

## **Exclusive Supply Arrangement Practice Between Retailer and Supplier and its Impact to the Business Competition**

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### **ABSTRACT**

This research examines the practice of exclusive supply arrangements between retailers and suppliers in Indonesia, focusing on their compliance with the Indonesian Anti-Competition Law (Law No. 5 of 1999, as amended). The background highlights how such arrangements, often embedded in Trading Terms Agreements, restrict suppliers from distributing products to competitors, potentially harming market competition and consumer choice. Despite the regulatory authority of the Business Competition Supervisory Commission (KPPU), enforcement challenges persist due to corporate confidentiality and legal limitations. The study aims to analyze whether these exclusivity practices constitute prohibited agreements or activities under Indonesian law and assess their impact on business competition. Using a doctrinal research method, the study analyzes legal norms, primary and secondary materials, and case studies to evaluate the legal and economic implications of exclusive supply agreements. Findings reveal that while these agreements do not strictly qualify as Exclusive Dealing under current law, they may still violate provisions on abuse of dominant position and monopsony, thereby stifling competition and disadvantaging consumers. The research underscores the need for clearer regulatory frameworks to address such practices and ensure fair market competition. Implications suggest policymakers and the KPPU should enhance oversight and enforcement mechanisms to mitigate anti-competitive behaviors.

**Keywords:** retail, exclusive arrangement, supply restriction, exclusivity territorial, anti-competition.

### **INTRODUCTION**

Trade competition among *business actors* is inevitable. Competition can drive innovation and competitiveness in the sale of goods and/or services, but it can also put pressure on the sales and profitability of businesses. Competition provides benefits to both *business actors* and consumers. With competition, *business actors* will continuously strive to improve their products or services. A positive perspective can transform losses into great opportunities to be developed for achieving greater profits (Ramadhan, 2022).

According to the Organization for Economic Co-Operation and Development (OECD), competitive and fair markets bring consumers higher-quality goods and services, lower prices, and innovative products, while supporting economic growth and innovation (OECD, n.d.). Legally, fair competition means equitable competition among competitors. From an economic perspective, the base of fair competition is the proper functioning of competitive markets, within which the benefits are equally shared among members (consumers and firms) (OECD, 2018).

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The government enacted Law Number 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition as amended by Law Number 6 of 2023 concerning Stipulation of Government Regulation In Lieu of Law Number 2 of 2022 concerning Job Creation Into Law (*Indonesian Anti-Competition Law*) as a manifestation of the 1945 Constitution Article 33 paragraph (4), stating that the national economy is organized based on *economic democracy* with the principles of togetherness, fair efficiency, sustainability, environmental awareness, independence, and balance between progress and national economic interests (Suradiyanto & Pratiwie, 2020).

*Economic democracy* is a principle that must be upheld by *business actors* in conducting business in Indonesia, considering the harmony between the interests of *business actors* and the public, as stated in the *Indonesian Anti-Competition Law*. To boost economic growth and create fair competition and a healthy, conducive business environment, the Indonesian government provides equal opportunity for its citizens to participate in production and marketing processes of goods and/or services.

Competition between companies for customers and market share is a key aspect of business competition. From a *business actor's* perspective, market control or becoming a market leader provides significant benefits for the business and correlates with higher profit levels. Market control practices can involve influencing production, marketing, purchasing, distribution, and access to goods and/or services in the relevant market.

Many retailers offer consumers several store brands in multiple categories. Store brands also fuel fierce competition between store brands and national brands (Hsiao & Xiong, 2022). Retailers who do not sell only their own brands purchase products from suppliers. Competition between firms can be *vertical*—between buyers and sellers in the marketing channel (e.g., manufacturer and retailer)—or *horizontal*—between similar types of actors at the same level of the economic process (e.g., two rival supermarkets) (Robson, 2020).

This kind of intratype or *intragroup competition* is not a new phenomenon. In Indonesia, many retailer brands within the same industry and category are considered *intragroup competitors*, such as Guardian, Watsons, and Boots in the health and beauty business; Century Healthcare and Kimia Farma in health; Central, Sogo, and Matahari with their fashion retail; and Ranch Market, Kem Chicks, and Foodhall as supermarkets selling fresh and household products.

In the retail business, selling products to end customers always involves suppliers providing products to the retailer. One method of implementing these practices is through exclusive arrangements in supplying goods and/or services between *business actors*. The potential for strategies such as lowering costs, offering innovative products, reducing transaction costs, and achieving economies of scale makes these arrangements common. Many such arrangements made between retailers and suppliers impose restrictions for the

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supplier to supply products exclusively to one buyer; likewise, the retailer may be the exclusive purchaser of certain products from a supplier.

The practice of exclusive arrangements in retail business is commonly reflected in a "Trading Terms Agreement," a formal agreement signed between the supplier and buyer incorporating the general conditions of purchase for selected products. One example of such exclusive arrangements in a Trading Terms Agreement is an "Exclusive Supply Agreement," which might include a clause as follows:

*The Supplier agrees that during the period agreed on Section A of the Schedule of this Agreement ("Exclusivity Period"), it shall supply its product(s) listed in Section B of the Schedule hereto ("Products") exclusively to [the retailer] and shall not supply the same to other wholesaler, retailer, company, association, or individual in Indonesia ("Territory").*

From such an Exclusive Supply Agreement, the reasons and interests behind the retailer's restriction become clear: first, the "wholesaler, retailer, company, association, or individual" referenced in the clause is likely a "competitor" to the retailer; second, such exclusivity will restrain competitors' opportunities to enter the market and offer the same products. The consequence of such restriction is that only the contracting retailer becomes the exclusive seller of the Products in Indonesia, leaving interested end customers with no option but to purchase from that specific retailer.

Actions that business actors can take to control the market negatively include rejecting and/or preventing certain business actors from carrying out the same activities in the relevant market, preventing consumers of competing *business actors* from carrying out business relations with their competitors, limiting the circulation and/or sale of goods and/or services, or conducting discriminatory practices against certain business actors. These actions ultimately harm other *business actors* and end consumers (Rasyida, 2021).

Although the *Business Competition Supervisory Commission (Komisi Pengawas Persaingan Usaha/KPPU)* has the authority to conduct research and investigations, the *KPPU* does not have the authority to conduct searches of business actors suspected of violating the *Indonesian Anti-Competition Law*. Additionally, in conducting investigations, *KPPU* often faces constraints due to company confidentiality and, as a result, cannot always obtain the necessary company data (Lubis & Sirait, 2009). Nevertheless, such arrangements remain prevalent in the market.

The *Indonesian Anti-Competition Law* is divided into two arrangements: prohibited agreements and prohibited activities, including abuse of dominant position. Prohibited agreements include regulations regarding exclusive dealing, a strategy commonly carried out in the distribution of goods and/or services. Prohibited activities include: monopoly, monopsony, market control, predatory pricing, price fixing, collusion, acquisition of company secrets, inhibiting the production and marketing of competitors (Tarmizi, 2022).

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Several studies relate to exclusivity agreements, focusing on business disputes arising from distribution agreements, and on European and United States legislation leading to monopolistic practices. However, based on the research conducted, discussions related specifically to exclusivity arrangements as supply restrictions and territorial exclusivity in the Indonesian retail business context remain limited.

Related to retail, the study by Lila Yuwono and Gunardi Lie in 2024 entitled "Violation of Exclusive Distribution Agreement: Case Study of PT Unilever Indonesia Tbk vs PT Indomarco Prismaatama" examines the legal aspects of exclusive distribution agreements in Indonesian business disputes, focusing on Supreme Court (MA) decision number 1559 K/Pdt/2015. This decision, which upheld Unilever's claim of breach of contract by Indomaret, highlights how distribution practices that contravene agreements can affect market dynamics—especially where violations by large distributors can create unfair conditions for other *business actors* acting in accordance with regulations (Yuwono & Lie, 2024).

Meanwhile, Noona Hanni's 2019 article, "Exclusive Distribution and Non-Compete Clause in Trade: Transnational Agreements in European Union and United States," takes a comparative approach to competition legislation in the European Union and United States, studying exclusive distribution and non-compete clauses commonly used in those countries (Hanni, 2019).

Eris Joni Alviansyah's 2020 research entitled "Exclusive Agreement and Market Control in the Perspective of Business Competition Law (Case Study of Court Ruling 22/KPPU-I/2026)" discusses the monopolistic practices conducted by PT Tirta Investama as a result of exclusive dealing arrangements implemented to reduce competition by applying a "refuse to deal" strategy related to selling bottled mineral water in Jabodetabek (Alviansyah, 2020).

The novelty and focus of this article is the exclusivity clause concluded between retailer and supplier that imposes restrictions on the supplier in supplying certain products to third parties and contains territorial restrictions as arranged in the Exclusive Supply Agreement. The aim is to analyze whether this practice can be classified as a prohibited agreement and/or a prohibited activity under *Indonesian Anti-Competition Law*, and to examine its impact on business competition.

The practice of exclusive supply arrangements between retailers and suppliers has become prevalent in Indonesia's retail sector, often embedded within Trading Terms Agreements to restrict suppliers from distributing products to competitors. While such arrangements may offer short-term benefits, such as reduced costs and market control for retailers, they raise important concerns under *Indonesian Anti-Competition Law* (Law No. 5 of 1999), particularly regarding prohibited agreements and abuse of dominant position. This research seeks to analyze whether these exclusivity clauses constitute violations of competition law and to assess their broader impact on market dynamics. By examining the legal framework and real-world

applications, the study aims to clarify the boundaries between permissible business strategies and anti-competitive practices, providing a foundation for more robust regulatory enforcement. The findings will benefit policymakers, legal practitioners, and *business actors* by offering insights into how exclusivity agreements distort competition and consumer choice, ultimately contributing to a fairer and more transparent marketplace.

The urgency of this research stems from the rising prevalence of exclusive supply arrangements in Indonesia's retail industry and the challenges faced by the *Business Competition Supervisory Commission (KPPU)* in investigating and enforcing competition laws. Despite their potential to stifle competition and innovation, the legal status of such practices remains ambiguous, opening the door for exploitation by dominant market players. This study addresses this gap by systematically evaluating the compatibility of exclusivity agreements with Indonesian competition law, focusing on their classification as prohibited agreements or abusive practices. The research also highlights the economic implications of such arrangements, including reduced market entry for competitors and limited consumer access to diverse products. By integrating legal analysis with practical market observations, this study not only contributes to academic discourse on competition law but also equips stakeholders with actionable recommendations for fostering a healthier business environment. The outcomes are expected to inform policy reforms and enhance *KPPU's* enforcement strategies, ensuring alignment with the principles of *economic democracy* and fair competition.

## RESEARCH METHOD

This research is *doctrinal research*, which aims to produce explanations and systematic problem-solving methods using legal norms that regulate a particular law, can analyze the relationships that regulate a specific law, and can examine the relationships that arise between laws (Amiruddin & Asikin, 2013). This approach is carried out by analyzing the provisions of the *Indonesian Anti-Competition Law* and is conducted by collecting and reviewing primary, secondary, and tertiary legal materials related to the legal issues that are the object of research. These materials are analyzed normatively and conceptually, and the findings are described descriptively.

## RESULTS AND DISCUSSION

### Prohibited Agreements and Prohibited Activities from The Perspective of Indonesian Anti-Competition Law

#### *Prohibited Agreements*

Article 4 until Article 16 of Indonesian Anti-Competition Law regulates several prohibited agreements namely oligopoly, price fixing agreement, price discrimination, predatory pricing, resale price maintenance, market division, group boycott or horizontal refuse to deal, cartel, trust, oligopsony, vertical integration, exclusive dealing, and agreements with foreign parties. Prohibited

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agreements are seen from the elements of the terms used which is "agreements" and this can be ascertained that there must be at least 2 (two) parties, while in prohibited activities, when carrying such activities can be carried out by only one party or business actors.

Since the Exclusive Supply Agreement contains the restrictions and exclusivities in terms of supply arrangement and territorial, therefore would be relevant to start the discussion directly from the Exclusive Dealing and before going into a discussion regarding the concept of exclusivity arrangements imposed under the Exclusive Supply Agreement, it is necessary to first understand the concept of Exclusivity Dealing as recognized under Article 15 of Indonesian Anti-Competition Law as follows:

1. Exclusive Distribution Agreement as stipulated under Article 15 paragraph (1) is an agreement where the business actor makes an agreement with another business actor that contains the terms and conditions that the party receiving the product will only supply or not resupply the product to certain parties or in certain places or in other words, the distributor is bound by the agreement in the agreement to only be allowed to supply the product to certain parties and in certain places.
2. Tying Agreement as stipulated under paragraph (2) specifically business actors at the upstream level which is acting as suppliers are not allowed to impose obligations on other business actors which is acting as recipients of supplies and/or distributors to purchase other products and/or services that differ in character from their main products.
3. Vertical Agreement on Discount as stipulated under paragraph (3) prohibit dealing on pricing policies or discount that are linked to (a) tying practices; and (b) exclusive agreements.

### ***Prohibited Activities***

Indonesian Anti-Competition Law also regulates regarding prohibited activities as stipulated from Article 17 until Article 24 as follows:

1. Monopoly which defines by Article 1 number 1 of Indonesian Anti-Competition Law as control of the production and/or marketing of goods and/or the use of certain services by one business actor or by one group of business actors. Basically, monopoly is not prohibited based on the provisions of Indonesian Anti-Competition Law, however monopolistic practices are included in prohibited activities.
2. Monopsony as stipulated under Article 18 of Indonesian Anti-Competition Law stated that: "(1) Business actors shall be prohibited from controlling the acquisition of supplies from acting as sole buyer of goods and/or services in the relevant market which may potentially cause monopolistic practices and/or unfair business competition."

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3. Market Control as stipulated under Article 19 states as follows: "Business actors shall be prohibited from engaging in one or several activities, either individually or jointly with other business actors, which may cause monopolistic practices and/or unfair business competition."
4. Collusive Tendering as stipulated under Article 22 of Indonesian Anti-Monopoly and Anti-Competition Law states that "Business actors shall be prohibited from conspiring with other parties with the aim of determining the awardees of tenders which may cause unfair business competition."
5. Abuse of Dominant Position Indonesian Anti-Competition Law prohibit the "Abuse of Dominant Position" owned by business actors in Indonesia as stipulated under Article 25 which states: "(1) Business actors shall be prohibited from using dominant position either directly or indirectly to: a. determine the conditions of trading with the aim of preventing and/or impeding consumers from obtaining competitive goods and/or services, both in terms of price as well as quality; or b. restrain the market and technology development; or c. hamper other potential business actors from entering the relevant market."

### **Analysis and Impact of Exclusive Supply Agreement Practices to The Business Competition**

The stipulations of Article 1 Number (5) of Indonesian Anti-Competition Law follow the Exterritorial Doctrine, and implicitly and based on several decisions, the KPPU follows the concept of Single Economic Entity Doctrine. "Business Actors" is a vital element to determine whether a person/enterprise may be considered to have violated Indonesian Anti-Competition Law (Widhiyanti, 2020). Based on each main factors to meet the criteria as exclusive agreement as described, whether:

- a. as an Exclusive Distribution Agreement must (1) involving principle or manufacturer as a business actors at the upstream level; (2) involving suppliers, distributors, and/or those at the downstream level; (3) the parties enter into the agreements must be in a vertical production and distribution chain; and (4) the agreements imposing the restriction by the said principle or manufacturer on the freedom to provide supplies based on the criteria of certain parties and territory. Based on the foregoing criteria, can be concluded that the Exclusive Supply Agreement cannot be classified as Exclusive Distribution Agreement as the Exclusive Supply Agreement is the agreement entered by and between a retailer and its suppliers in a vertical distribution chain imposing the restriction by such retailer on the freedom to not supply the same products to other third parties;
- b. as a Tying Agreement must (1) involving suppliers and the recipient and/or distributor of their supply; (2) the agreements imposing the

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obligations to such recipient to purchase the main product along with another products; and (3) those two products are completely different products. Based on the foregoing criteria, for the same reason as described in the point a. above, the Exclusive Supply Agreement cannot be classified as Tying Agreement;

- c. as a Vertical Agreement on Discount since this type of agreement should contains provision imposing pricing policies that are linked to tying practices and exclusive agreements, none of the arrangement under the Exclusive Supply Agreement met the criteria, therefore, can be concluded that the Exclusive Supply Agreement cannot be classified as a Vertical Agreement on Discount as well.

The system of legal regulation of agreements is an open system. This means that everyone is free to enter into agreements, both those that have been regulated and those that have not been regulated by law. It can be concluded from the provision contained in Article 1338 paragraph (1) of the Civil Code, which reads "All agreements made legally are valid as law for those who make them".

The foregoing definition of an agreement in line with one stipulated under Article 1 number 7 of Indonesian Anti-Competition Law where an "agreement" defines as an agreement between one or more business actors to bind themselves to one or more other business actors under any name, whether written or unwritten. Therefore, it is understood that Indonesian Anti-Competition Law recognize both business agreement made in writing and unwritten.

The exclusivity arrangement made between the retailer and its supplier as imposed under the Exclusive Supply Agreement can be classified as an abuse of dominant position which will be able to limit or narrow the room for movement for new player to enter the industry and/or competitors of the retailer to sell or market the same product which will have a possibility to drive out competing companies from the business, i.e. bankruptcy.

**Table 1. Comparison of Approaches in Indonesian Anti-Competition Law**

<b>Approach</b>	<b>Description</b>	<b>Application</b>
Rule of Reason	Case-by-case analysis considering market impact	Monopoly, Monopsony, Market Control
Per Se Illegal	Automatic prohibition without market analysis	Price Fixing, Market Division

In terms of Abuse of Dominant Position, as stated on Regulation of Business Competition Supervisory Commission Number 6 of 2010 concerning Guidelines of Implementation of Article 25 Concerning Abuse of Dominant Position Based on Law Number 5 of 1999 Concerning Prohibition of Monopolistic Practices and Unfair Business Competition the company can carry out strategies that are independent of the behavior of competing business

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actors without being influenced by competing business actors or consumers because they have high market power.

"Market Power" is the ability of a companies to influence the price of goods and services it sells. Thus, Market Power reflects the dominance of a company in the market. With its market power the dominant company can control prices. The literal textbook definition of market power is a firm having the ability to influence the price at which it sells its product(s) (Syverson, 2019).

To determine whether such retailer (a party in the Exclusive Supply Agreement) conduct an abusive of their dominant position only in the event such retailer has been proven to do so upon going through 3 (three) stages of processes which is same as used by KPPU in order to determine whether a business actor conducting an abusive of dominant position as follow:

- 1. First Stage: Defines the Relevant Market** based on the followings:
  - a. Product Market** where KPPU will combine the definitions of the consumer demand (demand-side substitution) approach by analyzing the relationship between the Product that being an object of investigation with potential substantial product and producer substitution (supply-side substitution) approach by categorize both the goods concerned and their substitutes into one Relevant Market.
  - b. Geographic market** where KPPU will investigate if the price of the investigated goods increases significantly above the competitive price, whether consumers can easily switch to buying the same (or similar) product from producers in other areas.
- 2. Second Stage: Proof of the existence of a Dominant Position** in the Relevant Market. Applying this method to proof the existence dominant position owned by such retailer by analyze whether the Market Share of the Product in the Relevant Market based on the result of investigation reaches more than 50%.
- 3. Third Stage: Proof of whether the business actor** who has a Dominant Position has abused the Dominant Position. Exclusive dealing can be said to be one of the behaviors (through agreements) that limits the market, both the sales market and the purchase market.

From the exclusivity imposed, the Exclusive Supply Agreement can be linked to monopsony practices as regulated under Article 18 of Indonesian Anti-Competition Law. The law prohibits the act of controlling the receipt of supplies or becoming the sole buyer of certain goods and/or services in the market because the sole buyer can then practice monopoly so that there is no healthy competition in the market (Masihor, 2022).

**Table 2. Key Elements of Market Power Assessment**

<b>Element</b>	<b>Description</b>	<b>Impact on Competition</b>
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Market Share	Percentage of total market controlled	High share indicates potential dominance
Financial Capacity	Ability to sustain competitive practices	Enables predatory behavior
Supply Control	Ability to restrict product availability	Limits consumer choice
Barriers to Entry	Obstacles for new competitors	Maintains market position

The implementation of the exclusive arrangement with restriction to supply and territorial exclusivity under the Exclusive Supply Agreement will be able to limit or narrow the room for movement for new players and the competitor of the retailer who will enter the industry and can even drive out such competitors.

Indonesian Anti-Competition Law regulates how the business actors must interact in a healthy and fair competition, however the behavior of business actors interacting in the market is based on economic motives, therefore it is also important to understand the economic perspective of this transaction in order to understand the rationality of the emergence of retailer and supplier behavior agreeing to the Exclusive Supply Agreement.

The potential for retailers to achieve higher revenue and profits through exclusivity is positively associated with the extent of competition between retailers and negatively associated with the retailer's level of product differentiation (Kim et al., 2023). Retailers typically expect to profit through exclusivity agreements, while manufacturers lost sales opportunities due to distribution restrictions (Kim et al., 2023).

In a perfect competition market, there is no market power or one economic actor that influences the price that applies in the market. So that both producers and consumers act as a price taker, prices are influenced by demand and supply between sellers and buyers. In imperfect competition markets, namely monopoly, oligopoly markets, monopolistic, monopsony, and oligopsony, the characteristics are that the number of sellers is small and the number of buyers is large, and there is an element of monopoly, so that between demand and supply does not play a big role in price application (Firdaus, 2023).

The rule of reason approach is a case resolution approach used by competition authorities to evaluate a business action and assess whether the action violates fair competition or not. The formulation of the law commonly used in this approach usually contains the statement "*which can result in*", and or "*allegedly*". These words imply the need for more in-depth research into the actions of certain business actors (Jemarut, 2020).

The per se illegal approach can be categorized as a positivistic approach. A business action is assessed based on laws and regulations; to state whether it violates the Indonesian Anti-Competition Law or not. The consequences

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caused by the business actor's business actions do not have to be proven as a basis for assessment (Jemarut, 2020).

### CONCLUSION

The *Indonesian Anti-Competition Law* recognizes forms of *Exclusive Dealing* as *Prohibited Agreements*, with each criterion being a key factor in interpreting whether an agreement made between *business actors* can be classified as *Exclusive Dealing*. The implementation of the Principle of Freedom of Contract granted by Indonesian contract law is limited, among other things, if it concerns causes that are prohibited by law or contrary to morality or public order. Although the exclusive arrangement agreed upon by the retailer and its supplier under the *Exclusive Supply Agreement*, which includes restrictions on supply to third parties and territorial exclusivity, cannot be classified strictly as *Exclusive Dealing*, the implementation of the *Exclusive Supply Agreement* cannot necessarily be interpreted as an activity that is not contrary to the *Indonesian Anti-Competition Law*. This practice has the potential to constitute *Abuse of Dominant Position* and *Monopsony*. *Exclusivity Agreements* can result in preventing or inhibiting other *business actors* from making the same agreements, limiting or narrowing the room for new players to enter the industry and/or competitors of the retailer to sell or market the same product. This may drive competing companies out of the business due to the ability of certain *business actors* to reduce supply in the market and will ultimately harm consumers, as consumer choice to enjoy cheaper prices will be hampered, prices of goods may increase, and healthy business competition may be hindered.

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