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The Form and Pattern of Business Actors Requirements in Exclusive Dealing: A Rule of Reason Approach

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Abstract

Tying is usually defined as the dominant company selling one product since the buyer must also purchase a different product or agree not to purchase the bonded product from other suppliers. This paper analyzes requirements imposed by the reported business actor on other parties deemed to have violated the tying and bundling under competition law in Indonesia, the U.S., and the European Union. Also, it discusses the application of the Rule of Reason by the competition commission in these three region. This study uses a comparative law approach. The results of the analysis show that a tying agreement is an agreement that requires the recipient of the supply to buy other products that are not necessarily needed. Usually, these agreements are entered into by two affiliated companies or at least cooperating partners, one of which occupies a dominant position to prevent competitors from entering the relevant market. Not all tying agreements have a negative impact. Therefore, an impact analysis is needed through a rule of reason approach, especially in digital-based industries.

I. Introduction

The differences between competition policies in Indonesia, the United States ("US"), and the European Union ("EU") have attracted much attention. One area where these differences are evident is the treatment of vertical barriers. In Indonesia, closed agreements are one of the agreements prohibited by Law Number 5 of 1999 ([Galuh Pusapaningrum, 2013](#)), where there are ten types of agreements prohibited by the Antimonopoly Law, one of which is a closed agreement (exclusive dealing) regulated in Article 15 of Law Number 5 of 1999. In the U.S., an antitrust plaintiff must demonstrate that vertical agreements tend to harm competition—that is, reduce economic welfare. EU competition law, in contrast, places a lighter burden on the European Commission ("EC") ([James C. Cooper, Luke Froeb, Daniel P. O'Brien, 2005](#)) recognizing the benefits of harmonization of competition policies worldwide. The Department of Justice's chief

antitrust enforcer, H. Hewitt Pate, 2005 argued “pursuing international convergence in law enforcement” and “establishing a unilateral approach to dealing with that does not stifle innovation” as two of three goals in Major US anti-monopoly enforcement ([James F. Ponsoldt Christohper D. David, 2007](#)).

Almost no competition law doctrine has been modified more significantly by digitalization than tying and bundling. Although originally developed for the joint sale of two products, the concept has recently been applied to software integration or priority display in search engine rankings ([Stefan Holzweber, 2018](#)). This is an agreement established between business actors who have different levels in the process of production or distribution of goods or services ([Philip Clarke, 2000](#)). In Indonesia, Article 15 of Law Number 5 of 1999 divides the agreements covered in paragraphs (1), (2), and (3). The three paragraphs have different types of agreements.

The first closed agreement is the Exclusive Distribution Agreement, where in paragraph (1), the business actor and other business actors enter into an agreement where the recipient of the product supply will not resell the product supply to certain buyers. This is closely related to discrimination against certain parties. Paragraph (2) regulates tying agreements, in which business actors enter into agreements with other business actors of different levels, then agree to sell a product, but it must be with other products. The general public positively knows tying agreements as bundling or frugal packages by combining two or more products into one (1) product for sale. However, this is different as bundling does not necessarily mean that the product is a tying agreement because bundling is an action of business actors to bundle two (2) or more products into one (1) sales package in the market. Paragraph (3) regulates Vertical Agreement Discount, i.e., if a business actor wants to purchase a product at a discounted price, the business actor may not purchase the same or similar product from its competing business actor.

In Belgium, Canada, Chile, Croatia, Czech Republic, Denmark, European Commission, France, Germany, Israel, Jamaica, Jersey, Lithuania, Mexico, Netherlands, New Zealand, Romania, Russia, Singapore, Switzerland, Taiwan, United Kingdom, and the United States, all responding agencies stated that their competition law provisions addressed tying practices and combined discounts either under general competition law or in some cases statute unfair trade or consumer protection (International Competition Network, 2009).

Even though tying agreements are prohibited by Law Number 5 of 1999, it is difficult to judge whether a business has violated a closed agreement or not; the fact is that tying agreements and bundling are very closely related in the world of trade. An example is McDonald's, which sells PaNas 2 packages, where McDonald's bundle's rice, chicken, and drinks that customers can choose from (between Fruit Tea, Coca-Cola, Fanta, and Sprite without additional price) for IDR 18.182,00 (eighteen thousand one hundred and eight twenty-two rupiahs) (price based on the McDonald's application as of August 12,

2022), if purchased as separate products, the total price purchased by consumers can be more expensive, because the chicken will be priced at IDR 19.500,00 (nineteen thousand and five hundred rupiahs) and rice IDR 9.500,00 (nine thousand five hundred rupiahs), and IDR 9.000,00 (nine thousand rupiahs) for drinks (prices for Fruit Tea, Coca-Cola, Fanta, Sprite products), so the total price that consumers must purchase is IDR 38.000,00 (thirty-eight thousand rupiahs), this price is slightly more expensive than the bundling package with a price difference of IDR 19.818,00 (nineteen thousand eight hundred and eighteen rupiahs). McDonald's took steps to attract customers since the PaNas 1 offer will be very profitable for consumers if they want to buy chicken rice with drinks compared to these foods at separate prices.

The next example is the sale of kitchen utensils sold by Tupperware, which offers a bundling package for the purchase of a package called "Smart Kitchen with Bag," where the bundling package is valued at IDR 545.000,00 (five hundred forty-five thousand rupiah). Consumers will get seven kitchen utensils. The seven products can be obtained for IDR 815.000,00 (eight hundred and fifteen thousand rupiah). The price between bundling and non-bundling has a difference of IDR 270.000,00 (two hundred seventy thousand rupiahs). The slight price difference is meaningful for homemakers, so it determines whether to buy a product. Buying bundled products will be more attractive to consumers than separate products. This is clear because consumers will benefit from saving as much as IDR 270.000,00 (two hundred seventy thousand) for the bundled product "Smart Kitchen with Bag." Consumers will feel even more advantaged because Tupperware includes a bag for Tupperware jars included in the bundling purchase, and consumers will get free food ingredients that can be selected between wheat flour, sago, bread flour, and other food ingredient options.

These two examples of product bundling or tying are just a few of the many other bundling products, where most of the product bundling is considered beneficial to consumers because consumers will get a lower price than buying the same total product by purchasing it separately. However, this does not mean that there is no product bundling that causes consumers to be harmed or even makes consumers feel disadvantaged because they do not buy the product. From the search results, the authors found similar dishes being sold at IDR 2.000,00 (two thousand rupiahs) to IDR 5.000,00 (five thousand rupiahs) (Tokopedia, 2023), this means that Soklin Smart detergent products have the potential to have lower prices, starting from IDR 17.000,00 (seventeen thousand rupiahs) to IDR 14.000,00 (fourteen thousand rupiahs). The price difference is quite decent for homemakers. Furthermore, plates obtained by consumers will be very difficult to resell, considering anyone can get a similar plate for free by buying detergent. Therefore, this bundling may look profitable at first, but over time, bundling detergent with dishes will cause losses for consumers, where consumers should be able to get detergent at a lower price, but because there is bundling with dishes, detergent prices are higher expensive.

These three examples are signs that product tying and bundling are closely related to our daily lives, but there are tying products that benefit consumers, and there are also

those that can harm consumers. Based on the description presented in the background section above, this paper analyzes requirements imposed by the reported business actor on other parties deemed to have violated the tying and bundling under competition law in Indonesia, the U.S., and the European Union. Also, it discusses the application of the Rule of Reason by the competition commission in Indonesia, the U.S., and the E.U. in a closed agreement. This study uses a comparative law approach describing the rule of reason approach in closed agreements in comparative law between Indonesia, the U.S., and the E.U. The data was obtained from library materials commonly referred to as secondary data, including official documents, such as the Competition Law in Indonesia, the U.S., and E.U., books, and research results in the form of reports, journal articles, bulletins, etc.

II. Literature Review

A. Concept of Monopoly and Unfair Business Competition

Article 1 point 2 of Law Number 5 of 1999 states that “The practice of monopoly is the concentration of economic power by one or more business actors which results in the control of the production and or marketing of certain goods and or services, which creates unfair business competition and can harm the public interest.”

In the United States, unfair competition is recognized as a tort giving rise to lawsuits. United States law has specific prohibitions contained in state statutes reflecting the Uniform Deceptive Trade Practices Act (UDTPA). The law prohibits three types of specific statements: (1) false statements that goods or services have certain characteristics, ingredients, uses, benefits, or quantities; (2) false statements that the goods or services are new or genuine; and (3) false representations that goods or services are of a certain quality, standard or level. United States Federal law includes the ‘unfair competition’ provisions in the Federal Trade Commission Act (FTC Act) and the regulations made under those laws. Section 5 (a) of the FTC Act states that “unfair methods of competition” and “unfair or deceptive acts or practices in or affecting trade are also unlawful.”

The Federal Trade Commission Act prohibits “unfair methods of competition” and “unfair or deceptive acts or practices.” The Supreme Court held that all violations of the Sherman Act also violated the FTC Act. So, if the FTC technically does not enforce the Sherman Act, the FTC can bring charges under the FTC Act against the same type of activity that violates the Sherman Act.

The Unfair Commercial Practices Directive 2005/29/EC regulates unfair trade practices in the EU. These prohibited acts include general prohibitions on unfair business trading practices towards consumers in articles 3, articles 5, and more specific prohibitions. Notably, these regulations do not seek to harmonize commercial practices within the European Union. Even if it does not harm consumers, it can harm the business’s competitors and customers.

The element of “detriment to the public interest” must determine whether the monopolistic practices carried out significantly impact society. The element of public interest could be clearer as it has different definitions in the economic and legal literature, plus each country has a different approach and understanding depending on its application (Yongama, 2015). According to Leslie, the public interest is defined as providing access to affordable food and medicines ([Christoper R. Leslie, 2011](#)). From Leslie’s opinion, the author is of the opinion that what is considered to be in the public interest is not food and medicine, but the convenience of services to access goods or services.

In a juridical context, the definition of monopoly is more to control over the production and or marketing of goods and or use of certain services by one business actor or one group of business actors or one group of business actors (Article 1 point 1). 1 Law Number 5 of 1999), where this is not something that is prohibited by law, because in reality there are monopolies that are actually mandated by law, such as intellectual property or state-owned enterprises in the production branch that control the lives of many people. This provision is the same as in the United States in the Sherman Act which states:

“It is important to note that section 2 of the Sherman Act does not forbid the status of being a monopoly, but the act or attempted act of monopolization. Therefore, it is not illegal in and of itself for a company to achieve great dominance in its industry or for effective competition to be lacking in the industry and marketplace. Indeed, in some instances, monopolies or exclusive privileges may be granted by federal, state, or local governments because of the industry’s peculiar nature or an area’s needs.”([Mark R. Joelson, 2018](#)).

Article 1 point 6 states, “Unfair business competition is competition between business actors in producing and/or marketing activities of goods and/or services carried out dishonestly or unlawfully or impede business competition.” According to Andrew I. Sriro, it has been translated into English, namely ([Andrew I. Sriro, 2011](#)):

“Unfair business competition means competition among business actor in conduct of activities of production and/or marketing of goods and/or services which is conducted in manner is dishonest or unlawful or obstructs business competition”.

B. The Tying Agreement Concept

The definition of agreement in Article 1 point 7 of Law Number 5 of 1999 states that “Agreement is one or more business actors to bind themselves to one or more other business actors under whatever name, whether written or not written.” The concept of agreement in Law Number 5 of 1999 differs from the agreement in Article 1320 of the Civil Code. Law Number 5 of 1999 requires only business actors to enter into agreements, and consumers are not included. But

in essence, the difference referred to still refers to the legal requirements of an agreement in Article 1320 of the Civil Code.

The world of competition involves 2 (two) types of agreements, namely vertical agreements and horizontal agreements ([UNCTAD, 2004](#)). Vertical agreements when agreements occur on products that have markets that are different from the production process and distribution. Meanwhile, horizontal agreements occur for products that have the same market share. Law Number 5 of 1999 does not explicitly classify closed agreements as horizontal agreements or vertical agreements, but UNCTAD classifies them as vertical agreements, which are divided into exclusive dealing agreements and tie-in agreements.

Susanti Adi stated that a tying agreement is when the supply recipient must be willing to accept other products from the supplier, so that the supply recipient is forced to buy 2 (two) products or more from the supplier's business. In contrast to vertical discount agreements, tying agreements do not provide discounts to parties who receive supplies from suppliers, but equally eliminate the rights of the supply recipients to freely choose the product needed ([Susanti Adi Nugroho, 2016](#)).

Article 15, paragraph (1) of Law Number 5 of 1999 is an exclusive distribution agreement, which discusses the prohibition on the party receiving the supply only to supply or not to re-supply certain parties. This is called exclusive distribution because the recipient of the supply is forced not to distribute their products to certain parties or only to certain parties so that business actors who do not get supplies will loss ([Anna Maria Tri Anggraini, 2018: 118](#)).

Article 15 paragraph (3) of Law Number 5 of 1999 is referred to as a vertical agreement on discount where if the recipient of the supply wants to get a discount, then he must buy other products sold by the supplier (not just one product), or the recipient of the supply promises not to accept supplies from other suppliers, where the other supplier is a competitor of the previous supplier ([Susanti Adi Nugroho, 2016](#)).

Whereas Article 15 paragraph (2) of Law Number 5 of 1999 is commonly referred to as a tying agreement, namely the party receiving the delivery must be willing to accept other goods from the supplier so that the party receiving the delivery is forced to buy 2 (two) products or more from the supplying business actor. One of the elements of an agreement that is considered a tying agreement is that there must be a tying product ([Turner, 1958](#)), namely goods that are tying, and products that are tied, namely goods that are tied or other items that must be purchased ([Lubis, 2017](#)).

In contrast to the vertical discount agreement, the tying agreement does not provide a discount to the party receiving supplies from the supplier but has the same effect, namely eliminating the right of the supply recipient to choose

the product needed freely. KPPU Regulation Number 5 of 2011 on Guidelines for Article 15 of Law Number 5 of 1999 (hereinafter referred to as “Article 15 guidelines”) defines tying agreements as a form of distribution agreement based on which distributors are allowed to purchase certain goods (tying products) on condition that they have to purchase other goods (tying products). Based on this agreement, the seller sells his product to the buyer by stipulating the condition that the buyer will buy another product from the seller ([KPPU, 2011](#)). Agreement by one party to sell one product but only on condition that the buyer also buys a different product (or is bound to), or at least agrees that they will not buy that product from another supplier.” ([UNCTAD, 2004](#)).

In E.U., tying (or bundling) situations are expressed in paragraphs (d) Section 102. It arises when, for example, a dominant firm informs a customer dependent on the dominant firm that the dominant firm will supply it with one product (X: a tying product) only if the customer also agrees to purchase another product (Y: tied product) thereof. Tying can take different forms. Companies use tying for various reasons, most notably to strengthen their position in the tying product market. You may find that this is sometimes called ‘leveraging’ due to the use of dominance in one market to gain a strong position in another ([Dabbah, 2012](#)).

The impact and reasons for the prohibition of entering into an agreement are ([Susanti Adi Nugroho, 2016](#)):

1. Business actor who enters into a tying agreement has eliminated the opportunity for the supply recipient to freely choose the product he wants to buy; and
2. Business actors that enter into a tying agreement inhibit fair business competition by making it difficult for potential competitors to enter/ compete in the relevant market.

What needs to be considered from point 1) above is that the goods being sold will only be obtained if the recipient of the goods buys the tying goods; this will be even more difficult because the recipient of the goods does not have an alternative way to buy the desired product ([Patricia Carneiro da Silva, 2018](#)).

C. Rule of Reason Approach

The rule of reason approach cannot only look at the fulfillment of the elements in the Anti-monopoly Law but also considers the effects on the market, business reasons, market share, substitute products, and business actors’ objectives, implying that the rule of reason is not enough just with legal knowledge, but needs to involve the economy in it, taking into account the actions of business actors besides fulfilling the elements of the article but also their actions hindering fair competition ([OECD, 2020](#)).

The rule of reason also requires investigators to be able to find facts, namely: First, it can answer the actions of business actors that can raise prices or control output; second, it can find whether the business actions of business actors have implications for a good thing in the market or create a monopolistic practice and/or unfair business competition; and third, investigators must be able to determine whether the actions of the perpetrators are indeed worthy of being declared an anti-competitive act or are still reasonably carried out by business actors, even though they have fulfilled the elements of the article ([Susanti Adi Nugroho, 2016](#)).

The disadvantage of the rule of reason approach is that it requires all fact-finders, both investigators and judges, to master not only the science of law but also the science of economics. Secondly, because it involves the science of economics, it results in more complicated proof and longer case settlements. This approach is indeed very good for determining the truth of economic impact, but if the fact finder cannot really master economics, then there are new weaknesses that arise, namely resulting in less precise decisions. The same effect is caused if the evidence reveals a lack of data.

III. Forms of Tying Agreement Requirements

The tying agreement contains a clause that the supplier will sell his product if the recipient of the supplier is willing to buy other products sold by the supplier ([Joseph P. Bauer, 1980](#)). Therefore, the United States Supreme Court stated that tying agreements are not only limited to the form of “agreement”, but can also be in the form of “conditions” (arrangements) set by the business actor (who is suspected of violating the tying agreement).

The agreement or requirement set by the business actor is the availability of the recipient of the supply to buy other products (tied products) that are sold together with the product that the recipient of the supply wants (tying product), and the supplier can refuse to supply the product if the recipient of the supply does not want to buy the tied product (Robert Lane, 2018), so that an element of “coercion” arises because the supplier indirectly forces the recipient of the supply to buy an unwanted tied product as a condition for getting the tied product as the desired product ([Hassan Qaqaya & George Lipimile, 2018: 218](#)). Whether or not the tying product and the tied product have an interdependent relationship ([Dennis W. Carlton & Jeffrey M. Perloff, 2016](#)). The element of “compulsion” exists in the words “...must be willing to buy...” in accordance with the guidelines of Article 15 ([KPPU, 2011](#)). Therefore, the author describes the forms of requirements and the element of “compulsion” set by the reported business actors in the 2014-2019 KPPU decisions, thus allegedly violating Article 15 Paragraph (2) of Law Number 5 of 1999 as follows:

A. Decision Number 05/KPPU-I/2014

This decision began when Bank Indonesia issued a Bank Indonesia Circular Letter (*Surat Edaran Bank Indonesia-SEBI*), which contained an insurance obligation to provide every mortgage product. Bank Indonesia classified this as a reference business model in the context of bank products because customers who enjoy commercial bank credit products are required to have insurance for risk management faced by commercial banks ([Surat Edaran Bank Indonesia Number 12/35/DPNP, 2010](#)). Bank Indonesia requires providing insurance products involving at least three insurance business actors, and one of them can be affiliated with the bank that provides credit so that customers can choose the insurance products that customers want.

In this case, the Reported Party I, in the context of providing mortgages to its customers, cooperates with the Reported Party II and the Reported Party III to conduct financing. Reported Party II and Reported Party III had previously made a consortium in 2003, and Reported Party II was the consortium leader, policy issuer, and insurance participant certificate issuer. Several other insurance companies offered cooperation in providing insurance services to the Reported Party I, but the Reported Party was suspected of violating Article 19 letter of Law Number 5 of 1999, namely obstructing other business actors.

The KPPU Panel considered that the provisions of the Reported Party I to select an insurance financing partner had made it difficult for other insurance business actors to cooperate with the Reported Party. The Reported Party I only refers to the provisions given by the Reported Party II and the Reported Party III in providing provisions to other prospective partners and other business actors who want to become partners of the Reported Party I consider that the provisions referring to the provisions of the Reported Party II and the Reported Party III make it difficult for them. Ultimately, the Reported Party had no partners other than the consortium of Reported Party II and Reported Party III.

In this case, the tied product is the Reported Party's KPR product, where the customer wants to buy a house using the KPR program provided by the Reported Party. In contrast, the tied product is an insurance product from the Reported Party, a life insurance product formed by a consortium of Reported Party II and Reported Party III. This insurance product can be called a tied product because the Reported Party's customers who took part in the KPR program did not depart from the intention of becoming life insurance participants but wanted to buy a house.

However, SEBI requires the Public Housing Loans (*Kredit Perumahan Rakyat - KPR*) customers to have and become insurance participants so that life insurance products can be considered tied products. The installation of life insurance products as a tied product is not prohibited, but the Reported Party I only provides life insurance products of the consortium of Reported Party II and Reported Party

III, not under SEBI, which requires a minimum of 3 (three) life insurance business actors. Therefore, the Reported Party I customers who wanted to participate in the mortgage had no choice of other insurance products and were forced to participate in the life insurance products of the consortium of the Reported Party II and the Reported Party III. ([KPPU, 2014](#)).

B. Decision Number 13/KPPU-I/2019

In this case, the investigator considered that the tied product was the vehicle loan provided by the Reported Party II. The Reported Party II provides motor vehicle loans to its partners to provide transportation services, which the loan will be paid by the partner at 20% of the transportation service fee obtained by the partner. Furthermore, the investigator also considered that the tied product in this case was the obligation of the partners of the Reported Party II to use the Grab application, comply with the code of ethics, the recommendations given by the Reported Party, and the provisions stipulated by the owner of the Grab application intellectual property.

However, the KPPU Panel disagrees with the allegations of the investigator. In this case, the KPPU Panel considers that the tied product is the Grab application itself, because the prospective partners of the Reported Party II really want to become the transportation service provider of the Reported Party using the Grab application. This can be seen from the testimony of witnesses who indeed from the beginning intended to become Grab application transportation service providers who automatically became partners of the Reported Persons ([KPPU Decision, Number 13/KPPU-I/2019: 476](#)).

The author agrees with the KPPU Panel that the Grab application is indeed a tying product because it is a product desired by the partners of the Reported Party II, where the partners want to become transportation providers through the Grab application. Whereas the tied product in this case, according to the Panel of KPPU, is the motorized vehicle owned by the Reported Party II. This is seen from the Reported Party II, which rewards its partners who have joined for 5 (five) years. However, the rewards will only be given if you buy a vehicle unit from the Reported Party II, based on the notification letter of the Reported Party I given to the partners of the Reported Party II, so that the agreement that was originally in the form of motor vehicle leasing became a motor vehicle lease-purchase agreement, where the vehicle will belong to the partner and be changed into the partner's name after joining for 5 (five) years ([KPPU, 2011](#)).

In this case, the author also considers that there is no element of coercion experienced by the partners of the Reported Party II. Because the partners of the Reported Party II really want to own a motorized vehicle unit from the Reported Party II after joining for 5 (five) years.

C. Decision Number 31/KPPU-I/2019

This case involved Astra Honda Motor (AHM) as the reported party, which runs a business that manufactures 2-wheeled vehicles and distributes spare parts, including lubricating oil (oil). To maintain these motorized vehicles, AHM built a service workshop for 2-wheeled vehicles called AHASS. To ensure the broad marketing of goods, AHM established Main Dealer as the first level of the distribution chain to distribute the sales of wheeled vehicles throughout its marketing area. The Main Dealer then appoints dealers as the second-tier distribution chain to market the products to consumers. The appointment and appointment as Main Dealer (by AHM) and dealers (by Main Dealer) are made in the Dealer Appointment and Appointment Agreement Letter (SP3D).

The tying agreement made by AHM is to make an agreement that binds AHASS and Main Dealer to provide free after sales service for 1-3 months of the warranty period, using AHM Oil products made by AHASS. If this opportunity is not used, then the after sales service warranty along with oil changes with AHM oil will be lost (forfeited). With this sales pattern, AHM oil's market share is increasing and becoming more dominant. In this case, the tying product are strategic tools in the service of 2- wheeled vehicles, such as bike lift, mechanic trusters and other workshop equipment to support service services to consumers. Meanwhile, the tied product is the sale of AHM oil with specifications SAE 10W 30, JASO MB, API SG or more. In the examination, it was revealed that if consumers bring their own lubricant oil products, it is also not prohibited, so that KPPU considers that there is no element of coercion to buy AHM Oil, and there is no obligation to perform services at AHASS workshops ([KPPU Decision, Number 31/KPPU-I/2019: 4](#)). In international practice, a brand can be said to be a tying product because it is a tradable thing so that it enters into a product like a franchise business that "buys" the brand from the brand holder as its main product and equipment in the franchise business as a tied product ([Bruce C. O'neill, 1966](#)).

The following is a description of the tying and tied product requirements carried out by business actors in each case:

Table 1. Forms of requirements set by businesses

No	Form of requirements set.	Decision Number 05/ KPPU-I/2014	Decision Number 13/KPPU-I/2019	Decision Number 31/ KPPU-I/2019
1	There is an element of "compulsion"	There is an element of compulsion	No compulsion	No compulsion
2	Alleged tied product that must be purchased	In this case, it is suspected that the tied product that must be	Allegedly tied products that must be accepted are that they must be willing to provide transportation	The alleged tied product in this case is AHM Oil oil.

No	Form of requirements set.	Decision Number 05/ KPPU-I/2014	Decision Number 13/ KPPU-I/2019	Decision Number 31/ KPPU-I/2019
		purchased is a life insurance product.	services in the Grab application, comply with the code of ethics, and recommendations of the Reported Persons.	

Source: KPPU Decision, data processed

IV. Pattern of Tying Agreement in KPPU Decisions 2014-2019

Law Number 5 of 1999 does not explicitly state whether tying agreements are vertical or horizontal agreements, but the guidelines of Article 15 have stated that tying agreements are part of those that inhibit competition vertically ([KPPU, 2011](#)). This is related to the intraband nature of competition, which is the competition of business actors in the same product, then between suppliers and other suppliers, and the obstacle occurs when the producer limits the supply, so it has an Interbrand nature of competition. Interbrand competition occurs between business actors at the producer level, where the obstacle occurs when the producer inhibits competing products from other producers (brands). The author concludes that a tying agreement between a tying product and a tied product is impossible in the same product market. Therefore, tying agreements can create intraband and Interbrand barriers to competition; tying agreements can be carried out by production- or distribution-level businesses.

Besides being related to vertical and horizontal agreements, tying agreements also related to the behavior of abuse of dominant position ([Massimiliano Vatiro, 2019](#)). According to Article 1 paragraph 4 of Law Number 5 of 1999, a dominant position is a situation where there are no competing business actors or no significant competitors for business actors in the relevant market. Dominant position is not prohibited, but the abuse of dominant position is prohibited, as regulated in Article 25 to Article 29 of Law Number 5 of 1999. According to the guidelines of Article 15, a business actor may be found guilty of violating Article 15 Paragraph (2) of Law Number 5 of 1999 if the product of the reported business actor has controlled at least 10% of the relevant market share in accordance with Article 4 of the Antimonopoly Law ([KPPU, 2011](#)). This guideline is contrary to Article 4 Paragraph (2) of Law Number 5 of 1999 which states that at least 75% (seventy-five percent) of the relevant market is controlled by 2 (two) or 3 (three) business actors or groups of business actors. In addition, Article 25 Paragraph (2) of Law Number 5 of 1999 states that a business actor has a dominant position if the product has controlled 50% or more of the market share by one business actor; or has controlled 75% or more of the market share if carried out by 2 (two)

or more business actors. In this case, the author refers to Law Number 5 of 1999 in the principle of *lex superior derogate legi inferiori* (Antimonopoly Law which should override the guidelines of Article 15 in terms of market share size. The use of market power (leverage market power) depends on the dominant position held by the business actor or business actors ([OECD, 2020](#)).

The next behavior is a tying agreement carried out by business actors to prevent competing business actors from entering the market for tied products (barrier to entry), where business actors tie tied products with tying products so that existing or future business actors in the same relevant market as tied products cannot compete with business actors who carry out tying agreements because consumer needs for tied products have been met in the form of tying agreements ([Guy Sagi, 2014](#)). Another behavior that is still related to barrier to entry is the behavior that forces the recipient of the supply to purchase the tied product, but I will not explain it again because it has been discussed in the previous sub-chapter point 1.

The description of several business actors' behaviors above results in a pattern of tying agreements conducted by the Reported business actors in the alleged violation of tying agreements as follows:

A. Decision Number 05/KPPU-I/2014

In this case, the mortgage is a tying product, so the abuse of the dominant position must look at the market share of the mortgage product of the 1st Respondent in Indonesia. Regarding Article 25 of Law Number 5 of 1999, the provision of mortgage products in Indonesia in 2013 was the largest market share held by PT Bank Tabungan Negara (BTN), as much as 24% or approximately IDR 87.050.000.000.000,00. Then followed by PT Bank Central Asia (BCA) of approximately IDR 52,900,000,000,000,000.00 (fifty-two trillion nine hundred billion rupiahs); the next, PT Bank Negara Indonesia (BNI 46), which provides mortgage funds of approximately IDR 31,700,000,000,000.00, then PT Bank Mandiri (Bank Mandiri) of IDR 26,900,000,000,000.00, then PT Bank Pan Indonesia (Bank Panin) of IDR 22,000,000,000,000.00 ([Rr. Anggraini Puspa Dewi, 2016](#)). In 2014, the condition of market power was still relatively the same, with some increase in the value of mortgages disbursed in the community, so the Reported Party I (Bank BRI) did not have a dominant market above 10% in providing mortgages in Indonesia compared to BTN, BCA, BNI, Bank Mandiri, and Bank Panin.

Regarding the relationship between tying products and tied products, there is a vertical product relationship. In this case, mortgage and life insurance products. KPR is a house purchase financing facility the Reported Party I provides customers. While insurance, according to Article 246 of the Commercial Code, is an agreement where the insured (insurance policy holder) will pay a premium every certain

period of time to the insurer (insurance company), and the insurer will provide compensation or compensation if there are things that happen to the insured or the insured's property. In the case of life insurance, if the insured dies, the insurer will provide compensation for the insured's death. These two products are different, but they are related because of the policy that requires guarantees for the certainty of mortgage repayment by the customer (bancassurance).

B. Decision Number 13/KPPU-I/2019

In this case, the tying product is the Grab application (Reported Party I) and the tied product is the motorized vehicle leased by Reported Party II. In fact, there is no compulsion to become a partner (driver) and buyer of the vehicle of the Reported Party II, but if you want to buy a motorized vehicle from the Reported Party II, then the partner of the Reported Party II will get a rewards. The bonus is given with a system of giving diamonds to each partner of the Reported Party II who draws transportation services (trips), as each trip, the Reported Party II partner will get seven (7) diamonds and the diamonds will be accumulated every day and the bonus will also be given every day (depending on whether the minimum diamonds are met or not). The distribution of incentives for the partners of the Reported Party II in the Jakarta, Bogor, Depok, Tangerang and Bekasi areas is as follows:

Table 2. Form of Bonus for Reported Partner II

Diamond Schema		Incentive/day
1	85 diamonds	IDR 100.000,00
2	155 diamonds	IDR 200.000,00
3	205 diamonds	IDR 300.000,00
1 trip = diamonds		-
10 trips = 70 diamonds		-
12 trips = 84 diamonds		-
13 trips = 91 diamonds		IDR 100.000,00

Source: KPPU Decision No. 13/KPPU-I/2019

Based on these facts, there is no indication of a barrier to entry in this tying agreement since the drivers as partners of the Reported I and Reported II are not forced to buy vehicles from the Reported Party II, they still have other options to use their own vehicles or buy from other companies.

C. Decision Number 31/KPPU-I/2019

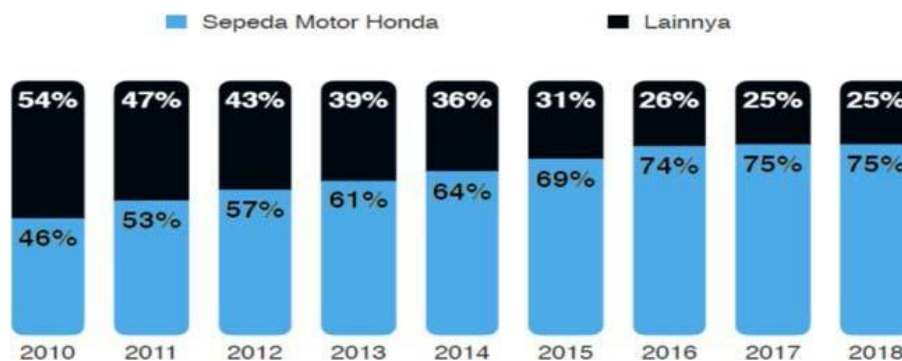


Figure 1. Market Share of 2-Wheeler (Motorcycle) Sales:

Source: [KPPU Decision Number 31/KPPU-I/2019](#).

Then the market share owned by the Reported Party in AHM Oil almost reached 70% (seventy percent) with details from 2015 to 2016 as follows:

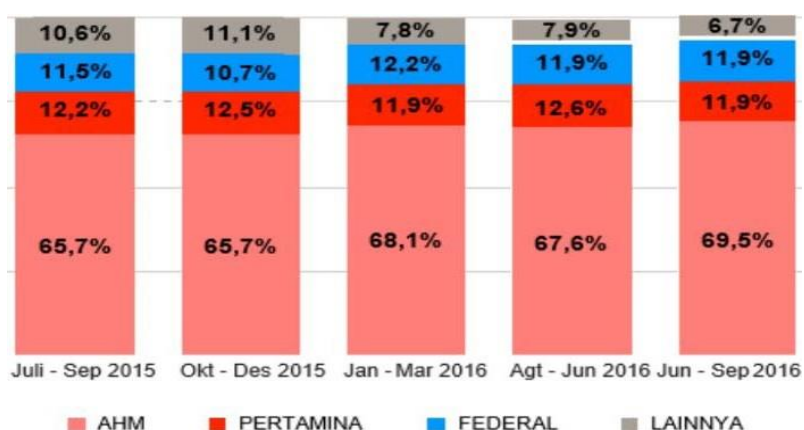


Figure 2. Market Share of Lubricant Oil Sales

Source: [KPPU Decision Number 31/KPPU-I/2019](#).

The tying and tied products have reached a dominant position in this case. There is a linear relationship between the increasing market share of motorcycles and the market share of AHM Oil by AHASS. Business actors on the downstream side who will become AHASS (which is authorized to sell AHM Oil exclusively) see the opportunity to open AHASS workshops will be able to shift competitors' opportunities in the similar workshop market because motorcycle consumers in a very dominant market will choose AHASS rather than other service workshops. In addition, on the upstream side, AHMs relationship with the AHASS workshop is where AHASS will get a discount on each lubricant purchase between 12%-15% on each lubricating oil sale, depending on the amount of lubricant purchased by AHASS ([KPPU Decision, Number 31/KPPU-I/2019: 36](#)).

Regarding the abuse of dominant position, it can be indicated that through the obligation of AHASS to purchase AHM Oil with specifications SAE 10W 30, JASO MB, API SG, or more as an utilization of the concept of leverage theory which can be used by the reported party with a dominant position in the oil market to increase his income again by forcing AHASS to buy AHM Oil. The allegation of abuse of dominant position referred to in Article 25 of Law Number 5 of 1999 is not proven, because AHASS does not only require supplying AHM Oil in its workshops, and allows consumers to use other brands of oil products. This also eliminates the alleged barrier to entry for the supply of other brands of lubricating oil.

For the description of the analysis, the author provides a summary in the form of a table as follows:

Table 3. Tying and tied product behavior patterns

No	Pattern of tying agreement between tying and tied product	Decision Number 05/ KPPU-I/2014	Decision Number 13/ KPPU-I/2019	Decision Number 31/ KPPU-I/2019
1	Investigator's allegation of tying product and tied product	It is alleged that the tying product is mortgage product, and the tied product is life insurance of the consortium of Reported Party II and Reported Party III.	It is suspected that the tying product is a leased motor vehicle and the tied product is willing to provide transportation services in the Grab application, comply with the code of ethics, and recommendations of The Reported Persons.	It is suspected that the tying product is strategic tools in motorcycle service and the tied product is AHM Oil sales.
2	Tying and tied products that should be	In this case, the investigator was correct in determining tying and tied products.	The Grab application should be a tying product and the rental of motorized vehicles, compliance with the code of conduct, and recommendations of the Reported Persons should be a tied product that should be.	AHASS brand and appointment should be a tying product, purchase of strategic tools and AHM Oil should be a tied product.
3	Barrier to entry behavior	Found by means of the Reported Party I not holding a tender in finding a partner.	Absence of barrier to entry behavior	Absence of barrier to entry behavior

The description of the three KPPU decisions above shows the similarity of the behavior patterns of business actors in tying products and tied products, namely as follows:

- 1) The actions are based on agreements (agreements) between business actors in tying products and business actors in tied products;
- 2) The agreements are in different relevant markets which are two complementary products and are vertical agreements;
- 3) There is an affiliation relationship between the two business actors, which in this case is share affiliation, between the parent company and its subsidiary or at least a cooperation partner;
- 4) The market share of the tying product is usually dominant, so it has the ability to encourage an increase in the market share of the tied product;

In E.U., one of the first binding contract cases in the Windsurfing case, the Commission examined the practices of Windsurfing International, a sailboard manufacturer. Sailboards consist of boards and rigs, and Windsurfing International grants several licenses to other manufacturers. The Commission found that in the agreement, there was an obligation for the licensee not to supply rigs manufactured under Windsurfing's patents separately and without Windsurfing-approved boards. Also, in the case of *Eurofix- Bauco v. Hilti*, the European Commission considered whether Hilti, the producer of nail guns and the cartridge strips protected by patents, had abused its dominant market position by conducting tying. This case began with the fact that the manufacturer had not patented the nails for its nail guns, which resulted in compatible nails being produced by the company's competitors. However, Hilti decided to apply business practices and legal remedies to ensure that their customers would buy cartridge magazines and nails produced by Hilti at the same time. Another important case concerning tying was the Tetra Pack case. Tetra Pack produces aseptic packaging machines, aseptic cartons, and non-aseptic cartons for liquid or semi-liquid food products. Tetra Pack, in contracts with customers who purchased their packaging machines, reserved the exclusive right to service the machines, deliver replacement parts, have the machines used only on cartons produced by Tetra Pack, and respect the guarantee on the machines only if they used cartons were produced by Tetra Pack ([Aleksander M, 2013:3](#)).

In the U.S., the most important modern binding case for understanding the treatment of tying under U.S. law is *U.S. v. Microsoft*. In the Microsoft case, the product being bound was Microsoft Windows, and the product being bound was Internet Explorer. Microsoft argued that this should not be a per se case because applications and operating systems are not separate products. The D.C. Circuit disagreed. However, the court found merit in the larger argument that stopping there would stifle innovation to the detriment of consumers by preventing companies from integrating new functionality previously provided by stand-alone products into their products ([Matthew Lane, 2019](#)).

V. Analysis of the Rule of Reason Approach Pattern of Tying Agreement

In the London European-Sabena Case, Belgian airline Sabena refused to grant access to their computer reservation system – Shapir – to London European Airlines. The Commission found that airlines had entered into agreements in most European countries that allowed them access to one another’s reservation systems. Sabena refused to grant access to the computerized reservation system because London European did not want to sign a ground service handling agreement for its aircraft. The Commission finds that Sabena holds a dominant position in the market for the provision of computerized services to operators of such services to travel agents and to other air carriers. In addition, the Commission found that the handling contract was not related to the contract granting access to the computer reservation system. Hence, this behavior constituted an abuse of the dominant position.

The court ultimately ruled that Microsoft should not be “exempt from binding liability” but also that it should “heed Microsoft’s warning that stand-alone product elements of the rules per se may not give a newly integrated product a fair shake.” The court ruled that a less stringent ‘rule of reason’ standard should govern arrangements involving software platforms. This does not absolve Microsoft, and the binding claims are returned to court to be tried under these different standards. The case was resolved soon after this decision, so we wonder whether Microsoft violated binding law under the rules of reason ([Matthew Lane, 2019](#)).

In the case of Indonesia, the Commission concluded that this practice could result in the withdrawal of London Europe as the airline to Brussels, and there was limited competition in that market. Both cases show that engagement can rely on forcing the consumer to use a service close to the primary service. From the point of view of companies offering similar services, it is justified even for economic reasons. Still, at the same time, this decision demonstrates that the problem usually boils down to the fact that the service is being offered at a non-competitive price. As a result, these companies aim to force the contractors and consumers to buy both services markets ([KPPU, 2011](#)), so that a rule of reason approach is needed to analyze the occurrence of monopolistic practices and/or unfair business competition. The analysis of the KPPU decisions is reviewed from four (4) criteria, namely:

- 1) Alleged violation of Law Number 5 of 1999;
- 2) Determination of the relevant market in tying and tied products;
- 3) Dominant position of one of the main products (tying product);
- 4) Impact on business competition.

The following is a description of the use of the rule of reason approach in the three KPPU decisions above.

Table 4: Rule of Reason Approach to Tying Agreement according to Article 15 paragraph 2 of Law Number 5 of 1999

No	Rule of Reason Approach	Decision Number 05/KPPU-I/2014	Decision Number 13/KPPU-I/2019	Decision Number 31/KPPU-I/2019
1	Alleged violation of Article 15 paragraph (2) of Law Number 5 of 1999	It is suspected that there is a tying agreement between the marketing of mortgage products bundled with life insurance products to guarantee the repayment of mortgages.	It is suspected that there is a tying agreement between applications in the field of transportation services and the lease-purchase service of 4- wheeled motorized vehicles with bonus prizes for renters/ buyers.	Alleged tying agreement between strategic tools in motorcycle service and AHM Oil product sales.
2	Determination of the Relevant Market for tying and tied products	The relevant market in the tying product is mortgage services; The relevant market in the tied product is life insurance services.	The relevant market for tying products is online transportation applications, and the relevant market for tied products is motor vehicle rental/sales in Five (5) city areas.	The relevant market in the tying product is strategic tools in the service of motorized wheeled vehicles and the relevant market in the tied product is AHM Oil products.
3	Dominant positioning of one product (tying/tied product)	The reporting party in tying products that organizes mortgage services does not occupy a dominant position, as well as in life insurance services.	The market share of online applications in the tying product reaches 70% and the market share in the tied product is only 6%, but this tying agreement only applies among driver partners in the tying product, namely the online transportation application G.	AHM's share of the 2- wheeled motor vehicle market is 75% while AHM's share of the lubricating oil market is nearly 70%.
4	The Impact of tying agreement	The mortgage customers of Reported-I do not have the freedom to choose other life insurance products they want other than the insurance services of Reported II and Reported III.	Tying agreement has no impact on drivers who do not rent and/or buy vehicles at the Reported Party II will not get a bonus, but they still have other choices to get vehicles according to their needs.	There is no negative impact, because consumers do not lose the choice to choose other workshops or lubricating oils specified by AHASS, because there is an opportunity to supply other brands of oil at AHASS workshops.

Source: KPPU decisions, data processed.

The description of the application of the rule of reason approach to the three KPPU decisions above shows the following trends:

- 1) Factually, tying agreements occur in the world of trade, but it is necessary to use an approach that analyzes the impact on business competition;
- 2) The need to carefully determine the relevant market in both tying products and tied products, especially in digital-based industries, in order to calculate how much influence the performance of tying product companies can have on monopolistic practices and unfair business competition.

VI. Conclusion

Based on the analysis, there is a requirement for the recipient of the supply to obtain a tying product (main product) by having to purchase a tied product that the recipient of the supply may not need. The requirement to purchase the tied product becomes an element of coercion from the recipient of the supply since the recipient does not wish to purchase the tied product. In addition, tying agreements also relate to behavior that inhibits competing business actors from entering the same market share (barrier to entry). There is a similarity in the pattern of behavior of business actors conducting tying agreements, namely that the action is based on an agreement between business actors in the tying product and business actors in the tied product in the relevant market that is different but complementary and is conducted by two or more companies that have an affiliate relationship or at least cooperation partners; related to structure, the market share of the tying product is usually dominant so that it can encourage an increase in the market share of the tied product. Not all types of tying agreements have negative impacts; therefore, an analysis is needed to see the impact of monopolistic practices and/or unfair business competition on tying agreements. However, the concern is needed to determine the relevant market in tying and tied products, especially in digital-based industries.

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