

Vertical Agreements

in 35 jurisdictions worldwide

2014

Contributing editor: Stephen Kinsella OBE



Published by
Getting the Deal Through
in association with:

Accura Advokatpartnerselskab
Advokatfirmaet Steenstrup Stordrange DA
Allende & Brea
Antitrust Advisory
Ashurst Advokatbyrå AB
Asters
Baker & McKenzie
Bán, S Szabó & Partners
Banning NV
Caiado Guerreiro & Associados
Cortázar Urdaneta & Cía – Abogados
De Berti Jacchia Franchini Forlani
Dentons Europe CS LLP
Glade Michel Wirtz
Golfinopoulos Law Office
Herbert Smith Freehills LLP
Homburger
J Sagar Associates
King & Wood Mallesons
Korman & Oren
Kramer Levin
Legal and Economic Avantgarde SC
Levy & Salomão Advogados
Matheson
Momo-o Matsuo & Namba
Peli Filip SCA
Pellegrini & Cía
Sidley Austin LLP
Soewito Suhardiman Eddymurthy Kardono (SSEK)
Vivien & Associés
Wolf Theiss
Zaid Ibrahim & Co

Vertical Agreements 2014

Contributing editor:
Stephen Kinsella OBE
Sidley Austin LLP

Getting the Deal Through is delighted to publish the eighth edition of *Vertical Agreements*, a volume in our series of annual reports that provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 35 jurisdictions featured. New jurisdictions this year include Indonesia, Norway, Russia and Sweden. There is also a new chapter on most-favoured-nation clauses.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually. Please ensure you are referring to the latest print edition or to the online version at www.GettingTheDealThrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editor Stephen Kinsella OBE of Sidley Austin LLP for his continued assistance with this volume.

Getting the Deal Through

London
 March 2014

Increased Scrutiny of Most Favoured Nation Clauses in Vertical Agreements Noëlle Lenoir, Marco Plankensteiner and Elise Créquer Kramer Levin	3	European Union	79
Stephen Kinsella OBE, Stephen Spinks, Patrick Harrison and Rosanna Connolly Sidley Austin LLP		France	92
Argentina	6	Muriel Perrier Vivien & Associés	
Julián Peña Allende & Brea		Germany	100
Australia	13	Markus M Wirtz and Silke Möller Glade Michel Wirtz	
Wayne Leach and Sharon Henrick King & Wood Mallesons		Greece	110
Austria	21	Christos Golfopoulos Golfopoulos Law Office	
Gunter Bauer and Robert Wagner Wolf Theiss		Hungary	119
Brazil	29	Chrysta Bán Bán, S Szabó & Partners	
Alexandre Ditzel Faraco, Ana Paula Martinez and Mariana Tavares de Araujo Levy & Salomão Advogados		India	127
Chile	37	Amit Kapur, Farhad Sorabjee and Amitabh Kumar J Sagar Associates	
Julio Pellegrini and Pedro Rencoret Pellegrini & Cía		Indonesia	136
China	45	Fahrul S Yusuf and Meta N Mustikaningrum Soewito Suhardiman Eddymurthy Kardono (SSEK)	
Chen Yang and Lei Li Sidley Austin LLP		Ireland	143
Colombia	54	Helen Kelly Matheson	
Javier Cortázar-Mora Cortázar Urdaneta & Cía – Abogados		Israel	151
Czech Republic	61	William B Korman and Nachum Oren Korman & Oren	
Katerina Schenkova Baker & McKenzie		Italy	162
Denmark	70	Fabio Ferraro and Andrew G Paton De Berti Jacchia Franchini Forlani	
Christina Heiberg-Grevy and Malene Gry-Jensen Accura Advokatpartnerselskab			

Publisher

Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions

Rachel Nurse
subscriptions@gettingthedealthrough.com

Business development managers

George Ingledeu
george.ingledeu@lbresearch.com

Alan Lee
alan.lee@lbresearch.com

Dan White
dan.white@lbresearch.com

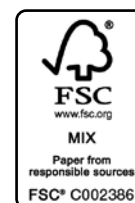


Published by
Law Business Research Ltd
 87 Lancaster Road
 London W11 1QQ, UK
 Tel: +44 20 7908 1188
 Fax: +44 20 7229 6910
 © Law Business Research Ltd 2014
 No photocopying: copyright licences do not apply.
 First published 2007
 Eighth edition 2014
 ISSN 1753-9250



The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of March 2014, be advised that this is a developing area.

Printed and distributed by
 Encompass Print Solutions
 Tel: 0844 2480 112



CONTENTS

<u>Japan</u>	<u>174</u>	<u>Romania</u>	<u>224</u>	<u>Switzerland</u>	<u>271</u>
Nobuaki Mukai Momo-o, Matsuo & Namba		Carmen Peli and Manuela Lupeanu Peli Filip SCA		Franz Hoffet, Marcel Dietrich, Gerald Brei and Barbara Wächli Homburger	
<u>Malaysia</u>	<u>183</u>	<u>Russia</u>	<u>235</u>	<u>Ukraine</u>	<u>280</u>
Sharon Tan Zaid Ibrahim & Co		Alexander Egorushkin and Igor Panshensky Antitrust Advisory		Igor Svechkar and Oleksandr Voznyuk Asters	
<u>Mexico</u>	<u>191</u>	<u>Serbia</u>	<u>243</u>	<u>United Kingdom</u>	<u>288</u>
León Ricardo Elizondo Castro Legal and Economic Avantgarde SC		Guenter Bauer and Maja Stanković Wolf Theiss		Stephen Kinsella OBE, David Went, Patrick Harrison and Rosanna Connolly Sidley Austin LLP	
<u>Netherlands</u>	<u>199</u>	<u>Slovakia</u>	<u>251</u>	<u>United States</u>	<u>301</u>
Minos van Joolingen and Martijn Jongmans Banning NV		Katarína Pecnová Dentons Europe CS LLP		Joel Mitnick Sidley Austin LLP	
<u>Norway</u>	<u>208</u>	<u>Spain</u>	<u>258</u>		
Thomas Sando and Aksel Joachim Hageler Advokatfirmaet Steenstrup Stordrange DA		Luis Blanquez and Manuel Contreras Herbert Smith Freehills LLP			
<u>Portugal</u>	<u>216</u>	<u>Sweden</u>	<u>265</u>		
Joana Gomes dos Santos Caiado Guerreiro & Associados		Mats Johnsson and Elsa Arbrandt Ashurst Advokatbyrå AB			

Indonesia

Fahrul S Yusuf and Meta N Mustikaningrum

Soewito Suhardiman Eddymurthy Kardono (SSEK)

Antitrust law

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

The applicable legal source in Indonesia is Law No. 5 of 1999 regarding the Prohibition of Monopolistic Practices and Unfair Business Competition (Antimonopoly Law). To date no implementing regulations for the Antimonopoly Law have been issued, other than Government Regulation No. 57 of 2010 regarding the Merger or Consolidation of Business Entities and the Acquisition of Companies that May Result in Monopolistic Practices and Unfair Business Competition. Indonesia's Business Competition Supervisory Commission (Komisi Pengawas Persaingan Usaha, KPPU) also issues guidelines from time to time. The purpose of the guidelines is to provide a clear picture of the requirements of the Antimonopoly Law. They are mainly for internal use only and are not binding on third parties.

Types of vertical restraint

- 2 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?

The Antimonopoly Law does not provide a specific definition of vertical restraint. However, it does regulate certain types of vertical restraints. The following are provisions in the Antimonopoly Law related to vertical restraints:

- Resale price maintenance (article 8): prohibition on a business actor entering into an agreement that prohibits the other party from resupplying or reselling products at lower than the agreed price.
- Vertical integration (article 14): prohibition on a business actor entering into agreements 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.
- Closed agreement (article 15): there are three type of prohibition under this article, ie, prohibitions on exclusive dealing (article 15(1)), tying agreements (15(2)) and special discounts (article 15(3)).
- Market control (article 19): prohibition on business actors conducting certain activities, either individually or jointly, with other business actors. Such activities can be those that:
 - impede other business actors from conducting the same business activities;
 - hinder the customers of business competitors from engaging in a business relationship with such business competitors;
 - limit the distribution or sale of goods or services; or
 - result in discriminatory practices toward certain business actors.

Legal objective

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

In principle, the objective of the Antimonopoly Law is to protect the public interest and to offer consumer protection, while also creating a conducive business climate.

Responsible authorities

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

In principle, the KPPU is the authorised body to enforce prohibitions under the Antimonopoly Law. The KPPU is authorised to receive reports, conduct investigations and make decisions with regard to violations of the Antimonopoly Law.

In addition to the KPPU, district courts and the Supreme Court also have enforcement authority if parties involved in a KPPU decision file an appeal with the district court and cassation to the Supreme Court. A district court hearing an appeal of a KPPU decision will examine the matter and issue a decision. It may also instruct the KPPU to conduct an additional investigation into the case.

Jurisdiction

- 5 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?

There are several elements that must be fulfilled for vertical restraints to be subject to the Antimonopoly Law. There must be:

- at least two business actors that have a vertical relationship within one production or distribution agreement or network;
- an agreement entered into by such business actors (see question 9);
- goods that can be sold or used by consumers or business actors;
- a service or services that can be sold or used by consumers or business actors;
- manufacture or supply and distribution or resale of goods or services; and
- resulting unfair business competition in the relevant market.

In addition to these six elements, there are the provisions in the different types of vertical restraints, as discussed in question 2.

In general, business actors engaged in activities within the jurisdiction of the Republic of Indonesia, wherever they may be located, are subject to the Antimonopoly Law. Thus foreign business actors may be subject to the Antimonopoly Law if they are engaged in

business activities in Indonesia. However, they should not be subject to the law as long as they have no local presence or subsidiaries in Indonesia and their products or services are not available for sale in Indonesia.

Further, to date the Antimonopoly Law has never been applied within the context of the internet, nor has the KPPU issued guidelines to address this matter.

Agreements concluded by public entities

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

In general, public entities are allowed to engage in monopolistic practices or the centralisation of economic power as long as it positively relates to the general public or a sector of production important to the state. In 2010 the KPPU issued guidelines that set forth the criteria for public entities to engage in monopolistic practices. Under these guidelines, public entities must first have a legal mandate to engage in monopolistic practices and such legal mandate must clearly describe the purposes of the monopolistic practice or centralisation of economic power.

Sector-specific rules

- 7 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.

Most notably, in the trading sector a foreign principal may appoint a sole agent or sole distributor as the only party that can distribute or market its products in Indonesia. Principals for certain types of products like motor vehicles, heavy equipment, electronics and household appliances are required to appoint an exclusive agent to import and distribute the products in Indonesia. The agency or distribution agreement between the national trading company and the overseas principal must be registered at the Ministry of Trade. See question 33.

In the insurance industry, an insurance agent can act as an agent for only one insurance company.

General exceptions

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

In general, the Antimonopoly Law provides several exemptions with regard to agreements. These include:

- agreements intended to implement applicable laws and regulations;
- agreements related to intellectual property rights and franchises;
- agreements for the stipulation of the technical standardisation of goods or services that do not restrict or hamper competition;
- agreements for agency purposes that do not contain provisions to resupply goods or services at a price level lower than the agreed price;
- agreements on research cooperation to increase or improve the living standards of the public at large;
- international agreements ratified by the government of Indonesia; and
- export-orientated agreements or actions not disrupting domestic needs or supplies.

Such agreements are not automatically exempted from the Antimonopoly Law. Rather, the KPPU must issue exemptions. See questions 14 and 43.

Agreements

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

Yes, under the Antimonopoly Law 'agreement' means the action of one or more business actors in binding themselves under whatever name, either in writing or not in writing.

- 10 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?

An agreement does not necessarily have to be a formal written agreement. A consensus between parties can be deemed an agreement. In analysing cases related to vertical restraints, the KPPU will look at other types of evidence besides agreements, such as witness testimony, expert testimony, letters or documents and statements from business actors. See question 9.

Parent and related-company agreements

- 11 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)?

No specific circumstances are provided for in the Antimonopoly Law and its implementing regulations. The vertical restraint rules remain applicable to agreements between related companies. A decision on a case in 2003 regarding alleged vertical integration between an airline company and its 95 per cent-owned subsidiary showed that vertical restraint rules apply to agreements even between a parent company and a related company, and to date it does not seem that the KPPU has changed its policy in this regard.

Agent–principal agreements

- 12 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?

Generally, there is no express exemption provided under the Antimonopoly Law and its implementing regulations for agent–principal agreements, including the vertical restraints provisions. Undertaking to perform certain services on a supplier's behalf for a sales-based commission will be a factor in the KPPU's consideration in determining the type of legal relationship between the supplier and buyer. For instance, if the legal relationship is that of a principal and an agent, then there should be no true sale in the transfer of the contract products from the supplier to the buyer and the liability and responsibility toward end-consumers would remain with the supplier. However, if the buyer is an independent distributor or reseller, then there should be no reason for the supplier to exercise control over the distribution and sale of the parts by the buyer. In this case, an exercise of such control would otherwise be viewed as exclusive dealing by the KPPU, especially if the liability or responsibility toward end-consumers is shifted from the supplier to the independent buyer or reseller.

- 13 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?

No specification or definition of what constitutes an agent–principal relationship is provided under the Antimonopoly Law and its implementing regulations, KPPU decisions or guidelines. See question 12.

Intellectual property rights

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

The Antimonopoly Law expressly provides that the provisions of the Antimonopoly Law do not apply to intellectual property rights-related arrangements (eg, licensing agreements). The KPPU, however, issued guidelines in 2009 under which the main criterion for such exemption is that there is no significant market impact resulting from the exclusive rights given under such licensing agreement.

Analytical framework for assessment

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

For each possible violation of the Antimonopoly Law (see question 2), an analysis should be undertaken of whether all of the elements of a particular provision have been met (eg, business actors, agreement, unfair business activities, welfare loss, etc). Typically, the KPPU will also identify whether there are any possible links with other provisions of the Antimonopoly Law that presumably are being violated as well.

As part of its analysis the KPPU would first determine the relevant market in which the contracting business actors are engaged and whether either holds a dominant position and thus has the ability to use its market power to restrict access by potential competitors (level of barriers to entry). Assuming that a business actor does have that kind of power, next in the analysis would be whether such business actor has the incentive to exercise its power in the identified relevant market. The KPPU will also look into whether the strategy pursued by the business actors to the vertical restraint in order to lessen the competition is economically rational. The cost to foreclose access in the upstream market may not be recoverable by the profits expected in the downstream or distribution market.

One last important point if such a business actor does exercise its market power is whether there are any losses associated with consumers. This is an analysis of the pro-competitive and anti-competitive effects and whether consumers are better off or worse off by retaining those kinds of vertical restraints between the two contracting business actors.

- 16** 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?

The KPPU recognises that vertical restraints can be entered into between a business actor with another business actor acting as its supplier or a business actor with another business actor acting as its buyer. In both cases, identifying both parties' market share is relevant to determine whether the vertical restraint will result in less competition in the market, either at the supplier's level or the buyer's level. Vertical integration between a dominant supplier and Buyer A can drive away Buyer A's competitors as they will no longer have access to supplies from the dominant supplier and they may have to incur additional costs dealing with other suppliers that presumably have less capacity and are less efficient. This would also be the case when a dominant buyer or distributor has entered into an exclusive arrangement with Supplier A, cutting off its competitors' access to the dominant buyer or distributor, and thus they might incur additional costs dealing with other buyers or distributors with less extensive market reach.

- 17** 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?

See question 16. To date no cases relating to online sales have been reported to the KPPU.

Block exemption and safe harbour

- 18** 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.

No express block exemption or safe harbour on vertical restraints is provided under the Antimonopoly Law and its implementing regulations. Generally, all elements have to be met (see question 15) before an allegation of violation of a particular provision can be made and those elements have to be proven before the KPPU can render any punitive decision against the business actor. In most cases, such proof includes the existence of market dominance, without which it is unlikely that the vertical restraint would result in a considerable impact on the market.

Despite the above, there is always the possibility for a third party to file a report to the KPPU with regard to an alleged violation of the law. The KPPU will proceed with an investigation whenever it receives a report of an alleged violation of the Antimonopoly Law, whether or not the activities have actually fulfilled all the elements for a violation. However, if during the investigation process the KPPU discovers that the report is unsubstantiated, the KPPU may decide to discontinue the investigation.

Types of restraint

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

In general, the Antimonopoly Law prohibits resale price maintenance in the form of a minimum resale price. The Antimonopoly Law does not prohibit resale price maintenance in the form of maximum resale price or specified resale price.

- 20** 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'?

No decisions have been rendered or guidelines issued by the KPPU to address this specific issue. In general, resale price maintenance in the form of maximum resale price is permitted.

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

Yes, guidelines issued in 2011 specifically address the possible link between resale price maintenance and abuse of dominant position (article 25), price-fixing (article 5) or price-fixing in an agency framework.

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

To the best of our knowledge the guidelines issued by the KPPU did not address this specific issue. However, a business actor would not be automatically considered as violating the Antimonopoly Law by having a resale price maintenance agreement with another business

actor. Further analysis would be required to determine whether the arrangement had a positive (eg, efficiency) or negative effect (eg, market entry barrier, increase of market power resulting in price discrimination or price increase).

- 23** 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.

The Antimonopoly Law, its implementing regulations and the guidelines issued by the KPPU are silent with regard to this matter. In the most likely circumstances, assuming that the buyer is dominant with a wide market reach and no market partitioning in place, the similar retail price between the products of Supplier A and Supplier B would encourage both suppliers or manufacturers to increase the quality of their products and this would benefit end-consumers. From the Antimonopoly Law's perspective, this may be deemed pro-competitive (inter-brand competition).

- 24** 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.

On its own, the former may raise concerns regarding discriminatory practices toward consumers, which is prohibited under the Antimonopoly Law, and it may seem that the latter would be ideal in avoiding the slightest allegation in that regard. However, with allegations of violations, the anti-competitive effects of the supplier's practice must be proven before any penalties are issued by the KPPU. In order to legally retain the practice, one of the things that should be demonstrated to the KPPU is the justification for the different treatment among buyers (eg, transport or delivery cost, market value) and whether that means different buyers will have different prices (eg, according to their locations, volume commitments and contract periods). The supplier's market dominance will of course be taken into account because the more powerful the supplier the more able it is to exercise its market power and 'non-favourite' buyers would be likely to be put in a very disadvantageous position. When proven, this could easily be deemed an unfair business practice from the point of view of the Antimonopoly Law.

- 25** 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.

No decisions have been rendered or guidelines issued by the KPPU to address this specific issue. A similar approach as described in question 23 should be applicable.

- 26** 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.

Again, the market dominance of the buyer plays an important role here and this will be the first item to be identified by the KPPU when an alleged violation is reported. As for the analysis, a similar approach as in question 24 should be applicable. The different treatment may prove to be discriminatory if not sufficiently justifiable for valid economic reasons.

- 27** 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?

This type of practice is expressly prohibited under the Antimonopoly Law, but not without proven anti-competitive effects arising

from such practice. In general, the Antimonopoly Law prohibits a business actor from entering into an agreement with another business actor by which the first business actor imposes terms on the second business actor by which the second business actor receiving goods or services is required to supply or to not resupply the goods or services to certain parties or certain places. Guidelines issued in 2011 by the KPPU categorise that type of arrangement as exclusive dealing. According to the guidelines, the imposition of a restriction by a business actor on another business actor's freedom in supplying goods or services is the main criterion of exclusive dealing. However, a business actor would not automatically be considered as violating the Antimonopoly Law just by having exclusive dealing with another business actor. Further analysis is required to determine whether such exclusive dealing results in positive (eg, increase of specialisation between producer and distributors, efficiency) or negative effects (eg, market entry barrier, geographic allocation, increase of market power that results in price discrimination or price increase).

- 28** 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?

This type of arrangement would also be considered as exclusive dealing (see question 27).

One example is the *Semen Gresik* case in 2005. According to the KPPU, Semen Gresik violated article 15 of the Antimonopoly Law because it required distributors, through an agreement, to sell the goods only to certain parties, even though the distributors were independent distributors. It was proven that this arrangement eliminated competition between the distributors, that it was impossible for the distributors to expand their business and that it was also impossible for their regular customers to obtain supplies other than from the distributors. Semen Gresik was found guilty by the KPPU and the KPPU decision was reaffirmed by the Supreme Court in 2008.

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

No applicable restrictions are in place for restricting the uses to which a buyer (or a subsequent buyer) puts the contract products.

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

No decisions have been rendered or guidelines issued by the KPPU to address this specific issue. This type of arrangement would also be considered exclusive dealing. A similar approach as in question 27 should be applicable.

- 31** Have decisions or guidelines on vertical restraints dealt in any way with the differential treatment of different types of internet sales channel?

None so far.

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

This type of arrangement would also be considered exclusive dealing. In a selective distribution system, contract products may typically only be sold to certain parties (eg, authorised dealers, authorised workshops, end-customers). In other words, the sale of contract products to or through non-approved parties would be strictly prohibited. This is effectively a restriction imposed on a supplier or buyer to 'not resupply the goods and/or services to certain parties',

which can be prohibited under the Antimonopoly Law, if the prerequisite elements are fulfilled (see question 27).

33 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?

Yes, see question 7. For certain types of products (ie, motor vehicles, heavy equipment, electronics and household electronic appliances), a supplier is required to appoint a qualified local company to act as its exclusive sole agent to import and distribute the contract products exclusively in Indonesia. Such requirement applies mainly because such types of products require after-sales service.

34 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?

No decisions have been rendered or guidelines issued by the KPPU to address this specific issue.

35 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?

The KPPU has not taken any decisions so far with regard to this matter.

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

No decisions have been rendered or guidelines issued by the KPPU to address this specific issue. In practice, the KPPU is quite receptive to opinions and arguments and the possible cumulative restrictive effects of multiple selective distribution systems operating in the same market should be taken into account by the KPPU should the occasion arise.

37 Has the authority taken decisions dealing with the possible links between selective distribution systems and resale price maintenance policies? If so, what are the key principles in such decisions?

To the best of our knowledge, none so far.

38 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?

Generally, selective distribution with territorial restrictions would also be considered exclusive dealing. See question 27.

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

This type of arrangement can be deemed a violation of the Antimonopoly Law, particularly if it is tied with an agreement on price or a special discount to be given by the supplier to the buyer; or if there is any penalty or sanction imposed by the supplier in case of breach of the agreement by the buyer.

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

This type of arrangement may give rise to the issue of restricting the circulation or sales of goods or services in the relevant market,

which is prohibited under the Antimonopoly Law, particularly since the arrangement would probably result in less competition in the relevant market for that particular 'inappropriate' product.

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

A similar approach as in question 39 should be applicable.

42 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?

A requirement to purchase a certain amount or minimum percentage of contract products is permissible depending on the buyer's position in the relevant market and as long as it does not limit the buyer's capability to buy other suppliers' products. Any requirement to purchase a full range of a supplier's products may give rise to the tying prohibition under the Antimonopoly Law.

43 To what extent are franchise agreements incorporating licences of IPRs relating to trademarks or signs and know-how for the use and distribution of products assessed differently from 'simple' distribution agreements?

As is the case with intellectual property rights-related agreements, the Antimonopoly Law provides an express exemption that the provisions of the Antimonopoly Law do not apply to franchise agreements. The KPPU, however, issued guidelines in 2009 under which the main criterion for such exemption is that there are no clauses in the agreement that would potentially violate any provisions of the Antimonopoly Law, such as resale price maintenance, tying or non-compete clauses.

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

See question 16.

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

No express prohibition on this is provided under the Antimonopoly Law. In this particular situation, and if an alleged violation is somehow reported to the authority, one of the main issues to be considered is the potential welfare loss that may be suffered by consumers by not having direct access to the supplier. Arguably, in most cases, it would be more efficient for consumers to purchase the products directly from the manufacturer or supplier, and in this respect such practice would promote both inter-brand and intra-brand competition between suppliers and buyers, which is favourable to general consumers from the standpoint of the KPPU.

46 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?

None so far.

Notifying agreements

47 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.

Authority guidance

48 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?

The KPPU does not provide any formal guidance for the assessment of a particular agreement. It provides formal written guidance only in certain contexts, namely suggestions to the government, decisions on cases and opinions on mandatory post-merger notification.

Complaints procedure for private parties

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

The KPPU has issued guidelines that set forth the procedure to report any alleged violations of the Antimonopoly Law, including vertical restraint agreements. Any parties knowing of or suffering losses related to vertical restraints may file a written report to the KPPU, including clear information on the alleged violation and the identity of the reporting party. Based on that report, the KPPU will first gather information from both the reporting party and the reported party. It will request the reported party to provide clarification or information on the case. If the information is deemed complete, the KPPU will open an examination. Such examination will take up to 90 days. Upon the completion of the examination, the KPPU will issue a decision, which must be read out in a hearing that is open to the public.

Most KPPU decisions that find vertical restraints result in administrative sanctions and the revocation of an agreement.

Enforcement

50 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?

Roughly 80 per cent of KPPU decisions concern tender cases. None of the KPPU's decisions last year involved vertical restraints.

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

Indonesian law adopts the principle of freedom of contract, embodied in article 1338 of the Indonesian Civil Code. The parties

to a contract may include a severability provision whereby if one or more of the provisions in the agreement is deemed invalid, void, illegal or unenforceable under any applicable law or decision, the validity, legality and enforceability of the remaining provisions shall not be affected or impaired in any way.

In the case of vertical restraints, a contract containing prohibited vertical restraints will not automatically become null and void. The vertical restraints should be first analysed and evidenced that the contract results in anti-competitive effects. The KPPU has issued several decisions revoking an agreement that has anti-competitive effects. It can revoke an entire contract or just certain provisions of a contract containing vertical restraints.

52 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 has the authority to directly impose penalties on parties violating the Antimonopoly Law. However, parties can appeal KPPU decisions, in which case the imposition of the penalties shall be undertaken by the designated district court or the Supreme Court.

There are three types of sanction that can be imposed by the KPPU on parties violating the Antimonopoly Law:

- Administrative sanctions – these include:
 - termination of prohibited agreements;
 - an order to end the prohibited activities and the imposition of damages; and/or
 - the imposition of fines ranging from 1 billion to 25 billion rupiah.
- Criminal sanctions – these include:
 - imposition of criminal fines ranging from 5 billion to 100 billion rupiah, depending on which provisions of the Anti-Monopoly Law have been violated; or
 - in lieu of such criminal fines, imprisonment for up to six months, depending on which provisions of the Antimonopoly Law have been violated.
- Additional criminal sanctions – these include:
 - revocation of a company's business licence;
 - prohibition on the individual business actor holding a position as a director or a commissioner for a period of two to five years; and/or
 - termination of certain activities or actions that result in damages to other parties.



Fahrul S Yusuf
Meta N Mustikaningrum

fahrlyusuf@ssek.com
metamustikaningrum@ssek.com

Mayapada Tower, 14th Floor
Jl Jend Sudirman Kav 28
Jakarta 12920
Indonesia

Tel: +62 21 521 2038
Fax: +62 21 521 2039
www.ssek.com

Investigative powers of the authority

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

In conducting investigations, the KPPU has the power to summon business actors, witnesses, expert witnesses or any person deemed to have knowledge of a violation of the Antimonopoly Law. It is prohibited for business actors to refuse examination by the KPPU or to refuse to provide requested information for an investigation or examination. The KPPU can obtain assistance from police investigators to make business actors, witnesses, expert witnesses or any other person appear before the KPPU. In practice, the KPPU can also request information from foreign parties if it is relevant to its investigation.

Private enforcement

54 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 enforcement can be requested by a party affected by a violation of the Antimonopoly Law. The parties to the agreement may claim compensation. There has been one KPPU decision ordering the reported party to pay a fine to the party that suffered a loss. That decision concerned a conspiracy between business actors. However, to date there has been no KPPU decision or judgment on vertical restraints applicable for private enforcement.

Other issues

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

No.

GETTING THE DEAL THROUGH

Annual volumes published on:

Acquisition Finance	Life Sciences
Air Transport	Mediation
Anti-Corruption Regulation	Merger Control
Anti-Money Laundering	Mergers & Acquisitions
Arbitration	Mining
Asset Recovery	Oil Regulation
Banking Regulation	Outsourcing
Cartel Regulation	Patents
Climate Regulation	Pensions & Retirement Plans
Construction	Pharmaceutical Antitrust
Copyright	Private Antitrust Litigation
Corporate Governance	Private Client
Corporate Immigration	Private Equity
Data Protection & Privacy	Product Liability
Dispute Resolution	Product Recall
Dominance	Project Finance
e-Commerce	Public Procurement
Electricity Regulation	Real Estate
Enforcement of Foreign Judgments	Restructuring & Insolvency
Environment	Right of Publicity
Foreign Investment Review	Securities Finance
Franchise	Shipbuilding
Gas Regulation	Shipping
Insurance & Reinsurance	Tax Controversy
Intellectual Property & Antitrust	Tax on Inbound Investment
Investment Treaty Arbitration	Telecoms and Media
Islamic Finance & Markets	Trade & Customs
Labour & Employment	Trademarks
Licensing	Vertical Agreements



For more information or to purchase books, please visit:
www.gettingthedealthrough.com



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



Official Partner of the Latin American
Corporate Counsel Association