Client Update: Indonesia
23 February 2021

The Will to Comply: Government Highlights Compliance in Competition Law Violations

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.

One of the topics that were left open-ended under the Omnibus Law was the removal of the cap on administrative fine and criminal sanctions for violations of the Competition Law (Law No. 5 of 1999) (click here to read our previous client update). We mentioned then that a new cap is likely to be introduced. The newly issued government regulation for the Omnibus Law on competition (Government Regulation No. 44 of 2021 on the Implementation of Prohibition of Monopolistic Practices and Unfair Business Competition) confirmed this finding.

Under this regulation, the new cap is tied to either 50% of the relevant company's net profit or 10% of its turnover, both calculated from the relevant market during the violation period. In addition, adopting the approach of other more established competition agencies worldwide, KPPU will consider compliance as part of the extenuating factors in determining the amount of administrative fines.

Calculation and Criteria

Instead of the previously fixed maximum fine, the regulation now sets criteria for administrative sanctions. First, the sanctions must be proportionate to the degree or impact of the violation. Second, the sanction should ensure business continuity but effective enough to create a deterrence effect. Third and last, the sanction must be based on detailed and concrete reasoning from valid and measurable data.

The minimum fine that KPPU can impose is IDR 1 billion. Assuming that the above criteria are fulfilled, KPPU can impose a larger fine, and KPPU will calculate the amount based on the adverse effects of the violation, the duration of the violation, extenuating factors, aggravating factors, and the business actor's ability to pay. All these factors are elaborated further in the regulation.

With respect to the duration of the violation, KPPU will round up the duration. This means that a violation of fewer than 6 months will be rounded up to 6 months, while that of between 6 to 12 months will be rounded up to 12 months.

Meanwhile, with respect to extenuating and aggravating factors, KPPU will examine the business actor's compliance. KPPU will look at, among others, the business actor's efforts to comply with the law (e.g. by establishing a code of ethics, training, or other similar activities), voluntary termination of the violating conduct, previous violation (whether similar or not in the previous eight years), the part played by the business actor (i.e. was the business actor the initiator of the violation), and impact of the violation on competition.

Once all the above elements have been considered, the regulation stipulates that the fine must not exceed 50% of the business actor's net profit or 10% of its turnover of the relevant market during the violation period.

Other Points of Interest

The regulation clarifies that KPPU may declare an agreement that contains infringing articles to be null and void. While KPPU already has this power with respect to an entire agreement, the regulation makes it clear that KPPU must review the infringing articles against non-infringing ones before exercising this power. If KPPU finds more non-infringing articles in the agreement, KPPU must declare only the infringing articles to be null and void.

On appeal, to ensure the business actor's commitment to pay the fine imposed by KPPU, business actors must deposit a bank guarantee of a maximum 20% of the fine imposed. This guarantee and the appeal must be filed to the Commercial Court within 14 business days after receipt of the KPPU decision. The regulation extends the period of examination by the Commercial Court of the merit of the appeal to 3-12 months, from previously only 30 days.

A further appeal against the Commercial Court decision can be filed by way of cassation to the Supreme Court within 14 days after receipt of the decision.

Key Takeaways

Businesses should note that the regulation has been effective since 2 February 2021. Thus, all KPPU cases, including those in the hearing stage that are not yet decided, will be subject to the new regulation. While there are specific mechanisms that are still lacking, for example, in the detailed procedures of appeal in the Commercial Court and implementation of bank guarantee requirement, we expect that KPPU or the Supreme Court will issue further guidelines in the near future.

Further, considering the wide spectrum of fines, it is also important that businesses carefully review the risks of potential competition law violations from their business conduct. Indeed, with KPPU putting compliance under the microscope, businesses should adopt a proactive approach in their conduct, including by establishing a reliable compliance program, which may include establishing competition and antitrust handbook and protocol, conducting regular training for employees and regular competition audit, and setting up a whistleblowing program.

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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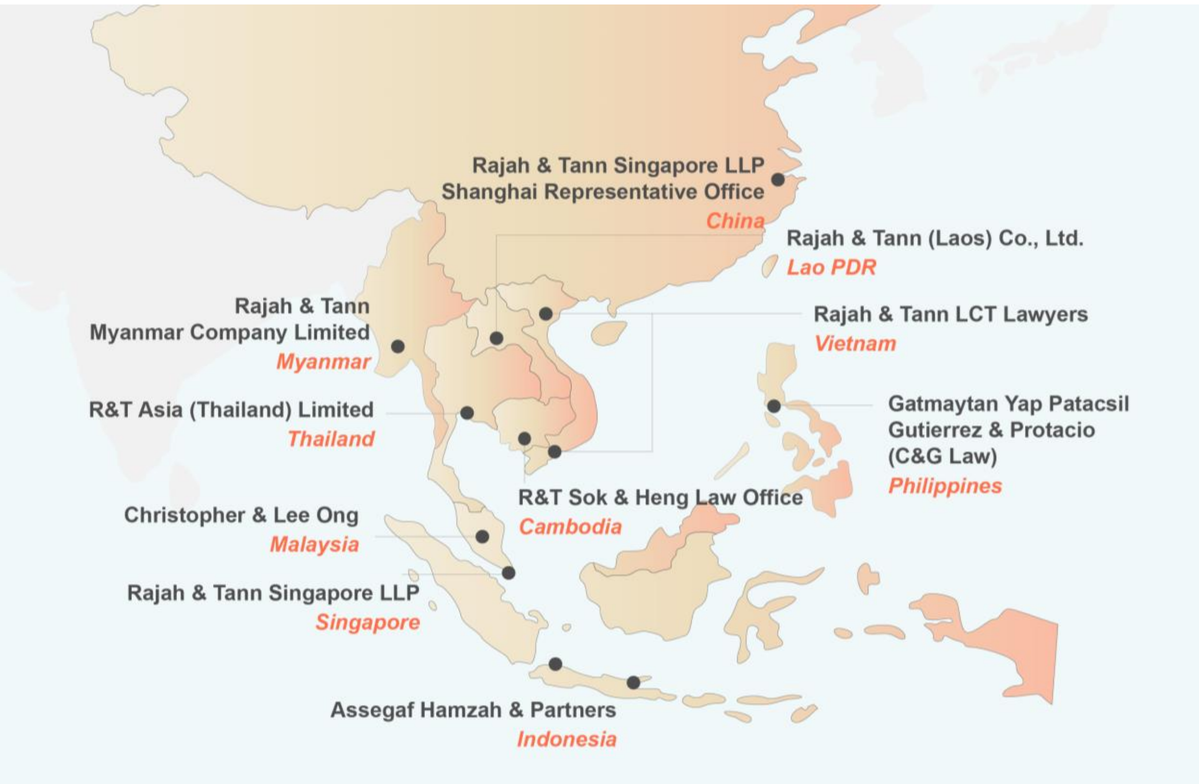

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