

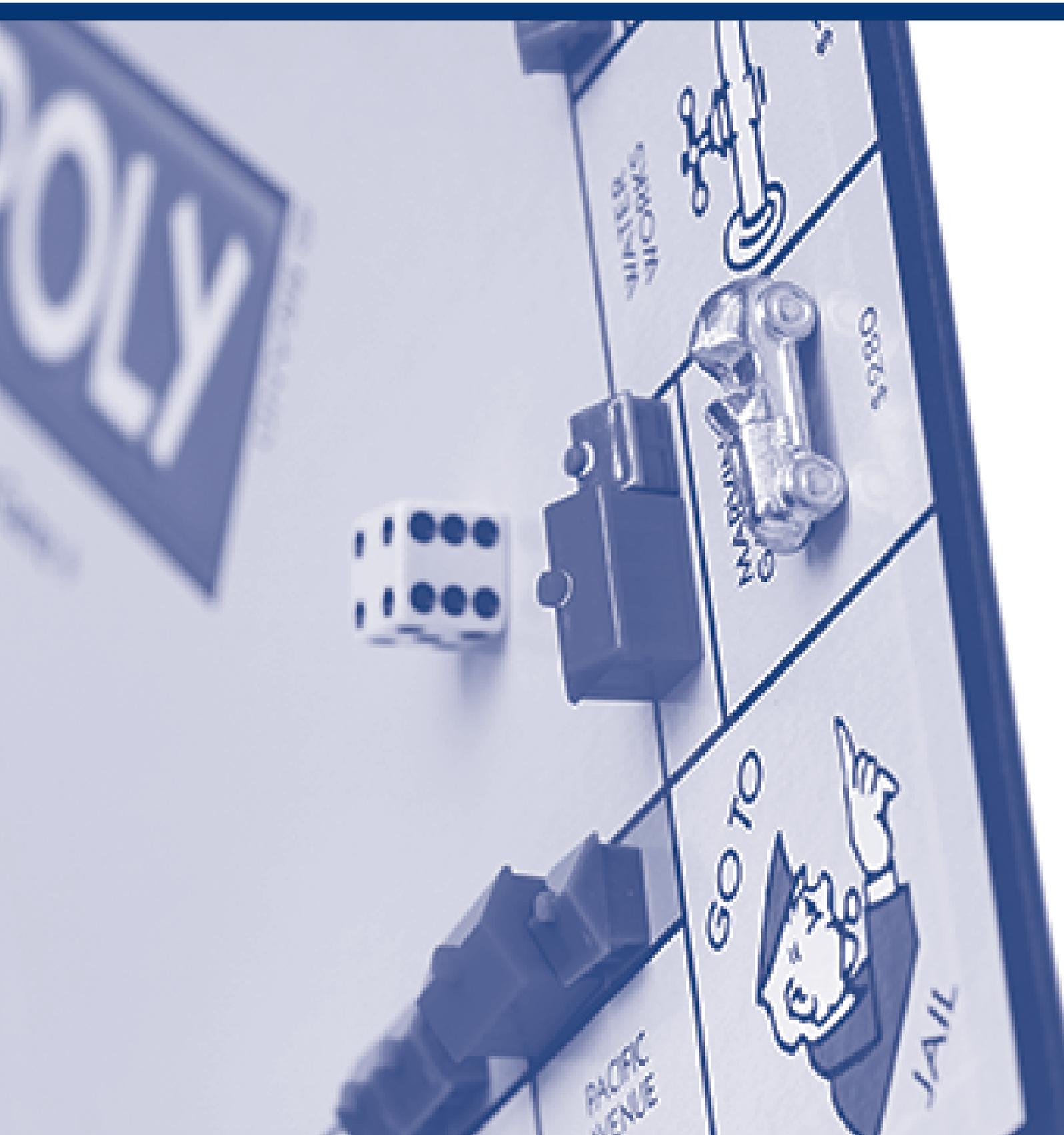


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to include mergers and amalgamations and clarifying that only the 'true target' in case of asset acquisitions will now be considered for the purposes of determining the applicability of the asset and turnover thresholds under the Act.

In light of the Notification, the approach of attributing the value of assets/turnover of each of the parents to the proposed JV is no longer necessary. Stated differently, brownfield joint ventures need only be notified when the 'true target' meets the relevant thresholds under the Act.

Proposed amendment of Indonesia's competition law

In Q4 2016, DPR¹ released the latest working draft of the proposed amendment to the Indonesia's competition law.² Since its promulgation in 1999, Indonesia's competition law has been formulated in a unique way compared to the competition laws in other jurisdictions. Infringements and various provisions are regulated separately and specifically to avoid wide interpretations and to ensure effective enforcement in accordance with Indonesian legal system, which is also reflected in the proposed amendment.

Currently the Legislative Board of DPR is in the midst of harmonising the draft amendment with reference to other applicable and relevant legal instruments. According to the released draft, some of the key points of the proposed amendment are discussed below.

Organisational structure of the competition authority

Currently, the KPPU³ is an auxiliary organ reporting to the President, but it stays as an independent institution.

The proposed amendment will change KPPU structurally as a governmental institution reporting to the President, which might in some ways translate to the transformation of its independence. Nevertheless, this change will transform the status of its employees to be state apparatus as well as giving them a clearer career path and resolve the high employee turnover problem in KPPU.

The extended authorities of KPPU

KPPU does not have the authority to conduct dawn raids, search or foreclosure. It aspires to

be equipped with these authorities to function optimally in deterring anti-competitive conducts and enforcing the law. However, the legal framework for these authorities under the Indonesian laws is limited to detectives (*penyidik*) as provided under the Criminal Procedural Code. Whether these authorities should be vested upon the KPPU is one of the reasons the draft amendment has been challenged and opposed.

Extraterritorial reach of the law

The current merger control regime of Indonesia applies this principle. The draft amendment will adopt the extraterritorial reach of the law as a general principle of law enforcement.

Merger control regime switch

The post-notification merger control currently in force will be replaced with a pre-notification (approval) merger control. Under the draft amendment, it is possible for KPPU to block potentially anti-competitive mergers or acquisitions in advance, since the businesses shall obtain KPPU approval prior to the transaction.

This will provide legal certainty that a transaction will not be wound up after its financial closing, something that could happen under the current regime. On the other hand, it will add another layer of bureaucracy. The current government's move in cutting off bureaucracy to enhance the ease of doing business in Indonesia may be at stake, but the KPPU has shown a fairly timely performance throughout the years, which might be taken into consideration.

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No more standalone private enforcement

The proposed amendment took out the provision whereby a party can file a report with a request of compensation that is currently available under the KPPU Regulation No 1 of 2010.

Although the current regime allows private enforcement (standalone action, through filing reports with requests of compensation to KPPU, and follow on action, through generic civil claims) competition law enforcement in Indonesia is still heavy on public enforcement by the competition authority.

Adopted leniency procedure

Leniency procedure is included in the proposed amendment, but in a very general manner. There is no clarity as to at what point this would be available and how the ‘pardoning’ is to be made.

Prepayment requirement for appeal

Currently an appeal to a KPPU decision has to be made within 14 days to the District Court and no part of the fine has to be paid for filing the appeal.

The proposed amendment might change the timeframe⁴ and the forum of appeal,⁵ as well as adding a requirement for a prepayment of ten per cent of the fine for filing the appeal.

Calculation of fines

The administrative fine imposable by the KPPU under the current regime ranges from IDR 1bn (approximately US\$75,000) to IDR 25bn (approximately US\$1.875m). The proposed amendment will change the fine calculation method by using the company’s

turnover within the period of infringements, ranging from five per cent to 30 per cent.

This has also become a topic of debate. If only the competition authority’s performance indicator is independent from the number of cases it closes and the amount of fines imposed and paid to the state’s treasury, the proposed change of fine calculation method resulting in higher sanction could actually be an effective tool for deterrence.

Counting the days

In one instance Syarkawi Rauf, the Chairman of KPPU, stated to the media that the amendment should be passed by mid-2017 (in June or July). Whilst in another instance, a representative of the Legislative Board of the DPR – Rufinus Hutauruk – stated that too many revisions are still needed and the amendment might as well be dropped for efficiency purposes.

The draft amendment has been in circulation since 2013, and it has been discussed and criticised. It has now reached the top of the list in the National Legislation Programme of the DPR and is being scrutinised by the Legislative Board of the DPR. The recently circulated draft may not be the final amendment, but it is only a matter of time before the law is finally amended.

Notes

- 1 The Indonesia House of Representatives (Parliament), Dewan Perwakilan Rakyat.
- 2 Law No 5 of 1999 on Prohibition of Monopolistic and Unfair Business Practices.
- 3 Indonesia’s competition authority, Business Competition Supervisory Commission, Komisi Pengawas Persaingan Usaha.
- 4 Although there is duality in the circulated draft whereby one article stated 14 days and another stated 30 days.
- 5 Whether it should be addressed to the District Court or Commercial Court.

IRELAND

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Updates from Ireland

Irish Competition Authority censures landlord association for coordinating activities

On 20 January 2017 the Competition and Consumer Protection Commission (CCPC) announced that it had concluded its investigation into the Irish Property Owners

Association (IPOA), Ireland’s residential landlord representative body. The IPOA had announced that its members were considering introducing new charges to their tenants in response to proposed rent control measures. The CCPC considered that this may constitute ‘collective withdrawal of services