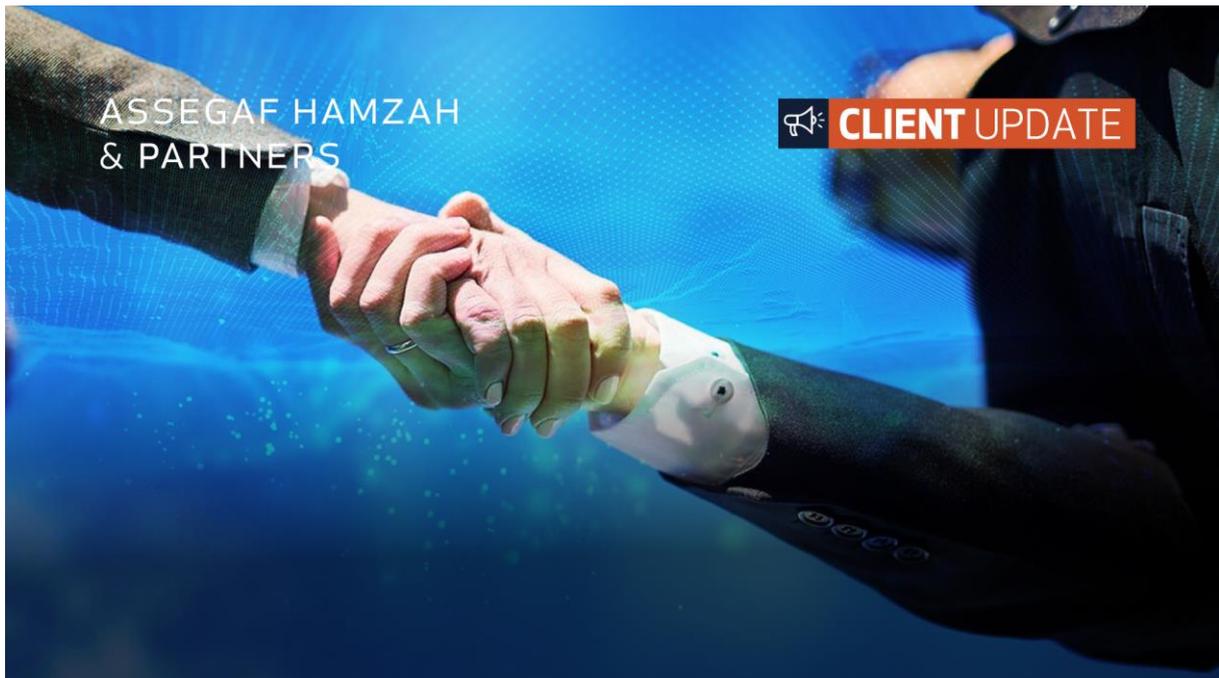


Client Update: Indonesia
30 April 2024

Potential Challenges under the New KPPU Regulation to Supervise Partnerships



Apart from enforcing competition law, the Indonesia Competition Authority (*Komisi Pengawas Persaingan Usaha* or “**KPPU**”) also supervises partnership agreements between large/medium businesses and their micro, small, or medium enterprise (“**MSME**”) partners. If a large/medium business is found to have ownership or control over its MSME partners, the KPPU can initiate a case against the business and impose administrative sanctions.

For several years, the KPPU has diligently focused on MSME partnerships. The recent issuance of a new regulation in this field underscores their unwavering commitment to this area. This regulation, KPPU Regulation No. 2 of 2024 on the Procedure and Case Handling of Partnership Cases (“**New Regulation**”) was issued in April 2024, and replaces KPPU Regulation No. 4 of 2019 on the same topic (“**Previous Regulation**”).

The highlights of the New Regulation are as follows:

1. **Enhanced clarity on the duration of the written warning stage, which gives more room for the reported party to implement the KPPU’s order**

The case handling for partnership cases has a unique feature that differentiates it from competition cases. Such feature is in the written warning stage. Similar to a change of behaviour

in competition cases, the KPPU can offer the reported party in a partnership case to implement specific remedies in exchange for dropping the case and not imposing administrative sanctions. However, unlike in competition cases, where the offer for the change of behaviour is optional at the KPPU commissioners' discretion, in partnership cases, the offer to implement specific remedies is mandatory.

Under the New Regulation, if the KPPU finds the allegations to be proven, it will issue a written warning containing corrective orders that the reported party must fulfil. Please note that this written warning will be issued irrespective of the reported party's admission or rejection of liability. If the reported party fully complies with the written warning, the KPPU will stop the case. Otherwise, the KPPU will proceed with the case, which could result in administrative sanctions.

The New Regulation has retained the three written warnings stage from the Previous Regulation. These written warnings offer an opportunity for the reported party to implement corrective actions to avoid potential partnership violations. They usually contain the KPPU's order that the reported party must implement to avoid a violation from occurring. Previously, the reported party had 14 business days to comply with the KPPU's order. Now, that period for compliance has been extended to 30 calendar days.

Additionally, in the Previous Regulation, if an extension period was granted during the first written warning, it would be treated as part of the duration of the second written warning. Consequently, the reported party would bypass the second written warning stage and would receive the third written warning if it had not complied with KPPU's order during the 14-business day period. The New Regulation amends this timeline by allowing the reported party to receive the second written warning even if an extension has been granted to such party under the first written warning. This amendment means that the reported party potentially has more time to implement the KPPU's orders.

2. Partnership cases now adopt stricter requirements for evidence, like competition cases

The requirements for witnesses, experts, documents, and reported party's statements under the New Regulation mirror the case handling regulation in competition cases, which demand stricter evidence presentation. This stands in contrast to the previous regulatory framework, which was more relaxed.

Under the Previous Regulation for instance, if the KPPU summoned a legal entity as a witness or reported party, they could be represented by their legal or business teams. Now, the New Regulation mandates that companies be represented by their directors (in case of a PT (*perseoran terbatas* or limited liability company)) or members of their management (in case of an entity other than a PT). The director or members of management can be accompanied by an employee and/or a legal representative of the entity.

3. Reported party has a more limited room to rebut the allegations

Under the New Regulation, the further examination stage will only assess whether the reported party has complied with all the corrective orders stated in the written warning from the KPPU. Consequently, the forum for the reported party to rebut the alleged violations is only available at the investigation and/or preliminary examination stages. This change presents a drawback for the reported party. Previously, a reported party could rebut the alleged violations in the further examination stage by presenting and cross-examining evidence, including factual and expert witnesses.

Moreover, the New Regulation is silent on when and at which stage a reported party can present and examine evidence (particularly factual and expert witnesses) to rebut the alleged violations. Under the Previous Regulation, the presentation and examination of evidence to prove the alleged violations were clearly specified in the further examination stage.

4. There is a lack of clarity of whether KPPU's decisions in partnership cases are final

Despite the precedent of appealed cases, the New Regulation states that the KPPU's decisions in partnership cases are final. While this is similar to the standing in the Previous Regulation, it is a significant departure from the recent initiative by the Supreme Court to regulate appeal mechanisms in partnership cases. It remains to be seen how the Court's initiative will play out in the context of the New Regulation.

Key Takeaways

Despite the gaps in the New Regulation, its enactment signals that partnership supervision enforcement will likely increase, with potentially tighter room for business parties to defend in partnership cases. In light of this, business actors should take a proactive approach, raising their awareness of mitigating partnership risks and preparing case-handling strategies as early and carefully as possible.

If you have any queries on the above, please feel free to contact our team members below who will be happy to assist.

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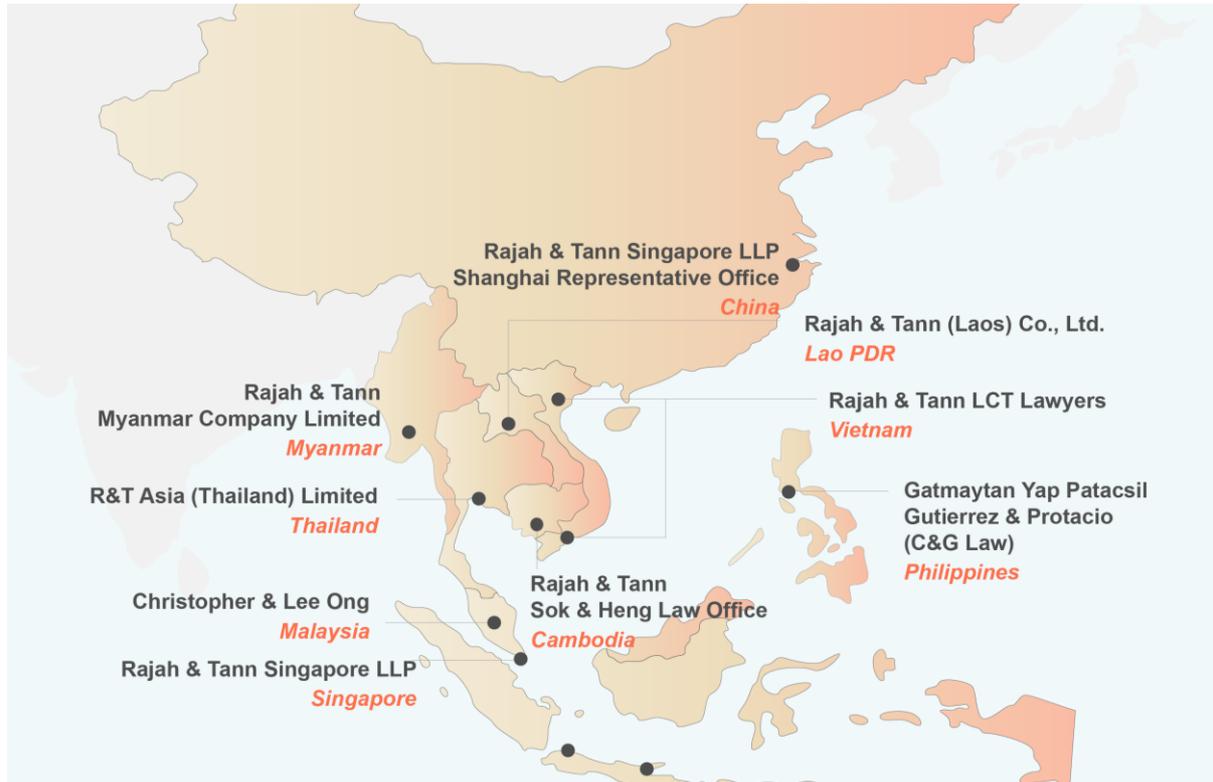
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Client Update: Indonesia

30 April 2024

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