

VERTICAL AGREEMENTS

Indonesia



Vertical Agreements

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into the legal framework; types of agreement; analytical framework for assessment of supplier and buyer positions; block exemption and safe harbour provisions; types of restraint; notification procedure and scope for guidance from applicable authorities; enforcement; other jurisdiction-specific issues; and recent/anticipated trends.

Generated 03 May 2022

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LEGAL FRAMEWORK

Antitrust law

What are the legal sources that set out the antitrust law applicable to vertical restraints?

Vertical restraints are covered by Law No. 5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, as amended by Law No. 11/2020 on Job Creation (the Indonesian Competition Law (ICL)). The Indonesian Competition Commission (KPPU) has issued several guidelines on the application of provisions in the ICL prohibiting vertical restraints.

Law stated - 01 March 2022

Types of vertical restraint

List and describe the types of vertical restraints that are subject to antitrust law. Is the concept of vertical restraint defined in the antitrust law?

Specifically, the ICL prohibits the following types of vertical restraints:

- Price discrimination (article 6): an agreement that results in one buyer paying a price that is different to the price paid by other buyers for the same goods or services.
- Resale price maintenance (RPM) (article 8): an agreement that prohibits another undertaking from resupplying or reselling goods at lower than the agreed price.
- Vertical integration (article 14): an agreement to control the production of several goods that are part of the production chain of certain related goods or services where each product link is the end product of the production process or of further processing, either in one direct link or indirect link.
- Exclusive dealing (article 15(1)): an agreement with another undertaking, which contains a condition that the recipient party of goods or services will only resupply or not resupply the goods or services to a certain party or at a certain place.
- Tying agreement (article 15(2)): an agreement with another party, which contains a condition that the recipient party of certain goods or services purchases other goods or services from the supplier business.
- Special discounts (article 15(3)): an agreement on a certain price or price reduction of the products or services, which contains a condition that the undertaking that receives the goods or services from the supplier (1) is willing to purchase other goods or services from the supplier or (2) will not purchase similar goods or services or of the same type from a competitor of the supplier.
- Market control (article 19(d)): activities, either individually or jointly with other undertakings, that result in discriminatory practices toward undertakings.

The concept of vertical restraints is not defined in the ICL. However, according to KPPU Regulation No. 8 of 2011 on the application of Article 8 (Resale Price Maintenance), a vertical restraint is 'a restriction on the transfer of an entitlement to a certain product or service in the framework of an economic exchange between two parties at different levels [of the production chain].'

Law stated - 01 March 2022

Legal objective

Is the only objective pursued by the law on vertical restraints economic, or does it also seek to promote or protect other interests?

The ICL has objectives to:

- promote the public interest and enhance the efficiency of national economics;
- create a sound business environment by ensuring equal opportunities for all undertakings;
- prevent monopolistic practices or unfair business, or both; and
- create effectiveness and efficiency in business.

Law stated - 01 March 2022

Responsible authorities

Which authority is responsible for enforcing prohibitions on anticompetitive vertical restraints? Where there are multiple responsible authorities, how are cases allocated? Do governments or ministers have a role?

The KPPU is a quasi-judicial body responsible for enforcement of the rules on vertical restraint and other antitrust rules. The ICL grants authority to the KPPU to conduct investigations or examinations of cases of alleged monopolistic practices or unfair business competition reported by the public or by undertakings, or based on their own initiative, and subsequently issue decisions and impose sanctions.

Law stated - 01 March 2022

Jurisdiction

What is the test for determining whether a vertical restraint will be subject to antitrust law in your jurisdiction? Has the law in your jurisdiction regarding vertical restraints been applied extraterritorially? Has it been applied in a pure internet context and if so, what factors were deemed relevant when considering jurisdiction?

A vertical restraint will be subject to antitrust law in Indonesia if it is created by an undertaking that (1) is domiciled in Indonesia or (2) directly or indirectly engages in business activities in Indonesia. In accordance with the single economic entity doctrine, the concept 'undertaking' includes affiliates. An undertaking is an affiliate of another if (1) it either directly or indirectly controls or is controlled by that undertaking, (2) both it and the other undertaking, directly or indirectly, are controlled by the same parent, or (3) there is a 'main principal shareholder' relationship with another undertaking.

The main principal shareholder should be a controlling shareholder. Affiliation means a relationship of control that occurs due to share ownership of more than 50 per cent, or less than 50 per cent but with an ability to influence or direct the company's policy or management. Sanctions for violation of rules on vertical restraints would, in principle, be imposed on undertakings, including their affiliates, domiciled in Indonesia.

Law stated - 01 March 2022

Agreements concluded by public entities

To what extent does antitrust law apply to vertical restraints in agreements concluded by public entities?

The rules on vertical restraints apply to undertakings. Under article 1(5) ICL, an undertaking is defined as an individual or business entity, either legal or non-legal, established and domiciled or carrying out activities within the Republic of Indonesia, either individually or jointly, by virtue of an agreement to carry out various business activities in the economic field. An undertaking can be a group of undertakings that jointly form a single economic entity.

According to article 50(a) ICL, activities or agreements aimed at implementing prevailing laws and regulations is exempt from the rules (including rules on vertical restraints) under the ICL. Further, according to article 51 ICL, a monopoly or concentration of activities related to the production and marketing of goods and services that dominate the lives of many people, as well as branches of production important for the state, is regulated by laws enacted by the parliament and run by state-owned enterprises, bodies or institutions established or appointed by the government. This means that state-owned enterprises, bodies or institutions established or appointed by the government may be exempt from rules on vertical restraints under the ICL, to the extent their behaviour is aimed at implementing prevailing laws and regulations.

For the avoidance of doubt, many state-owned enterprises have not been established for the above purpose and are not, therefore, exempt from the prohibitions under the ICL. The KPPU has also imposed sanctions on state-owned enterprises, including for breaching rules on vertical restraints.

Law stated - 01 March 2022

Sector-specific rules

Do particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry (motor cars, insurance, etc)? Please identify the rules and the sectors they cover.

To the best of our knowledge, no particular laws or regulations apply to the assessment of vertical restraints in specific sectors of industry.

Law stated - 01 March 2022

General exceptions

Are there any general exceptions from antitrust law for certain types of agreement containing vertical restraints? If so, please describe.

According to article 50 ICL, the following agreements and activities are exempted from the ICL:

- agreements and activities aimed at implementing prevailing laws and regulations;
- agreements related to intellectual property rights, such as licences, patents, trademarks, industrial product designs, integrated electronic circuits, trade secrets and franchise agreements;
- agreements related to the application of technical standards of goods or services that do not inhibit or impede competition;
- agent–principal agreements that do not contain a resale price maintenance provision;
- agreements involving a research cooperation agreement intended to improve the standard of life of society at large;

- international agreements that have been ratified by the Indonesian government;
- agreements related to exports of goods or services that do not disrupt domestic needs and supplies;
- agreements made by and between, or activities carried out by, small business undertakings; and
- agreements made by and between cooperatives aimed specifically at serving their members.

The KPPU has published guidelines of the application of some of the above exemptions. Exempted agreements must contain provisions that are consistent with the relevant type of agreement; and even then, the KPPU may still conclude that the provisions under the agreement violate the ICL.

Law stated - 01 March 2022

TYPES OF AGREEMENT

Agreements

Is there a definition of 'agreement' – or its equivalent – in the antitrust law of your jurisdiction?

Article 1(7) of the Indonesian Competition Law (ICL) defines 'agreement' as an action of one or more undertakings to bind themselves to one or more other undertakings under any name, whether in writing or in non-written form.

Law stated - 01 March 2022

In order to engage the antitrust law in relation to vertical restraints, is it necessary for there to be a formal written agreement or can the relevant rules be engaged by an informal or unwritten understanding?

In order to engage the antitrust law in relation to vertical restraints, it is not necessary for there to be a formal written agreement. This is evidenced, inter alia, by Indonesian Competition Commission (KPPU) Case No. 22/KPPU-I/2016, in which a principal and distributor were fined for allegedly violating the special discounts prohibition (article 15(3)), although part of the commitments between the parties were not laid down in a formal written agreement, but concerned a collaboration that amounted to a concerted action. In other cases, the KPPU determined that there was violation of a vertical restraint prohibition, despite there being no written agreement, including KPPU Case No. 01/KPPU-L/2003 and KPPU Case No. 13/KPPU-I/2019 (both related to article 14). Further, article 19(d) does not require any agreement at all, and may be violated if an undertaking carries out certain activities alone or with one or more undertakings.

Law stated - 01 March 2022

Parent and related-company agreements

In what circumstances do the vertical restraints rules apply to agreements between a parent company and a related company (or between related companies of the same parent company)?

Although the KPPU has applied the single economic entity doctrine in certain instances, vertical restraints rules generally apply to agreements between affiliates. This is evidenced, inter alia, by KPPU Case No. 01/KPPU-L/2003, in which the country's national airline Garuda Indonesia, which was also the controlling shareholder of a company that provided a ticket booking system, was fined for violating the vertical integration (article 14 ICL) and tying agreement (article 15(2)) ICL prohibitions for agreeing with its subsidiary to impose a requirement on domestic flight agents of

the airline to purchase and use its subsidiary's ticket booking system, in addition to the booking system they already used. In a more recent case (KPPU Case No. 13/KPPU-I/2019), the KPPU concluded that PT Solusi Transportasi Indonesia, the company behind the ride-hailing app GRAB in Indonesia, and its affiliate, PT Teknologi Pengangkutan Indonesia, had violated the vertical integration (article 14 ICL) and discrimination (article 19(d) ICL) prohibitions by entering into an exclusive collaboration agreement. (This KPPU decision was overturned by the District Court of South Jakarta under decision No. 468/Pdt.P/2020/PN.Jkt.Sel. The decision of the District Court of South Jakarta was also upheld by the Supreme Court under decision No. 485 K/Pdt.Sus-KPPU/2021, but the fact that these prohibitions were applied to an agreement between affiliates (with the same parent company, either directly or indirectly) was not challenged in these cases.)

Law stated - 01 March 2022

Agent–principal agreements

In what circumstances does antitrust law on vertical restraints apply to agent–principal agreements in which an undertaking agrees to perform certain services on a supplier's behalf for a sales-based commission payment?

According to article 50(d) ICL, agent–principal agreements that do not contain a resale price maintenance provision are exempt from the ICL.

Law stated - 01 March 2022

Where antitrust rules do not apply (or apply differently) to agent–principal relationships, is there guidance (or are there recent authority decisions) on what constitutes an agent–principal relationship for these purposes?

KPPU Regulation No. 7/2010 on Guidelines for the Application of Article 50 (d) ICL , the agent–principal agreements should generally stipulate that:

- the agent acts in the name of the principal;
- the price of the goods and services is determined by the principal;
- the principal bears the risk for the agreement made by the agent with a third party;
- although the agent is not an employee, the relationship between the principal and agent is primarily a relationship of subordination, where the principal controls the actions performed by the agent in the fulfilment of their task; and
- the agent, as a general service provider, receives a commission or salary (fee) from the principal.

Agreements that fail to meet the above criteria are not exempt from the ICL.

Law stated - 01 March 2022

Intellectual property rights

Is antitrust law applied differently when the agreement containing the vertical restraint also contains provisions granting intellectual property rights (IPRs)?

According to article 50(b) ICL, agreements relating to intellectual property rights, such as licences, patents, trademarks, copyrights, industrial product designs, integrated electronic series and trade confidentiality, as well as agreements relating to franchise, are exempted from the ICL. However, KPPU Regulation No. 2 of 2009 on Guidelines for the Application of Article 50 (b) ICL adds an important nuance: agreements relating to intellectual property rights are only exempt from the ICL if they:

- concern licence agreements not related to the use of an essential facility;
- concern licence agreements for the use of intellectual property rights;
- meet all requirements under prevailing laws (ie, registration with the Directorate General for Intellectual Property Rights); and
- do not include clauses that inherently have an anticompetitive characteristic.

Law stated - 01 March 2022

ANALYTICAL FRAMEWORK FOR ASSESSMENT

Framework

Explain the analytical framework that applies when assessing vertical restraints under antitrust law.

A 'rule of reason' analysis is applied when assessing vertical restraints under the Indonesian Competition Law (ICL). As far as resale price maintenance (RPM) and vertical concentration prohibitions are concerned, this follows from the formulation of the prohibition in the relevant articles, which state that the agreement is prohibited if it may cause unfair business competition or harm the public. A 'rule of reason' analysis is applied to the closed agreements prohibition based on Indonesian Competition Commission (KPPU) Regulation No. 5/2011 on Guidelines of Application of Article 15 (Closed Agreements) and to the discrimination prohibition based on KPPU Regulation No. 3/2011 on Guidelines of Application of Article 19 (d) ICL (Discrimination) .

According to KPPU Regulation No. 5/2010 on Guidelines of Application of Article 14 ICL (Vertical Integration) , the KPPU will assess whether:

- the undertaking engaged in vertical integration has the ability to use its market power either on the upstream market or downstream market, by closing competitors' access so that their prices increase;
- the undertaking has an incentive to use its market power to be engaged in anticompetitive actions; and
- such anticompetitive actions have a negative impact on consumer welfare.

Based on KPPU Regulation No. 3/2011 on Guidelines of Application of Article 19 (d) ICL (Discrimination), to prove that there is a violation of article 19(d), the following actions will be taken:

- The KPPU will analyse an undertaking's market share and the existence of market power.
- The KPPU will then determine the prevalence of discrimination.
- If, indeed, the KPPU determines that there is discrimination, it will assess what the effects of it are. Identifiable effects of discrimination on business competition could be:
 - an undertaking being pushed out of the relevant market;
 - the reduction of an undertaking's role in the relevant market;
 - an undertaking or group of undertakings being able to impose their will upon the relevant market;
 - the creation of various competition barriers (eg, barriers to enter or expand) in the relevant market;
 - the reduction of healthy business competition in the relevant market;

- the occurrence of monopolistic practices; or
- the reduction of consumer choice.
- Finally, as discrimination may have pro-competitive and anticompetitive effects, the KPPU will assess if there is an acceptable legal, social, economic, technical or other justification for the discrimination (eg, as far as an economic justification is concerned, it allows for cost efficiency, guaranteed availability of raw materials and a smooth distribution process).

The KPPU has not officially published any guidelines on the analytical framework for assessment of an alleged violation of the price discrimination (article 6 ICL) prohibition.

Law stated - 01 March 2022

Market shares

To what extent are supplier market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other suppliers relevant? Is it relevant whether certain types of restriction are widely used by suppliers in the market?

Supplier market shares are relevant when assessing the legality of individual restraints. In principle, an undertaking can only violate the price discrimination (article 6), resale price maintenance (article 8), vertical concentration (article 14), exclusive arrangements (article 15) and discrimination (article 19(d)) prohibitions if it has market power (on the upstream or downstream market). Undertakings have market power if they can increase prices above the competition level, while still making a profit. They have market power either because they are dominant or hold a significant market share (according to KPPU Regulation No. 5/2011 on Guidelines of Application of Article 15 (Closed Agreements), 10 per cent or more), or because special factors apply – namely, that they hold certain intellectual property rights or an exclusive right (licence); government regulations create a special position for them; they hold market power through a distribution network; they have financial support (eg, from a parent company); an essential facility exists; there is brand loyalty or consumer preference; or there are significant entry barriers.

According to KPPU Regulation No. 8/2011 on Guidelines of Application of Article 8 ICL (Resale Price Maintenance), an undertaking should have a dominant position before they can be alleged to violate the RPM prohibition. Article 1(4) ICL defines 'dominant position' as a situation in which an undertaking has no meaningful competitors in the relevant market in view of the market share that it holds, or the undertaking holds a higher position among competitors in the relevant market in view of financial capability, the ability to access supplies and sales, and the ability to adjust offer and demand of certain goods and services. According to article 25(2) ICL, which is closely related to article 8 ICL, there is dominance if: (1) one undertaking controls 50 per cent or more of the market share on one type of good or service; or (2) two or three undertakings or groups of undertakings control 75 per cent or more of the market share for one type of good or service.

In an appeal case before the District Court of South Jakarta, in which PT Solusi Transportasi Indonesia, the company behind the ride-hailing app GRAB in Indonesia, challenged the KPPU's decision that it had violated the vertical integration (article 14 ICL) and discrimination (article 19(d) ICL) prohibitions (see KPPU Case No. 13/KPPU-I/2019), the court concluded that an undertaking can only violate article 14 ICL if it has market power with a market share of 50 to 75 per cent (see decision No. 468/Pdt.P/2020/PN.Jkt.Sel). However, it is hard to find a legal justification for this conclusion. In any event, the doctrine of precedent does not exist in Indonesia and each case must be determined on its own facts and merits, although consideration may be given to similar, previously determined cases and academic theories. Accordingly, another court may reach a different decision in a similar case in the future.

Law stated - 01 March 2022

To what extent are buyer market shares relevant when assessing the legality of individual restraints? Are the market positions and conduct of other buyers relevant? Is it relevant whether certain types of restriction are widely used by buyers in the market?

Market shares and conduct of buyers are not explicitly mentioned in the various guidelines on vertical restraints as a relevant factor when assessing the legality of individual restraints. However, as part of its 'rule of reason' analysis, the KPPU will assess whether the restraint can actually be enforced against buyers. Depending on the circumstances, it is more likely that buyers with a high market share will be able to resist the restraints imposed by suppliers on them. It should not be relevant whether certain types of restrictions are widely used by buyers in the market.

Law stated - 01 March 2022

BLOCK EXEMPTION AND SAFE HARBOUR

Function

Is there a block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions? If so, please explain how this block exemption or safe harbour functions.

There is no block exemption or safe harbour that provides certainty to companies as to the legality of vertical restraints under certain conditions.

Law stated - 01 March 2022

TYPES OF RESTRAINT

Assessment of restrictions

How is restricting the buyer's ability to determine its resale price assessed under antitrust law?

Indonesian Competition Commission (KPPU) Regulation No. 8 of 2011 on the application of Article 8 (Resale Price Maintenance) provides that the KPPU will assess whether there is an agreement containing a resale price maintenance (RPM) provision. Reference to a specified resale price will be an important piece of evidence. A maximum resale price and suggested retail price, on the other hand, are not prohibited. The KPPU will also assess whether the RPM provision is actually enforceable, in particular, if the buyer of the products can be sanctioned in case it fails to honour the RPM provision.

The KPPU will also assess whether the RPM arrangement causes unhealthy business competition. Apart from assessing the undertaking's market share and market power, the KPPU will look at other market elements to prove the occurrence of unhealthy business competition as a result of the arrangement, including whether (1) it has an impact on the structure of the market and (2) the consumer's benefit from the arrangement is larger than the cost of the limitation on competition.

Law stated - 01 March 2022

Have the authorities considered in their decisions or guidelines resale price maintenance restrictions that apply for a limited period to the launch of a new product or brand, or to a specific promotion or sales campaign; or specifically to prevent a retailer using a brand as a 'loss leader'?

KPPU Regulation No. 8 of 2011 on the application of Article 8 (Resale Price Maintenance) does not consider RPM restrictions that apply for a limited period to the launch of a new product or brand, to a specific promotion or sales campaign or specifically to prevent a retailer using a brand as a 'loss leader'. We are also not aware of any KPPU decisions in which these circumstances were considered justification for RPM restrictions.

Law stated - 01 March 2022

Relevant decisions

Have decisions or guidelines relating to resale price maintenance addressed the possible links between such conduct and other forms of restraint?

KPPU Regulation No. 8 of 2011 on the application of Article 8 (Resale Price Maintenance) addresses the possible links between RPM and the following antitrust violations:

- abuse of dominance (article 25 Indonesian Competition Law (ICL)): RPM will have a significant impact on competition if it is done by undertakings with a dominant position;
- price fixing (article 5 ICL): an RPM arrangement may be used by an undertaking to facilitate collusion; and
- RPM in an agency relationship (article 50(d) ICL): an RPM arrangement may be agreed by undertakings in an agency relationship.

The KPPU may – and in practice often does – look into the violation of several antitrust prohibitions as part of the same investigation.

Law stated - 01 March 2022

Have decisions or guidelines relating to resale price maintenance addressed the efficiencies that can arguably arise out of such restrictions?

KPPU Regulation No. 8 of 2011 on the application of Article 8 (Resale Price Maintenance) and the only KPPU case related to article 8 (KPPU Case No. 11/KPPU-I/2005) do not address the efficiencies that can arguably arise out of RPM restrictions. However, according to Regulation No. 8 of 2011, the KPPU will, inter alia, assess if the consumer's benefit from the arrangement is larger than the cost of the limitation on competition.

Law stated - 01 March 2022

Explain how a buyer agreeing to set its retail price for supplier A's products by reference to its retail price for supplier B's equivalent products is assessed.

KPPU Regulation No. 8 of 2011 on the application of Article 8 (Resale Price Maintenance) does not address this scenario. However, such an arrangement could potentially result in a violation of article 5 on price-fixing.

Law stated - 01 March 2022

Suppliers

Explain how a supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, is assessed.

A supplier warranting to the buyer that it will supply the contract products on the terms applied to the supplier's most-favoured customer, or that it will not supply the contract products on more favourable terms to other buyers, could raise competition concerns if it results in discrimination between buyers. However, according to KPPU Regulation No. 3/2011 on Guidelines of Application of Article 19 (d) ICL (Discrimination), before the KPPU concludes that this results in a violation of article 19(d) ICL, it will first assess whether (1) the supplier has market power, (2) the discrimination results in unhealthy business competition and (3) there is an acceptable legal, social, economic, technical or other justification for discrimination.

Law stated - 01 March 2022

Explain how a supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B is assessed.

A supplier agreeing to sell a product via internet platform A at the same price as it sells the product via internet platform B could raise competition concerns if it results in discrimination between internet platforms. However, according to KPPU Regulation No. 3/2011 on Guidelines of Application of Article 19 (d) ICL (Discrimination), before the KPPU concludes that this results in a violation of article 19(d) ICL, it will first assess whether (1) the supplier has market power, (2) the discrimination results in unhealthy business competition and (3) there is an acceptable legal, social, economic, technical or other justification for discrimination.

Law stated - 01 March 2022

Explain how a supplier preventing a buyer from advertising its products for sale below a certain price (but allowing that buyer subsequently to offer discounts to its customers) is assessed.

A supplier preventing a buyer from advertising its products for sale below a certain price could raise competition concerns if (1) the supplier has a dominant position, (2) the RPM provision is actually enforceable (ie, the buyer can be sanctioned in case it fails to honour the RPM provision) and (3) it results in unhealthy business competition, including whether it has an impact on the structure of the market and the consumer's benefit from the arrangement is larger than the cost of the limitation on competition.

Law stated - 01 March 2022

Explain how a buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, is assessed.

A buyer's warranting to the supplier that it will purchase the contract products on terms applied to the buyer's most-favoured supplier, or that it will not purchase the contract products on more favourable terms from other suppliers, could raise competition concerns if it results in discrimination between buyers. However, according to KPPU Regulation No. 3/2011 on Guidelines of Application of Article 19 (d) ICL (Discrimination), before the KPPU concludes that this

results in a violation of article 19(d) ICL, it will first assess whether (1) the buyer has market power, (2) the discrimination results in unhealthy business competition and (3) there is an acceptable legal, social, economic, technical or other justification for discrimination.

Law stated - 01 March 2022

Restrictions on territory

How is restricting the territory into which a buyer may resell contract products assessed? In what circumstances may a supplier require a buyer of its products not to resell the products in certain territories?

Restricting the territory into which a buyer may resell contract products could be a violation of the exclusive dealing provision, which prohibits an agreement with another undertaking, and which contains a condition that the recipient party of goods or services will only resupply or not resupply the goods or services to a certain party or at a certain place. Such an exclusive arrangement is prohibited if it (1) substantially or potentially reduces the volume of trade and (2) has been entered into by undertakings that have market power and the market power can increase due to the exclusive arrangement.

Law stated - 01 March 2022

Have decisions or guidance on vertical restraints dealt in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products?

KPPU Regulation No. 5/2011 on Guidelines of Application of Article 15 (Closed Agreements) does not deal in any way with restrictions on the territory into which a buyer selling via the internet may resell contract products. We are also not aware of any KPPU decisions in which such restrictions were considered.

Law stated - 01 March 2022

Restrictions on customers

Explain how restricting the customers to whom a buyer may resell contract products is assessed. In what circumstances may a supplier require a buyer not to resell products to certain resellers or end consumers?

Restricting the customers to whom a buyer may resell contract products could be a violation of the exclusive dealing provision, which prohibits an agreement with another undertaking that contains a condition that the recipient party of goods or services will only resupply or not resupply the goods or services to a certain party or at a certain place. Such an exclusive arrangement is prohibited if it (1) substantially or potentially reduces the volume of trade and (2) has been entered into by undertakings that have market power, and the market power can increase due to the exclusive arrangement. KPPU Regulation 5/2011 on Guidelines of Application of Article 15 (Closed Agreements) makes no distinction between restrictions on 'active' sales (ie, soliciting sales) and restrictions on 'passive' sales. We are also not aware of any cases in which the KPPU made this distinction. Therefore, it would be safe to assume that both restrictions of 'active' and 'passive' sales could raise competition concern. The guidelines do not make clear under which circumstances a supplier may require a buyer not to resell products to certain resellers or end consumers.

Law stated - 01 March 2022

Restrictions on use

How is restricting the uses to which a buyer puts the contract products assessed?

The KPPU has not published any guidelines or, to the best of our knowledge, taken any decisions on the implications of restricting the uses to which a buyer or subsequent buyer puts the contract products.

Law stated - 01 March 2022

Restrictions on online sales

How is restricting the buyer's ability to generate or effect sales via the internet assessed?

The KPPU has not published any guidelines or, to the best of our knowledge, taken any decisions on the implications of restricting the buyer's ability to generate or effect sales via the internet.

Law stated - 01 March 2022

Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel? In particular, have there been any developments in relation to 'platform bans'?

The KPPU has not published any guidelines or, to the best of our knowledge, taken any decisions dealing in any way with the differential treatment of different types of internet sales channel.

Law stated - 01 March 2022

Selective distribution systems

Briefly explain how agreements establishing 'selective' distribution systems are assessed. Must the criteria for selection be published?

Agreements establishing 'selective' distribution systems could be a violation of the exclusive dealing provision (article 15(1) ICL), which prohibits an agreement with another undertaking that contains a condition that the recipient party of goods or services will only resupply or not resupply the goods or services to a certain party or at a certain place. Such an exclusive arrangement is prohibited if it (1) substantially or potentially reduces the volume of trade and (2) has been entered into by undertakings that have market power, and the market power can increase due to the exclusive arrangement. However, the KPPU acknowledges in KPPU Regulation No. 5/2011 on Guidelines of Application of Article 15 (Closed Agreements) that exclusive arrangements may also have positive effects, including (1) an increase of specialisation between producers and distributors, resulting in an increase of economies of scale of each party and a reduction of uncertainty in the distribution process, (2) a reduction in searching, transaction and monitoring costs, resulting in more efficiency, (3) an increase of certainty in doing business for undertakings that commit to the exclusive arrangement and (4) a reduction in distributors taking advantage of arbitrage.

Law stated - 01 March 2022

Are selective distribution systems more likely to be lawful where they relate to certain types of product? If so, which types of product and why?

Selective distribution systems are more likely to be lawful where they relate to high-technology utility products (eg, motor vehicles, heavy equipment and electronics). It is common in Indonesia to create selective distribution systems for such products (eg, with authorised dealers), partly because these products require after-sales service. As far as we are aware, the KPPU has not acted against such selective distribution systems, apparently recognising the positive effects of such systems.

Law stated - 01 March 2022

In selective distribution systems, what kinds of restrictions on internet sales by approved distributors are permitted and in what circumstances? To what extent must internet sales criteria mirror offline sales criteria?

The KPPU has not published any guidelines or, to the best of our knowledge, taken any decisions on the kind of restrictions that would be permitted on internet sales by approved distributors in selective distribution systems.

Law stated - 01 March 2022

Has the authority taken any decisions in relation to actions by suppliers to enforce the terms of selective distribution agreements where such actions are aimed at preventing sales by unauthorised buyers or sales by authorised buyers in an unauthorised manner?

To the best of our knowledge, the KPPU has not taken any decisions in relation to such actions by suppliers.

Law stated - 01 March 2022

Does the relevant authority take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market?

It is unclear if the KPPU would take into account the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market, as the authority has never issued any guidelines or, to the best of our knowledge, taken any decisions in which this scenario was addressed.

Law stated - 01 March 2022

Has the authority taken decisions (or is there guidance) concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products?

To the best of our knowledge, the KPPU has not taken any decisions concerning distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products.

Law stated - 01 March 2022

Other restrictions

How is restricting the buyer's ability to obtain the supplier's products from alternative sources assessed?

Restricting the buyer's ability to obtain the supplier's products from alternative sources could be a violation of the special discount provision (article 15(3)), which prohibits an undertaking from entering into an agreement on a certain price or price reduction of the products or services, and which contains a condition that the undertaking that receives the goods or services from the supplier will not purchase similar goods or services or of the same type from a competitor of the supplier. The KPPU will assess the positive and negative effects of the special discount arrangement. Such arrangements are prohibited if they (1) substantially or potentially reduce the volume of trade and (2) have been entered into by undertakings that have market power, and the market power can increase due to the special discount arrangement.

Law stated - 01 March 2022

How is restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate' assessed?

The KPPU has not published any guidelines or, to the best of our knowledge, taken any decisions on restricting the buyer's ability to sell non-competing products that the supplier deems 'inappropriate'.

Law stated - 01 March 2022

Explain how restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement is assessed.

Restricting the buyer's ability to stock products competing with those supplied by the supplier under the agreement could be a violation of the special discount provision (article 15(3)), which prohibits an undertaking from entering into an agreement on a certain price or price reduction of the products or services that contains a condition that the undertaking that receives the goods or services from the supplier will not purchase similar goods or services or of the same type from a competitor of the supplier. The KPPU will assess the positive and negative effects of the special discount arrangement. Such arrangements are prohibited if they (1) substantially or potentially reduce the volume of trade and (2) have been entered into by undertakings that have market power, and the market power can increase due to the special discount arrangement.

Law stated - 01 March 2022

How is requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products assessed?

Requiring the buyer to purchase from the supplier a certain amount or minimum percentage of the contract products or a full range of the supplier's products could be a violation of (1) the tying agreement provision (article 15(2)), which prohibits an undertaking to enter into an agreement with another party that contains a condition that the recipient party of certain goods or services purchases other goods or services from the supplier business, or (2) the special discount

provision (article 15(3)), which prohibits an undertaking from entering into an agreement on a certain price or price reduction of the products or services that contains a condition that the undertaking that receives the goods or services from the supplier is willing to purchase other goods or services from the supplier. The KPPU will assess the positive and negative effects of the tying agreement or special discount arrangement. Such agreements are prohibited if they (1) substantially or potentially reduce the volume of trade, (2) have been entered into by undertakings that have market power and the market power can increase due to the tying agreement or special discount arrangement, (3) in case of a tying agreement, the tying product differs from the main product and (4) the undertaking that enters into the tying agreement is able to force buyers to purchase the tying product.

Law stated - 01 March 2022

Explain how restricting the supplier's ability to supply to other buyers is assessed.

Restricting the supplier's ability to supply to other buyers could be a violation of the exclusive dealing provision (article 15(1) ICL), which prohibits an undertaking from entering into an agreement with another undertaking that contains a condition that the recipient party of goods or services will only resupply or not resupply the goods or services to a certain party or at a certain place. Such an exclusive arrangement is prohibited if it (1) substantially or potentially reduces the volume of trade and (2) has been entered into by undertakings that have market power, and it can increase due to the exclusive arrangement.

Law stated - 01 March 2022

Explain how restricting the supplier's ability to sell directly to end-consumers is assessed.

Restricting the supplier's ability to sell directly to end consumers could be a violation of the exclusive dealing provision (article 15(1) ICL), which prohibits an undertaking from entering into an agreement with another that contains a condition that the recipient party of goods or services will only resupply or not resupply the goods or services to a certain party or at a certain place. Such an exclusive arrangement is prohibited if it (1) substantially or potentially reduces the volume of trade and (2) has been entered into by undertakings that have market power, and the market power can increase due to the exclusive arrangement.

Law stated - 01 March 2022

Have guidelines or agency decisions in your jurisdiction dealt with the antitrust assessment of restrictions on suppliers other than those covered above? If so, what were the restrictions in question and how were they assessed?

No KPPU guidelines or decisions deal with the antitrust assessment of restrictions on suppliers other than those covered above.

Law stated - 01 March 2022

NOTIFICATION

Notifying agreements

Outline any formal procedure for notifying agreements containing vertical restraints to the authority responsible for antitrust enforcement.

There is no formal procedure for notifying agreements containing vertical restraints to the Indonesian Competition Commission (KPPU).

Law stated - 01 March 2022

Authority guidance

If there is no formal procedure for notification, is it possible to obtain guidance from the authority responsible for antitrust enforcement or a declaratory judgment from a court as to the assessment of a particular agreement in certain circumstances?

Guidance is available from the KPPU on the assessment of a particular agreement. However, the guidance has no binding force, which means that the KPPU may always decide to initiate an investigation for breach of vertical restraint rules by an undertaking that entered into the agreements, even if the undertaking's action was in accordance with the KPPU's guidance. It is not possible to obtain a declaratory judgment from a court on the assessment of a particular agreement.

Law stated - 01 March 2022

ENFORCEMENT

Complaints procedure for private parties

Is there a procedure whereby private parties can complain to the authority responsible for antitrust enforcement about alleged unlawful vertical restraints?

Private parties may file a report on alleged unfair business practices, including by violating vertical restraints rules, based on which the KPPU may launch an investigation against the reported undertakings. Upon receiving a report from private parties on an alleged violation of the Indonesian Competition Law (ICL), the KPPU will examine whether the report meets the criteria for an investigation. These criteria are as follows: the report satisfies the administrative requirements under KPPU Regulation No. 1/2019 on Procedure for Case Handling of Monopolistic Practices and Unfair Business Competition ; it has been substantiated by at least one item of evidence; the reported offence can be regarded as a prohibited act or agreement under the ICL; and the KPPU has exclusive jurisdiction to investigate the reported allegation.

Law stated - 01 March 2022

Regulatory enforcement

How frequently is antitrust law applied to vertical restraints by the authority responsible for antitrust enforcement? What are the main enforcement priorities regarding vertical restraints?

The ICL is not frequently applied to vertical restraints by the KPPU. To date, almost two-thirds of the total cases handled by the KPPU related to bid rigging. There is also an increasing number of cartel cases. However, in the past five years, the KPPU only handled seven cases related to vertical constraints. Most cases concerned alleged violation of the closed agreement (article 15 ICL) prohibition. Lately, there has been an uptick in cases related to discrimination (article 19(d) ICL).

Law stated - 01 March 2022

What are the consequences of an infringement of antitrust law for the validity or enforceability of a contract containing prohibited vertical restraints?

In accordance with the Indonesian Civil Code, the infringement of antitrust law will render the relevant provisions of the agreement (not the whole agreement) governed by Indonesian law null and void. However, it is common to include a separate severability clause in the agreement to confirm this.

Further, the KPPU may, as part of its sanction authority, cancel an agreement that violates the resale price maintenance (article 8) and closed agreement (article 15) prohibitions. The ICL does not make any reference to the matter of severability and in practice we have seen that the KPPU has cancelled relevant clauses (eg, see KPPU Case No. 11/KPPU-I/2005 and KPPU Case No. 02/KPPU-I/2013) and entire agreements (eg, see KPPU Case No. 05/KPPU-I/2014) for violation of vertical restraint rules.

Law stated - 01 March 2022

May the authority responsible for antitrust enforcement directly impose penalties or must it petition another entity? What sanctions and remedies can the authorities impose? What notable sanctions or remedies have been imposed? Can any trends be identified in this regard?

The KPPU may directly impose penalties. It can impose the following sanctions and remedies.

Sanctions under the ICL apply to undertakings. An undertaking may be an individual or business entity, either a legal or non-legal entity, established and domiciled or carrying out activities within the Republic of Indonesia, either individually or jointly, by virtue of an agreement to carry out various business activities in the economic field. An undertaking can be a group of undertakings that jointly form a single economic entity.

Administrative sanctions introduced by the ICL for violation of vertical restraint rules include:

- decisions to cancel agreements as referred to in, inter alia, article 8 (resale price maintenance) and article 15 (closed agreements);
- orders to terminate the vertical integration as referred to in article 14;
- orders to cease activities proven to have involved monopolistic practices or resulted in unfair business competition in the relevant market or other public harm as referred to in, inter alia, article 19;
- orders to pay damages; and
- orders to pay fines of at least 1 billion rupiah.

Government Regulation No. 44/2021 on the Implementation of the Prohibition against Monopolistic Practices and Unfair Business Competition and KPPU Regulation No. 2/2021 on the Guidelines for Imposing Administrative Fines further determine that the KPPU can impose a base fine of 1 billion rupiah, plus a certain amount.

The final calculation of fines is subject to the following limits:

- up to 50 per cent of the net profits earned by the undertaking in the relevant market, during the period of the violation; or
- up to 10 per cent of the total sales in the relevant market, during the period of the violation.

The amount calculated is based on:

- the negative impact caused by the violation;
- the duration of the violation;
- mitigating factors;
- aggravating factors; and
- the ability of the undertaking to pay.

Since the issuance of Law No. 11/2020 on Job Creation in 2020, only refusal to cooperate with a KPPU investigation, or to disclose significant information to a KPPU investigation, would be subject to a criminal sanction, punishable by a maximum fine of 5 billion rupiah or maximum imprisonment of one year (should the fine not be paid). Other prohibited acts and agreements would be subject only to administrative sanctions.

Law stated - 01 March 2022

Investigative powers of the authority

What investigative powers does the authority responsible for antitrust enforcement have when enforcing the prohibition of vertical restraints?

The KPPU has limited investigative powers and, for instance, has no authority to carry out dawn raids. However, it can call reported parties, witnesses and others to provide clarification, obtain letters and documents related to the case, data regarding the assets and turnover of a reported party, carry out an investigation on-site and analyse the information obtained based on the foregoing.

Law stated - 01 March 2022

Private enforcement

To what extent is private enforcement possible? Can non-parties to agreements containing vertical restraints obtain declaratory judgments or injunctions and bring damages claims? Can the parties to agreements themselves bring damages claims? What remedies are available? How long should a company expect a private enforcement action to take?

Private parties that have suffered losses resulting from an anti-competition offence, in principle including non-parties to agreements containing vertical restraints, may claim damages. First, they can claim damages based on a decision of the KPPU in which it explicitly orders the undertaking violating the ICL to pay compensation. If the KPPU does not order the payment of compensation, private parties that have suffered losses resulting from an anti-competition offence may file a claim under article 1365 of the Indonesian Civil Code (which prohibits a party from committing an unlawful act that causes loss to another party) with the general district court. This may be a lengthy process, also because the parties may appeal the decision of the general district court to the court of appeal and file for cassation to the Supreme Court.

It should be noted that a recent court decision seems to imply that a damages claim must always be based on a KPPU order to pay damages, not on an unlawful act claim under article 1365 of the Indonesian Civil Code: in September 2019, a representative of consumers submitted a claim to the District Court of Central Jakarta following the sanctions imposed by the KPPU against motorcycle manufacturers for cartel practices. However, in its decision on 7 July 2020, the District Court of Central Jakarta rejected the claim, arguing that it was not competent to handle the case as the KPPU had exclusive authority to impose sanctions, including an order to pay damages. The consumers' representatives appealed the decision, and it is unclear whether it will be upheld.

In any event, the doctrine of precedent does not exist in Indonesia and each case must be determined on its own facts and merits, although consideration may be given to similar, previously determined cases and academic theories. Accordingly, another court may reach a different decision in a similar case in the future.

Law stated - 01 March 2022

OTHER ISSUES

Other issues

Is there any unique point relating to the assessment of vertical restraints in your jurisdiction that is not covered above?

No.

Law stated - 01 March 2022

UPDATE AND TRENDS

Recent developments

What were the most significant two or three decisions or developments in this area in the past 12 months?

The Indonesian Competition Commission (KPPU) rendered three decisions in the area of vertical restraints in the past 12 months: in KPPU Case No. 06/KPPU-L/2020 , KPPU Case No. 07/KPPU-I/2020 , and KPPU Case No. 08/KPPU-I/2020 . All are related to the discrimination prohibition under article 19(d) of the Indonesian Competition Law.

KPPU Case No. 06/KPPU-L/2020 involved the appointment by the national airline Garuda Indonesia of six wholesalers for the direct sale of Umrah tickets to Jeddah and Madinah. According to the KPPU, the airline had appointed these wholesalers without going through the appointment process openly and transparently, which was not based on requirements and considerations that were clear and measurable, and there were inconsistencies in the rationality of wholesaler appointments. This resulted in the discrimination of at least 301 other wholesalers. The airline had made an offer to the KPPU to change its behaviour, but then failed to comply with the integrity pact it had committed to. Therefore, the authority imposed a fine of 1 billion rupiah on Garuda Indonesia.

KPPU Case No. 07/KPPU-I/2020 concerned another major commercial airline of Indonesia, Lion Air Group, and three of its group companies, which entered into an intragroup collaboration for the sale of cargo capacity for cargo from several airports. The KPPU found that as part of the collaboration, the companies had agreed on an exclusive right to PT Lion Express for the use of 40 tons of cargo capacity for four routes. As a result, registered agents other than PT Lion Express had no or limited access to the Lion's cargo services, forcing them to use alternative cargo or cargo agents. Such discrimination was not effective though, as PT Lion Express failed to take customers of other cargo agents, who instead moved to do business with other airlines. A fine was imposed on each of the Lion group entities, which due to Lion Air Group's willingness to cooperate, the negative impact of the covid-19 pandemic and the fact that the agreement had already been terminated was limited to 1 billion rupiah for each company.

Finally, KPPU Case No. 08/KPPU-I/2020 revolved around the question of whether PT Telekomunikasi Indonesia (Persero) Tbk (Telkom) and PT Telekomunikasi Seluler (Telkomsel) had discriminated against Netflix for failing to provide the latter internet provider access services. The KPPU had found that Telkom and Telkomsel had indeed blocked access to Netflix services on their fixed broadband and mobile broadband networks, respectively. Further, the companies had discriminated against Netflix as they did offer access to other subscription-based video on demand (SVOD) providers. However, the authority concluded that the blocking did not result in unhealthy competition as Telkom

and Telkomsel took this measure to prevent violating prevailing laws, Netflix had not suffered any losses and consumers would still have the option to watch Netflix through other providers.

Law stated - 01 March 2022






Anticipated developments

Are important decisions, changes to the legislation or other measures that will have an impact on this area expected in the near future? If so, what are they?

The Indonesian legislature plans to enact a new competition bill that will replace the current Indonesian Competition Law. The bill was originally planned to be enacted last year but, due to the covid-19 emergency, the parliament decided early in July 2021 to stop the deliberations. It is unclear when the deliberations will continue.

Law stated - 01 March 2022

Jurisdictions

	Argentina	Allende & Brea
	Brazil	Pinheiro Neto Advogados
	China	DeHeng Law Offices
	European Union	Sidley Austin LLP
	France	Kramer Levin Naftalis & Frankel LLP
	Germany	Glade Michel Wirtz
	India	Chandhiok & Mahajan, Advocates and Solicitors
	Indonesia	ABNR
	Japan	Momo-o, Matsuo & Namba
	Netherlands	Van Doorne
	Spain	Callol, Coca & Asociados
	Sweden	Advokatfirman Cederquist KB
	Switzerland	Homburger
	Turkey	ELIG Gurkaynak Attorneys-at-Law
	United Kingdom	Sidley Austin LLP
	USA	Sidley Austin LLP