutes an opinion or fact. Furthermore, the guidelines do not address how the element of “deliberate act of harming someone’s honor or reputation” applies in relation to opinions and facts. In other words, a statement may still be deemed as defamatory if the intent is to harm someone’s honor even though the statement is based on one’s opinion or factually true.

The Police Circular Letter and Attorney General Guidelines provide some guidelines for investigators and prosecutors in dealing with defamation cases. The Police Circular Letter notes that investigators must clearly differentiate between criticism and defamation, of which only the latter is a crime under the EIT Law. The Police Circular Letter also emphasizes that criminal sanctions should be imposed only as the last resort and that restorative justice must be prioritized. The Attorney General Guidelines further provides that the determination of suspects in cases under the EIT Law must be done diligently and carefully.

## II. Closing

The intention of the issuance of the Pocket Book was to provide more certainty in the implementation of the EIT Law. The hope is that it makes the application of the EIT Law more consistent and minimize the misuse of certain provisions of the EIT Law. However, some issues remain ambiguous, such as the meaning and threshold of “opinion,” “fact,” and “deliberate act of harming someone’s honor or reputation”. These may need to be addressed in future guidelines or in amendments to the EIT Law and Indonesian Criminal Code.

It should be noted that there are discussions on further amendments to the EIT Law. Assuming that those amendments will address the ambiguities discussed in this article and until those amendments are finalized, the public will need to make do with the Pocket Book.

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