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Indonesian New Criminal Code

In brief

This client alert discusses the new Indonesian criminal code, which in a few years will replace the existing criminal code. This alert outlines the key features of the new criminal code, and is the first of a series of client alerts on the new Indonesian criminal code.

In this issue

Snapshots of the New Criminal Code
Extraterritoriality
Corporate criminal liability
Living law/customary law
Settlement in a criminal case

Snapshots of the New Criminal Code

The House of Representatives and the Government of Indonesia approved the draft of the new criminal code on 6 December 2022 ("**New Criminal Code**"), despite some concerns from community groups about the contents of the code. The New Criminal Code is expected to be promulgated within 30 days after 6 December 2022 and will take effect three years after the promulgation. As of the date of this client alert, the New Criminal Code has not yet been promulgated, and the client alert is based on the latest draft of the New Criminal Code that has been made publicly available. Pending the effective date of the New Criminal Code, the current criminal code is still enforceable and will continue to operate in Indonesia.

The New Criminal Code attempts to modernize and update the criminal legal framework in Indonesia and will distinctly revolutionize Indonesia's current penal regime. Some of the provisions worth noting in the New Criminal Code are as follows:

1. The New Criminal Code includes the expansion of the corporate criminal liability principle and recognition of living law (customary law).
2. The New Criminal Code provides a settlement framework in certain criminal cases allowing wrongdoers to be discharged from criminal prosecution by paying a monetary fine to the state.
3. The New Criminal Code will revise and revoke a number of criminal offenses that are scattered under several specific laws. The affected specific laws include:
   a. Law No. 31 of 1999 on Eradication of Corruption as amended by Law No. 20 of 2001
   b. Law No. 8 of 2010 on Prevention and Eradication of Money Laundering Crimes
   c. Law No. 11 of 2008 on Electronic Information and Transactions as amended by Law No. 19 of 2016

   This means that the penal regime of these affected laws will change once the New Criminal Code comes into effect.
4. The New Criminal Code mandates that all other legislation containing criminal offenses must be amended/adjusted to be consistent with the general provisions of Chapter 1 of the New Criminal Code.
5. The New Criminal Code largely maintains some general criminal offenses. However, it expands the formulation of criminal offenses and introduces some new criminal offenses which include:
   a. Article 263 prohibits dissemination of false news or hoaxes that may result in unrest, with a jail penalty of up to six years or a fine of up to IDR 500 million. Article 264 expands this further by introducing punishment of imprisonment for up to two years or a fine of up to IDR 50 million for any persons (which include corporations) that disseminate news that is "uncertain", "exaggerated" or "incomplete", which they reasonably know, or suspect, may cause unrest.
   b. Article 411 punishes adultery and extramarital sex with up to one year in jail or a fine of up to IDR 10 million. Similarly, Article 412 punishes the act of couples living together without being legally married with up to six months in prison or a

fine of up to IDR 10 million. Arguably these provisions may also be used to criminalize same-sex conduct and same-sex cohabitation because same-sex marriage is not recognized in Indonesia. However, it should be noted that that conduct can be criminalized only if the husband or wife (for married couples), or the parent or child of the offender files a criminal complaint about that conduct to the law enforcement agencies (which can be revoked). The law enforcement agencies have no legal authority to prosecute that conduct in the absence of a criminal complaint.

c. Article 424 prohibits any persons (including corporations) from selling alcohol to an intoxicated person, with a penalty of up to one year in jail or a fine of up to IDR 10 million. It is unlikely that this provision will be disruptive to tourism and the F&B industry noting that Article 424 largely mirrors Article 300 paragraph 1 of the existing criminal code.

d. Article 444 punishes employees who breach confidentiality during employment and post-employment with up to two years in jail or a fine of up to IDR 50 million. This conduct can be criminalized if a company files a criminal complaint against the employee/ex-employee to the law enforcement agencies (which can be revoked).

e. Article 495 punishes business actors who commit fraudulent acts by making a false statement or failing to disclose actual circumstances that cause economic losses to others with up to one year in jail or a fine of up to IDR 10 million. The statutory elucidation provides an example of prohibited conduct, namely business actors providing false representation about the quality of goods resulting in consumers purchasing the goods that are not in accordance with the consumers' expectations or not in accordance with the costs incurred by the consumers. It is not yet entirely clear if this provision can be interpreted broadly to include false representations in corporate transactions.

The New Criminal Code also dedicates a specific section to address fraudulent trading in the context of insolvency, with punishment of imprisonment ranging from up to one and a half years to seven years or fines ranging from up to IDR 50 million to IDR 2 billion.

Extraterritoriality

The general rule under the territorial principle is that the New Criminal Code applies in the territory of Indonesia. But, depending on a number of factors, the New Criminal Code may also have an extraterritorial effect. The extraterritorial effect will apply when the effects of the criminal offense are experienced or occur in the territory of Indonesia. Some criminal offenses that are clearly stipulated to have extraterritorial effect are mostly related to information technology/cyber crime and state security/interest.

Corporate criminal liability

Although the corporate criminal liability principle already existed before the New Criminal Code was approved, the New Criminal Code reinvents that principle. As an example, the New Criminal Code expands the element of "person" in all provisions to also include corporations. This shows that the New Criminal Code acknowledges that corporations can also commit general criminal offenses instead of only specific criminal offenses (e.g., corruption, money laundering and environment-related offenses). Under the New Criminal Code, corporations are defined broadly to include limited liability companies, foundations, cooperatives, state owned companies and partnerships. It is not clear whether the New Criminal Code will also apply to foreign corporations despite the extraterritoriality.

The New Criminal Code now also provides a clear stipulation on when a criminal offense is considered a corporate crime. It qualifies corporate crimes as criminal offenses that are committed by (i) members of a corporation's management who have a functional position or (ii) persons who have employment or other relationships with the corporation, where such criminal offenses fall within the scope of the corporation's business or activities. The New Criminal Code provides that corporate crimes can also be committed by controllers or beneficial owners of a corporation.

In addition, the New Criminal Code also provides a clear stipulation on when a corporation can be held liable, i.e.:

1. If the committed criminal offense falls within the scope of the corporation's business or activities as stipulated under its articles of association or other applicable documents
2. If the criminal offense unlawfully benefits the corporation
3. If the offense is accepted under the corporation's policy
4. If the corporation did not take preventive actions or if the corporation did not ensure compliance with applicable laws and regulations to prevent such offenses from happening
5. If the corporation allows the offense to occur

The criminal liability can be extended to the corporation, the management, shareholders, controllers and even the beneficial owners depending on the circumstances of the case.

The New Criminal Code is silent on whether the corporate liability will be transferred to a surviving entity in the case of a merger.

In that regard, it is interesting to note that before the New Criminal Code comes into force, the reference used in prosecuting a corporation is Supreme Court Regulation No. 13 of 2016 on Case Handling Procedures for Corporate Crimes ("**SC Regulation**"). The SC Regulation specifically governs the liability of a corporation after a restructuring. Generally, restructuring will not relieve a corporation from its liability; the liability will be borne by the successor or surviving corporation. The SC Regulation goes into further detail on liability in cases of mergers, consolidations, spin-offs, and liquidations.

In the event of a merger or consolidation, the surviving corporation bears the liability for any crimes committed before the merger or consolidation. However, the extent of the liability of the surviving corporation is not clear. There are at least two possible interpretations: (i) the liability extends to the whole value of the assets placed in the surviving corporation at any time, or (ii) the liability only extends to the value of the assets placed in the surviving corporation by the corporation that committed the crime prior to the merger or consolidation.

In the event of a spin-off, the liability may extend to either one of the corporations being spun off, or both, depending on their roles.

If a corporation is in a liquidation process, the liability still lies with the corporation. Thus, initiating liquidation does not free a corporation from its criminal liability. Criminal liability is only lifted if the corporation has been effectively dissolved, where there can be no criminal liability. However, this does not stop the state from going after the liquidated assets. Assets which are alleged to have been used to conduct a crime or are the result of a crime can be chased. The claim for these assets is filed against the former management, heirs, or third parties who control the assets of the liquidated corporation.

Corporations contemplating restructuring may want to take into consideration their liability in light of the restructuring, i.e., whether they will lose or be exposed to more liability because of the restructuring. This calls for due diligence to assess the risks that the corporation is exposed to due to pre-existing criminal liability.

However, it is not clear whether the SC Regulation will remain relevant upon the effectiveness of the New Criminal Code.

Under the New Criminal Code, the principal sanction for corporations is the imposition of fines, ranging from IDR 200 million to IDR 50 billion. In addition, corporations are also subject to additional sanctions such as revocation of license, closure of business, freezing of operations and liquidation. On top of the principal sanction and additional sanctions, corporations may also be subject to the following sanctions upon committing a criminal offense:

1. Takeover
2. Placement under supervision
3. Placement under guardianship

The New Criminal Code mandates the promulgation of an implementing regulation on procedures for imposing sanctions on corporations. Therefore, the full implementation of the corporate criminal liability under the New Criminal Code is something that remains to be seen.

Living law/customary law

Under Indonesia's current penal system, a person (including a corporation) can only be prosecuted based on written laws in force in Indonesia. The New Criminal Code changes this concept by recognizing "living law" (*hukum yang hidup dalam masyarakat*) as an additional reference to prosecute someone. The term "living law" refers to customary laws that exist in the regions of Indonesia. Because of Indonesia's cultural diversity, most regions in Indonesia have their own customary law. This recognition means that a person can also be prosecuted based on customary laws, and not only written laws such as the criminal code and other legislation.

Although the drafters of the New Criminal Code seem to want to balance the concept by mandating the promulgation of a Government Regulation to further clarify the procedures and criteria to determine which customary law is "living law", it is not entirely clear if the Government Regulation will provide lucid or vague criteria to determine that. Indonesia has diverse customary laws that have vast coverage, and it would be challenging to discern such expansive notions. Moreover, many living laws may not be well-documented.

The New Criminal Code's elucidation provides that regional regulations will affirm criminal offenses established from customary laws. Although the practical purpose of this stipulation is unclear, it seems to suggest that the recognition will be made via regional regulations and the regional regulations will compile the criminal offenses. It is not clear whether affirmation under a regional regulation is imperative for a customary criminal offense to be used as a basis for prosecuting a person.

Under the New Criminal Code, the sanction for criminal offenses established under a living law is fulfillment of customary obligations, which may be replaced by paying a fine of IDR 10 million.

Settlement in a criminal case

The New Criminal Code allows wrongdoers to be discharged from criminal prosecution by making a monetary fine to the state. There are two categories:

1. If the criminal offense provides a sanction of a fine of up to IDR 10 million (without jail time), the wrongdoer can voluntarily pay the maximum fine to be discharged from criminal prosecution without obtaining the prosecutor's approval.
2. If the criminal offense provides a sanction of jail time of up to one year or a fine of up to IDR 50 million, the wrongdoer can pay IDR 200 million to be discharged from criminal prosecution but must first obtain the prosecutor's approval.

According to the New Criminal Code, it is also legally possible for wrongdoers to be discharged from criminal prosecution if the relevant parties agree to settle the case amicably under the prevailing laws. The New Criminal Code does not provide further elaboration on a settlement procedure. Before the New Criminal Code comes into force, this settlement framework is made possible by the regulations issued by the Chief of the Indonesian National Police and the Attorney General. If these law enforcement agencies approve the settlement, the criminal case (criminal investigation or prosecution prior to the trial, as the case may be) will be terminated.

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