CLIENT UPDATE
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Supreme Court Moves to Close Corporate Crime Loophole

A. Introduction

The Supreme Court recently issued a regulation (the "**Regulation**") [i] setting out the procedures for handling criminal offenses committed by corporations. The new rules, which entered into force on 29 December 2016, provide a partial remedy to one of the most obvious deficiencies in Indonesian law, namely, the lack of a solid legal framework for addressing corporate crime.

B. Background

The issue of corporate criminal liability has long been a topic of debate in Indonesian legal circles. While there is little dispute over the legal personality of a corporation (known in law as a "legal person") or that a corporation has, in the eyes of the law, the same legal rights and obligations as a natural person (save for obvious things like the right to marry or where specific exceptions are made by statute), there has been significant confusion as to whether a corporation may actually be prosecuted, tried and convicted of a criminal offense.

This confusion stems from the differing approach to legal personality applied by the civil law, as compared with the common law. [ii] The latter has traditionally focused on legal certainty, as reflected in the very strict version of legal personality that was laid down by the English Courts in the leading case of Salomon v Salomon in 1897, which once and for all established the "corporate veil" principle, meaning that the Courts are reluctant in the extreme to look behind the corporate façade so as to identify the individuals operating or actualizing the corporation. The corollary of this is that, as a "person", a corporation bears undoubted criminal liability.

By contrast, the civil law applies a much more nuanced approach that is influenced by the realization that corporate personality can be used as a vehicle for fraud and other abuses. Thus, the concept of corporate personality is not so clearly defined in the civil law, leading to a situation where historically the civil law has tended to focus primarily on the individuals ultimately responsible for wrongdoing by a corporation (i.e., the corporation's officers). Unfortunately, this approach fails to inflict punishment on the owners of the corporation -- its shareholders -- despite the fact that the wrongdoing will generally be perpetrated so as to advance their interests.

This was also the situation in Indonesia, a civil law jurisdiction, where the bulk of substantive criminal law is contained in the colonial era Criminal Code (*Kitab Undang-undang Hukum Pidana* / KUHP), which confines criminal liability to "persons" (*orang*). This term has traditionally been interpreted as encompassing only natural persons (i.e., human beings).

At the same time, quite a number of statutes have been enacted in Indonesia over the last couple of decades that establish corporate criminal liability for offenses in specific sectors. Moreover, some of the statutes, for example, Law 31/1999 on the Eradication of Corruption (as amended by Law 20/2001), clearly describe the term "person" (*orang*) as not just encompassing natural persons but also legal persons, i.e., corporations.

C. Key Issues

As a Supreme Court regulation, the Regulation cannot create new legal norms or penalties, and may only complement the prevailing statute law (or "*Undang-Undang*"), in particular, those statutes that provide for corporate criminal liability.

The Regulation addresses the following principal aspects: (a) nature of corporate criminal liability, (b) investigation and trial; and (c) penalties.

a. *Nature of Corporate Criminal Liability*

The Regulation defines a corporate crime as an act that is committed by one or more persons based on a relationship of employment or other relationship, where such act is committed on behalf of the corporation, whether within the corporation or outside the corporation.

The parties that may be required to account for a corporation's actions during an investigation and/or trial process are not confined to company officers (normally the directors), but may also be other individuals who, while not officially authorized to make decisions, are nevertheless in a position to control the corporation, influence its policies, or participate in policy-making. The individuals who may be required to represent the corporation are collectively referred to below, in both the singular and plural, as "Officer/Person with Significant Control" ("**OPWSC**").

The Regulation also makes it clear that criminal liability is not confined to the corporation that actually committed the offense but may also extend to an affiliate that participated in the offense. In addition, reflecting the continuity inherent in corporate personality, a corporation may continue to be held liable notwithstanding that one or more OPWSC has resigned or passed away.

b. *Investigation and Trial*

A criminal investigation of a corporation may be conducted independently or may be combined with an investigation of one or more OPWSC. During the investigation, the corporation will be represented by an OPWSC, who will be required to participate in the investigation process. Should he or she fail to do so, participation may be compelled through court order.

At the trial stage, the OPWSC representing the corporation is required to attend Court. Should he or she fail to do so on account of a temporary or permanent impediment, the Court may direct the Prosecution Service to designate another OPWSC to represent the corporation and to ensure his or her attendance in Court.

The Regulation also provides for corporate criminal liability in the event of a merger, demerger, consolidation or dissolution.

In the case of a merger or consolidation, the criminal liability of the surviving or successor corporation is confined to the value of the assets it acquired as a result of the merger or consolidation, while in the case of a demerger or spin off, criminal liability is apportioned having regard to the roles played in the offense by each entity.

Further, a corporation that is undergoing a process of dissolution continues to bear criminal liability until such time as it has actually been dissolved, at which point in time criminal liability ceases to exist. In such circumstances, the relevant law enforcement authority may bring a civil action against former OPWSC of the corporation, their heirs and successors and/or third parties that control assets of the dissolved corporation which are believed to have been used in, or to represent the fruits of, the offense.

c. *Penalties*

The Regulation provides that in determining the penalty to be imposed on a corporation upon conviction of an offense, the Court shall take into consideration the following factors:

(i) The potential benefit or advantage accruing to the corporation as a result of the offense and whether or not the offense was committed in the interests of the corporation;
(ii) Whether or not the corporation acquiesced in the committing of the offense.
(iii) Whether or not the corporation failed to take necessary action to prevent the occurrence of the offense, failed to take mitigation measures and/or failed to comply with the prevailing laws in order to prevent the occurrence of the offense.

Upon conviction, both primary and supplemental penalties may be imposed. Primary penalties consist of fines, while supplemental penalties are as provided for by the relevant legislation.

Should a fine not be paid within the prescribed period, assets of the corporation may be confiscated by the Prosecution Service and subsequently auctioned, with the proceeds being used to pay the fine.

Should the Court impose a fine on an OPWSC and such fine is not paid as required, the individual in question will be subject to a term of light imprisonment [iii] that is deemed commensurate with the amount of the unpaid fine.

AHP Commentary

The ambit of the Regulation is confined to criminal offenses established by sectoral legislation, that is, legislation enacted to address issues in specific areas, such as corruption, banking, fisheries and the environment (where the annual saga of hugely destructive forest fires has brought the issue of corporate criminal liability very much to the fore).

Since various statutes regulations recognize corporations as legal subjects in the criminal law, it is indisputable that a corporation may be tried and convicted by a criminal court in Indonesia. The Regulation provides clear guidance for the courts in conducting such proceedings. Before the Regulation was issued, the following questions may not be answered by the prevailing procedural regulations/rules:

(1) What is the benchmark for the court in imposing a penalty (fine) on a corporation in a criminal proceeding?

(2) What if the corporation being prosecuted has been merged or acquired by a different corporation, or has been liquidated?

The Regulation, as stated in Article 2, is intended to fill the procedural void related to criminal proceedings involving corporations. A number of provisions of the Regulation provide answers tom the questions above, for example:

(1) Under Article 4 of the Regulation stipulates that in determining a sentence against a company, Judges shall put the following into consideration:

- Whether the company receives proceeds from the criminal act;
- Whether the company is negligent during the commission of the criminal act; or
- Whether the company has performed precautionary measures to prevent the criminal act.

This provision clearly guides Judges on how they should impose punishment on a corporation, i.e., the maximum penalty if the company receive proceeds, is negligent, or never performs any precautionary measures; OR the minimum penalty if it is proven that the company is only negligent, but does not receive any proceeds.

(2) Article 7 and 8 also regulate how a case against the corporation should by handled by the Court if the corporation is in the process of merger, acquisition, or liquidation.

As Article 4 of the Regulation confirms that negligence in the management of a corporation may lead to heavier punishment, corporations should consider taking the following actions:

(1) Procure and maintain a compliance program, applicable to management and employees;

(2) Ensure that all decision-making processes are conducted based on good corporate governance principles and free from conflicts of interest;

(3) Maintain records and key material documentation of the company.

i. *Peraturan Mahkamah Agung No. 13/2016 tentang Tata Cara Penanganan Perkara Tindak Pidana Oleh Korporasi.*
ii. *The common law system is practiced in England and most of its former colonies and territories, while the civil law system is adhered to by the countries of Continental Europe, and their former colonies and territories. In Asia, the civil law has also been adopted by the People's Republic of China, Japan, South Korea and Thailand.*
iii. *Pidana kurungan – a form of imprisonment that is less onerous than normal imprisonment.*

Contacts

Chandra M. Hamzah
Partner

D (62) 21 2555 9999
F (62) 21 2555 7899
chandra.hamzah@ahp.co.id

Eri Hertiawan
Partner

D (62) 21 2555 7883
F (62) 21 2555 7899
eri.hertiawan@ahp.co.id

ASEAN Economic Community Portal

With the launch of the ASEAN Economic Community ("**AEC**") in December 2015, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch "Business in ASEAN", a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN's business landscape. Of particular interest to businesses is the "Ask a Question" feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at http://www.businessinasean.com/.

Our regional presence

Our regional contacts

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP
9 Battery Road #25-01
Straits Trading Building
Singapore 049910
T +65 6535 3600 F +65 6225 9630
sg.rajahtannasia.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office
Vattanac Capital Office Tower, Level 17, No. 66
Preah Monivong Boulevard, Sangkat Wat Phnom
Khan Daun Penh, 12202 Phnom Penh, Cambodia
T +855 23 963 112 / 113 F +855 963 116
kh.rajahtannasia.com
**in association with Rajah & Tann Singapore LLP*

RAJAH & TANN REPRESENTATIVE OFFICE | *China*

Rajah & Tann Singapore LLP
Shanghai Representative Office
Unit 1905-1906, Shui On Plaza, 333 Huai Hai Middle Road
Shanghai 200021, People's Republic of China
T +86 21 6120 8818 F +86 21 6120 8820
cn.rajahtannasia.com

RAJAH & TANN NK LEGAL | *Myanmar*

Rajah & Tann NK Legal Myanmar Company Limited
Myanmar Centre Tower 1, Floor 07, Unit 08,
192 Kaba Aye Pagoda Road, Bahan Township,
Yangon, Myanmar
T +95 9 73040763 / +95 1 657902 / +95 1 657903
F +95 1 9665537
mm.rajahtannasia.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office
Menara Rajawali 16th Floor
Jalan DR. Ide Anak Agung Gde Agung Lot #5.1
Kawasan Mega Kuningan, Jakarta 12950, Indonesia
T +62 21 2555 7800 F +62 21 2555 7899
www.ahp.co.id

Surabaya Office
Pakuwon Center, Superblok Tunjungan City
Lantai 11, Unit 08
Jalan Embong Malang No. 1, 3, 5, Surabaya 60261, Indonesia
T +62 31 5116 4550 F +62 31 5116 4560

** Assegaf Hamzah & Partners is an independent law firm in Indonesia and a member of the Rajah & Tann Asia network.*

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong
Level 22, Axiata Tower, No. 9 Jalan Stesen Sentral 5,
Kuala Lumpur Sentral, 50470 Kuala Lumpur, Malaysia
T +60 3 2273 1919 F +60 3 2273 8310
www.christopherleeong.com
**in association with Rajah & Tann Singapore LLP*

RAJAH & TANN | *Thailand*

Rajah & Tann (Thailand) Limited
973 President Tower, 12th Floor, Units 12A-12F
Ploenchit Road, Lumpini, Pathumwan
Bangkok 10330, Thailand
T +66 2 656 1991 F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Sole Co., Ltd.
Phonexay Village, 23 Singha Road, House Number 046/2
Unit 4, Saysettha District, Vientiane Capital, Lao PDR
T +856 21 454 239 F +856 21 285 261
la.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office
Saigon Centre, Level 13, Unit 2&3
65 Le Loi Boulevard, District 1, HCMC, Vietnam
T +84 8 3821 2382 / +84 8 3821 2673 F +84 8 3520 8206

Hanoi Office
Lotte Center Hanoi - East Tower, Level 30, Unit 3003,
54 Lieu Giai St., Ba Dinh Dist., Hanoi, Vietnam
T +84 4 3267 6127 F +84 4 3267 6128
www.rajahtannlct.com

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