

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Procompetitive Industrial Policy – Note by Indonesia

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1. Competition Legal Framework

1. Industrial policies can cause competition problems. The government generally regulates the industry for better development with various regulatory instruments. Some of these restrictions result in business actors being unable to compete in the market or facilitate cartels. For example, when regulating private involvement in essential public sectors, if not regulated carefully instead of encouraging improvements, it may create monopoly power and result in worse service conditions and increased rates. There is even an impression of sectoral openness, such as only transferring monopoly rights from the state to the private sector. The KPPU as the Indonesia Competition Commission, finds that the inaccuracy in drafting industrial policies causes this situation. However, the KPPU's proactive stance in addressing these issues instills confidence in their ability to ensure fair competition.

2. KPPU carefully applied the articles of the Indonesian Competition Law, particularly the articles with the rule of reason approach, since the necessity to prove the negative impact of behavior or agreement on a particular relevant market. In some cases, government policies can trigger the effects of unfair competition. In this case, the prudence of the KPPU and the stakeholders involved is needed to address the problems caused by the policy.

3. Indonesian Competition Law accommodates several exceptions; Article 50a of Law N. 5 of 1999 exempts activities or agreements to implement laws and regulations. Applying this exception requires in-depth analysis by the KPPU to see the impact on the market. Regarding activities or agreements that are excluded based on the regulations and result in unfair business competition, the KPPU has the authority to advise the government to revise the regulations.

4. The KPPU, mandated by Article 35e of Law N. 5 of 1999, actively provides policy advice and recommendations on government policies related to monopolistic practices and unfair competition. Since 2000, the KPPU has issued up to 300 suggestions and considerations on policies that could foster unfair competition. This proactive stance of the KPPU in ensuring fair competition underscores the need for their oversight. It's important to note that pro-competitive policies are also encouraged, as they may stimulate market growth, enhance efficiency, and offer more choices to the public.

5. To exercise its authority to provide advice and recommendations to government policies, the KPPU has a particular organ assigned to analyze advisory suggestions to the government, viz. the Directorate of Competition Policy, with several responsibilities, including identifying regulations potentially resulting in monopolistic practices and unfair competition and preparing advice and recommendations for government policies. Another responsibility is formulating, evaluating, and developing government policy evaluation instruments related to monopolistic practices and unfair competition. The tasks' complexity starts from identifying regulations, analyzing regulations, and compiling advice and recommendations about monopolistic practices and unfair competition. This activity will undoubtedly involve external parties to the KPPU. However, the creation of healthy competition is not only the responsibility of the KPPU but also of policymakers. For this reason, it is necessary to internalize competition values in policy formulation, one of which is using instruments as an initial screening for policy formulation to align with the values of healthy business competition.

6. Providing policy recommendations is a meticulous process that requires a case-by-case analysis to ensure the proper remedy from the competition side. To guide this process, the KPPU has issued Regulation N. 4 of 2023 concerning Providing Advice and Recommendations to Government Policies Relating to Monopoly Practices and Unfair Competition. This regulation serves as a guideline for policy analysts in conducting policy evaluations, policymakers in formulating policies, and governments in adopting KPPU suggestions. The KPPU continually improves these guidelines in accordance with the development of theories and practices.

7. This guideline adopts the OECD Competition Assessment Toolkit, which emphasize the necessitous to measure the impact of competition should ed be carried out if the proposed regulation has one of three effects: limiting the number or scope of business actors, limiting suppliers' ability to compete, and or reducing suppliers' encouragement to compete fiercely. This guideline has 13 questions to examine the substance of Government Policy. If one or more answers indicate the potential for unfair competition, it is necessary to follow up in the form of Policy Analysis by the KPPU. This policy analysis uses policy impact research methods within a maximum of 60 days, and is extendable.

2. Broiler Production Case (2016)¹²

8. The case number 02/KPPU-I/2016 related to Broiler Production Regulation in Indonesia began with the drop in live chicken prices caused by oversupply, and in the end, it has caused the selling price to no longer be able to cover production costs. This situation was a severe blow to many smallholder farmers who could not afford continuous losses, so many went bankrupt. To overcome this, the Ministry of Agriculture took action by calculating the oversupply of Day Old Chicks (DOC) to find a solution to the oversupply problem of falling prices at the farmer level.

9. The Ministry concluded that the solution to the problem was to cut parent stock early at 55 weeks, a hen's productive period. Then, in the fourth quarter of 2015, the Ministry of Agriculture made a policy in the form of a circular letter for applying to six million parent stock throughout Indonesia, and this instruction was utilized as an instrument to penalize every disobedient business. They agreed to implement early cutting following the Ministry of Agriculture's policy to maintain the supply and price of chicken meat in the market.

10. The KPPU considers agreements between these business actors to be cartels to regulate production, contrary to Law N. 5 of 1999. This early cutting agreement reduced the number of parents' stock and caused DOC prices to increase at the breeder level. The KPPU then ordered the early application to be stopped and prosecuted because it had no solid legal basis.

11. In this case, the KPPU affirmed that the provisions of Article 50a of Law N. 5 of 1999 were limited to powers based on explicit delegation of the Act. The KPPU also cites Application of Competition Law: Exemptions and Exceptions by R. Shyam Khemani (UNCTAD, 2002), stating that "Exemptions from the application of competition laws may be justified on various ground, such as reducing risk and uncertainty, facilitating innovation, collection, and dissemination of information, and counterbalancing unequal bargaining power." For this reason, several things must be done by the government, including analyzing their impact on economic efficiency and consumer welfare, and in a

¹ <https://putusan.kppu.go.id/simper/menu/>

² <https://kppu.go.id/laporan-tahunan/>

cost-benefit framework identify the "winners" and "losers," and whether indeed there are overriding benefits that serve the consumer or broader economic interests. In addition, the KPPU's decision revealed that the ministry had never held a public hearing even though it was important to absorb public aspirations.

12. The task of the Ministry of Agriculture is to conduct guidance for the development of livestock production to increase the competitiveness and productivity of livestock in general, not to increase or decrease supply and demand. The government needed to have valid data related to supply and demand but only received data immediately from business actors coordinated by associations. The KPPU concluded that the Ministry of Agriculture acted not based on laws and regulations but merely facilitated the interests and desires of business actors. Therefore, the KPPU cannot exempt the business actors' agreement on reducing the number of parent stock from the provisions of article 50a of Law N. 5 of 1999.

13. Based on KPPU research, the CR4 of the chicken breeding industry, also known as DOC Parents Stock, was 63 %, indicating a high level of concentration among the four most prominent companies in the market with a market form in the form of an oligopoly market leading to a monopoly market. Other companies in the market are residual players who need to have the power not to follow the price level dictated by large companies (dominant firms). Another fact shows an imbalance in DOC distribution/sales. There were companies where most of their DOC production was distributed (sold) to the internal market segment, while the rest targeted the external segment. It might impact the price fluctuations of live birds in the market. By mastering the production of live birds produced from internal farming and its partners, the company has "great power" to control prices in the market.

14. In addition to assessing market power, the KPPU also conducted a policy impact analysis and found that the early cutting agreement also increased the price of DOC Final Stocks at the breeder level. The above facts further convinced the KPPU to impose a guilty verdict. Then, in October 2016, the KPPU stated that the 12 companies were guilty because they were proven to have agreed to conduct early parent stock in September 2015.

15. In the same verdict, the KPPU also recommended the government improve its regulations to provide protection to independent farmers and prevent economic concentration in the poultry industry, make clear rules or regulations regarding poultry by the principles of fair business competition, cut long distribution chains (off-farm) in the downstream market to protect farmers, promote frozen meat to the community, and build an information/data system regarding the balance of needs/consumption and production of chicken meat in Indonesia.

3. Cooking Oil Case (2022)

16. Cooking oil is one of the primary necessities that the government strictly regulates. The government, Specifically the Ministry of Trade, issued a set of policies related to the Maximum Retail Price Policy for bulk oil and packaged cooking oil, Domestic Price Obligation and Domestic Market Obligation in the context of issuing export permits, export bans, and other policies, especially during the January-July 2022 period.

17. In 2022, the KPPU ruled on Case Number 15/KPPU-I/2022 regarding the Allegation of Law N. 5 of 1999 in the Sales of Packaged Cooking Oil in Indonesia. This case began from the scarcity and increased cooking oil prices in 2021-2022. The rise in global CPO demand and prices since November 2021 triggered domestic producers to export more. As a result, there is a scarcity and price increase in the country, and the government overcomes this by issuing a policy to regulate the Maximum Retail Price

Policy, the DMO of at least 30% of production, and the DPO to meet the needs of the community affordably.

18. This policy led to scarcity, and the KPPU suspects several companies intentionally hoarding cooking oil. KPPU found that the market structure is a tight oligopoly with a high market concentration (CR4 71.52%), possessing homogeneous products and various barriers to market entry. This tight oligopoly affects the behavior of business actors and market performance, including the potential of cooking oil price-fixing agreements, which the reported parties allegedly perpetrate.

19. KPPU's investigation found that the Allegate Parties did not comply with the government Maximum Retail Price Policy by reducing production and sales volumes during the violation period to influence the maximum retail price policy. The fact is that when the Ministry repealed the Maximum Retail Price Policy, the supply of packaged cooking oil was immediately available again in the market at a relatively higher price than before the issuance of the maximum retail price policy. Such noncompliance has given rise to a scarcity of cooking oil, resulting in a deadweight loss for the public. The behavior of a decrease in production volume and sales volume during the violation period despite the availability of the raw materials constitutes the behavior of business actors who are not honest and hinder business competition in conducting packaged cooking oil production and marketing activities. Thus, the KPPU stated that business actors deliberately restricted the circulation/sale of goods in violation of Law N. 5 of 1999.

20. The KPPU considered that the scarcity condition after the issuance of Maximum Retail Price Policy was a form of government failure to intervene. State intervention in an imperfectly competitive position should result in an optimal balance. However, it becomes a new problem because companies have massive market power to influence supply. The existence of a series of such policies in concentrated market conditions proved to be ineffective, and this policy should monitor and evaluate distribution channels to ensure the availability of products. Moreover, some reported parties vertically integrate with oil palm plantations and industries that process crude palm oil.

21. Therefore, the KPPU also recommends the government provide incentives to encourage the presence of new cooking oil producers to improve the structure of the cooking oil market resulting in not concentrating on a few business groups. KPPU also recommends that the government encourage cooking oil companies integrated with palm oil plantation companies to provide CPO allocations to new cooking oil business actors for cooking oil raw materials, as well as to supervise, monitor, evaluate, and audit cooking oil producers in distribution to the community to be right on target.

4. Advocacy

22. KPPU has also sent several letters of policy advice and recommendations in the poultry industry. After providing recommendations related to case number 02/KPPU-I/2016, in the first half of 2016, the KPPU also sent a recommendation letter to revise the Minister of Agriculture Regulation N. 26 of 2016 concerning Broilers' Supply, Distribution, and Monitoring. The Ministry of Agriculture responded to the KPPU letter by its regulations so that the broiler breeding business would be more conducive and synergistic, covering the supply, distribution, reporting, and monitoring. In December

2016, the KPPU and the Ministry of Agriculture Signed a Joint Declaration to Overcome Problems of Livestock.³

23. KPPU appreciated the Minister of Agriculture's regulation to correct market failures through policy instruments under applicable laws and regulations. The KPPU reminds the Minister of Agriculture to have a legal basis for exercising control over chickens' supply, distribution, and supervision. The KPPU emphasized government market intervention by reducing or increasing supply under a clear legal basis by considering the impact and not using it to set excessive prices. KPPU will continue to monitor market indicators to prevent the exploitation of consumers

24. In November 2023, the KPPU also submitted a letter of policy advice and recommendation to the Minister of Agriculture for various improvements in policies related to chicken poultry farming. The evaluation was carried out based on the Regulation of the Minister of Agriculture N. 32 of 2017 concerning the Supply, Circulation, and Supervision of Purebred Chickens and Consumption of Eggs, especially on the Circular Letter of Early Warning and Cutting Hatching Eggs issued by the Minister of Agriculture.⁴ In this letter, KPPU concluded that the agreement on early cutting of fertile hatching eggs and cross-monitoring needed to be more effective. The circular letter also needs to address the problem of disparity in the selling price of live bird farmers with the purchase price (carcass) of consumers strongly indicated to be regulated by brokers. KPPU also considers that various innovations and biotechnology in the poultry industry continue to develop and create a more productive breed of chicken breeds with a decreased mortality rate, making it challenging to regulate the balance of supply and demand for broilers and laying hens. The circular policy has been implemented for two years and could be more effective in overcoming independent chicken farming businesses that go bankrupt and stop doing business. Meanwhile, the Ministry of Agriculture needs help to address the managerial development problem of small and medium enterprises and industrial rescue in other agencies.

25. Considering the various findings in the policy evaluation, KPPU suggested that the Ministry of Agriculture should focus on opening vast opportunities to investors in feed businesses and livestock production facilities to break market concentration in the sector. The chicken poultry farming market is concentrated in several integrated business actors from upstream to downstream. Five business actors control 65.9% of the market share, even in the poultry feed market. To overcome the concentration of the upstream market in terms of providing Grand Parent Stocks (GPS), KPPU recommends that the Ministry of Agriculture restore the GPS fulfillment plan to the selection mechanism (competition for the market). Primarily through the selection/assessment process of prospective GPS importers transparently and competitively according to predetermined criteria. Meanwhile, to help independent farmers on a small business scale, KPPU recommends that the Ministry of Agriculture consider state intervention through affordable and targeted livestock production facilities policies.⁵

³ <https://eng.kppu.go.id/to-overcome-problems-of-livestock-kppu-and-the-ministry-of-agriculture-signed-joint-declaration/>

⁴ <https://kppu.go.id/kajian-kebijakan/>

⁵ <https://eng.kppu.go.id/to-overcome-problems-of-livestock-kppu-and-the-ministry-of-agriculture-signed-joint-declaration/>

5. Conclusion

26. Providing policy advice and recommendations in terms of competition is expected to provide fairness for all business actors in Indonesia to get the opportunity to do business. Pro-competitive regulations will provide opportunities and not discriminate against certain business actors. Benefits will be accepted by the general public, and with pro-competitive regulations, the market can compete in fairness so that consumers will get benefits, including the availability of goods/services at competitive prices. Pro-competitive regulations will provide legal certainty for the parties involved.

27. The KPPU has issued up to 300 policy recommendations to improve market conditions. It is determined to continue monitoring and analyzing industrial policies that have the potential to weaken fair competition in Indonesia. But this is challenging. It requires the awareness of all parties, including regulators, to conduct a self-assessment of the policies to be issued. In this case, the KPPU hopes that KPPU Regulation N. 4 of 2023 can be used as many as possible by policymakers.