Regulation on procedure for criminal cases involving corporations

by Sandi Adila, S.H., LL.M. and Ratna Mariana, S.H., LL.M.

Various laws in Indonesia have stated that a corporation can be held criminally liable, for example, the Anti-Corruption Law. However, criminal proceedings where a corporation becomes the defendant are still rare. One of the reasons is that the procedures for corporate investigation as a criminal offender remain unclear. After a long wait, the highly anticipated regulation on the procedures to handle criminal cases by corporations has finally been promulgated. On the 29th of December 2016, the Supreme Court promulgated *Regulation on the Procedures to Handle Criminal Cases by Corporations* (the "**Regulation**"). The Regulation aims, among others, to serve as a guideline for law enforcement authorities as well as to fulfill the legal gap, specifically in criminal procedural law, in handling criminal cases with corporations as the defendant. The Regulation has been effective as of December 29, 2016.

A few highlights of what the Regulation covers are as follows:

a. The Regulation provides a definition of "Manager" (*Pengurus*) of a corporation, which closely follows the definition of the same, as provided in the Anti-Corruption Law.

b. A criminal act by a corporation is defined in Article 3, which also appears to have followed the Anti-Corruption Law provisions. In short, a criminal act may be deemed to have been committed by a corporation if it is done by an employee or any other person having "other relations" with the corporation for and on behalf of the corporation. Factors which will be considered in determining whether a criminal act is committed by a corporation or not are as follows:

    (i) The corporation will reap benefits out of the crime committed or the crime is committed for the benefits of the corporation;
    (ii) The corporation allows for the crime to have been committed; or
    (iii) The corporation failed to impose measures to prevent commission of the crime or fails to ensure compliance with prevailing laws and regulations.

c. The Regulation also expressly provides a definition of "Corporate Statement" (*Keterangan Korporasi*), namely, information provided by a manager of a corporation shall serve as valid evidence.

d. The Regulation also provides that a merger, consolidation, spin-off and even dissolution of the corporation will not absolve the corporation from the crime in question. The prosecutor can hence still pursue the assets of the said corporation. Assets of a dissolved corporation which have been distributed to a party entitled to those assets can also be clawed back by prosecutors.

e. It is also provided in the Regulation that if sentenced, the corporation must pay the penalty within 1 month.

The Regulation does not apply retroactively. Article 34 of the Regulation makes it clear that the Regulation cannot be applied as a basis to request legal remedies for criminal proceedings involving corporations which have been decided prior to the promulgation of the Regulation.

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Pioneer Industry

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In recent times, the government has been pursuing policies to promote local manufacturing and in a broader sense to expand the manufacturing sector across the archipelago by setting local content targets and tying import/export approvals to commitments to investment, among others. One of these initiatives is a series of tax and other incentives to promote **Pioneer Industries**. Since Indonesia is a contracting party to the WTO and indicated its compliance with Trade-Related Investment Measures (**TRIMS**) on August 26, 1998, accordingly, foreign and local investors receive equal treatment. This principle is enshrined in the **Investment Law of 2007**.

Policy Reasoning

To understand the government's program on Pioneering Industries, it is best to first understand the policy reasoning that underpins it; the government hopes to push ahead its economic agenda by giving tax breaks and incentives to companies that operate in industries that expand the country's economic capability. Not all new industries, but specifically those industries and new technologies that converge with certain government priorities and goals. The definition of what constitutes a pioneer industry is therefore crucial to enjoying the incentives offered by the government; in this context, a pioneer industry is a project or new technology that is generally aligned with the government's goal of making Indonesia a maritime power: to achieve this goal, infrastructure throughout the archipelago will have to be built. *Projects and technology that can help accomplish this goal have a chance of being classed as pioneer projects.*

Companies working to this end can receive special treatment and incentives (mostly though not exclusively tax related) in order to encourage them to invest in Indonesia and set up the infrastructure and connectivity to unite the archipelago and help assert Indonesia as a maritime power. These incentives come in the form of a revision to the tax holiday scheme of up to ten years for certain companies that was already set out under **Ministry of Finance Decree No. 130/PMK.011/2011**.

On August 27, 2015, the government updated these tax holiday incentives by issuing **Ministry of Finance Decree No. 159/PMK.010/2015** to incentivize key pioneer industries (Note: Minister of Finance Regulation No. 159/PMK.010/2015 was amended on 30 June 2016 by Minister of Finance Regulation No. 103/PMK.010/2016.). The definition of pioneer industries was set out as follows:

- upstream metals
- petroleum refining (mini-refineries)
- organic basic chemicals derived from petroleum and natural gas
- machinery to produce industrial machines
- marine transportation
- economic infrastructure projects (non-PPP projects).
- manufacturing in a Special Economic Zone (SEZ)
- telecommunications, information and communications
- processing in agriculture, forestry and fisheries

Project owners and companies would do well to keep apprised of the opportunities afforded by these regulations.

Analysis of micro-insurance

by the MKK Insurance Team

The OJK recently issued a draft on Micro-insurance (**MI**), namely SEOJK.05/2016 (the "**Draft Reg**"). It makes reference to POJK number 23/POJK.05/2015, regarding Insurance Products and the Marketing of Insurance Products which regulates conventional and Sharia insurance products but not MI ones. The purpose of issuing this Draft Reg thus seems to be to fill this regulatory gap.

One of the strategic aims of the OJK is to promote financial inclusion, specifically to assist lower-income members of the community in entering the financial system, and insurance is an important conduit to doing so. It is hoped that by bringing these people into the financial network, they will be better protected against disasters, families will be stronger, and this in turn will lead to a deepening of the financial system.

MI is seen as a means to this end, and the OJK has promoted it extensively in the hopes that it will help reach the above goals. The Draft Reg sets out the objectives of MI and targets low-income segments of society. The Draft Reg sets out in *Part II* that MI should be (1) basic (2) easy (3) economical. Thus, the product should be straightforward and easy to understand, simple to market, and the premiums should not be too high. The MI product should be a *Guaranteed Issuance Offer (GIO)* or a *Simplified Issue Offer (SIO)*, meaning that no one should be turned away. if there are agents, they should be knowledgeable about the products they are selling but do not need to be licensed by a professional association. Signing up should be straightforward, and claims should be settled promptly. *Part II no 4 c, d, e* and *f* stipulate the waiting period, grace period and claim settlement time, respectively.

In *Part III,* the Draft Reg also sets out the channels of distribution and intentionally casts a wide net. Digital means are also encouraged as an alternative to agents. Every carrier should have its MI products approved by the OJK, and an *Operational Guide* (*Pedoman*) should be drawn up which sets out the details of the MI product, the risk involved, the premiums, the process for making a claim, claim settlement and a dispute resolution mechanism *(Part VIII).*

Analysis

In a nutshell, the OJK envisions micro insurance as a type of insurance that is simple and straightforward, as sort of 'simplified insurance' or even "automatic insurance" since signing up and making claims is automated to some extent. According to the Draft Reg, there are to be people actively promoting MI, but they never rise to the level of agents so as to keep the process simple. It is a pooled system of protection but with the inclusion of premiums and basic policies. It is for lower-income segments of society and universal in nature.

In many countries, MI is in fact not even counted as insurance and is regulated in a totally different fashion. Although MI collects premiums and has an underwriter, it does not need to be operated in this manner. *Mutual Benefit Association (MBA)* has no underwriter because it is not commercially viable to have one. Funds are placed in a 'kitty' and used according to the needs of the community. MBA can be thought of as commercially non-viable insurance; the participants need protection and the more affluent ones in the group are willing to step up to pick up the slack for the less affluent ones.

If there were MBAs without oversight by the OJK, there could be rampant abuse. However, the structure of an *arisan* is already well-known, and this sort of risk sharing co-insurance structure would help protect many people who are currently uninsured. It also fills a space that is not commercially uninsurable and so in this respect does not compete with insurance companies nor crowd out the insurance industry.

In any case, the OJK wishes to assert its authority over this sphere of activity and this Draft Reg places MI squarely under the purview of the OJK. The OJK has the requisite infrastructure (insurance law, regulations, administration) and mechanisms (dispute resolution, consumer protection) to regulate MI and defines it, not as a MBA scheme, but as a form of insurance in its own right for the lower-income segment of society.