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English Version

THE GUIDELINES ON ADMINISTRATIVE FINES FOR COMPETITION LAW VIOLATIONS

General Overview

The Business Competition Supervision Commission or *Komisi Pengawasan Persaingan Usaha* (hereinafter referred to "**KPPU**") issued KPPU Regulation Number 2 of 2021 concerning Guidelines for Imposition of Penalty for Violation of Monopolistic Practices and Unfair Business Competition ("**KPPU Reg 2/2021**") which has been effective since May 31, 2021.

KPPU Reg 2/2021 has been issued as the implementing regulation of Law Number 11 of 2020 concerning Job Creation ("**Job Creation Law**") and Government Regulation Number 44 of 2021 concerning the Implementation of the Prohibition of Monopolistic Practices and Unfair Competition ("**GR 44/2021**"). One of the purposes for the issuance of KPPU Reg 2/2021 is to strengthen the function of law enforcement in the business competition climate in Indonesia.

In this ARMA Update, we will discuss the new mechanism of administrative fines calculation that will be imposed on business actors that are found guilty of monopolistic and unfair business practices ("**Reported Party"**) based on KPPU Reg 2/2021.

Mechanism of Fines Imposition

The Job Creation Law amends certain provisions in Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition ("**Competition Law**"), including penalties for the violation in the Competition Law.

Initially, KPPU can impose an administrative fine to the Reported Party between IDR1,000,000,000 (one billion Rupiah) and a maximum of IDR25,000,000,000 (twenty-five billion Rupiah).[1] The Job Creation Law introduces a minimum fine of IDR1,000,000,000 (one billion Rupiah)[2] , and there is no maximum cap for such administrative fine.

The KPPU Reg 2/2021 further sets out the following limitation in calculating the maximum cap for the administrative fine[3] as following:

(i) Maximum 50% (fifty percent) of the net profit received by the Reported Party during operations throughout the duration of the violation[4]; or
(ii) Maximum 10% (ten percent) of the total sale generated throughout the violation duration.[5]

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[2] Article 2 (1) of the KPPU Reg 2/2021 *Jo* Article 6 (2g) of the GR 44/2021
[3] Article 8 (1) of the KPPU Reg 2/2021
[4] Pursuant to Article 9 (1) of the KPPU Reg 2/2021, the meaning of "**net profit**" is a gross profit which has reduced by the (i) fixed cost; (ii) taxes; and (iii) other state levies on the relevant market during the period of the violation.
[5] Pursuant to Article Pursuant to Article 10 (1) of the KPPU Reg 2/2021, "**total sales**" is determined based on the sales value before the imposition of taxes over the state levies that related to the goods and/or services sales to the.

KPPU Reg 2/2021 also sets out specific factors that KPPU can consider in calculating fine against the Reported Party, such as[6]:

a. The negative impact caused by the violation

There are negative impacts that cause a reduction or loss of business competition, which are as follows:[7]
- (i) increasing barriers to market entry for potential business actors and closing access for competing business actors;
- (ii) the potential for regional division occurs when the distribution allocation between producers and distributors is divided into several regions, with a dominant distributor for each region;
- (iii) enables business actors to increase market power and discriminate the prices and maximize profits; and
- (iv) resulting in a structured market that is not perfectly competitive and causes welfare loss.[8]

b. Duration of the violation

KPPU will determine the period of the violation occurred, as follows:
- (i) If the duration of violation is less or up to 6 (six) months, then KPPU will deem that the period of violation is 1/2 (half) year; and
- (ii) If the duration of a breach is more than 6 (six) months and does not exceed 1 (one) year, then KPPU will deem that the period of violation is 1 (one) year.

c. Relieving Factors

Certain factors can relieve business actors who violate the Competition Law, as follows[9]:
- (i) activities that demonstrate compliance with the principles of fair business competition;
- (ii) discontinue anti-competitive behavior from the time the case arises;
- (iii) have never committed the same or similar violations;
- (iv) commit violations unintentionally;
- (v) the business actor is not the leader/initiator of the violation; and/or
- (vi) the impact of the violation is not significant.

d. Aggravating factor

Conversely, some factors can be considered as aggravating factors for the Reported Party who violate the Competition Law, such as [10]:
- (i) the Reported Party committed the same or similar violations as regulated by law in less than 8 (eight) years based on a decision that has permanent legal force; and/or
- (ii) business actors act as initiators in violations.

[6] Article 2 (2) of the KPPU Reg 2/2021
[7] Article 3 (1) of the KPPU Reg 2/2021 *Jo* the Attachment of the KPPU Regulation Number 5 of the 2011 concerning the Guidelines of the Article 15 of the Competition Law
[8] The meaning of "**Welfare Loss**" is the level of consumer welfare lost as a result of increased tariffs.
[9] Article 5 of the KPPU Reg 2/2021
[10] Article 6 of the KPPU Reg 2/2021

e. The ability to pay the fine

KPPU may consider the financial capability or condition of the Reported Party in regards to imposing an administrative fine and analyze whether the fine may potentially disrupt the operational business of the Reported Party.[11]

Violation of Fines and Allowance for Payment of Fines

Based on KPPU Reg 2/2021, the amount of the fine stated in the decision, which has permanent legal force, is a state receivable and must be deposited into the state treasury no later than 30 (thirty) days after the Reported Party has received the notification of the decision.

If the Reported Party fails to pay the fine within 30 (thirty) days, it will be subject to administrative sanctions in the form of a late penalty, which is 2% (two percent) per month[12].

KPPU Reg 2/2021 may also consider the Reported Party to pay the fines in installment or within a specific period, with prior approval from the Head of KPPU. The maximum leniency period the KPPU can approve is 12 (twelve) months for installment payment or an extended period for payment of between 12 (twelve) months and 36 (thirty-six) months.

The Reported Party shall submit a leniency request with the relevant financial report no later than 14 (fourteen) days after the decision is deemed final and binding[13].

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[11] Article 7 of the KPPU Reg 2/2021

[12] As regulated in Law Number 9 of 2018 concerning Non-Tax State Revenue

[13] Article 16 of the KPPU Reg 2/2021