

# 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.

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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 Government Regulation in Lieu of Law No. 2 of 2022 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 that prohibit vertical restraints.

*Law stated - 31 January 2023*

### 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 restraint:

- Price discrimination (article 6): an agreement that results in one buyer paying a price that is different from 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 less 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 a production process or of further processing, either in one direct link or an 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 - 31 January 2023*

### 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 - 31 January 2023*

### 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 investigate or examine instances of alleged monopolistic practice or unfair business competition reported by the public, by undertakings, or based on their own initiative, and subsequently issue decisions and impose sanctions. ICL also states that a party can appeal the KPPU's decisions to the Commercial Court and then file for cassation with the Supreme Court.

*Law stated - 31 January 2023*

### 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. The ICL has been applied extraterritorially, but we are not aware of any cases in relation to vertical restraints in which this occurred. To the best of our knowledge, there are no cases to date in which the law was applied in a pure internet context.

*Law stated - 31 January 2023*

### 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 are 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, are 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 - 31 January 2023*

### **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 - 31 January 2023*

### **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 exempt 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 the public at large;
- international agreements that have been ratified by the Indonesian government;
- agreements related to the 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 on 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 - 31 January 2023*

## 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 or not in writing or in non-written form.

*Law stated - 31 January 2023*

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 - 31 January 2023*

### 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.

It agreed 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 - 31 January 2023*

### **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 - 31 January 2023*

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 - 31 January 2023*

### **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 - 31 January 2023*

## 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) .

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

- an 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;
- an undertaking has an incentive to use its market power to be engaged in anticompetitive actions; and
- these 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
  - a reduction in 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 - 31 January 2023*

### 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 a competitive 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 it can be alleged to have violated 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 could only violate article 14 ICL if it had 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 difficult 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. Consequently, a different court might reach a different decision in a similar case in the future.

*Law stated - 31 January 2023*

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 share 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 large 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 - 31 January 2023*

## 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 - 31 January 2023*

## 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, RPM) provides that the KPPU will assess whether there is an agreement containing an 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 greater than the cost of the limitation on competition.

*Law stated - 31 January 2023*

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 KPPU decisions in which these circumstances were considered justification for RPM restrictions.

*Law stated - 31 January 2023*

## 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 - 31 January 2023*

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 greater than the cost of the limitation on competition.

*Law stated - 31 January 2023*

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 - 31 January 2023*

## 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 - 31 January 2023*

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 - 31 January 2023*

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 if 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 greater than the cost of the limitation on competition.

*Law stated - 31 January 2023*

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 - 31 January 2023*

## 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 - 31 January 2023*

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 on 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 KPPU decisions in which such restrictions were considered.

*Law stated - 31 January 2023*

### **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 - 31 January 2023*

### **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.



### 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 - 31 January 2023

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 - 31 January 2023

### 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 - 31 January 2023

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 their positive effects.

*Law stated - 31 January 2023*

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 - 31 January 2023*

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 - 31 January 2023*

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 whether 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 - 31 January 2023*

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 on distribution arrangements that combine selective distribution with restrictions on the territory into which approved buyers may resell the contract products.

*Law stated - 31 January 2023*

### **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 - 31 January 2023*

### 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 - 31 January 2023*

### 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 - 31 January 2023*

### 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 from entering 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 - 31 January 2023*

**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 - 31 January 2023*

**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 - 31 January 2023*

**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 - 31 January 2023*

**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 - 31 January 2023*

**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 - 31 January 2023*

## 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 - 31 January 2023*

### 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. Based on its 2021 Annual Report, the KPPU has issued 26 decisions, 21 of which were related to late notification and bid rigging. Only four out of 26 decisions issued by the KPPU related to vertical restraints: one concerned an allegation under articles 15(2) and 15(3) ICL, and three cases related to discrimination (article 19(d) ICL) accounted for 15 per cent of the total decisions issued in 2021. Lately, there has been an uptick in cases related to discrimination (article 19(d) ICL).

*Law stated - 31 January 2023*

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 entire 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 a 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 - 31 January 2023*

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.

Under the current law regime, 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 - 31 January 2023*

## 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 - 31 January 2023*

## 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 - 31 January 2023*

## 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.

**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 Cases 06/KPPU-L/2020, 07/KPPU-I/2020, and 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 pilgrimage tickets to Jeddah and Madinah. According to the KPPU, the airline had appointed these wholesalers without going through the appointment process openly and transparently, and it 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 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 on 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 blockage did not result in unhealthy competition as Telkom and Telkomsel took this measure to prevent a violation of prevailing laws, Netflix had not suffered any losses and consumers would still have the option to watch Netflix through other providers.

Law stated - 31 January 2023

**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 in 2020 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.
- In its 2021 Annual Report, the KPPU conducted several studies, including one on the relevant digital economy market. This study will be used to draft an amendment to the KPPU Regulation on Guidelines for Relevant Markets to address the rapid development of relevant markets in the digital economy sector, which may also be relevant to vertical restraints within this market. However, the timing for the issuance of this amendment remains uncertain.

*Law stated - 31 January 2023*

## Jurisdictions

	<b>China</b>	DeHeng Law Offices
	<b>European Union</b>	Sidley Austin LLP
	<b>France</b>	Kramer Levin Naftalis & Frankel LLP
	<b>Germany</b>	Glade Michel Wirtz
	<b>India</b>	Chandhiok & Mahajan, Advocates and Solicitors
	<b>Indonesia</b>	ABNR
	<b>Japan</b>	Momo-o, Matsuo & Namba
	<b>Netherlands</b>	Van Doorne
	<b>Switzerland</b>	Homburger
	<b>Turkey</b>	ELIG Gurkaynak Attorneys-at-Law
	<b>United Kingdom</b>	Sidley Austin LLP
	<b>USA</b>	Sidley Austin LLP