

Client Update: Indonesia 19 July 2021

KPPU Introduces Guidelines on Administrative Fines



Continuing our Overview Series on the Omnibus Law and in light of the issuance of the implementing regulations to the law, our team is currently examining these regulations to assess their impact on your business.

In this update, we will highlight changes in the **competition** sector.

Following up on the government's move to confirm the cap on administrative fines for competition law violations, the KPPU has issued an implementing technical regulation on administrative fines. While this regulation (KPPU Regulation No. 2 of 2021 on the Guidelines for Imposing Administrative Fines) was enacted, and became effective, on 31 May 2021, it only recently became available to the public.

As discussed in our previous update on this topic (click [here](#) to read), the new administrative fine cap is tied to either 50% of the relevant company's net profit or 10% of its turnover. The new regulation contains more detailed provisions on the calculation and payment mechanism, including payment by way of instalment. The regulation also emphasises the requirement for the reported party to deposit a bank guarantee when filing an appeal against the KPPU decisions.

Calculation

As mentioned above, the KPPU may calculate the cap from either 50% of the company's net profit or 10% of the company's turnover, both calculated from the relevant market during the violation period. Interestingly, net profit is defined as gross profit minus fixed costs, taxes, and levies, as opposed to deducting the total cost (i.e. the sum of fixed cost and variable cost) from the gross profit. It remains to be seen whether variable cost will also be included as a deduction.

To confirm net profit or turnover, a business needs to provide strong supporting documents to the KPPU. For net profit, the company needs to give its legitimate and convincing financial statements and recapitulations, as well as proof of (i) sales; (ii) attributable fixed cost; (iii) tax payments; and (iv) levies payments (all of which are needed to calculate the net profit). Meanwhile, for turnover, the company needs to consider, among others, the following factors: (i) its legitimate and convincing financial statements; (ii) bank statements; (iii) sales volume; (iv) market price; (v) price list; (vi) offer price list; (vii)

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recapitulation and proof of sales and/or purchase; or (viii) other relevant data acknowledged by the KPPU's Commissioners Panel.

Naturally, questions arise as to what constitute "legitimate and convincing" financial statements. The regulation defines legitimate and convincing financial statements as either the company's audited financial statements or the company's financial statements supported by a statement from an accounting expert.

Bank Guarantee

Reiterating Government Regulation No. 44 of 2021, the regulation states that a party intending to appeal against the KPPU decision to the Commercial Court must deposit a bank guarantee. The bank guarantee must be issued by a commercial bank in Indonesia and deposited to the KPPU Chairman within 14 business days from receipt of the KPPU decision.

The KPPU will liquidate the bank guarantee if the Commercial Court upheld the fine issued by the KPPU (making the KPPU decision final and binding). Otherwise, the bank guarantee will be returned to the party.

Penalty for Late Payment

Assuming that the KPPU decision on the fine has become final and binding, the party must pay the fine within 30 business days from the date when the decision becomes final and binding. Otherwise, KPPU will impose a penalty for late payment.

However, the regulation does not detail how the penalty will be calculated. Because the penalty is considered as non-tax state revenue (*pendapatan negara bukan pajak*), its calculation will refer to the laws and regulations on non-tax state revenue, but it is unclear as to which one. If the calculation refers to Law No. 9 of 2018 on Non-Tax State Revenue, in conjunction with Government Regulation No. 58 of 2020 on Non-Tax State Revenue Management, a 2% penalty of the total fine per month with a maximum period of 24 months will apply. It is also worth noting that a one-day delay will be considered as one full month.

Instalment

If the reported party wishes to pay the fine by way of instalment, such request must be submitted to the Chairman of the KPPU no later than 14 business days after the KPPU decision becomes final and binding. The request must be supported with the party's financial statements that include, at least, the following data:

- (i) the company's cash flow during the proposed period along with an analysis of how the company's cash flow will be distressed if the fine is paid outright;
- (ii) a cash flow plan that includes a proposal for instalment or payment within a certain period; and
- (iii) an explanation on the analysis of how the proposed instalment or payments within a certain period is suitable for the company's financial capabilities or business activities.

The maximum period for the instalment is 36 months. If the instalment period is more than 12 months, the reported party must submit a sufficient guarantee approved by the KPPU in the form of insurance, bank guarantee, surety bond, security interest, or other guarantees.

Conclusion

In terms of the big picture, the new regulation fills in the gap on administrative fines. However, we believe that there is still more clarity required in practice.

As the government continues to catch up with the framework enacted under the Omnibus Law (Law No. 11 of 2020), another legislation from the Supreme Court is expected to be enacted to regulate bank guarantee in an appeal. Therefore, it remains to be seen how this regulation will be implemented..

To read our previous alerts on the Omnibus Law, please click [here](#).

If you have any questions or concerns, please contact our attorneys or the BD team at BD@ahp.id.

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Contacts



HMBC Rikrik Rizkiyana
Partner

D +62 21 2555 7855
F +62 21 2555 7899
rikrik.rizkiyana@ahp.id



Farid Fauzi Nasution
Partner

D +62 21 2555 9998
F +62 21 2555 7899
farid.nasution@ahp.id



Vovo Iswanto
Partner

D +62 21 2555 9938
F +62 21 2555 7899
vovo.iswanto@ahp.id



Asep Ridwan
Partner

D +62 21 2555 7819
F +62 21 2555 7899
asep.ridwan@ahp.id

Anastasia Pritahayu R. D., Aulia Alkausar, Berla Wahyu Pratama, Ingrid Gratsya Zega and Umery Lathifa also contributed to this alert.

Our Regional Contacts

RAJAH & TANN | *Singapore*
Rajah & Tann Singapore LLP
T +65 6535 3600
sg.rajahtannasia.com

R&T SOK & HENG | *Cambodia*
R&T Sok & Heng Law Office
T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN 立杰上海
SHANGHAI REPRESENTATIVE OFFICE | *China*
**Rajah & Tann Singapore LLP
Shanghai Representative Office**
T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*
Assegaf Hamzah & Partners

Jakarta Office
T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office
T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Lao PDR*
Rajah & Tann (Laos) Co., Ltd.
T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*
Christopher & Lee Ong
T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

RAJAH & TANN | *Myanmar*
Rajah & Tann Myanmar Company Limited
T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

GATMAYTAN YAP PATACSIL
GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*
Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)
T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

RAJAH & TANN | *Thailand*
R&T Asia (Thailand) Limited
T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*
Rajah & Tann LCT Lawyers

Ho Chi Minh City Office
T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

Hanoi Office
T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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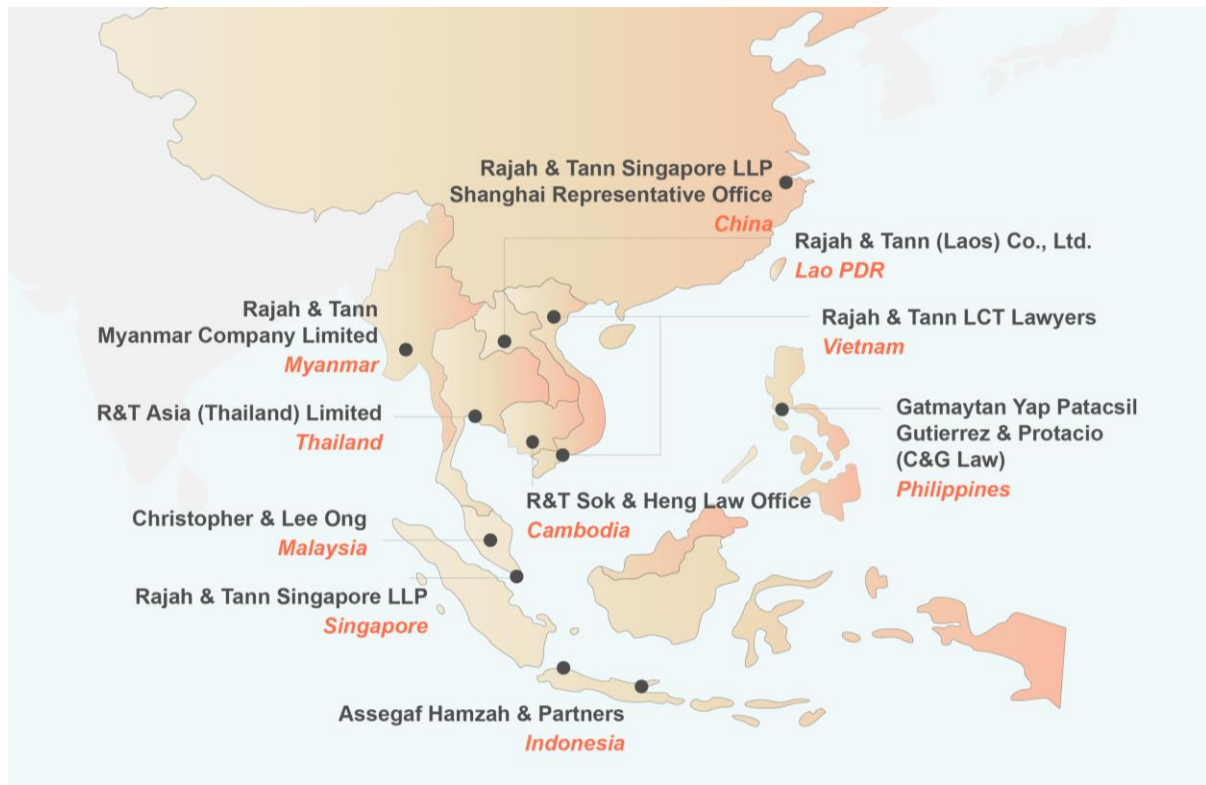
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