

INDONESIA – THE FIGHT AGAINST CORRUPTION TARGETS COMPANIES

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Indonesia's fight against systemic public sector corruption commenced in earnest following the Asian Financial Crisis and the subsequent fall of President Suharto's reign. As a condition of the bail out package received in 1998 from the International Monetary Fund, Indonesia was required to establish a comprehensive anti-corruption commission. A new anti-corruption law was enacted in 2002 (Law no. 30/2002) and in 2003 the Indonesia Corruption Eradication Commission was established, the Komisi Pemberantasan Korupsi ("**KPK**"), to effectively enforce Law 30/2002. Significant recent developments indicate a continued focus on and strengthening of approach toward corruption, such that companies conducting business in Indonesia should ensure that they have the appropriate internal policies and procedures in place to prevent corruption offences and ensure compliance.

The KPK removed corruption investigations and prosecutions from the sole control of the police, allowing specialist investigators and prosecutors to tackle cases where a public corruption report was not acted upon or in circumstances where there was obstruction from the executive, judiciary or legislature in the investigation. The KPK's purview extends to cases involving police officers, state officials, and other connected individuals, and includes cases of significant public concern or cases that involve amounts of at least one billion Rupiah (approximately US\$100,000).

The KPK has proven itself to be effective and fearless in its attempts to stamp out corruption, even at the higher echelons of power. In its first 13 years it achieved a 100 percent conviction rate and has contributed to the country's rise in the Transparency International Corruption Perception Index. In 2013, the Index placed the country at the same level as Egypt, at 114 out of 176 countries polled; in 2014 the country moved up 7 places to rank at 107; in 2015, there was a substantial jump as the country entered the upper half of the table, coming in at 88. In 2016, whilst slipping two places, it is clearly a country moving in the right direction in terms of taking steps to eradicate public sector corruption.

The KPK has shown itself to be capable of standing up against political pressure. Between 2004 and 2009 the KPK investigated 45 members of Parliament, 8 Ministers, judges, prosecutors, ambassadors and the former Chief of the National Police amongst others, suggesting that it is prepared to challenge the abuse of power at the highest levels of government [1]. This has led to strong support from the public with the organisation becoming Indonesia's most trusted public institution [2]. It is perhaps unsurprising that the public sentiment is not shared by the country's ruling elite, who have accused the Commission of overreach. Attempts have been made to clip the Commission's wings through the withholding of government funds [3] and accusing the KPK's leadership of forgery, witness tampering and assault. Further, in 2015 the Indonesian Parliament attempted to revise the anti-corruption law by curtailing the KPK's power and surveillance function and attempted to create a supervisory board to determine which cases the KPK could pursue. The attempt to revise the law backfired with the

Indonesian population coming out to support the work of the Commission and resisting any attempts to curtail the KPK's autonomy. The public backlash led to the proposed revisions being shelved in 2016, although they have been kept on the parliamentary agenda for consideration at a future date.

Despite these many difficulties, the KPK continues to pursue anti-corruption efforts. In its latest move on 14 July 2017, the KPK named the first corporation as a Corruption Suspect. Publicly listed construction firm PT Duta Graha Indah ("**DGI**"), linked to Jakarta deputy-governor-elect Sandiaga Uno and which has since changed its name to PT Nusantra Konstruksi Enjiniring, has been named as a suspect in a corruption case which involved the construction of a hospital in Bali between 2009 and 2010 [4].

The move comes after the 2016 Indonesian Supreme Court Regulation 13/2016, allowing enforcement agencies to name a company as a suspect in criminal cases involving corruption, environmental and fisheries crimes [5]. Companies conducting business in Indonesia should take note of this Regulation as it brings the enforcement of bribery and corruption offences up to the international norms of naming both the individual and the corporation as suspects in the wrongdoing.

REGULATION 13 OF 2016

Whilst corporate criminal liability has always been a concept in Indonesian criminal law, the Regulation provides a clear definition of "crimes committed by corporations" as those committed by persons, whether in an employment relationship or other relationship, either inside or outside the "corporation's environment". The "corporation's environment" includes those activities, whether directly or indirectly, which are part of the scope of the corporation's business.

In considering whether to hold a corporation liable for a criminal act, the following non-exhaustive factors will be considered:

- Whether the corporation gained from the criminal act or whether the act itself was in furtherance of the corporation's interest;
- Whether the corporation allowed the crime to occur; or
- Whether the corporation failed to take any steps to prevent the crime from taking place, including such steps as would limit the impact of the criminal act, or to ensure compliance with existing laws.

Further, the Regulation has far-reaching consequences by preventing corporations from simply reinventing themselves in a different guise in an attempt to evade liability being imposed:

- In the case involving multiple companies, the prosecuted company may be prosecuted for their role in the crime and liability will be apportioned according to the actual involvement of that company;
- The liability will be transferred to any part of the surviving corporation in the case of a subsequent merger or acquisition; and
- In the case of dissolution of a company, whilst dissolved companies are immune from criminal proceedings, the dissolved corporation's assets are still subject to seizure by enforcement agencies.

CONCLUSION

Whether the Regulation marks a change in approach from prosecuting the individual to going after the company, or both, remains to be seen. What it has shown is that the KPK remains the autonomous body for which it was set up and is prepared to take on corruption at the very highest level.

The move against DGI may also signal an end to the country's historic reluctance to tackle corruption at a corporate level, and makes it harder for Indonesia's neighbours to continue to turn a blind eye to their own companies' actions. Should the investigation against DGI lead to a trial the scope and impact of the regulations will undoubtedly become clearer. For now, Indonesia looks to be set to continue its ascent on the TI Index and therefore companies conducting business in Indonesia should ensure that they have the appropriate internal policies and procedures in place to prevent bribery and corruption offences being carried out on its behalf.

Notes:

- 1 <http://www.reuters.com/article/us-indonesia-graftbusters-specialreport-idUSBRE9AG00V20131118>
- 2 <http://www.thejakartapost.com/news/2017/07/21/public-trust-kpk-unscathed-despite-house-inquiry-move.html>
- 3 <http://www.nytimes.com/2012/08/04/world/asia/anti-graft-agency-corruption-eradication-commission-asks-ordinary-indonesians-for-funds.html>
- 4 <http://www.thejakartapost.com/news/2017/07/14/kpk-names-company-suspect-.html>
- 5 Supreme Court Regulations on Procedures for the Handling of Corporate Crime Cases (Regulation 13 of 2016)

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