

SELF-REPORT MECHANISM BY COMPANIES IN RELATION TO FRAUDULENT ACT OF BRIBERY: A CHANGE IN COMPANY'S LEADERSHIP CULTURE¹

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ABSTRACT

The purpose of this study is to emphasize that the goal of Criminal Justice System in terms of fraud and other corrupt practices by company (such as bribery), one of the way is to avoid far-reaching consequences, including debarment of the company from the local government. Notwithstanding its immensity, corruption can cause damage to the reputation of the business and jeopardize its profitability. To prevent this from happening, this study will examine the possibility for companies to conduct a self-report mechanism in relation to fraudulent act of bribery, as a way to change company's leadership culture. By conducting self-report mechanism (as have been implemented in U.S. through the FCPA and U.K. through the UK Bribery act), companies are expected to whistleblow its own wrongful acts to relevant authority, so that their employees are no longer committing fraud, knowing that the company will report them. While on the other hand, the company will gain benefit (such as monetary recoveries, leniency) in conditions that will be explained further in this paper.

BACKGROUND

Surrounded by various types of fraudulent acts committed in the corporate industry, one of the prevalent issues are **bribery and corruption**. According to Asia Pacific (APAC) Fraud Survey 2015 respondent, bribery and corruption remain frequent throughout APAC, with 6 out of 10 respondents agreeing that bribery and corruption happens

¹The Most Inspiring Paper of National Call For Paper ACFE Indonesia Chapter 2018

widely in their countries.¹ Bribery is defined by the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions which was enacted in 1997,² as the offering, promising or giving of something in order to influence a public official in the execution of his/her official duties. Bribes can take the form of money, or other pecuniary advantages, such as a membership in an exclusive club, a promise of a scholarship for a child, or non-pecuniary advantages, such as favourable publicity. Similar definitions concerning bribery of corporate employees are used in private sector codes of conduct.³ Therefore, this paper will elaborate further bribery and corruption perpetrated by public officials and how the legislation and methods to prevent and eradicate bribery and corruption aforementioned.

In projection, numerous cases can be found throughout Asia Pacific region. For instance, countries with low level of corruption such as Singapore, there are still 103 cases of corruption being investigated by Corrupt Practices Investigation Bureau (CPIB) in 2018⁴, on the other hand in the Philippines, which known as a country with high level bribery and corruption; projected on its position as the 101 out of 176 countries on the Transparency Corruption Index 2016⁵- bribery and corruption are indeed still a popular crime perpetrated by both public officials and foreign officials; protrude in popular case such as Chairman

Abalos and its US\$13 million project.⁶ Accordingly, familiar cases can be found on other APAC countries especially developing countries throughout the region.

Both external and internal forces have pushed countries to draft anti-corruption strategies in the APAC region.⁷ Majority of APAC region have established regulation that criminalise bribery of domestic public officials and foreign officials. For instance; Singapore's primary anti-corruption legislation which sets out in the Prevention of Corruption Act enacted in 1960 and revised on 1993,⁸ regulated bribery committed by members of parliament or other public bodies in its Article 11 and 12.⁹ Similarly, Philippines had also enacted a legislation concerning acts of bribery, *i.e.* Anti-Graft and Corrupt Practices Act (Republic Act 3019 jo. Revised Penal Code on bribery).¹⁰ Another example is Japan, which relies on Article 198 of their Criminal Code to regulate bribery to Japan's public officials and foreign officials,¹¹ thus Japan also revised the Act on Punishment on Organized Crime and Control Crime Proceeds to forbid conspiracies by groups of two or more people to commit certain crimes, including giving and receiving bribes.¹² Therefore, it can be concluded that the recent development on legislation regarding criminalisation against both local and foreign officials has been

¹ Asia Pacific Fraud Survey 2015. "Fraud and Corruption - Driving Away Talent?"

² See OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. 1997

³ OECD. "The Fight against Bribery and Corruption." Policy Brief, September 2000, pg.3.

⁴ The Straight Times, Lydia Lam. "All-time Low of 103 Corruption Cases Registered for Investigation in 2017: CPIB."

⁵ E.V., Transparency International. "Corruption Perceptions Index 2016." Transparency International - The Global Anti-Corruption Coalition. Accessed May 26, 2018. https://www.transparency.org/news/feature/corruption_perceptions_index_2016.

⁶ Cayabyab, Marc Jayson. "Ex-Comelec Chief Appeals Anew 'resurrected' Graft Case." Inquirer News Duterte Formally Asks Congress to Extend Martial Law in Mindanao Until End of 2018 Comments. Accessed May 25, 2018. <http://newsinfo.inquirer.net/904037/ex-comelec-chief-appeals-anew-resurrected-graft-case>.

⁷ Manandhar, Narayan. "Anti-corruption Strategies: Understanding What Works, What Doesn't and Why?" Edited by Elodie Beth-Seo and Samuel De Jaegere. Compiled by UNDP.

⁸ See Singapore, Prevention of Corruption Act 1993 amended on 1960.

⁹ See Singapore, Prevention of Corruption Act 1993 amended on 1960, art. 11 & 12

¹⁰ See Philippines, Republic Act No. 3019 regarding Anti-Graft and Corrupt Practices Act

¹¹ See Japan, Penal Code of 1999

¹² See Japan, Penal Code, Act 136 of 1999 jo. Act. 67 of 2017

included inside the amendments of relating regulations.

However, a real push came with the entry into force of the United Nations Convention Against Corruption (UNCAC) in 2005. As most of the APAC countries have signed and ratified the UNCAC which covers the issues regarding bribery and corruption, mentioned above are the projections in countries that have been followings on what's been stated inside the UNCAC itself. UNCAC specifically stated bribery acts which can be charge for criminal offences on Article 16¹³ regarding bribery made by the public officials and Article 21¹⁴ regarding bribery caused by the private sector. Thus, although this convention had covers most of the act of bribery and corruption, challenges still appears among its implementation in countries.

Indonesia has become the largest economy in Southeast Asia and the world's 10th largest economy (in terms of purchasing power parity) due to rapid economic progress over the past twenty years.¹⁵ The progress shows significantly in 2014 where Indonesia has an increase in gross national income per capita from US\$560 in 2000 to US\$3,630 in 2014.¹⁶ Consequently, the economy growth also comes with another side of the coin, the growth of corruption issues inside the country which hindered the possibility of further economic growth. Although various efforts has been made by the national governments to implement the UNCAC , which include development and revision of relevant legislation and regulatory frameworks, formulation of long and medium term national anti- corruption strategies and action plans, bureaucracy reforms, and the

establishment of powerful national anti-corruption institutions such as the Corruption Eradication Commission (KPK) and anti-corruption courts.¹⁷ Through the enactment of Law No. 31 of 1999 amended by Law No. 20 of 2001¹⁸ regarding Eradication of Criminal Acts of Corruption (“*Undang-Undang Tindak Pidana Korupsi*”) which aim to criminalizes major acts of corruption – including active and passive bribery, abuse of office and extortion, however in practice that the law itself are lacking of enforcement and do not address facilitation payments.¹⁹ In addition, the establishment of KPK as an independent body which aim to combat the extraordinary crime of corruption in Indonesia (according to Law No. 31 of 1999 as amended by Law No. 20 of 2001 on The Eradication of Corruption, Law No. 28 of 1999 on Corruption-Free State Governance, and Law No. 8 of 2010 on Combating Money Laundering Crime - relating to corruption actions) are enacted in order to decrease the number of corruption inside the country. Nonetheless, KPK also faced several challenges both externally and internally due to its operation. Externally, the newly passed law of the Anti-Corruption Court poses new challenges to KPK. The law requires that in some regions should be established Anti-Corruption Courts, compared to current existing condition with only one Anti-Corruption Court in Jakarta. This new condition would pose problems of technical coordination and supervision because KPK does not have branch offices in those regions.²⁰ Regarding internal issues, there are two significant challenge that are faced by KPK; the lack of human resources and facility to operate are not feasible for its operation.²¹

¹³ See United Nations, United Nations Convention Against Corruption, Art. 16

¹⁴ See United Nations, United Nations Convention Against Corruption, Art. 21

¹⁵ UNODC country program : indonesia 2017-2020, https://www.unodc.org/documents/indonesia/publication/2017/UNODC_Country_Programme_2017_-_2020.pdf

¹⁶ World Bank, Country Overview, Last Updated 5 April 2016, <http://www.worldbank.org/en/country/indonesia/overview>

¹⁷ UNODC country program : indonesia 2017-2020

¹⁸ See Indonesia, Law No. 31 Year 199 as amended by Law No. 20 Year 2001 on Corruption Eradication.

¹⁹ <https://www.business-anti-corruption.com/country-profiles/indonesia/>

²⁰ Ibid.

²¹ Ibid.

In consequence, these efforts might seem to have improved the situation, nevertheless significant challenges still remain. There are several significant challenges that need to be highlighted regarding this issue;²² 1) administrative decentralization in which the system has introduced new actors and changed the *modus operandi* of corruption at the local level, increasing the opportunities/incentives for officials to behave corruptly. Local governments enjoy wide discretionary powers and control over the application of more than 50% of the government budget including over resources from mineral and timber, without having proper internal and/or external accountability mechanisms in place. Resources are transferred to local governments under a revenue sharing scheme, and they represent up to 80% of the total revenue collected by these jurisdictions. (Bertelsmann Stiftung, 2012); 2) rising incentives for payment of bribery and recoil by private companies (foreign and national) with low level monitoring system in which the growth of economy of the nation also rise the bribery and corruption cases even though its being monitorize by KPK, however challenges that are being faced by KPK mentioned above are inevitable ²³; 3) weak accountability mechanism regarding related cases, which projected on law enforcement institutions suffer from limited financial and human resources, political interference, and vulnerability to bribery, among others. Even institutions which at the national level have improved their performance in the fight against corruption, such as the Audit Institution (BPK) and KPK, still have restricted activities at the local level (Freedom House, 2011).²⁴

Hence, we could conclude that we are indeed in need of a viable solution to ease the

²² <https://www.u4.no/publications/causes-of-corruption-in-indonesia/pdf>

²³ UNODC country program, available at <https://www.unodc.org>.

²⁴ <https://www.u4.no/publications/causes-of-corruption-in-indonesia/pdf>

responsibility of prosecutor to investigate cases of bribery by implementing the self-report system.

CONTENT

1. THEORETICAL BASIS

Act of bribery as a form of corrupt practice is often associated with harsh punishments under criminal law. However, the question that should be answered in sanctioning acts of bribery is not only that “how harsh should the perpetrators be punished?”, rather it should also answer “how do we handle the crime of bribery to positively impact the society?”. We believe that the answer to the latter question should be constructed from the theory of criminal justice, which concerns the delivery of justice to perpetrators of criminal offences.²⁵ In particular, we will discuss the purposes of punishment under the criminal justice theory, *i.e.*, retribution, protection, deterrence and rehabilitation.²⁶ In sanctioning criminal acts, the theory of criminal justice seeks to balance the 4 elements above in order to best handle the criminal.

In relation to bribery, one of the challenges in enforcing criminal law to the perpetrators is the absence of concrete evidence, and inability to detect whether such an action had been committed. In this regard, we propose the solution of self-report by companies in exchange for a more lenient sanction (in appropriate cases) to ease the burden of prosecutor in investigating crime of bribery. However, this solution does come with a dilemma: is it justifiable to reduce the effect of deterrence imposed by harsh punishment in exchange for information? To answer this, we must not overlook the benefit of self-report, that is to ease the job of prosecutors

²⁵ George F. Cole, C.E. Smith, Christina DeJong, *Criminal Justice in America*, 9th ed, (Cengage Learning, 2016), at 5.

²⁶ David C. May, Kevin I. Minor, *Corrections and the Criminal Justice System*, (Jones & Bartlett Learning, 2007), Chapter 2, at 29.

in the investigation. This is critical, because any information of bribery would unlikely surface without being reported by the persons involved, given that they are in control of the information.²⁷ Other benefits that should not be overlooked is the increased opportunity of rehabilitation. Rehabilitation itself focuses on how to rectify the relationship between criminal offender (in this case, giver and receiver of bribes) with the community in general that has been jeopardized when the value upheld by community had been breached by the crime committed.²⁸ Another facet of rehabilitation is to eliminate the cause of crime committed by the offender to prevent future violation,²⁹ which we believe could be achieved by the mechanism of self-report. Given that one of the contributing factor to corporate bribery is the lack of disciplinary actions and other internal enforcement measures by company. Once company self-report the act of bribery, it would send a message that the company does not tolerate not it protects the perpetrators of bribery offence, thereby preventing bribery to be committed in the future.

2. SELF-REPORT MECHANISM UNDER THE BRIBERY LAWS AROUND THE WORLD

Self-Report mechanism has been practiced by several countries in order to prevent, sanction, and mitigate the risk of bribery by companies. In this paper, we will discuss the practice of self-report in the United States and United Kingdom under their relevant legislation which could be used as an example of successful implementation of self-report mechanism.

²⁷ Susan Rose-Ackermann, "Corruption and Criminal Law", *Forum on Crime and Society* 2, vol. 2, 2002, at 7.

²⁸ See A. Duff, *Theories of Criminal Law*, ed.2, (Stanford, 2005).

²⁹ *Ibid.*

A. THE U.S. FOREIGN CORRUPT PRACTICES ACT (FCPA) 1977

The Foreign Corrupt Practices Act (FCPA), enacted in 1977,³⁰ is enforced dually by the Department of Justice (and its chief FCPA investigative arm, the FBI) and the Securities and Exchange Commission, in which both of them have intensified their ongoing efforts to identify and prosecute anyone who violate the FCPA, either criminally or administratively.³¹ The FCPA:³² 1) Makes it illegal for U.S. persons, real or corporate, or third parties acting on their behalf,³³ foreign companies registered with the SEC, and foreign companies or persons that commit an act in furtherance of an improper payment or offer while in the United States, to bribe foreign officials (that is, provide the officials with "anything of value") in order to "obtain or retain business,;" and 2) Mandates recordkeeping and internal-control standards for publicly held corporations registered under the Securities Exchange Act of 1934.

The FCPA was designed to go as far as ethical standards would demand and that its cost of administration are sufficient means of inducing, or compelling ethical behaviour from U.S. business firms.³⁴

³⁰ Robert N. Holt, *The Foreign Corrupt Practices Act*, (Virginia: Chartered Financial Analyst (CFA) Institute, 1981), at 73.

³¹ Funk, T. Markus (September 10, 2010). "Getting What They Pay For: The Far-Reaching Impact of the Dodd-Frank Act's 'Whistleblower Bounty' Incentives on FCPA Enforcement". *White Collar Crime Report*. Bureau of National Affairs. 5 (19): 1.

³² *Ibid.*, at 2.

³³ The FCPA also claims expansive territorial jurisdiction for itself. Consider, in this context, the FCPA's "alternative" nationality-based jurisdiction, see 15 U.S.C. §§ 78dd-1(g) and 78dd-2(i); the FCPA's jurisdiction over foreign companies that are not issuers but that commit an act in furtherance of a prohibited payment within the United States, see 15 U.S.C. § 78dd-3(a); and the FCPA's jurisdiction over any "issuer," "domestic concern," officer, director, employee, or agent of such issuer or domestic concern, or stockholder acting on behalf of such issuer or concern, who makes use of any instrumentality of interstate commerce in furtherance of any improper payment or offer of payment, see 15 U.S.C. §§ 78dd-1(a) and 78dd-2(a).

³⁴ W. Michael Reisman, *Folded Lies* (1979).

FCPA Provisions: Anti-Bribery and Accounting

FCPA attempts to eliminate bribery of foreign officials by U.S. corporate officials and their agents through both an anti-bribery and an accounting provision.³⁵ The FCPA mandates that corporate records contain accurate statements concerning the true purpose of all payments made by the company.³⁶ The law makes it a crime for the bribery of any foreign government official in return for assistance in:³⁷ 1) Obtaining or retaining business, or directing business to any particular person; 2) Influencing a foreign government official to do or to omit an act in violation of his duty; and 3) Influencing a foreign government official to affect an act or decision by a foreign government.

The first provision criminalizes the bribery of foreign politicians,³⁸ and the second creates a statutory requirement for any corporations subject to SEC regulation to develop an accurate record keeping and accounting.³⁹ The FCPA can be read to require corporate disclosure of any illegal payment, as the second provision's intention is to intensify the reliability of required report. Any illegal payments made by subordinates should be known by corporate management. To eliminate such illegality, corporate management should introduce internal controls, because the failure to do so might result in significant criminal penalties for the individual officers or directors as well as for the corporate entity.⁴⁰

While the Department of Justice (DOJ) is responsible for handling bribery violations of the FCPA, the Securities and

Exchange Commission (SEC) handles accounting violations. It is interesting to note that it is not a crime under the FCPA for an American company to pay bribes in a country where bribes are not illegal.⁴¹ FCPA's anti-bribery provision is expected to produce accountability for companies, because in order to avoid criminal accountability, companies should conduct self-reporting, self-enforcing, and preventive mechanisms.⁴² In this case, corporate management as the whistleblower who provides "original" violation-related information of the FCPA.

Incentives on FCPA Enforcement: The Dodd-Frank Act 2010

In July 21, 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act: H.R. 4173) into law, made it available both potentially huge new cash incentives for whistleblowers as well as beefed-up protection against retaliation.⁴³ This act provided a major boost to the U.S. government's FCPA enforcement efforts.⁴⁴ Foreign and domestic corporate "insiders" (including those at the parent and off-shore subsidiary levels), purported recipients of bribes, as well as corporate "outsiders" (such as family members and friends who happened upon relevant information), now have unparalleled financial incentives to come forward with evidence of possible FCPA violations.⁴⁵

The expected results are twofold: A notable uptick in government-initiated FCPA

³⁵ Porrata-Doria, *Amending the Foreign Corrupt Practices Act of 1977: Repeating the Mistakes of the Past*, (New Jersey: Rutgers L. R., 1985), 29.

³⁶ Title 15, United States Code, Section 78dd-2(a).

³⁷ *Ibid.*

³⁸ Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, § 103, 91 Stat. 1494 (1977) (amending 15 U.S.C. § 78dd (1976)).

³⁹ *Ibid.*, § 102 (amending 15 U.S.C. § 78q(b) (1976)).

⁴⁰ *Ibid.*

⁴¹ Martin T. Biegelman, Daniel R. Biegelman, *Foreign Corrupt Practices Act Compliance Guidebook: Protecting Your Organization from Bribery and Corruption*, Wiley (2010), 24.

⁴² S. Rep. No. 114, 95th Cong., 1st Session 4 at 10 (1977).

⁴³ Note that the Dodd-Frank Act contains identical whistleblower provision governing the Commodity Futures Trading Commission. See Section 748.

⁴⁴ Funk, T. Markus (September 10, 2010). "Getting What They Pay For.", 3.

⁴⁵ Section 922 enumerates a narrow category of individuals who are excluded from whistleblower award eligibility.

enforcement actions and an increase in self-disclosure by corporate entities. Companies will therefore need to update their anti-corruption compliance programs, making internal reporting mechanisms efficient and attractive to potential tipsters who surely will be tempted by the Dodd-Frank Act's considerable monetary incentives.⁴⁶ Under the act, whistleblowers are now statutorily entitled to a *minimum* of 10 percent, and a maximum of 30 percent, of *all* monetary recoveries made as a result of information (Section 922).⁴⁷

FCPA Case Study: Siemens Aktiengesellschaft (Siemens AG)

On December 15, 2008, Siemens Aktiengesellschaft and three of its subsidiaries pleaded guilty to violations and charges related to the FCPA.⁴⁸ In connection with the cases brought by the U.S. Department of Justice, the U.S. Securities and Exchange Commission and the Munich Public Prosecutor's Office, Siemens will pay a combined total of more than US\$1.6 billion in fines, penalties and disgorgement of profits, including US\$800 million to U.S. authorities. The combined U.S. penalties represent the largest monetary sanction ever imposed in an FCPA.⁴⁹

On March 12, 2001, Siemens became a listed company on the New York Stock Exchange, and thereby subject to U.S. regulatory and anti-bribery requirements.⁵⁰ Siemens' Managing Board failed to respond to

these regulatory requirements by implementing effective internal controls to detect and prevent violations of the FCPA. According to the U.S. Department of Justice's charging papers,⁵¹ the company had merely adopted a "paper program" that revolved around ineffective anti-corruption circulars and policy promulgations. The criminal internal controls allegations were also based on specific substantive and structural deficiencies, including failures to:⁵² 1) Establish a sufficiently empowered and competent compliance department and severely underfunded internal audit resources to support compliance efforts; 2) Implement sufficient anti-bribery compliance policies and procedures to control significant FCPA risks; 3) Appropriately investigate and respond to allegations of corrupt payments; 4) Discipline employees involved in making corrupt payments; and 5) Implement sufficient accounting and finance controls.

Siemens' investigation and settlement reinforces the latest trends in FCPA enforcement. The DOJ and the SEC continue to place significant weight on a company's cooperation with the government. The DOJ sentencing memorandum⁵³ repeatedly highlights Siemens' "extraordinary" level of cooperation and remediation. In the press conference announcing the settlement, the DOJ's Acting Assistant Attorney General Matthew Friedrich stressed that "Siemens' cooperation, in a word, has been exceptional."⁵⁴ Siemens' already staggering fines could have been significantly

⁴⁶ Funk, T. Mark (September 10, 2010). "Getting What They Pay For.", 3.

⁴⁷ In contrast, under the pre-Dodd-Frank Act regime, the largely unused SEC whistleblower program was far more limited, applying only to insider trading cases and restricting monetary reward to a maximum of 10 percent of the recovered funds.

⁴⁸ 15 U.S.C. § 78dd-1, et seq. (2004).

⁴⁹ The Largest FCPA settlement to date prior to the Siemens case was Baker Hughes US\$44 million settlement with the DOJ and SEC in 2007.

⁵⁰ Alexandra Wrage and Anne Richardson, Siemens AG--Violations of the Foreign Corrupt Practices Act, (Cambridge: International Legal Materials, Vol. 48, No. 2, 2009), 232.

⁵¹ Statement of Offense, United States v. Siemens Aktiengesellschaft, No. 08-367 (D.D.C. Dec. 15, 2008), available at <http://www.usdoj.gov/opa/documents/siemens-ag-stmt-offense.pdf>

⁵² Alexandra Wrage and Anne Richardson, Siemens AG, 233.

⁵³ Sentencing Memorandum, United States v. Siemens Aktiengesellschaft et al. (D.D.C. Dec. 12, 2008), available at <http://www.usdoj.gov/opa/documents/siemens-sentencing-memo.pdf>

⁵⁴ Matthew Friedrich, Acting Assistant United States Attorney General, Transcript of Press Conference Announcing Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations (Dec. 15, 2009), available at <http://www.usdoj.gov/opa/pr/2008/December/08-opa-1112.html>.

greater if the company had not received credit for its cooperation efforts. In addition, the company's level of cooperation may have saved the parent entity from charges for violating the FCPA's anti-bribery provisions, which could have led to debarment from U.S. government contracts.⁵⁵

B. UK Bribery Act

i. Scope of UK Bribery Act: UK's jurisdiction

The UK Bribery Act of 2010, which entered into force in 2011 is a legislation that governs the act of bribery (which is defined as giving or promising any benefit to public officials for the purpose of influencing their decision in the scope of their official capacity).⁵⁶ Under Section 7, companies have the obligation to prevent bribery in their official capacity. The fulfillment of this obligation comes in many facets, one of which is to create an internal procedure to prevent. In relation to such procedure, Ministry of Justice had issued a *Guidance About Procedures which Relevant Commercial Organisations can put into Place to Prevent Persons Associated with Them from Bribing of 2011* (Guidance on Bribery Prevention), whereby there are six core principles that the guidance promotes in order to prevent acts of bribery by company:⁵⁷ 1) Proportionality; 2) Top-Level Commitment; 3) Risk Assessment; 4) Due Diligence; 5) Communication and Training; 6) Monitoring and Review. In relation to the second principle promoted by Guidance on Bribery Prevention, one of the ways to establish non-tolerance towards bribery is by self-reporting any bribery committed by employees, subsidiaries and/or other persons related to the company. The UK Bribery Act itself does not contain any

⁵⁵ Alexandra Wrage and Anne Richardson, Siemens AG, 234.

⁵⁶ United Kingdom, Bribery Act of 2010, Chapter 23, 8 July 2010.

⁵⁷ See Ministry of Justice of United Kingdom, *Guidance About Procedures which Relevant Commercial Organisations can put into Place to Prevent Persons Associated with Them from Bribing*, 2011.

express provision on self-report by companies. However, such matter is regulated through various instruments, including: 1) Deferred Prosecution Agreements Code of Practice; 2) Guidance on Corporate Prosecutions; and 3) SFO/DPP Joint Prosecution Guidance on Bribery Act. The three instruments mainly provide that self-report may entail benefits for the company, such as: lighter sanction or in appropriate cases, no prosecution would be proceeded.⁵⁸ However, the three instruments do not provide express provision on the extent of "lighter sanctions" as it would be analyzed on a case-by-case basis.

ii. Case study in UK

In practice, there are many cases where companies self-report the act of bribery committed by its employee or its subsidiary. For instance, in 2008 the Balfour Beatty PLC reported an act of bribery committed by its subsidiary to Egyptian officials and the subsequent falsing of accounting report. In that case, Balfour Beatty PLC paid £2.25 Million as a sanction for its unlawful conduct, without any proceedings before the criminal court.⁵⁹ This practice was recognized as a monumental precedent, as it was the first time for UK to acquire an alternative enforcement measure outside criminal courts to sanction crimes of bribery, where the costs of long-process of litigation could be avoided and leniency in sanction was granted to trigger more companies to self-report.⁶⁰ Following this practice, in 2009 the Serious Fraud Office (SFO) issued a guideline on self-report by company for act of bribery it committed. The guideline was an

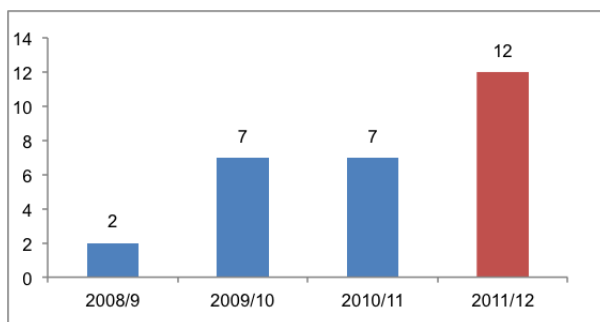
⁵⁸ See Jonathan Brogden, "The Bribery Act of 2010 - The Dynamics of Self-Reporting", 2016.

⁵⁹ David Leigh, Rob Evans, "Balfour Beatty agrees to pay £2.25m over allegations of bribery in Egypt", <https://www.theguardian.com/business/2008/oct/07/balfourbeatty.egypt> accessed 30 May 2018

⁶⁰ A.Raad, M. Thompson, K. Sandford, "Self-Reporting to the Authorities and Other Disclosure Obligations: The UK Perspective", *The Practitioner's Guide to Global Investigation*, (Global Investigation Review, 2017).

attempt to encourage companies to self-report instances of overseas bribery by promoting the idea that ‘in appropriate cases’ such self-reports would receive a civil rather than a criminal penalty.⁶¹ However, in a revised statement of policy issued in 2014, there was a sea change of procedure, where SFO explicitly mentioned that it does not guarantee that prosecution will not be conducted against companies committing bribery, yet it must be assessed on case-by-case basis.⁶² However, it is should be noted that according to Deferred Prosecution Agreements Code of Practice (DPA Code), self-report on acts of bribery constitutes a cooperation, which could lead to a leniency in sanctioning with possibility of not being prosecuted, or negotiated civil settlements.⁶³ The DPA Code also specifies how self-report shall be conducted, *i.e.* the report should be filed in timely manner to allow prosecutor to investigate, and the report should be filed along with relevant evidences.⁶⁴

Subsequent to the enactment of UKBA and the following regulations, the number of self-report of bribery to the SFO doubled, as shown by the following figure:



Source: <http://thebriberyact.com/>

This shows that subsequent to the enactment of UKBA and other rules governing

⁶¹ Serious Fraud Office, Guideline on Self-Report of Companies concerning Bribery, 2009. (The guideline is no longer publicly available).

⁶² Serious Fraud Office, Revised Policy Statement on Guidance on Company Self-Reporting, 2012.

⁶³ Serious Fraud Office, Deferred Prosecution Agreements Code of Practice, 2013, at para 2.8.2.

⁶⁴ Ibid, at para 2.8.2

the benefits for companies in conducting self-report, companies are more incentivized to self-report the act of bribery.

3. THE ROLE OF HIGH-LEVEL MANAGEMENT IN COMPANY IN IMPLEMENTING ANTI-FRAUD CULTURE THROUGH SELF-REPORTING MECHANISM: OVERVIEW OF IN-ONESIAN LAW

Fraud is a crime that often reported by third-party, taking up 42% of corporate misconduct reports.⁶⁵ In combating such misconduct, there has to be a widespread culture that resists it and share values, norms, beliefs, and ethical practices that will allow the company to carry out its business in an honest and ethical way. A culture as such requires development constructed from the top down, and no better to proliferate the existence of an anti-fraud culture in a company than the ones in a position to ‘set the tone’ of the company.⁶⁶ This position falls into the board of executives that handles the operation of a company and thus is the group that has ultimate responsibility over the business and the way it is run.⁶⁷

The tone of an anti-fraud culture is built both by character of persons in the company structure and also by the internal framework that exists within the company to discourage such misconduct. The internal framework, often called “Fraud Policy”, may include measures such as company strategy, definition of fraud, prevention techniques, procedures of investigation and follow up. One way a Fraud Policy is implemented is in creating a system

⁶⁵ OECD, “Committing to Effective Whistleblower Protection: Highlights”, page 10. <https://www.oecd.org/corruption/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf>, accessed 28 May 2018.

⁶⁶ Nigel Iyar and Martin Samociuk, A Short Guide to Fraud Risk, (Surrey: Gower Publishing Ltd, 2010), p.29-32.

⁶⁷ United States Securities and Exchange Commission, “Corporate Governance and Whistleblower Reform”, <https://www.sec.gov/comments/s7-21-11/s72111-9.pdf>, accessed 29 May 2018.

of reporting that exists in the hope of repressing misconduct. Leadership commitment is a key element in creating an effective self-reporting system that exists to protect and set forth anti-retaliation systems. A system as such would then discourage acts of misconduct through encouraging a culture of ‘speaking up’.⁶⁸ The challenge of an internal reporting system is in its incentive. Companies and its employees are unlikely willing to “speak up” because they are afraid of the repercussions.⁶⁹ Board of executives take the lead in implementing this system, and to follow through and carry it out should there be cases of fraud reporting by its employees. The question then turns into what measures should the company take when a misconduct of fraud by a member of the company is then discovered.

Generally, fraudulent act is regulated through *Kitab Undang-Undang Hukum Pidana* (Indonesian Penal Code), where police have the authority to investigate, save for cases of financial institution, where the authority is at *Otoritas Jasa Keuangan*.⁷⁰ Oftentimes, cases of corporate fraud intersect with public officials and could lead to corruption charges, which then fall under the authority of the Attorney General Office (*Kejaksaan Agung*) and Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*).⁷¹ These entities, along with several other sectoral regulations make it possible to extend the criminal nature of fraud to the responsibility of a corporation or a legal entity. Such regulations that may apply

include corporate frauds that moves in several specific fields.⁷²

In cases of bribery being the fraudulent action at hand, it is governed under several regulations depending on the specifications of the bribery conducted by a party. Generally, bribery that has been criminalized is directed towards bribery of government or court officials as seen under the Penal Code,⁷³ bribery leading to corruption charges under the Corruption Eradication Law,⁷⁴ bribery in money politics of public campaigns,⁷⁵ and bribery of bank officials.⁷⁶ The scope of bribery is then extended under Law No. 11 Year 1980 to include act of bribery towards any party that has the potential effect of endangering public interest.

Criminal action such as fraud under Indonesian Law is an offense that does not prerequisite a report to file charges against such action (*delik biasa*). In other words, there is no legal obligation or responsibility for any party to file a report on fraud. This is not only seen in reporting cases of fraud, but is seen in the general framework of compliance for private parties, such as corporations.⁷⁷ This makes it difficult for the prosecutor to investigate the case.

If companies are willing to comply through reporting fraudulent actions, then a framework that could protect them is the general framework of witness protection as the reporter (*pelapor*) and is applicable to natural

⁶⁸ Mara Lemos Stein, “Risk & Compliance Journal: Whistleblower: Companies Need to Encourage Speak-Up Culture”, <https://blogs.wsj.com/riskandcompliance/2017/12/14/whistleblower-companies-need-to-encourage-speak-up-culture/>, accessed 29 May 2018.

⁶⁹ OECD, “Committing to Effective Whistleblower Protection: Highlights”, page 8. <https://www.oecd.org/corruption/Committing-to-Effective-Whistleblower-Protection-Highlights.pdf>, accessed 28 May 2018.

⁷⁰ See Indonesia, Law No. 21 Year 2011 on Financial Services Authority

⁷¹ See Indonesia, Law No. 31 Year 199 as amended by Law No. 20 Year 2001 on Corruption Eradication.

⁷² See Indonesia Law No. 8 Year 1999 on Consumer Protection, Art. 61; Indonesia, Law No. 32 Year 2009 on Environmental Protection and Management, Art. 116; Indonesia, Law No. 7 Year 2014 on Trading, Art. 107 and 115.

⁷³ Indonesia, Penal Code, Articles 209, 210, 419, and 420.

⁷⁴ Indonesia, Law No. 31 Year 199 as amended by Law No. 20 Year 2001 on Corruption Eradication, Art. 5.

⁷⁵ See Law No. 12 Year 2003, Law No. 23 Year 2003, and Law No. 32 Year 2004

⁷⁶ Law No. 10 Year 1998

⁷⁷ Andini H. Dewi and Christina N. Soela, “American Chamber of Commerce in Indonesia: A Compliance Road Map for Companies in Indonesia”, <https://www.amcham.or.id/fe/4901-a-compliance-road-map-for-companies-in-indonesia>, accessed 30 May 2018.

persons or legal persons such as corporations.⁷⁸ Another framework that will protect companies willing to go through self-reporting is under Supreme Court Circular Letter No. 4 Year 2011 on Protection of Whistleblowers and Justice Collaborators. Neither an obligation nor a right, and not being an incentive or disincentive, the current framework relies heavily on the self-motivation of companies to report by only providing limited and unspecified protection towards self-reporting. Heavily reliance as such is dependent upon internal policies, culture and sense of responsibility of a company and its board of executives. Without the tone of anti-fraud ringing in the corporations, this system runs the risk of being lenient towards corporate actions that may as well fall under fraud, and let it go undetected and unreported.

The regulatory framework in Indonesia differs to those of the United States. Under the FCPA, the role of Board of Executives in following through on fraud cases under its company is more prolific and clear-cut under the option of self-reporting provided by the FCPA as elaborated above. With its enforcement policies enacted by the US Department of Justice, disclosure of fraudulent behavior as bribery is given much more incentives to proliferate an anti-fraud culture.⁷⁹ Such incentive then becomes the driving force of flourishing self-reporting and compliance efforts, as the United States does not only rely on the goodwill and moral obligation of a corporation and its Board of Executives, but gives concrete and beneficial results in turn for cooperation that may push its executives to set the tone for an anti-fraud culture of the company.

4. MECHANISM OF THE SOLUTION

One of the pillar of law is legal certainty, which would translate to fair and standardized sanctioning in order to avoid disparity for

⁷⁸ Indonesia, Law No. 13 Year 2006 as amended by Law No. 31 Year 2014 on Witness Protection, Art. 1 Point 9.

⁷⁹ <https://www.justice.gov/criminal-fraud/file/838416/download>

similar crimes. Therefore, the implementation of self-report by company requires clear mechanism to be put in place. As explained in Section 3 above, there are several instruments under Indonesian law which could be of a reference for the conduct of self-reporting in relation to bribery. However, given that there is an absence of clear mechanism, we propose a clear mechanism on self-report in relation to bribery as follows:

1. Internal Company Compliance Measures

The key to an effective external self-reporting system to a relevant authority stems from effectiveness of internal compliance measures that build an anti-fraud environment and a “speak up” culture for the company itself. The way to set a uniform anti-fraud tone is for government/relevant authorities to set standards that ensure compliance policies are well-designed. A general example of a compliance policy is set to assure that minimum safeguards are placed in companies in order to repress fraudulent action. Under relevant authority in Indonesia, this example of a compliance policy for fraud should be set - including, but not limited to measures regarding: code of conduct of employees; risk assessment of misconduct; internal incentive and disciplinary measures; company reporting system; and employee compliance training.

2. Filing the Report: Relevant Authorities, Benefits and other provisions

a. The scope of action

The proposed solution of self-report concerns about the act of bribery, which under Indonesian Law, as reflected in Law No. 31 of 1999 concerning the Eradication of Criminal Act of Corruption as amended by Law No. 20 of 2002 (“Corruption Law”) is giving gifts or promise to influence a public official in the execution of his official duty. In this regard, companies should be advised to self-report the bribery committed by their employees,

their subsidiaries, and/or other parties acting for and on behalf of the company, or persons under the supervision of the company. This is in line with the theory of negligence in corporate criminal liability, where companies are liable for criminal offence conducted by persons under their supervision as a result of their negligence.⁸⁰

b. Reporting Procedures

In enforcing the self-report mechanisms to avoid any criminal accountability and any fraudulent act being committed by subordinates, company management should implement the following mechanism: 1) Report any possibility of fraudulent act, based on the sufficient accounting and finance control, to the prosecutors, which are Corruption Eradication Commission (*KPK*) and Indonesian Police Department; 2) The submission of the report should be made not later than 30 days after the result of internal investigation within the company; 3) Content of the report should consist of evidences⁸¹ supporting the report and specific details on the action being reported.⁸² It's important to note that companies should also be able to file their report themselves (through the Board of Directors) or represented by their legal counsel.

3. Government Incentives for Companies to Self-Report

When companies have filed their self-report, they should be eligible for certain benefits, in order to incentivize other companies to do the same. In order to be eligible, there are three conditions which must be fulfilled: 1) The company has fulfilled the

procedural requirements as proposed above; 2) The company is proven have mitigated the damages of the bribery; 3) The company maintains its cooperative behavior throughout the process of investigation. This, for example, could be proven by taking enforcement actions (such as investigation, or disciplinary actions) in relation to the bribery. The authority to determine whether the company is eligible to receive the benefits is the Prosecutor, as the party to whom the report is addressed to or by Judges before criminal court (if the case proceeds to examination process before a criminal court) by the recommendation of the Prosecutor. As for the form of benefit of self-report, we believe that the mechanism in UK DPA Code as explained above could be used as a reference, whereby there are 2 benefits:

- Lighter Punishment (decided by Judges in Criminal Court): This should be given in cases where the bribery amounts to serious bribery (of which *KPK* has the authority as the prosecutor), yet the company has fulfilled the three conditions above. The specific reduction in sanction shall be determined case-by-case basis.
- Outside of Court Settlement (decided by the Prosecutor): This should be conducted in cases of non-serious bribery, where the company has fulfilled the three conditions above. The settlement itself could be done in a mediation process between Prosecutor and company, to determine the amount of fines imposed to the company.

As for the party receiving the benefit, it is the company that reports the bribery that receives the above-mentioned benefits, and not the employee who actively participates in the bribery (for example, if A works for Company ABC and bribes public official P, and such bribery is then reported by the company, Company ABC is the one that receives the benefit, and not A).

⁸⁰ See Jennifer Arlen, "The Potentially Perverse Effects of Corporate Criminal Liability", *The Journal of Legal Studies*, 1994, vol. 23, issue 2, 832-67.

⁸¹ Legal evidence materials are as stated in Article 184 of the Indonesian Criminal Procedure Code.

⁸² This should consist of: Name and position of the suspected person, including the detailed date and time of the action being committed. If available, the specific timeline of actions taken prior to the fraudulent act should also be reported.

CONCLUSION

By implementing our proposed solution, we believe that the efforts to prevent, mitigate, and sanction the criminal offence of bribery will further be strengthened, given that the self-report mechanism and its benefits provide not only deterrence, but also rehabilitation for future commission of bribery. That way, the corporate culture to eliminate all forms of bribery is more embedded, and the top-level management of the company would have more leverage as well as incentives to take internal enforcement actions towards the perpetrators of bribery, given the benefits of self-reporting bribery committed by their employees, subsidiary, or others under their control.

