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This issue covers the following topics:

India

MEMORANDUM OF COOPERATION BETWEEN COMPETITION COMMISSION OF INDIA AND JAPAN FAIR TRADE COMMISSION

日本の公正取引委員会とインド共和国の競争当局であるインド競争委員会との間で、2021 年 8 月 6 日、競争当局間の協力に関する覚書が締結された。それぞれの国の競争法の効果的な執行を実現するための協調及び協力体制を強化することを目的とするものである。本稿ではかかる覚書の締結に関して、日本・インド双方の観点から競争当局の声明を踏まえて概説する。

Introduction

To further strengthen and benefit from international cooperation in an era where cross-border transactions are the norm and cartels are becoming more global, competition regulators all over the world enter into cooperation agreements. On 6 August 2021, the Competition Commission of India ("**CCI**") concluded a Memorandum of Cooperation ("**MOC**") with the Japan Fair Trade Commission ("**JFTC**") to further enhance collaboration and cooperation between the two regulators to effectively enforce competition laws in each country. A brief summary is set out below.

Objectives of the MOC

The CCI has, pursuant to Section 18 of the Competition Act, 2002 (which permits the CCI to enter into memorandums with any foreign agency for the purpose of discharging its functions under the Competition Act), entered into cooperation arrangements with several jurisdictions such as the European Union, the United States of America, Brazil, Canada, Australia, Russia, South Africa and China which enable effective enforcement of the competition laws and regulations of each country. The CCI has in fact relied upon these arrangements and sought assistance from the regulators of these jurisdictions while dealing with several large global transactions.

With the number of transactions/cases involving Japanese parties substantially growing, the cooperation agreement with JFTC was the need of the day. The CCI has been constantly dealing with several Japanese

companies in both enforcement and merger-related matters and the MOC will enable CCI to obtain JFTC's guidance and support on these matters going forward.

The official statement issued by the Ministry of Corporate Affairs, Government of India highlighted that the MOC will enable the CCI to emulate and learn from the experiences and lessons of the JFTC. The MCA further stated that the MOC will improve the CCI's enforcement of the Competition Act and benefit consumers by promoting equity and inclusiveness. In his speech on the conclusion of the MOC, the CCI Chairperson commented that the MOC between CCI and JFTC has the potential to address anticompetitive restraints that affect international trade and curb international cartels affecting the countries.

The JFTC has also released an official statement which can be found here https://www.jftc.go.jp/en/pressreleases/yearly-2021/August/210806.html. The key objectives of the MOC are indicated to be as follows:

(i) Notification: Each competition authority will notify the other of its own enforcement activities that it considers may affect important interests of the other competition authority to the extent that such notification is not contrary to the laws and regulations of the country of the notifying competition authority and does not affect any investigation or proceeding being carried out by the notifying competition authority.

(ii) Exchange of Information: The competition authorities would, to the extent consistent with the laws and regulations of each country and the important interests of each competition authority, and within its reasonably available resources, exchange information on the following matters: (a) each other's laws, regulations and competition policy and developments of enforcement in their respective jurisdictions; (b) experience in improving legal framework of competition policy; (c) experience in conducting investigations of anti-competitive activities in their respective jurisdictions; (d) improvement of competition conditions in markets; and (e) development of research in the field of competition law.

(iii) Technical Cooperation: The competition authorities can cooperate on technical matters such as (a) participation in training courses on competition laws and regulations and competition policy organized or sponsored by the other competition authority; (b) exchange of personnel of the competition authorities for training purposes; (c) participation of personnel of the competition authorities as lecturers or consultants at training courses on the implementation of competition laws and regulations and competition policy organized or sponsored by either or both competition authorities; (d) providing assistance, where appropriate, in promoting understanding of sound competition policy among various stakeholders like business community, bar associations, academic institutions and others; or (e) any other form of technical cooperation as the competition authorities may mutually decide.

(iv) Coordination of Enforcement Activities: The competition authorities, when they are investigating competition matters that are related to each other, would consider coordination of their enforcement.

It is also expected that periodic high-level working meetings as decided mutually, would be held in addition to discussing issues of common interests and the competition authorities may review and evaluate cooperation between them in such meetings.

Conclusion

With this MOC, the CCI has joined forces with yet another key peer regulator and this move will further improve and facilitate CCI's assessment of global mergers and investigations of global cartels. The culmination of the MOC between CCI and JFTC is an important step for the antitrust authorities of India and Japan to strengthen the existing relations between the two nations and develop sound competition law jurisprudence in the process.

[Author]

Rashmi Grover (Nagashima Ohno & Tsunematsu Singapore LLP)
rashmi_grover@noandt.com
Rashmi Grover is an Indian and UK qualified foreign attorney in the Singapore office. Her areas of practice include mergers and acquisitions, private equity and general corporate. She has extensive experience working in the Indian markets and advising clients on corporate commercial and finance transactions including transactions involving mergers, formation of joint ventures, acquisition of stakes in companies, private equity investments, business/asset acquisition transactions, regulatory filings, debt issuances and structured lending transactions.

Indonesia

CALCULATION OF ADMINISTRATIVE FINES FOR VIOLATION OF COMPETITION LAWS

2020 年の雇用創出に関する法律（通称オムニバス法）に基づき競争法も一部改正がなされたが、重要な改正の一つに競争法の違反者に対する課徴金の上限が改正された点が挙げられる。改正前は 250 億ルピアが上限と定められていたのが、今般の改正により純利益の 50%又は総売上の 10%と利益や売上に連動して上限額が定められることとなった。本稿ではかかる競争法の改正について解説する。

Introduction

The amendment of Law No. 5 of 1999 on Prohibition of Monopolistic Practices and Unfair Business Competition ("**Competition Law**") under Law No. 11 of 2020 on Job Creation ("**Omnibus Law**") creates new rules in competition laws regime in Indonesia. One of the significant amendments was the omission of upper limit of administrative fines for the violation of the Competition Law.

Under the Competition Law, the administrative fine was set as minimum IDR 1billion and up to IDR 25billion. While the Omnibus Law retains the lower limit, the upper limit has now been omitted which has led to concerns about whether the Indonesian Business Competition Supervisory Commissioner/*Komisi Pengawas Persaingan usaha* ("**KPPU**") was able to impose administrative fines without any limitation. These concerns were put to rest with the implementation of the Government Regulation No. 44 of 2021 on the Implementation of the Prohibition of Monopolistic Practices and Unfair Business Competition ("**GR 44/2021**"), pursuant to which it was clarified that the government still regulates the maximum amount of administrative fines for the violation of Competition Law.

Upper Limit of Administrative Fines

To implement the amendment of Competition Law under the Omnibus Law, the government issued the GR 44/2021, pursuant to which the government set out the maximum amount of administrative fines for the violation of Competition Law, namely:

a. Maximum of 50% (fifty percent) of the ***net profit*** obtained by business actors in the relevant market, during the period of violation of the law; or

b. Maximum of 10% (ten percent) of the ***total sales*** in the relevant market, during the period of violation of the law.

GR 44/2021 further regulates that the amount of fines imposed by the KPPU must take into consideration various factors, among others (i) negative impact caused by violations, (ii) duration of the violation, (iii) mitigating factors, (iv) aggravating factors, and/or (v) ability of business actors to pay.

With respect to the period of violation stated in (a) and (b) above, the KPPU will round up the period. If the violation lasted fewer than 6 (six) months, the period of violation will be rounded up to half a year, whilst if the violation lasted more than 6 (six) months but less than a year, the period of violation will be rounded up to 1 (one) year.

Calculation of Administrative Fines

Specifically for the implementation of administrative fines under GR 44/2021, KPPU as the government authority in competition laws sector issued the KPPU Regulation No. 2 of 2021 on Guidelines for Imposing Administrative Fines, which has been effective since 31 May 2021 ("**KPPU Guidelines**").

According to KPPU Guidelines, in terms of the calculation of administrative fines based on net profit, it defines net profit as gross profit minus fixed costs, taxes, and levies. On the other hand, for the administrative fines based on total sales, it is calculated from the total sales before tax or levies which are directly related to the sales in the relevant market during the period of violation.

Guarantee

GR 44/2021 states that in the event that the business actors wishes to submit an appeal against the administrative fines imposed by KPPU, it must provide bank guarantee in the amount of maximum 20% of the total fines imposed by KPPU at the latest 14 days after it receives the decision. If the business actors fail to provide the guarantee, it will be deemed to have accepted KPPU decision and willing to pay the entire amount of fines.

Leniency Program

KPPU may grant leniency for the payment of administrative fines by considering relevant reasons, among others, financial capability of the company. In order to apply for leniency program, business actors must submit a written application to KPPU at the latest 14 (fourteen) days after the final and binding decision is issued. If successful, business actors are allowed to pay the administrative fines in installment. KPPU Guidelines regulates that the maximum installment period is 36 months.

Conclusion

The issuance of GR 44/2021 and KPPU Guidelines provide clarity to business actors that KPPU still regulates the upper limit of administrative fines, which is now calculated based on net profit or total sales. These new regulations give a fair treatment to business actors as the administrative fines are only calculated during the period of violation, hence any profit or revenue prior to or after the violation would not be included in the calculation.

As these regulations have just come into effect, business actors should note that all administrative fines will now be imposed based on these regulation although the KPPU may continue to use its discretion on matters which are still not clearly regulated such as the procedure to issue bank guarantee and procedure to pay the installment payment in leniency program.

[Author]

Ichsan Montang (Nagashima Ohno & Tsunematsu Singapore LLP)
ichsan_montang@noandt.com
Ichsan Montang is an Indonesian qualified attorney in the Singapore Office. He graduated from the University of Indonesia with Cum Laude predicate and obtained his LL.M. degree in Erasmus University Rotterdam, the Netherlands. Prior to joining NO&T, Ichsan worked at one of the most prominent law firms in Indonesia and experienced in handling both domestic and international clients. He focuses his practice on mergers and acquisitions, foreign direct investment, general corporate matters, TMT, and real estate business.

Singapore

RIGHTS OF DEVELOPERS AND PURCHASERS UNDER PART 8C OF THE COVID-19 (TEMPORARY MEASURES) ACT 2020 (NO. 14 OF 2020) AND THE COVID-19 (TEMPORARY MEASURES) (PART 8C RELIEF) REGULATIONS 2021

シンガポールでは新型コロナウイルスの感染拡大に伴い、2020 年 4 月に COVID-19 暫定措置法が制定され、一定の契約不履行に対する一時的な救済措置が付与された。これに関連して、2021 年 7 月 1 日には、長引くコロナ禍により事業活動の停滞を余儀なくされた建設業分野に関して、更なる救済措置を定める法令を施行した。本稿ではかかる措置について概説する。

Introduction

On 1 July 2021, Part 8C of the COVID-19 (Temporary Measures) Act 2020 (No. 14 of 2020) ("**Part 8C of the Act**") and the COVID-19 (Temporary Measures) (Part 8C Relief) Regulations 2021 ("**Part 8C Regulations**") came into effect (collectively "**The Provisions**"). They are part of a broader legislative framework under Part 8 of the COVID-19 (Temporary Measures) Act 2020 (No. 14 of 2020) that aims to support the construction industry in the wake of COVID-19's impact.

Scope of the Provisions

Part 8C of the Act addresses delays by housing (including the Housing and Development Board ("**HDB**")) and commercial developers:

- in delivering possession of one or more units of housing accommodation or commercial property to purchasers;
- in accordance with delivery dates on or after 1 February 2020;
- as provided under the under a sale and purchase agreement ("**SPA**") entered into or an option granted before 25 March 2020;
- where permits to carry out structural works under section 6(3) of the Building Control Act (Cap. 29) ("BCA") had been granted before 7 April 2020;
- and as at 7 April 2020, the temporary occupation permit ("**TOP**") under section 12(3) of the BCA had not been granted; and,
- in respect of the failure to deliver possession, no legal proceedings were commenced or "*judgment, arbitral award, or compromise or settlement*" had been entered into before 2 November 2020.

The following elaborates on the rights of developers and purchasers under Part 8C of the Act.

Please note at the outset, that in the interest of cogency, this update omits detailed reference to the use of specific forms, particulars, administrative fees and/or further documents required thereto and the timelines for their service which must be complied with in accordance with The Provisions. Please also note that service of forms must be in accordance with the applicable mode prescribed under regulation 6 of the Part 8C Regulations. All forms mentioned can be accessed at https://www.ura.gov.sg/Corporate/Guidelines/Developers/COVID-19-Relief-Measures.

Developers' Rights

Developers may protect themselves against liability for liquidated damages for up to 122 days after the contractually agreed date for delivery. In order to avail themselves of this protection, the developer must serve a notice on the purchaser of the period of extension (up to 122 days).

If an initial notice of extension was for a period of less than 122 days, the developer can still serve a subsequent notice of extension so long as the total period of extension does not exceed 122 days.

If after having extended the period for delivery by 122 days, the developer still requires a further extension, it must serve a notice on the purchaser of its "*intention to extend delivery date and of the proposed period of extension*". After which, the developer must apply to the Registrar of assessors ("**the Registrar**") for an assessor to certify that the developer is "*unable to deliver possession…by the delivery date in question and the inability is to a material extent caused by a COVID-19 event*"; and that it "*may only be reasonably expected to deliver possession…by the end of a specified period after the delivery date in question*". Thereafter, the developer must serve a notice on the affected purchaser to inform the latter of its application for an assessor's certification.

The period for delivery will only be further extended beyond the initial extended period of 122 days if, on being notified by the Registrar that an assessor has made an affirmative certification, the developer serves a notice of the assessor's certification on the purchaser.

Part 8C of the Act also provides for a moratorium period between the day on which the developer had served the purchaser with its notice to further extend the period for delivery beyond the extended period of 122 days to the earliest of the following:

(i) the day the purchaser is notified under section 39I(6) of Part 8C of the Act of the assessor's certification;

(ii) "*252 days after the date on which the developer notifies the purchaser of the developer's intention to extend the delivery date in accordance with section 39I(4) of the Act*"; unless the project was issued with TOP and CSC on or after 1 July 2021, the last day of the period of 252 days after the date of issuance of TOP or CSC whichever is earlier;

(iii) "*the last day of the period of 21 days after the date on which the Registrar notifies the developer of the assessor's determination under section 39O(1)(a) of the Act*."

During the moratorium period, purchasers are precluded from:

(a) "*making any deduction from any instalment or payment due under the affected agreement for any damages or liquidated damages and any other cost allowed under the affected agreement for a failure by the developer to comply with the delivery date*;" and

(b) any action prescribed under regulation 11 of the Part 8C Regulations.

Purchasers' Rights

Where developers have extended the date of delivery beyond the date provided for under the SPA, purchasers may claim reimbursement for qualifying costs (defined under section 39G of Part 8C of the Act and regulation 3(1) of the Part 8C Regulations) incurred in relation to the extended period by serving a notice of the same on the developers. The amount of such costs is capped at an amount:

(a) derived from the formula set out at regulations 13(1)(a) and 13(2)(a) of the Part 8C Regulations where the developer is HDB; and

(b) for any other developer, "*70% of the liquidated damages that"* it would have been liable to pay the purchaser under the terms of the SPA but for the extension(s) under section 39(I) of Part 8C of the Act. However, where the total period of extensions exceeds 122 days, the capped amount must deduct the qualifying costs incurred for the first 122 days of extension.

Depending on whether a claim for reimbursement is for a period of extension within the first 122 days or thereafter, the timeline of service would differ.

Thereafter, the developer may accept the amount of reimbursement claimed by the purchaser, or reach an agreement with the purchaser on an alternative amount. In the event of disagreement over the amount of reimbursement, the developer or purchaser may apply to the Registrar for an assessor to make "…*a determination as to the amount the developer is liable to reimburse the purchaser…*". Following which, the party that made the application must serve a notice of its application on the other party.

Note that while the assessor's determination is binding and cannot be appealed against, section 39OA(1) of Part 8C of the Act provides that "*the assessor or another assessor may, either on his or her own motion or on the application of all or any of the persons to whom the assessor's original determination relates, vary or replace the determination if*

(a) *one of those persons adduces further information or documents after the original determination which would have had a material influence on the original determination but which could not have with reasonable diligence been obtained for use at the proceedings before the assessor; and*

(b) *it is fair and just for a variation or replacement of the original determination to be made under this subsection*."

In respect of an amount that the developer is liable to pay the purchaser for the latter's reimbursement claim, the purchaser may set off the said amount against any instalment or other payment payable to the developer under the SPA. The purchaser may also take any action to recover the said amount as debt due. Either or both of these options may be undertaken by the purchaser after the time prescribed under The Provisions (which would differ, depending on whether or not an application had been made for an assessor's determination of the amount of reimbursement).

Conclusion

The Provisions are helpful in providing some relief to developers that have or are currently facing downstream impediments in meeting their delivery deadlines as a result of COVID-19. However parties should carefully consider the facts of their case in determining if the regime under The Provisions offers the most beneficial recourse. As mentioned at the start of this update, parties must not have taken any other course of legal action to avail themselves of their rights under The Provisions.

[Author]

WeiJian Teo (Nagashima Ohno & Tsunematsu Singapore LLP)
weijian_teo@noandt.com
WeiJian Teo is a Singapore qualified attorney based in the firm's Singapore office. His practice has focused on complex cross-border commercial disputes, building and construction disputes and international arbitrations; having previously been instructed to act at all levels of the Singapore Courts and arbitrations under various institutional rules such as SIAC, ICC and DIFC-LCIA. The matters that he has handled encompass a diverse range of sectors such as energy, infrastructure, construction, tourism and hospitality, industrial manufacturing, international trade and cryptocurrency.

[EDITORS' PROFILES]

Nobuo Fukui (Nagashima Ohno & Tsunematsu Singapore LLP)
nobuo_fukui@noandt.com

Nobuo Fukui is a partner at Nagashima Ohno & Tsunematsu and a representative of its Singapore Office (Nagashima Ohno & Tsunematsu Singapore LLP). He has been stationed in Singapore since 2013 and providing legal services mainly to Japanese companies and its affiliates to expand their business into south-east Asian countries.

He is a graduate of the University of Tokyo (LL.B., 2001) and Duke Law School (LL.M., 2009). He was admitted to the Japan Bar in 2003 and New York State Bar in 2010. He worked as a foreign lawyer at Widyawan & Partners (Jakarta) from 2010 to 2013, focusing on Indonesian legal practice, and he has extensive legal experience in the Indonesia related transactions.

Rashmi Grover (Nagashima Ohno & Tsunematsu Singapore LLP)
rashmi_grover@noandt.com

Rashmi Grover is an Indian and UK qualified foreign attorney in the Singapore office. Her areas of practice include mergers and acquisitions, private equity and general corporate. She has extensive experience working in the Indian markets and advising clients on corporate commercial and finance transactions including transactions involving mergers, formation of joint ventures, acquisition of stakes in companies, private equity investments, business/asset acquisition transactions, regulatory filings, debt issuances and structured lending transactions.

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NAGASHIMA OHNO & TSUNEMATSU

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan
Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com

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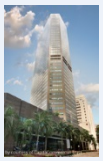
Singapore Office
(Nagashima Ohno & Tsunematsu Singapore LLP)



6 Battery Road #40-06
Singapore 049909
Tel: +65-6654-1760 (general)
Fax: +65-6654-1770 (general)
Email: info-singapore@noandt.com

Bangkok Office
(Nagashima Ohno & Tsunematsu (Thailand) Co., Ltd.)

34th Floor, Bhiraj Tower at EmQuartier
689 Sukhumvit Road, Klongton Nuea
Vadhana, Bangkok 10110, Thailand
Tel: +66-2-302-4800 (general)
Fax: +66-2-302-4899 (general)
Email: info-bangkok@noandt.com

HCMC Office
(Nagashima Ohno & Tsunematsu HCMC Branch)

Suite 1801, Saigon Tower
29 Le Duan Street, District 1
Ho Chi Minh City, Vietnam
Tel: +84-28-3521-8800 (general)
Fax: +84-28-3521-8877 (general)
Email: info-hcmc@noandt.com

Hanoi Office
(Nagashima Ohno & Tsunematsu Hanoi Branch)

Suite 10.04, CornerStone Building
16 Phan Chu Trinh, Hoan Kiem District
Ha Noi City, Vietnam
Tel: +84-24-3266-8140 (general)
Fax: +84-24-3266-8141 (general)
Email: info-hanoi@noandt.com

Shanghai Office
(Nagashima Ohno & Tsunematsu
Shanghai Representative Office)

21st Floor, One ICC, 999 Middle Huaihai Road
Xuhui District, Shanghai 200031, China
Tel: +86-21-2415-2000 (general)
Fax: +86-21-6403-5059 (general)
Email: info-shanghai@noandt.com

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