

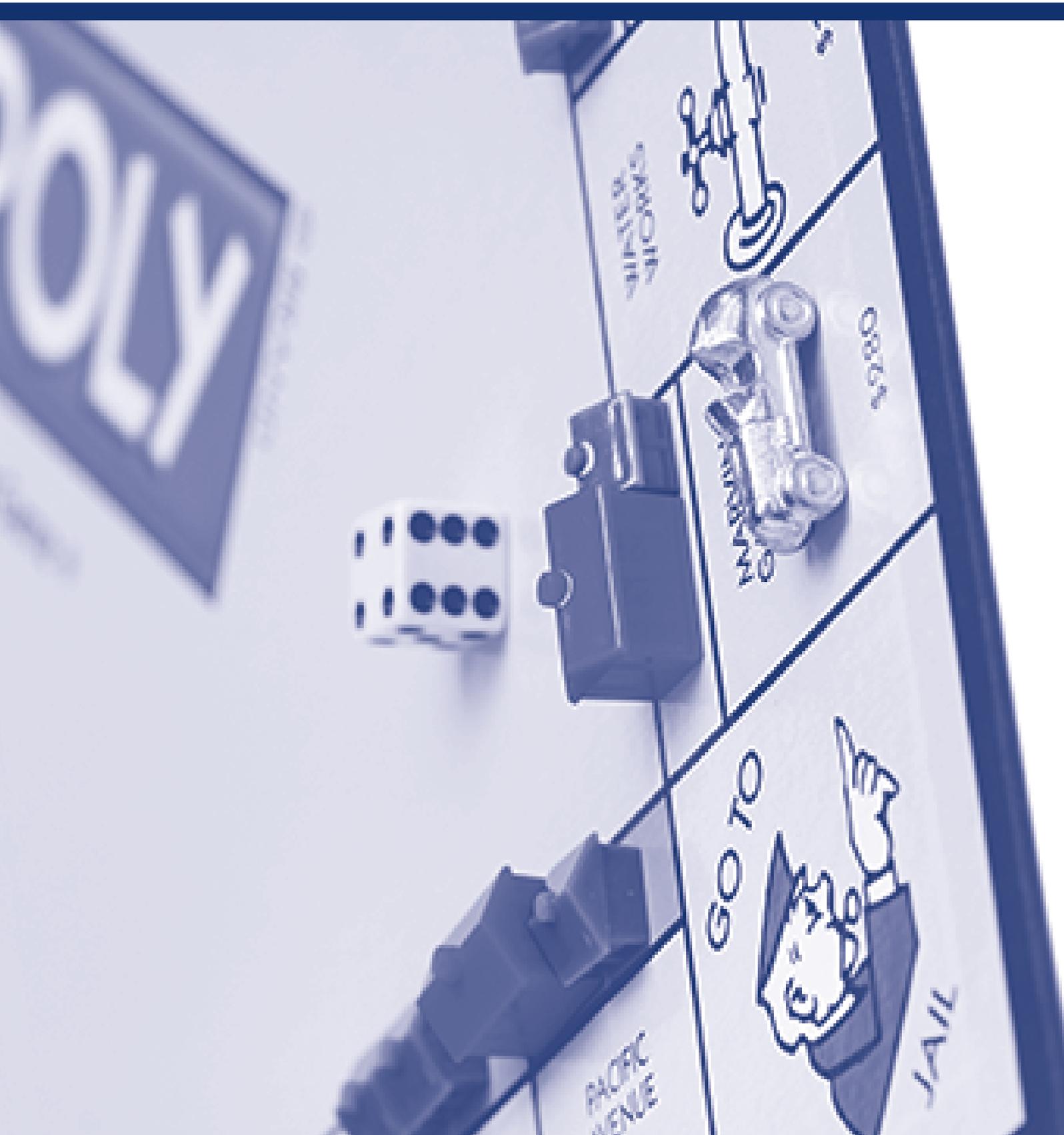


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in relation to the competition arguments on the basis that this part of Loyal Profit's case 'should not have been advanced'.

Conclusion

The *Loyal Profit* case is an important case for private litigants wishing to test the limits of the bar on stand-alone actions under the Ordinance. The key takeaway from the decision is that litigants should think carefully before advancing arguments based

on contraventions of the Ordinance even if the cause of action is not based on the Ordinance. Such advances are likely to be rejected by the courts much earlier on in the proceedings in the future.

Unfortunately, the Court in the *Loyal Profit* case did not delve into the issue of whether it was mandated by section 113 of the Ordinance to refer the matter to the Competition Tribunal. The approach of the courts to section 113 remains to be seen in future cases.

INDONESIA

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KPPU introduces guidelines for compliance programme

Indonesia's competition authority, Komisi Pengawas Persaingan Usaha (KPPU) recently introduced and is actively promoting its Guide for Compliance Programmes ('KPPU Compliance Guide'). The aim is for this guide to be used as a reference for private companies establishing their internal compliance programmes.

Similar to the 'adequate procedure' mechanism recently introduced by the Republic of Indonesia Supreme Court Regulation on Corporate Criminal Liability, the KPPU Compliance Guide indicates that having a solid and active compliance programme would enhance risk protection for companies.

There are several useful tools in the KPPU Compliance Guide, which can be used as a checklist for compliance programmes.

Business interaction risk

An ideal compliance programme would include warnings and cautions regarding several situations categorised as business interaction risks, inter alia: (1) entering into an agreement with another party; (2) promotion and sales activities; and (3) relationships with consumers, suppliers, and competitors. These situations should be carefully addressed and comprehensive guidelines for employees provided on the prevention of violations of competition law.

Training and awareness-raising

A good compliance programme has to be properly implemented and understood by the employees and officers of the company to ensure comprehensive compliance with the law. Therefore, an introduction to the directive is advisable for all new recruits and regular awareness-raising training is essential to ensure that the company has done all that it can to prevent violations.

Scheduled monitoring

On an ongoing basis, the company should check that its employees and officers apply the programme properly in running the business. Consequently, a scheduled monitoring, preferably by engaging experts in internal audit or corporate investigation, is a recommended addition to a well-shaped programme. Any resulting report should typically suggest the level of awareness and compliance of the employees and officers in the principles of the law, an evaluation of what the employees and officers have done and could do to improve in terms of compliance with competition law in business, and will give everyone first-hand experience of how to apply the competition law principles as well as of how to avoid violating them.

Identification of potential infringements

The KPPU Compliance Guide specifically identifies key areas and functions in a company where violations can occur.

High risk functions

These may include:

- top management with decision-making authority;
- the sales and marketing function;
- the procurement/purchasing function;
- employees assigned to attend industry association meetings; and
- employees with authority to decide pricing.

Medium risk functions

These may include:

- managerial positions with limited interaction with competitors or partners;
- employees in other functions (eg, finance, communications, operations) which contribute to pricing policies; and
- new employees from a competitor's company not working in a high risk function.

Low risk functions

These may include:

- employees in the human resource function who have no relationship with other companies;
- employees with only administrative duties;
- direct salesman with no price-determining authority; and
- back office functions.

Disciplinary action

A zero-tolerance culture in the company is recommended. This should include enforcing strict disciplinary action towards employees or officers who fail to fulfill their obligations in accordance with the programme, for example failure of an employee or officer to flag a potential violation that falls under his/her responsibility. The disciplinary action can range from a written warning up to punishment (eg, demotion).

Regular update

Regularly revisiting the programme to ensure that it is still relevant to the currently applicable law is also recommended. By going through this phase, the company is showing an extensive commitment towards compliance.

As discussed in the previous issue, the House of Representatives (Dewan Perwakilan Rakyat) of the Republic of Indonesia is currently discussing a draft amendment to Law No 5 of 1999 on the Prohibition of Monopolistic and Unfair Business Practices. The most recent draft amendment to the law is being scrutinised by the Government of the Republic of Indonesia, and includes consideration of a clause on leniency and the commitment decision, albeit there is no expanded explanation on the two subjects as yet. However, a solid directive which includes zero tolerance and a proper code of conduct may favour a leniency application, if made as soon as the management of the company realises a wrongdoing has been committed.