

New KPPU Case Handling Procedure May Allow Dismissal of Anti-Competition Investigation Based on Change of Behaviour



Starting from April 2023, businesses must follow the new case handling procedure regulation under the Indonesia Competition Commission (“**KPPU**”) Regulation No. 2 of 2023 on Case Handling Procedure (“**New Regulation**”). The New Regulation became effective on 31 March 2023, even though it only became available to the public on 6 April 2023.

The New Regulation replaces the entire case handling procedure regulation in KPPU. Among others, a notable new feature under the New Regulation is the allowance for reported parties to propose a change of behaviour to the KPPU during the investigation stage instead of going through the preliminary examination hearing without admitting guilt and regardless of other reported parties doing the same. This is significant because if the KPPU accepts the proposed change of behaviour and the reported parties fully implement such change, the KPPU will dismiss the investigation altogether and the reported parties will not be subject to any sanction.

Below we highlight the changes in KPPU's new case handling procedure:

1. Change of Behaviour

The New Regulation allows a reported party to propose a change of behaviour to the KPPU during the investigation stage instead of going through the preliminary examination hearing without admitting guilt. If the proposal is accepted, the KPPU may dismiss the case altogether. Previously, the regulation only allowed such a proposal during the preliminary examination hearing, at which point the investigation would have been concluded and the investigators would have presented their report.

Moreover, under the previous regulation, a change of behaviour required the reported party to admit their alleged guilt as stated in the report. Moreover, the KPPU would only allow a change of behaviour to stand (by way of a decree) if all reported parties (assuming that there are more than one) propose such change. As a result, it required all reported parties to agree to benefit from the decree.

Now, the New Regulation no longer requires all reported parties to agree to propose a change of behaviour as long as the case is still in the investigation stage. This way, the investigation will only stop for a reported party that:

- (a) propose a change of behaviour and such proposal is accepted by the KPPU; and
- (b) fully implements the proposal.

The case will continue for other reported parties who do not agree to the proposal.

As to the gist of the change of behaviour avenue in the preliminary hearing stage, the New Regulation retains most provisions on the change of behaviour forum in the previous regulation. These include, for example, admission of guilt and a proposal of change of behaviour by all reported parties. The New Regulation also gives example of actions that may constitute a "change of behaviour", for example payment of fines and/or damages (especially in the preliminary examination hearing).

At the same time, unlike the previous regulation that allows virtually all types of violation to the change of behaviour forum, the New Regulation excludes specific alleged violations that cannot be subject to the change of behaviour forum. These are price fixing, market allocation, output arrangement, bid rigging, and late merger filing.

2. Detailed Technicalities for Evidence

Another notable feature under the New Regulation is the expansion of the definition of witness. Previously, a witness is any individual who directly heard, saw and experienced the allegation. Now, a witness may include any person who did not directly hear, see, and experience the allegation. However, it remains to be seen how this criterion will be implemented.

The New Regulation also sets out that any business entity that testifies as either a witness or a reported party must be represented by its directors. This means that a testimony by a company's witness must be made by its director as the spokesperson. Employees of the company can only accompany the director, and their testimonies must be presented by the director.

Further, the New Regulation allows the minutes of witness or expert's testimony taken under oath in the investigation stage to be used as evidence if that witness or expert refuses or is unable to testify in the examination hearing. In that case, a cross-examination would not be possible. On the other hand, witnesses or experts presented by the reported parties must testify in the examination hearing. Therefore, they would be subject to cross-examinations. As a general principle, testimonies are valid evidence if they are made in the hearing and not during the investigation stage.

Lastly, the New Regulation requires all letters and/or documents submitted to the KPPU to be in Bahasa Indonesia. If not, those letters and/or documents must be translated into Bahasa Indonesia by a sworn translator prior to submission. Translated letters and/or documents must be submitted together with the foreign-language letters and/or documents.

3. Other Points of Interest

In the preliminary examination hearing, a reported party can examine documentary evidence referred to in the allegation report. While this was also permitted under the previous regulation, there was no mention of timing, and as a result, the practice varied from case to case. However, the previous approach stands, in that the reported party can only take notes from the evidence as opposed to obtaining a copy of it.

Key Takeaways

The allowance to propose a change of behaviour early in the investigation stage will appeal to reported parties as it would allow them to stop the case against them earlier. Doing so may also minimise the adverse impacts on a reported party, for example, bad publication, higher legal cost, and third party's follow-on damages.

That being said, caution should be exercised by a party seeking to use the change of behaviour approach, considering the requirements that they would have to satisfy in order to obtain KPPU's approval of the proposal and dismissal of the case. Moreover, if the KPPU rejects the proposal during the investigation stage, the party cannot submit another change of behaviour proposal later during the preliminary examination hearing.

Therefore, considering the gravity of the outcome, it is highly advisable for businesses to be prudent in fulfilling the change of behaviour requirements during the investigation stage.

Moreover, other changes in the New Regulation seem to set a more stringent approach to the case handling procedure compared to the previous regulation. It remains to be seen whether reported parties would face more technical challenges in going through cases under the New Regulation.

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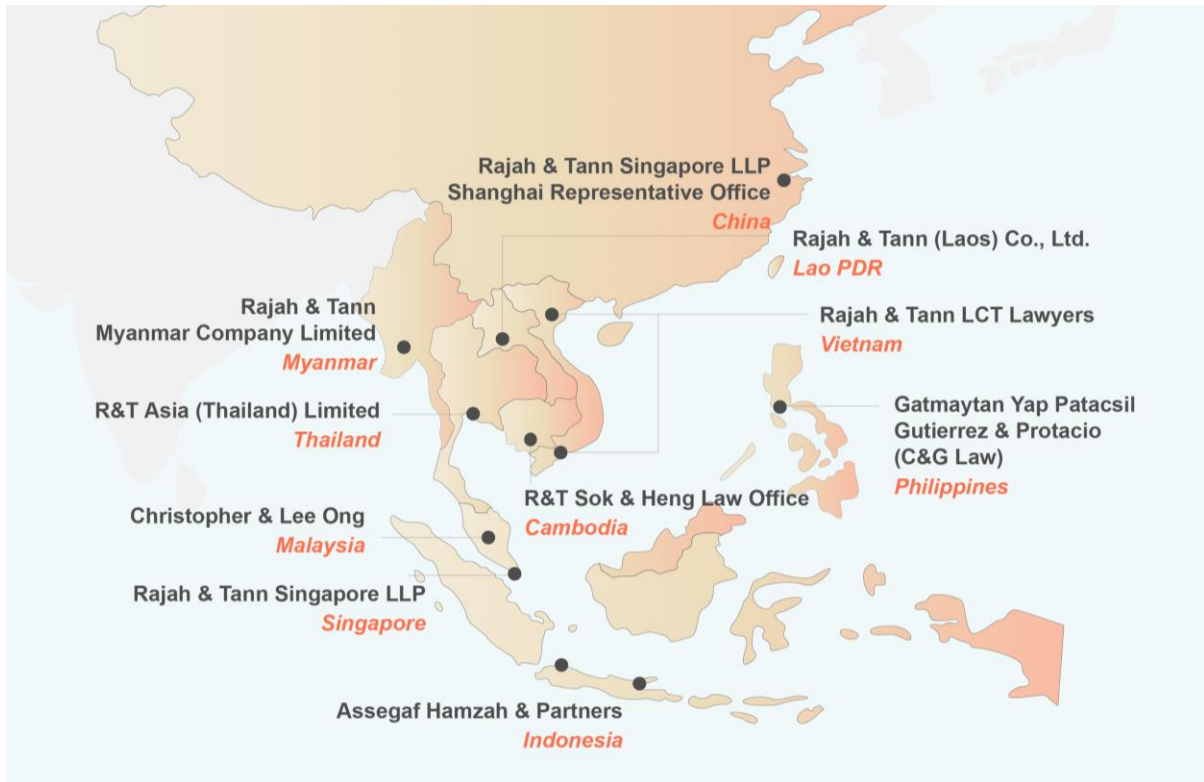
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