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Indonesia

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Brief overview of the law and enforcement regime

Last year, we contributed to this publication a chapter addressing the legal regime underpinning anti-corruption enforcement in Indonesia. A year has passed and we are privileged to contribute to this publication again. Here, we address key developments in the Indonesian anti-corruption legal regime from the past year. One key development that we address briefly below concerns the contemplated amendment of the Indonesian Criminal Code, which could potentially affect future anti-corruption efforts. Until the amended Criminal Code is enacted, the current body of anti-corruption laws and regulations remain valid. Before we address the key developments in Indonesia over the past year, we set out below the general legal framework for corruption and bribery in Indonesia.

The Indonesian anti-corruption regime is manifested in Law No. 31 of 1999 regarding Eradication of Criminal Acts of Corruption (August 16, 1999), as amended by Law No. 20 of 2001 (November 21, 2001) (together, the "Anti-Corruption Law").

The Anti-Corruption Law governs seven types of corruption crimes, namely corruption:

- that causes loss to the state's finances;
- related to bribery;
- related to malfeasance;
- related to extortion;
- related to tort;
- related to conflict of interest in procurement; and
- related to gratuity.

As can be seen from the above, the Anti-Corruption Law adopts a broad definition of corruption, which encompasses bribery. Therefore, in the Indonesian legal context, the term "corruption" also covers bribery.

In addition, Law No. 11 of 1980 regarding Bribery (October 27, 1980) (the "Anti-Bribery Law") stipulates punishment for any person who bribes a public official. It would appear that both the Anti-Corruption Law and the Anti-Bribery Law punish corruption crimes related to bribery. However, the Anti-Bribery Law provides that the law applies to bribery crimes that have not been regulated. In that sense, the Anti-Bribery Law complements the Anti-Corruption Law. That notwithstanding, most corruption crimes, including bribery, are prosecuted under the Anti-Corruption Law. We are not aware of any recent cases charged under the Anti-Bribery Law.

Corruption is a special crime under Indonesian law. Perpetrators of corruption acts are brought before the Corruption Court pursuant to Law No. 46 of 2009 regarding the Corruption

Court (October 29, 2009) (the "Corruption Court Law"). The Corruption Court is a special court having jurisdiction over corruption crimes in Indonesia and has an extraterritorial reach. Article 7 of the Corruption Court Law expressly empowers the Corruption Court to adjudicate corruption crimes committed by Indonesian citizens in overseas territories.

The Anti-Corruption Law applies not only to the party providing the illicit payment (bribe, gift, or gratification), but also to the recipient of such payment. Under the Anti-Corruption Law, any person attempting, assisting, or conspiring to commit a criminal act of corruption is subject to the same penalties as the perpetrator.

The forms of punishment that may be meted out under the Anti-Corruption Law can be divided into two categories, namely: (i) primary sanctions; and (ii) additional sanctions.

(i) Primary sanctions can be any of fines, imprisonment, and/or capital punishment.

Fines that can be imposed range from a minimum of IDR 50 million (approximately US$ 3,350 using the current exchange rate of US$ 1 = IDR 14,900) up to IDR 1 billion (approximately US$ 67,115 using the current exchange rate).

Prison sentences that can be imposed range from one year up to life in prison.

Capital punishment may be applied if the criminal act of corruption involves funds intended for the eradication of a dangerous situation, a national disaster, riots, or an economic or monetary crisis, or for repeated criminal acts of corruption.

(ii) Additional sanctions comprise the following:

(a) confiscation of tangible or intangible movable or immovable goods used for or obtained from criminal acts of corruption, including any company owned by the accused where a criminal act was perpetrated, and the same shall apply to goods that replace the aforementioned movable or immovable goods;

(b) payment of compensation in a maximum amount equal to those assets obtained from the criminal acts of corruption;

(c) whole or partial closure of the company for a maximum period of 1 (one) year; or

(d) revocation of all or certain rights or the cancellation of all or certain profits that have been or can be given by the government to the accused.

It is important to note that both the Anti-Corruption Law and the Anti-Bribery Law only govern corruption involving government officials or causing losses to state finances. Corruption in the private sector (involving only companies or only among private individuals), which does not involve a government official or relate to state finances, is not subject to these laws. The scope of "private corruption" would fall under the ambit of the Indonesian Criminal Code and in practice, perpetrators would be reported as committing the crime of embezzlement or fraud.

There are essentially three law enforcement bodies tasked with combating corruption in Indonesia, namely: (i) the Police; (ii) the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi* or the "KPK"); and (iii) the Attorney General's Office. Each body is authorised to investigate criminal acts of corruption. Any of these bodies may proceed with an investigation if it has obtained sufficient preliminary evidence.

Police:

The authority of the Police to investigate criminal acts of corruption is governed under Article 7(1) of Law No. 8 of 1981 regarding the Indonesian Criminal Procedural Code (December 31, 1981) (*Kitab Undang-undang Hukum Acara Pidana* or "KUHAP"), in conjunction with Article 14(1) Letter (g) of Law No. 2 of 2002 regarding the National Police (January 8, 2002) (the "Police Law").

KPK:

The KPK's authority to conduct pre-investigations, investigations, and prosecutions of criminal acts of corruption is governed under Law No. 30 of 2002 regarding the KPK (December 27, 2002) (the "KPK Law"). Article 6 of the KPK Law stipulates that the KPK has the following authorities:

(a) to coordinate with the authorised institutions to combat criminal acts of corruption;
(b) to supervise the authorised institutions to combat criminal acts of corruption;
(c) to conduct pre-investigations, investigations, and prosecutions of criminal acts of corruption;
(d) to conduct corruption prevention activities; and
(e) to monitor state governance.

The scope of the KPK's authorities under Article 6 letter (c) above is further set forth in Article 11 of the KPK Law, which stipulates that in carrying out its authorities under Article 6 letter (c), the KPK may conduct pre-investigations, investigations, and prosecutions of criminal acts of corruption that:

(a) involve the state legal enforcement apparatus, state organisers, and others involved in the enforcement of criminal acts of corruption;
(b) cause societal concern; and/or
(c) involve a minimum state loss of at least IDR 1 billion (approximately US$ 67,115 using the current exchange rate of US$ 1 = IDR 14,900).

Attorney General's Office:

The authority of the Attorney General's Office to conduct an investigation is generally stipulated under Law No. 16 of 2004 regarding the Attorney General's Office (July 26, 2004) (the "Attorney General Law"). Article 30 of the Attorney General Law stipulates that in the criminal field, the Attorney General has the duties and authorities to:

(a) conduct prosecutions;
(b) implement the decisions of judges and courts that have legally binding force;
(c) supervise the implementation of conditional criminal decisions, supervisory criminal decisions, and parole decisions;
(d) conduct investigations into certain criminal acts based on the law; and
(e) complete certain case dossiers and conduct additional investigations before transferring the case to the courts.

Separately, the Supreme Court of Indonesia issued Supreme Court Regulation No. 13 of 2016 (December 29, 2016) ("SC Reg. 13/2016"), which sets out the procedures for handling criminal acts, including criminal acts of corruption, committed by corporations.

Overview of enforcement activity and policy during the last year

Since its inception, the KPK has garnered most of the Indonesian public's and media's attention in the fight against corruption. The KPK is known for its sting operations, or *operasi tangkap tangan* ("OTT"), resulting in the red-handed capture of perpetrators, mostly state officials. The KPK's activities are focused on bribery crimes. The KPK website reported around a 30% increase in corruption investigations and prosecutions in 2017 compared to the previous year (source: https://acch.kpk.go.id/id/statistik/tindak-pidana-korupsi).

One corruption case prosecuted by the KPK that captured headlines in 2017 was the e-KTP (electronic identification cards) scandal. The case involved state losses of IDR 2.3 trillion

(approximately US$ 155,000 using the current exchange rate). A number of government officials have been given prison sentences and criminal fines in connection with their roles in the case. The former speaker of the Indonesian House of Representatives, Setya Novanto, was among those officials implicated and has been given a lengthy prison sentence and a large fine by the Corruption Court.

In addition to that case, the KPK in a recent sting operation apprehended a lawmaker in connection with a bribery case related to a power plant project. An active minister in the current cabinet has also been called for questioning in connection with the case, which is ongoing. The KPK is also still actively investigating and prosecuting bribery cases at the regional level. Public sources suggest that between January and July 2018, 10 local government heads (at the governor or mayor level) have been arrested and named suspects by the KPK. Other government officials and lawmakers have also been targeted by the KPK in sting operations.

Separately, the Attorney General's Office is investigating a corruption case involving one of the largest state-owned banks in Indonesia. It is reported that the case involves state losses amounting to IDR 1.83 trillion (approximately US$ 123 million using the current exchange rate). Two senior officials at the bank have been detained by the Attorney General's Office for their alleged roles in the granting of an investment credit and the extension thereof to a local private company, which was alleged to have misappropriated the funds received from the bank. The case is ongoing as of the date of this writing.

In 2018, we have also seen a number of corporations investigated under SC Reg. 13/2016. A large state-owned construction company has been named a suspect in an ongoing corruption case, becoming the first state-owned company to be named a suspect by the KPK. The case involves the construction of a loading dock in a free trade zone, which is alleged to have caused state losses in the amount of IDR 313 billion (approximately US$ 21 million using the current exchange rate).

Law and policy relating to issues such as facilitation payments and hospitality

We understand that the Foreign Corrupt Practices Act (the "FCPA") permits facilitating payments to be made to foreign officials for routine governmental actions to expedite the performance of their duties. Such payments are generally considered as not being intended to influence the outcome of the official's action or decision, but rather to expedite an action or decision that is already a given. A facilitating payment, therefore, is an exception to the anti-bribery prohibitions in the FCPA.

In contrast, facilitating payments are not recognised under Indonesian law. Generally, there is no provision under the Anti-Corruption Law or in Indonesian law that permits facilitating payments or exempts such payments from the general prohibitions of the Anti-Corruption Law. In fact, unauthorised payment to any government official, regardless of the purpose, is very suspect and may be considered a bribe. The Anti-Corruption Law expressly provides that gifts or gratifications given to a government official or state organiser shall be considered a bribe if they are related to his/her position and are contrary to his/her official duty or obligations. The Anti-Corruption Law does not define the term "gift". It merely provides that "gratifications" are "*gifts in a broad meaning, which includes the giving of money, goods, discounts, commissions, interest-free loans, travel tickets, lodging, travel, free medical care, and other facilities*". Such gratification shall also encompass any gift that is accepted outside the country and given by using electronic means or otherwise. The term is thus meant to suggest any consideration of any kind, whether requested or

not. In this regard, it is difficult to see any meaningful difference between a "gift" and a "gratification". We believe it is prudent to give the term "gratification" a broad meaning such that it includes any consideration, in cash or in kind, for the personal benefit of the recipient, which is not required by law, administrative regulation, or similar enactment to be made, and whether or not solicited by the recipient.

Based on the foregoing broad definition, we are of the view that a facilitating payment provided for the purpose of expediting or securing the performance of a routine governmental action by an official would constitute a gift and gratification within the meaning of the Anti-Corruption Law.

In 2015, the KPK issued Guidelines for Gratification Control. Separately, KPK Regulation No. 2 of 2014 regarding Guidelines for Reporting and the Determination of Gratuity Status (December 9, 2014) requires state officials to report the receipt of a gratification to the KPK within 30 days of its receipt. While the KPK takes a hard line on this issue, it has not, to our knowledge, exercised its authority to prosecute people who make or receive such payments. These payments are considered relatively small in amount compared to the cases subject to the KPK's sting operations. It would appear that the KPK has much bigger fish to fry and prefers not to expend its limited resources pursuing either donors or government officials engaged in the practice of these "small" payments.

Another issue faced by companies in Indonesia is "official" requests for the payment of travel and logistical costs or the daily allowances of government officials in the performance of their official duties. Such practice often occurs in the oil and gas industry, although we note it happens in other industries as well. Companies will typically receive an official written request from the government institution concerned. Companies tend to view such requests as suspect and question, rightfully so, whether such payments are allowed under the Anti-Corruption Law.

To be clear, there is no regulation which expressly provides, obliges, or allows companies to bear the travel costs and pay the daily allowances of government officials. The general rule for official travel clearly stipulates that the daily allowances of government officials are to be provided by the relevant government ministry or state institution.

Interestingly, Indonesian law enforcement agencies appear to take a flexible approach to this issue. Law enforcement agencies understand that many government ministries and other government bodies lack the budget to accommodate official travel. Acknowledging the limits of the government's fiscal capability, law enforcement agencies accept, as a matter of unwritten policy, that the private sector may be asked to bear some or all of the costs of official travel, provided that: (i) the amount given to an official does not exceed the maximum amount stipulated by the Minister of Finance for official travel, which is regularly updated, typically on a yearly basis; and (ii) the daily allowance of the officials has not been covered by the state budget.

In our view, a private sector entity paying a government official an amount in respect of official travel to which the official is entitled by statute, but which has not been covered by the state budget, would not likely be deemed unlawful. However, there is no provision of Indonesian law with the clear intent of permitting or prohibiting the practice.

Accordingly, we have prepared a few pointers which we hope are useful for companies in handling such a situation. As the practice normally occurs through the issuance of a request, the company should ask for an official written request from the relevant government institution. The company will need to review whether the activity the government institution will perform and the amount requested are consistent with the prevailing laws

and regulations. It is advisable that companies do not make such payments in cash, if possible. However, any cash payment should be to an official state bank account and paid through any of the officially appointed state-owned banks. Any request for payment to an individual's bank account should at all times be avoided.

We must caution that this is not catchall legal advice. Every case and situation may be unique and should be treated as such. We would recommend that companies consult their legal and compliance teams in every situation where payments to government officials are involved.

Key issues relating to investigation, decision-making and enforcement procedures

As discussed above, there are three law enforcement bodies authorised to investigate and/or prosecute corruption. These three bodies have equal standing and there is no regulation in regard to who should begin an investigation. Whichever body has sufficient preliminary evidence to conduct an investigation may proceed with the investigation, resulting in the potential overlap of authorities.

The KPK Law seeks to address this problem. Pursuant to the KPK Law, the KPK has the authority to take over the investigation or prosecution of a criminal act of corruption conducted by the Police or the Attorney General's Office based on a number of specified criteria under the KPK Law. Further, Article 44(4) of the KPK Law stipulates that where the KPK is of the opinion that a criminal act of corruption should be prosecuted based on sufficient proof, the KPK may conduct the investigation by itself or transfer the investigation to the Attorney General's Office or the Police. Conversely, it does not appear that the Attorney General's Office or the Police have the active authority to take over the investigation of a criminal act of corruption that has been initiated by the KPK.

The authority of the KPK to take over a Police or Attorney General's investigation shall be based on one of the following reasons, pursuant to the KPK Law:

(a) a report from the public on a criminal act of corruption has not been followed up;
(b) the handling of the criminal act of corruption is delayed for no accountable reason;
(c) the handling of the criminal act of corruption is designed to protect the real perpetrator;
(d) there is an indication of corruption in the handling of the criminal act of corruption;
(e) there is an intervention by the executive, judicial, or legislative branch in the handling of the criminal act of corruption; or
(f) other reasons based on the consideration of the Police or the Attorney General's Office that mean it will be difficult to properly and accountably handle the criminal act of corruption.

Although all three bodies have equal standing to investigate criminal acts of corruption, the Anti-Corruption Law provides that the KPK will generally be the relevant authority where the corruption:

- involves the state legal enforcement apparatus, state organisers, and others involved in the enforcement of criminal acts of corruption;
- causes societal concern; and/or
- involves a minimum state loss of IDR 1 billion.

These points are drafted as alternatives and it is not necessary to meet all of the elements for the KPK to assert its authority to investigate an act of criminal corruption.

Any investigation for which sufficient preliminary evidence is gathered should proceed to a court trial. In a court trial, the judges will only sanction the suspect when there are at least

two sufficient pieces of legal evidence. Principally, if there is insufficient proof that a crime has occurred, the investigator under the Indonesian Criminal Procedural Code may issue an order letter to stop the investigation, known in Bahasa Indonesia as a *Surat Perintah Pemberhentian Penyidikan* (SP3). The Attorney General's Office can also stop a prosecution if there is insufficient evidence, because the event did not constitute a crime, or in the interest of the law pursuant to the Indonesian Criminal Procedural Code. Contrary to the above, the KPK does not have any authority to stop an ongoing investigation or prosecution.

These law enforcement bodies will proceed with criminal prosecution if there is sufficient evidence to justify such prosecution. Civil claims are rarely, if ever, pursued, although the Anti-Corruption Law empowers the state apparatus to file a civil claim to recover as damages losses as a result of corruption. Aside from the death of the alleged perpetrator, there is probably no reason for law enforcement to take this civil route. Pursuing a civil claim can be lengthy and these law enforcement bodies may be subject to budget constraints. In any event, law enforcement would normally seek criminal sanctions in the form of fines or compensation pursuant to the Anti-Corruption Law.

The Anti-Corruption Law is silent on voluntary disclosure of corruption acts by perpetrators. There is no leniency programme offered under the Anti-Corruption Law for perpetrators who come forward and cooperate with the authorities in the investigation of an act of corruption.

Despite that, we note that there have been several cases in which a corruption suspect volunteered himself as a "justice collaborator" with the aim of gaining more lenient sanctions.

The concept of justice collaborator in Indonesia can be found in Law No. 13 of 2006 regarding Witness and Victim Protection (August 11, 2006), as amended by Law No. 31 of 2014 (October 17, 2014) (the "Witness and Victim Protection Law"). The Witness and Victim Protection Law provides that a witness who is also an offender, i.e., a justice collaborator, is given special treatment during the examination process and is rewarded for his/her testimony. Such special treatment comprises being held in a separate location from the accused, separation of the witness' dossiers from those of the accused, and/or the ability to give witness testimony without the presence of the accused. The witness may be given leniency in his/her sentence, early parole, and other rights.

A similar provision on lighter sanctions for a justice collaborator can be found in Supreme Court Circular Letter No. 4 Year 2011 regarding Treatment for Whistleblowers and Justice Collaborators in Certain Criminal Acts (August 10, 2011), which stipulates that in return for the collaboration offered by a justice collaborator, the judges may impose lighter sanctions or penalties compared to those for other suspects involved in the same criminal acts.

Overview of cross-border issues

The Anti-Corruption Law and the Anti-Bribery Law recognise the extra-territorial principle.

The Anti-Corruption Law stipulates that "individuals outside the territory of Indonesia" are subject to its provisions. These individuals may be held liable for corruption in the event that they provide any assistance, opportunity, infrastructure, or information for a transnational criminal act of corruption in Indonesia (such as transferring funds originating from corruption overseas) that gives rise to a corruption crime specified under the Anti-Corruption Law. The individual will be treated as a perpetrator under the Anti-Corruption Law.

The Anti-Bribery Law provides that bribery committed outside Indonesia is subject to the Anti-Bribery Law. It is important to note that the Anti-Bribery Law concerns the bribery of

Indonesian government officials who have authority related to public services in Indonesia. It does not govern bribery of foreign officials.

Further, SC Reg. 13/2016 does not seem to limit the "citizenship" of a corporate entity, and in fact requires the "citizenship" information of a corporate entity in the event that the KPK or the Attorney General's Office issues a summons to a corporation as part of an investigation (either as a witness or perpetrator). Article 10 of SC Reg. 13/2016 stipulates that a summons letter for a corporation shall at least contain:

(a) the name of the corporation;

(b) the corporation's domicile;

(c) the nationality of the corporation;

(d) the status of the corporation in the criminal act of corruption (witness, suspect, or defendant);

(e) the place and time of investigation; and

(f) a summary of the criminal act of corruption that relates to the summons.

Although SC Reg. 13/2016 provides the authority to issue summonses to foreign entities, we are not aware of any incident whereby law enforcement bodies have issued such a summons. We also believe that it would be very difficult to enforce such a summons without the cooperation of the country of domicile of the entity to which the summons is addressed. In this regard, the KPK Law provides that cooperation between inter-state law enforcement institutions may be pursued based on the relevant laws and regulations or international treaties recognised by the Government of Indonesia.

Corporate liability for bribery and corruption offences

The Anti-Corruption Law may hold corporations responsible for criminal acts of corruption. Pursuant to Article 20 of the Anti-Corruption Law, a corporation found guilty of an act of corruption may be required to pay a maximum fine equal to the maximum fine for an individual, plus an additional one-third on top of such fine. Individual members of management may be held liable for criminal acts of corruption committed by the corporation.

In a similar vein, SC Reg. 13/2016 stipulates that a corporation shall be represented by member(s) of its management during any investigation and subsequent court proceedings for corporate crimes, except for a corporation that is undergoing a dissolution process, which shall be represented by the liquidator.

SC Reg. 13/2016 also suggests that in deciding criminal penalties for a corporation, the Panel of Judges may assess whether the corporation:

(a) profited or benefited from such criminal act, or whether such act was committed for the corporation's interest;

(b) allowed such criminal act to happen; and

(c) failed to take necessary measures to prevent and/or minimise the impact of such criminal act, and also to ensure the compliance of the corporation with the prevailing laws and regulations to avoid such criminal act from being committed.

We would note that the above provision (c) may be interpreted to mean that the Panel of Judges would likely look into the measures taken by a corporation in preventing the alleged act of corruption. However, it is not clear whether such provision provides a defence or excuse for companies that claim to have taken measures to prevent an act of corruption from occurring. The regulation does not address the forms of valid defence.

Since the enactment of SC Reg. 13/2016, law enforcement agencies have utilised the provisions of SC Reg. 13/2016 to target corporations in relation to corruption allegations. As discussed above, the KPK has for the first time named a state-owned company a suspect in a corruption case.

It is interesting to note that prior to SC Reg. 13/2016, a number of corporations were already subject to penalties under the Anti-Corruption Law.

One case involving a private company was decided by the District Court in Banjarmasin, South Kalimantan, in 2011. The company was found to have committed an unlawful act that caused state losses and was fined IDR 1,317,782,129 (approximately US$ 88,440 using the current exchange rate). It was also given a sanction in the form of a temporary business closure for a period of six months.

In a separate case, in 2013, a former president director of a major state-owned telecommunications company was fined and sentenced to prison for illegally enriching the company by unlawfully using the 2.1-gigahertz (3G) telecommunications frequency. In addition, the Indonesian Corruption Court in the first instance also ordered the company to pay IDR 1.3 trillion to the state as reimbursement for financial losses, although the company itself had not been declared a suspect. Ultimately, the charges brought against the company were dismissed at the appeal level.

Both of these cases were brought by the Attorney General's Office and demonstrate that criminal acts of corruption by a corporation do not go unnoticed by law enforcement bodies.

Proposed reforms / The year ahead

One key legislative reform that is of significance is the impending amendment to the Indonesian Criminal Code. Based on the most recent draft amendment that we have reviewed, there are a number of proposed amendments to provisions relating to corruption. These include the proposed amendment to the criminal fines for acts of corruption. One concern that has been raised is whether the proposed amendment of the Criminal Code will impede the authority of the KPK to investigate and prosecute corruption cases. Another issue is that the proposed amendments to the Criminal Code exclude corruption in the private sector, which would seem to indicate that private sector corruption will be incorporated into a future amendment of the Anti-Corruption Law.

These are major points which will surely receive serious scrutiny going forward. Only time will tell whether these proposed amendments to the legal regime underpinning anti-corruption efforts in Indonesia will stand the test of time and reason.

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