

## **BAB IV FINDING AND ANALYSIS**

### **A. The Urgency of Eradicating Private-to-Private Corruption**

#### **1. The Concept of Private-to-Private Corruption**

Private-to-private corruption is a reaction of rapid economic growth. The common definition of private-to-private corruption is a manager or employee exercises a certain power or influence over the performance of a function, task, or responsibility within a private organization or corporation that is contrary to the duties and responsibilities of his position in a way that harms the company or organization in question and for his own or another person or organization benefits.<sup>1</sup> There are three important factors in eradicating private-to-private corruption.<sup>2</sup> First, the rapid growth and the large numbers of the private sector exceeds the public sector corruption, especially in third world countries. Second, the trend of privatization of economic activity and third, the birth and development of multinational companies. These three factors encourage corruption to be not only involves public sector (private-to-public corruption) but also private sector (private-to-private corruption). Private corruption manifests in various forms are as follows:<sup>3</sup>

##### **a. Bribery**

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<sup>1</sup> Antonio Argandona, 2003, "Private-to-Private Corruption", *Journals of Business Ethics*, Vol. 47 No. 3, p. 4.

<sup>2</sup> Webb and Phillipa, 2005, "United Nation Convention Against Corruption: Global Achievement or Missed Opportunity", *Journals of International Economic Law*, Vol. 8 No. 1, p. 212-213.

<sup>3</sup> Antonio Argandona, *Op. Cit.*, p.4-5.

Private bribery or commercial bribery is defined as bribery from a business operator to an entity or individual of a counterparty.<sup>4</sup> Private bribery is the same as public bribery. The difference is bribes and recipients who do not involve the public sector. Private bribery may be separated into an active and passive form. The active form is where the briber offers or gives the bribe, meanwhile the passive form is where the receiver accepts or agrees to accept the bribe. For example, companies may engage in private-to-private bribery to secure business and facilitate the functioning of hidden business cartels. Employees from large companies may exploit their influence and buying power by demanding bribes from potential suppliers.

b. Embezzlement

Unlike bribery that involves two parties, embezzlement is a single-party corruption. A person who works in a private entity fulfilled the material elements of the offence unilaterally by diverting the property entrusted to him for his personal benefit or for the benefit of another person.<sup>5</sup>

c. Collusion

Collusion is an agreement between competitors to fix prices, allocate markets or rig bids which are both anti-

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<sup>4</sup> Boles J R, 2014, "The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes", *Michigan Journal of International Law*, Vol. 35 No. 4, p. 681.

<sup>5</sup> Tessema and Koen, 2017, "The Problem of Private-to Private Corruption", *Journal of Anti-Corruption*, Vol. 2 No. 1, p. 151-174.

competitive and corrupt behavior.<sup>6</sup> Collusion typically leads to monopoly-like outcomes, including monopoly profits that are shared by the colluding parties because it is a collective action. Firms may also collude to disadvantaging rivals in a manner that causes the rivals output to be diminished or causes their behavior to become chastened.<sup>7</sup>

d. Trading of Information

Trading of Information occurs when employees of a company receives or offers bribes in exchange for confidential information.<sup>8</sup>

e. Gifts and Hospitality

Tangible or intangible gifts accepted in the course of employment may be perceived as a bribe or secret commission, generate a perception of undue influence consciously or unconsciously that affect decisions made by the receiver.<sup>9</sup> In addition, accepting gifts potentially create a conflict of interest between professional duties and personal interests.

f. Conflict of Interests

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<sup>6</sup> Lande, Robert H., Marvel, Howard P, 2000, “The Three Types of Collusion: Fixing Prices, Rivals, and Rules”, *Wisconsin Law Review*, Vol. 11 No. 941, p. 1.

<sup>7</sup> *Ibid.*

<sup>8</sup> Martini M., 2014, *Regulating Private-to-Private Corruption*, Germany, Transparency International, p. 3.

<sup>9</sup> Krista Lee-Jones, 2018, *Regulating Private Sector Corruption*, Germany, Transparency of International, p.3.

A conflict of interest occurs when an agent has an undisclosed interest in a transaction that adversely affects their professional role.<sup>10</sup>

## **2. The Impact of Private-to-Private Corruption**

Corruption is not a victimless crime because it may leads to decisions being made for the wrong reasons. The effects of corruption on society are well documented. Corruption costs companies, people freedom, health, human rights and, in the worst cases, their lives.<sup>11</sup> Politically it represents as an obstacle to democracy and the rule of law. Meanwhile, economically it depletes a country's wealth, which often diverting it into way that business is done, enabling those who conduct the corruption to win. Private-to-private corruption is not less serious than private-to-public corruption, it deserves to be taken seriously. Private-to-private corruption has a serious impact on a country's economy and society in general. Particularly considering that private enterprises play an increasing role in providing public services and in controlling key sectors of the economy.<sup>12</sup>

In direct economic loss, private-to-private corruption creates inefficiency of economy which detrimental for the society. It may also have a negative impact on economic development and the investment climate, distorting markets and fair competition, increasing costs as well as

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<sup>10</sup>*Op. Cit.*, p. 5.

<sup>11</sup> Harriet Kemp, 2014, "Supporting Staff to Fight Corruption", *Emerald Publishing Limited*, Vol. 22 No. 6, p. 33-36.

<sup>12</sup> Organization for Economic Cooperation Development, 2013, *Anti-corruption Reforms in Eastern Europe and Central Asia: Progress and Challenges 2009-2013*, Paris, OECD Publishing, p. 156.

reducing the quality of services to the consumer.<sup>13</sup> A number of studies provides the empirical evidence that corruption is commonplace within the business community, finding that the perceived likelihood of private-to-private bribery is nearly as high as bribery of public officials across all sectors.<sup>14</sup> Based on PricewaterhouseCooper's Global Economic Crime and Fraud Survey 2018, 28 percent companies said that they had suffered from business misconduct, while 45 per cent had suffered from asset misappropriation.<sup>15</sup>

Private-to-private sector corruption creates high cost of production in a not only financial (economic costs, inefficiency, fines, etc.), but also legal (accusations, suits and penalties), social (loss of reputation, creation of an atmosphere favoring corruption, etc.), and ethical (deterioration of the quality of the organization's people and of its rules and culture).<sup>16</sup> Based on the description above, the impact of private-to-private corruption consists of following:

a. Unfair competition

Private to private bribery harms private sector and public at large engendered by its anti-competitive effects. Private bribery provides the briber with an unfair competitive advantage by eliminating form of consideration products or services offered by

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<sup>13</sup> Martini M., *Op. Cit.*, p. 2.

<sup>14</sup> Jenkins Matthew, 2018, *The Relationship between Business Integrity and Commercial Success*, Norway, U4 Anti-Corruption Resource Centre, p. 4-9.

<sup>15</sup> PricewaterhouseCoopers, 2018, *Pulling Fraud Out of the Shadows*, Global Economic Crime and Fraud Survey, p. 8.

<sup>16</sup> Antonio Argandona, *Op. Cit.*, p. 17.

the bribing company's competitors in the usual course of business.<sup>17</sup> The unfair competition felt through the entire supply chain, distorting markets and competition, increasing costs to firms. This unfair competition, penalized the smaller companies that cannot afford to compete on these terms and those firms with high integrity that refuse to do so. This practice can be very detrimental to industrial competitors, potentially forcing them out of the market, and disrupting the functioning of domestic and international markets.

b. Inflated Cost

The anti-competitive effects of private-to-private corruption might harm consumers in large scale through high prices and poor quality goods and services.<sup>18</sup>

c. Firm-level Consequences

Private-to-private sector corruption may have negative effects for the firm it-self. It reduced employee morale, reduced productivity, loss of shareholder and investor confidence, damaged reputation, business relations, and related loss of business, as well as the cost associated with investigation and remediation of the issues. Conversely, in many contexts, "higher

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<sup>17</sup> *Op. Cit.*, p. 45.

<sup>18</sup> *Ibid.*

levels of firm integrity correspond with stronger commercial performance”.<sup>19</sup>

d. Inefficiency Economy

With impacts such as unfair competition, inflated cost, and firm-level consequences, private-to-private sector corruption automatically impact to inefficiency economy.

e. Politic, Legal, and Social Impacts

Considering that private sector plays a role in providing public services and key sectors of the economy. Private-to-private corruption damages fair competition, affects the quality of public services, damages public trust in both public and private entities, aggravate inequality, ultimately threaten political stability, obstructing democracy and the rule of law. Moreover, legally, private-to-private corruption brings on accusations, suits and penalties. While socially, it impacts loss of reputation, property, employment, wealth, creation of an atmosphere of favoring corruption, and deterioration of the quality of the organization’s people and of its rules and culture (ethical).

### **3. Private-to-Private Corruption in International Framework**

International bodies may play an important role in filling the gap of eradicating private-to-private corruption. Some already actively encourage other countries to criminalize corrupt behavior within the private sector

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<sup>19</sup>*Op. Cit.*, p. 4-5.

through legal mechanism. The UNCAC calls on countries to consider criminalizing private-to-private sector corruption, but this provision does not include as part of its binding requirements. The article 21 of the UNCAC encourages state parties to criminalize commercial bribery but does not require, which stated each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities, such as:<sup>20</sup>

- a. The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.
- b. The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

Similarly, the article 22 of the UNCAC only encourages to criminalize embezzlement in the private sector. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the

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<sup>20</sup> See Article 21 of United Nations Office on Drugs and Crime, 2004



course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position.<sup>21</sup> In addition, Article 12 of UNCAC requires state parties to take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.<sup>22</sup>

There is Anti-Bribery Convention by Organization for Economic Co-operation and Development (OECD) which focuses on the prohibition of illegal payments by companies to foreign public officials in foreign countries. However, it does not cover private-to-private corruption which later creates a pressure from the International Chamber of Commerce (ICC). The realization of the pressure by ICC stated in a Memorandum on further provisions to be adopted to prevent and prohibit Private-to-Private Corruption Bribery in International Business Transactions with the aim to purpose and recommend state parties and enterprises take measures to against private-to-private corruption.<sup>23</sup>

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<sup>21</sup> *Ibid*, p. 19.

<sup>22</sup> *Ibid*. p. 14.

<sup>23</sup> International Chamber of Commerce (ICC), 2016, *Memorandum to the OECD: further Provisions to be adopted to Prevent and Prohibit Private-to-Private Corruption*, Paris, International Chamber of Commerce, p. 1.

Combating private-to-private corruption requires not only international instrument to play a role but also regional instrument. In Europe, there is Criminal Law Convention on Corruption (CLCC), which is overseen by the Council of Europe's Group of States Against Corruption (GRECO).<sup>24</sup> The CLCC is an ambitious instrument aiming at the coordinated criminalization of a large number of corrupt practices.<sup>25</sup> It also provides for complementary criminal law measures and for improved international co-operation in the prosecution of corruption offences.<sup>26</sup> The convention requires member states and open to the accession of non-member States to adopt legislation criminalizing bribery in the private sector.<sup>27</sup> Furthermore, the European Union Council has adopted a Framework Decision (2003/568/JHA) on Combating Corruption in the Private Sector, which provides that member states must criminalize both active and passive bribery in the private sector.<sup>28</sup>

Another regional convention is the African Union Convention on Preventing and Combating Corruption that was enter into force on July 11<sup>th</sup> 2003. The parties of this convention undertake to criminalize bribery in the private sector. Unlike Europe, Africa and the Americas, the Asia- Pacific does not have a region-wide inter-governmental system.

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<sup>24</sup> See European Treaty Series 173 Criminal Law Convention on Corruption 1999.

<sup>25</sup> Council of Europe, "Impact of the European Convention on Human Rights", [https://www.coe.int/en/web/impact-convention-human-rights/criminal-law-convention-on-corruption#/,](https://www.coe.int/en/web/impact-convention-human-rights/criminal-law-convention-on-corruption#/) accessed on November 21<sup>st</sup>2019, at 19.30.

<sup>26</sup> See Chapter IV of European Treaty Series 173 Criminal Law Convention on Corruption 1999.

<sup>27</sup> See Article 36 of European Treaty Series 173 Criminal Law Convention on Corruption 1999.

<sup>28</sup> See the Council Framework Decision 2003/568/JHA on Combating Corruption in the Private Sector.

The Asia-Pacific Economic Cooperation (APEC) Anti-Corruption and Transparency Working Group coordinates the implementation of the Santiago Commitment to Fight Corruption and Ensure Transparency and the APEC Course of Action on Fighting Corruption.<sup>29</sup> Under these frameworks, APEC leaders commit to develop effective actions to fight all forms of bribery (includes private bribery), adopt and encourage measures to prevent corruption in the private sector. Not only that, but also supports the recommendations of the APEC Business Advisory Council to operate their business affairs with highest level of integrity and to implement effective anticorruption measures in their businesses, wherever they operate.

#### **4. The Private-to-Private Corruption in Indonesia**

In Indonesia, corruption is formulated into thirty forms of corruption that are regulated in Chapter II of the Law Number 31 of 1999 *juncto* Law Number 20 of 2001 on Corruption Eradication. The thirty forms of corruption can basically be classified as follows:

a. Corruption of State Finance Loss

1) Against the law to enrich themselves and could harm the state finances.<sup>30</sup>

2) Abusing authority to benefit themselves and could harm the state finances.<sup>31</sup>

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<sup>29</sup> Asia-Pacific Economic Cooperation, 2018, *Anti-Corruption and Transparency Experts' Working Group (ACTWG): Endorsed Plan for 2018*, Papua New Guinea, ACTWG Chair, p. 3.

<sup>30</sup> See Article 2 of the Law number 31 of 1999 *jo* Law number 20 of 2001 on Corruption.

b. Bribery

- 1) Bribing public servants.<sup>32</sup>
- 2) Give gifts to employees because of their position.<sup>33</sup>
- 3) Public servants accept bribes.<sup>34</sup>
- 4) Public servants receive gifts related to his position.<sup>35</sup>
- 5) Bribing a judge.<sup>36</sup>
- 6) Bribing advocates.<sup>37</sup>
- 7) Judges and advocates accept bribes.<sup>38</sup>
- 8) The judge accepts bribes.<sup>39</sup>
- 9) Advocates accept bribes.<sup>40</sup>

c. Embezzlement in Office

- 1) Civil servants embezzle money or allow embezzlement.<sup>41</sup>
- 2) Civil servants falsified books for administrative examination.<sup>42</sup>

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<sup>31</sup> See Article 3 of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>32</sup> See Article 5 Paragraph 1(a) and (b) of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>33</sup> See Article 13 of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>34</sup> See Article 5 Paragraph 2 and Article 12 Point (a) and (b) of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>35</sup> See Article 11 of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>36</sup> See Article 6 Paragraph 1(a) of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>37</sup> See Article 6 Paragraph 1(b) of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>38</sup> See Article 6 Paragraph 2 of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>39</sup> See Article 12(c) of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>40</sup> See Article 12 (d) of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>41</sup> See Article 8 of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

- 3) Civil servants damage evidence.<sup>43</sup>
- 4) Public servants allow others to destroy evidence.<sup>44</sup>
- 5) Civil servants help others destroy evidence.<sup>45</sup>

d. Extortion

- 1) Public servants blackmail.<sup>46</sup>
- 2) Civil servants blackmail other civil servants.<sup>47</sup>

e. Cheat Action<sup>48</sup>

- 1) The contractor commits fraud.
- 2) The project supervisor allows fraudulent acts.
- 3) The partner of the Indonesian Armed Forces or the Police of the Republic of Indonesia is cheating.
- 4) Supervisory partners of the Indonesian Armed Forces or the Police of the Republic of Indonesia allow fraudulent acts
- 5) Recipients of the goods of the Indonesian Armed Forces or the Police of the Republic of Indonesia allow fraudulent acts
- 6) Civil servants seize state land to the detriment of others.<sup>49</sup>

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<sup>42</sup> See Article 9 of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>43</sup> See Article 10(a) of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>44</sup> See Article 10(b) of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>45</sup> See Article 10(c) of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>46</sup> See Article 12 (c) of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>47</sup> See Article 12 (f) of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>48</sup> See Article 7 Paragraph 1 and Paragraph 2 of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

<sup>49</sup> See Article 12 (h) of the Law Number 31 of 1999 *jo* Law Number 20 of 2001 on Corruption Eradication.

f. Gratification

Civil Servants receive gratuities and do not report to the Corruption Eradication Commission.

In addition to the categories that mentioned above, the Law Number 20 of 2001 on the amendment of Law Number 31 of 1999 on Corruption Eradication regulates other types of criminal acts related to the investigation of corruption cases, namely:

- a. Obstruction of the process of examining corruption cases.
- b. Banks that do not provide the offender's account.
- c. Witnesses or Experts or person who holds secrets of the case that do not give information or give false information.
- d. Witness who opens the identity of the reporter.

By the forms of corruption mentioned above, there are no provisions that regulate private to private to be the subject of corruption prosecution. Therefore, criminal acts of corruption committed by non-state officials or non-public servants (private-to-private corruption) cannot be qualified as acts of corruption in the law of corruption eradication. That is because in the law of corruption eradication only regulates public-to-public corruption and private-to-public corruption, the act of corruption must involve the public sector. Considering the provisions of article 1 of the Penal Code (KUHP) and the principle of legality (*nullum delictum noella poena sine praevia lege poenali*), private-to-private corruption cannot be punished by the law of corruption eradication. Corruption is as stipulated

by the law of corruption eradication. Thus, private-to-private corruption is not corruption in Indonesia positive law.

Even though the law of corruption eradication does not regulate corruption in the private-to-private sector, Indonesia already had bribery arrangements in the private sector where this crime is a form of corruption regulated in the law of corruption eradication. The provisions can be seen in the Law Number 11 of 1980 on Bribery, Article 2 regulates active bribery, and article 3 regulates passive bribery. The complete provisions of the regulation are as follows:

- a. Article 2, Whoever gives or promises something to someone with a view to persuading that person to do something or not to do something in his duty, which is contrary to his authority or obligations concerning the public interest, is convicted of giving bribes with imprisonment for a maximum of 5 (five) years and a maximum fine of IDR 15.000.000 (fifteen million rupiahs).
- b. Article 3, Anyone who accepts something or promises, while he knows or ought to suspect that giving something or promise is intended so that he does something or does not do something in his duties, which is contrary to his authority or obligations concerning the public interest, convicted of accepting bribes with imprisonment during - a maximum of 3 (three) years or a maximum fine of IDR 15.000.000 (fifteen million rupiahs).

From the provisions of article 2 and article 3, there are no elements

of public officials in the two articles. This is clearly different from the bribery provisions in the law of corruption eradication, which is based on the historical development of the Law of corruption eradication originated from the Penal Code (KUHP).<sup>50</sup> Therefore, both the law of corruption eradication and criminal code has no regulating private-to-private corruption. In fact, it is unfortunate that now it seems that the provisions are 'forgotten' and (perhaps) never be used.<sup>51</sup> Although, the provisions have never been revoked, many writings and discourse raised by such as academics, anti-corruption observers, and law enforcement in Indonesia as though all agreed that Indonesia does not have any legal instruments that may punish bribery in the private to private sector.

Many bribery cases in the private sector occur in community. The Tempo magazine November 2, 2015 edition of the investigation report titled "Footprint of Doctor's Prescription Bribery". The report is a report about the alleged bribery case by PT Interbat with doctors in various hospitals, both private and government.<sup>52</sup> In this investigation report, it was stated that there were bribes from pharmaceutical companies to doctors.<sup>53</sup> A total of 2,125 doctors were also suspected of taking bribes of up to IDR 131 billion. Tempo revealed the investigation report along with

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<sup>50</sup> Marbum, Andreas Nathaniel. (2017). Suap di Sektor Privat: Dapatkah Dijerat. *Jurnal Integritas*, 3(1), p.80.

<sup>51</sup> *Ibid*, p.81.

<sup>52</sup> Tempo, "Eksklusif: Suap Obat, Dokter Terima Mobil Yaris hingga Camry", <https://nasional.tempo.co/read/news/2015/11/03/173715547/eksklusif-suap-obat-dokter-terima-mobil-yaris-hingga-camry>, accessed on May 17<sup>th</sup> 2019 at 20.00.

<sup>53</sup> Tempo, "Eksklusif: Suap Obat, Dokter Naik Haji pun Dibayari", <https://nasional.tempo.co/read/news/2015/11/02/173715198/eksklusif-suap-obat-dokter-naik-haji-pun-dibayari>, accessed on May 17<sup>th</sup> 2019 at 23.00.



photos of the slip of the money given by the pharmaceutical company to the doctors.<sup>54</sup> However, it seems that no one believes that these doctors and pharmaceutical companies can be charged with the provisions of the Bribery Act.

This behavior is sometimes seen as normal and tolerated or even legalized by corporations, such as the behavior of gratuities by pharmaceutical companies for doctors as an incentive for prescribing drugs. It should also be noted that the cases of bribery in the private sector have not only occurred recently. Construction of bribery cases in the private sector has occurred since a long time ago. It can be seen from the existence of the Law Number 11 of 1980 on Bribery. This shows that the law enforcement of private-to-private bribery in Indonesia is still far from feasible. Law enforcement authorities seem to forget about law enforcement in eradicating bribes in the private-to-private sector. Based on the data of KPK, corruption by profession/position from 2004 to September 2019, there are 287 from the private sector and it makes private sector is the highest of others.<sup>55</sup> It indicates that private sector have corrupt behavior and tends to corrupt in business activities. This corrupt behavior can certainly occur in the private-to-private sector as well.

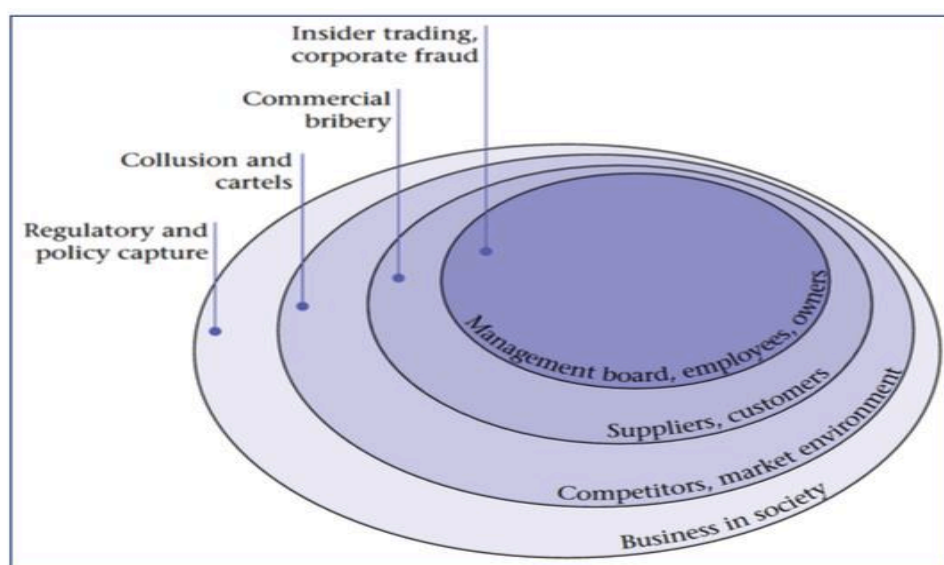
Moreover, the corruption risks of private sector issued by the Global Corruption Report 2009 which illustrates the risk of corruption that is

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<sup>54</sup> Tempo, "Eksklusif: Terkuak, 40 Persen dari Harga Obat buat Menyuap Dokter", <https://nasional.tempo.co/read/news/2015/11/02/078714995/eksklusif-terkuak-40-persen-dari-harga-obat-buat-menyuap-dokter/2>, accessed on May 17<sup>th</sup> 2019, at 20.00.

<sup>55</sup> Komisi Pemberantasan Korupsi, "Statistik", <https://www.kpk.go.id/id/publikasi/penanganan-perkara>, accessed on November 1<sup>st</sup> 2019, at 20.00.

spread in every business activity.



**Figure 4.1**

Source: Transparency International, 2009<sup>56</sup>

The urgency of the corruption eradication in the private sector has been sticking out since 2006 when Indonesia issued the Law Number 7 of 2006 concerning the Ratification of the United Nations Convention Against Corruption (UNCAC). Some articles in the UNCAC on the release to state parties to take steps indoors in the private sector and analyze each country to commit private-to-private corruption as a crime, but at present, the results of UNCAC have not been realized as a product of legislation.

Indeed, it seems strange. Corruption in the private sector is conceptually and theoretically included as a category of corruption so that it is regulated in UNCAC, but corruption of private-to-private sector in Indonesia cannot be said as an act of corruption because it is not included as a category of corruption in Indonesia based on the Corruption

<sup>56</sup> Transparency International, 2009, *Global Corruption Report 2009 Corruption and the Private Sector*, Cambridge University Press, London, p. 8.

Eradication Law. Thus, this indicates that the legal policy on corruption in the private-to-private sector in Indonesia is currently not yet placed as part of fighting corruption. This criminal offense is still separated from the Indonesia Corruption Law so that the KPK cannot reach private-to-private corruption.

## **B. Comparison of Anti-Corruption Agencies**

### **1. Corruption Eradication Commission (KPK) Indonesia**

The reason for establishing the Corruption Eradication Commission (KPK) is corruption in the New Order era is endemic among bureaucrats, civilians, military and the institutions that handle cases of corruption are not functioning effectively and efficiently. Therefore, in the era of reform, corruption eradication has become a priority program of law enforcement. It can be seen by the issuance decree of the People's Consultative Assembly (MPR) Number XI / MPR / 1998 on State Official that Clean and Free Corruption, Collusion and Nepotism; Law Number 28 of 1999 on State Official that Clean and Free Corruption, Collusion, and Nepotism; Law Number 31 of 1999 concerning Eradication of Corruption; and the establishment of the KPK was born with the Law Number 31 of 2002 concerning the KPK.

The KPK is an institution that in carrying out its duties and authorities is independent and free from any power. This commission was formed with the aim of increasing the usability and results of efforts to eradicate corruption. The addition of new institutions such as the KPK

often occurs when the classical concept of the separation of powers in accordance with the *trias politica* is deemed to be no longer relevant. The functions of executive, legislative and judicial powers are not able to bear the burden of the state in organizing government.<sup>57</sup> The various types of new state institutions are expected to be more responsive in overcoming the state's actual problems. According to Jimly Asshidiqie, the presence of this new institution is classified as an "Auxiliary State Institution" in the form of a board, commission, committee, body, or authority, with each task and authority.<sup>58</sup> Furthermore, the KPK also functions as a trigger and empowerment of existing institutions in the eradication of autopsy (trigger mechanism).

The duties and authority of the KPK regulated in Article 6-14 of Law Number 19 of 2019 concerning the amendment Law Number 30 of 2002 on the KPK. Based on Article 6 of Corruption Eradication Commission Law, the task is not only to carry out coordination and supervision with agencies authorized to eradicate corruption, carry out preliminary investigations, investigations, prosecutions, but also preventive actions against criminal acts of corruption monitor the implementation of state government, and actions to implement the determination of judges and court decisions that have final decision. The authority of KPK regulated in Articles 7-14 that is to coordinate investigations, investigations and prosecutions, establish reporting systems

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<sup>57</sup> Gunawan A Tahuda, 2012, *Komisi Negara Independen*, Yogyakarta, Genta Press, p. 52.

<sup>58</sup> Jimly Asshidiqie, 2016, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, Jakarta, Sinar Grafika, p. 40.

and request information in the eradication of corruption, carry out hearings or meetings with agencies authorized to eradicate corruption, and request reports from relevant agencies regarding prevention of corruption. Based on the Appendix to the Corruption Eradication Commission's Chairman Regulation Number 03 of 2018 on 20 February 2018 regarding the Organization, Work Procedures and Organizational Structure of the KPK are as follows:

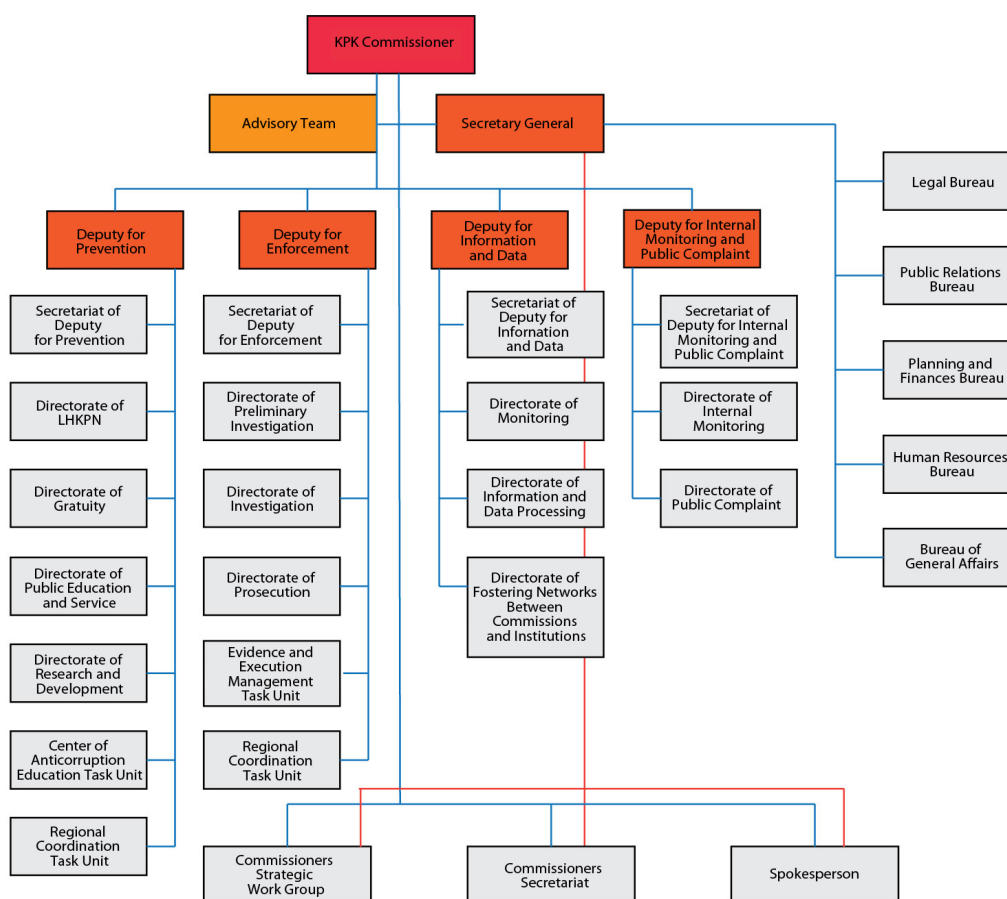


Table. 4.2

Source: Komisi Pemberantasan Korupsi<sup>59</sup>

<sup>59</sup> Komisi Pemberantasan Korupsi, "Struktur Organisasi", <https://www.kpk.go.id/id/tentang-kpk/struktur-organisasi>, Accessed on 20 November 2019, at 21.00.

From the KPK organizational structure above, the concept of KPK corruption eradication strategies can be formulated through its functions and mandates, among others, as follows:

a. The Deputy of Enforcement

The task of this deputy is to formulate and implement policies in the sub-fields of preliminary investigation, investigation, prosecution, coordination and supervision of the handling of corruption cases by other law enforcer. This deputy oversees the Directorate of Inquiry, the Directorate of Investigation, the Directorate of Prosecution, the Coordination and Supervision Work Unit, and the Deputy Secretariat of Enforcement.

b. The Deputy of Prevention

Deputy of Prevention formulates and implements policies in the field of corruption prevention in the registration and investigation sub-sectors of the assets of the state administrators, gratuities, education and public services, as well as research and development.

c. The Deputy of Information and Data

This deputy formulates and implements Information and Data Sector policies in the Information and data processing sub-sector, fostering networks between commissions and agencies, and monitors. In carrying out its duties and functions the Deputy

of Information and Data can form a Working Group whose membership comes from one Directorate or across Directorates of the Deputy for Information and Data as determined by the Decree of the Deputy of Information and Data.

d. The Deputy of Internal Oversight and Community Complaints

The Deputy of Internal Oversight and Community Complaints has the task of preparing and implementing policies in the field of Internal Oversight and Community Complaints. In carrying out its duties and functions the Deputy for Internal Control and Public Complaints may form a Working Group whose membership comes from one Directorate or across the Directorates in the Deputy for Internal Control and Public Complaints determined by the Decree of the Deputy for Internal Supervision and Public Complaints.

e. The Secretariat General

The Secretariat General prepares and implements administrative policies, resources, public services, security and comfort, public relations and legal defense to all KPK organizational units. In carrying out its duties and functions, the Secretariat General may form a Working Group whose membership comes from one Bureau or across Bureaus determined by a Decree of the Secretary General. The Secretariat General oversees the Planning and Financial Bureau, the General

Bureau, the Human Resources Bureau, the Legal Bureau, the Public Relations Bureau, and the Leadership Secretariat.

In addition, KPK has established Strategic Plan of 2015-2019 which is divided into four perspectives that have been set out illustrated in the strategy map as follows:

| <b>TOGETHER WITH ALL THE ELEMENTS OF THE NATION, ACTUALIZE A CLEAN INDONESIA FROM CORRUPTION</b> |   |   |   |  |
|--|---|---|---|--|
| Stakeholders Perspectives  | S.1 Decreased level of corruption                     |   |   |  |
|  | S.2 Effective law enforcement in the Corruption Court | S.3 Integrity of government, society, politics and the private sector | S.4 Effective partnerships are established                          |  |
| Internal Process Perspectives  | I.1 Integration of corruption enforcement efforts     | I.2 Integration of efforts to prevent corruption                      | I.3 Integration of efforts to enforce and prevent corruption        | I.4 The implementation of coordination, supervision and monitoring of corruption eradication |
| Learning & Growth Perspectives   | LG.1 The realization of an effective organization     | LG.2 The formation of optimal performing human resources              | LG.3 Establishment of an integrated and adaptive operational system | Financial:<br>F.1. Financial management is accountable                                       |

Table. 4.4

Source: Rencana Strategis KPK<sup>60</sup>

The policy directions and strategies set out in the programs which consists of:<sup>61</sup>

- a. Harmonization of Legislation in the Field of Corruption with reference to the provisions of the United Nations Convention Against Corruption (UNCAC).

<sup>60</sup> Komisi Pemberantasan Korupsi, 2015, *Rencana Strategis KPK 2015 – 2019*, Jakarta, Komisi Pemberantasan Korupsi, p. 33.

<sup>61</sup> *Ibid.*



- b. Institutional strengthening in the context of eradicating corruption, which has consequences for the need for guarantees of laws and regulations.
- c. Increasing the effectiveness of the implementation of anti-corruption policies through optimizing the handling of corruption cases, mutual legal assistance in the return of corruption assets, as well as strengthening coordination mechanisms, monitoring, and evaluating national strategies to prevent and eradicate corruption.
- d. Increasing the prevention of corruption, by increasing awareness and understanding of anti-corruption of the public and state administrators.

The Strategic Plan of 2015-2019 is the phase II implementation of the KPK Road Map in eradicating corruption in Indonesia 2011-2023,<sup>62</sup> which realizes the organization's core competencies by taking the role of pioneers in the development of the National Integrity System (SIN) and the development of Fraud Control. However, corruption is still a major challenge in Indonesia. Based on the data conducted by Transparency International (TI), Corruption Perceptions Index (CPI) of Indonesia 2018 has score 38 and ranked 89<sup>th</sup> out of 180 countries.<sup>63</sup> This score is certainly far from the target of 50 in 2019 which is initiated by the Government with

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<sup>62</sup> Komisi Pemberantasan Korupsi, 2011, *Road Map KPK dalam Pemberantasan Korupsi di Indonesia Tahun 2011-2023*, Jakarta, Komisi Pemberantasan Korupsi, p. 7.

<sup>63</sup> Transparency International, 2018, *Corruption Perceptions Index of 2018*, Germany, Transparency International Secretariat, p. 8.

the KPK.<sup>64</sup> The Political and Economic Risk Consultancy (PERC)'s 2018 Report on Corruption in Asia, Indonesia is in 14<sup>th</sup> position out of 16 countries with 7.57 points.<sup>65</sup> This position makes Indonesia one of the most corrupt countries in the world. As for the obstacles and challenges of the KPK in combating corruption are as follows:

a. Independence and Status

There is a lack of managing operational authority, as well as a limited indication of the use of the KPK as a political tool. This can be seen in the dynamics of establishing a single corruption law enforcement that often occurs conflicts of interests and limited authority of the KPK in handling private-to-private sector corruption cases whereas the private sector has corrupt behavior and tends to corrupt in business activities. This corrupt behavior can certainly occur in the private-to-private sector as well.

b. Human Resources and Budget

The number of KPK employees was 1,652 in 2018.<sup>66</sup> With a population of Indonesia ± 265 million people, the KPK's human resources are relatively small. Moreover, KPK's budget in the 2015-2019 period tends to fluctuate and very small portions in the

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<sup>64</sup> Transparency International, 2019, *Inisiatif Penguatan Lembaga Antikorupsi Indonesia: Komisi pemberantasan korupsi 2015-2019*, Germany, Transparency International Secretariat, p. 14.

<sup>65</sup> Asian Intelligence, 2018, *An Independent Fortnightly Report on Asian Business and Politics*, Hong Kong, Political and Economic Risk Consultancy Ltd., p. 1.

<sup>66</sup> Komisi Pemberantasan Korupsi, "Pejabat Struktural", <https://www.kpk.go.id/id/tentang-kpk/pejabat-struktural>, accessed on November 23<sup>rd</sup> 2019, at 23.00.

APBN (less than 0,0004% annually). Budget planning with related agencies that have not been maximized and the realization of incomplete programs is also one of the factors that need to be considered for the KPK to be going forward. The KPK's budget request was only approved in the range of 67%.<sup>67</sup> In 2019, the KPK proposed a budget of IDR 1.9 trillion to target the number of 200 cases handled, but the House of Representatives (DPR) stated that the maximum budget for the KPK is IDR 813 billion.

c. Accountability and Integrity

The frequent turmoil of independent investigators and police investigators, ethical enforcement has not been maximally applied, and the security of employees who often face criminalization and threats.

## 2. Corrupt Practices Investigation Bureau (CPIB) Singapore

The Corrupt Practices Investigation Bureau (CPIB) was established in 1952 and one of the oldest anti-corruption agencies in the world. CPIB is the only agency authorized to investigate corruption offences under the Prevention of Corruption Act (PCA) and other related offences in Singapore.<sup>68</sup> The CPIB is a government agency under the Prime Minister Office which has mandate to investigate any act of corruption both public and private sector and operate with functional independence and led by a director who reports to the Prime Minister CPIB. The CPIB has three main

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<sup>67</sup> Komisi Pemberantasan Korupsi, "Tentang KPK", <https://www.kpk.go.id/id/tentang-kpk/sekilas-komisi-pemberantasan-korupsi>, accessed on November 23<sup>rd</sup> 2019, at 21.30.

<sup>68</sup> See Prevention of Corruption Act Chapter 241 of Singapore

departments that are Investigations, Operations and Corporate Affairs with 220 staffs where about 60% lies in the Investigation and Operations Department.



Figure 4.5  
Source: Corrupt Practices Investigation Bureau<sup>69</sup>

Today, Singapore is considered globally as one of the few countries in the world with a low of corruption. In 2018, The Transparency International (TI) Corruption Perceptions Index (CPI) has ranked Singapore 3<sup>rd</sup> out of 180 countries with a score of 85 and the least corrupt Asian country.<sup>70</sup> The Political and Economic Risk Consultancy (PERC)'s

<sup>69</sup> Corrupt Practices Investigation Bureau, "About Us", <https://www.cpib.gov.sg/about-us/our-work/organisational-structure>, accessed on October 22<sup>nd</sup> 2019, at 21.00.

<sup>70</sup> Transparency International, 2018, *Corruption Perceptions Index 2018*, Germany, Transparency International Secretariat, p. 4.

2018 Report on Corruption in Asia, Singapore has continued to rank as the least corrupt country in the region, a position it has held since 1995.<sup>71</sup> Over the years, Singapore has established effective anti-corruption from a country that rampant corruption becomes one of the least corrupt countries in the world. The strategy of Singapore consists of four pillars of corruption control such effective laws, independent judiciary, effective enforcement, and responsive public service which are supported by strong political will.

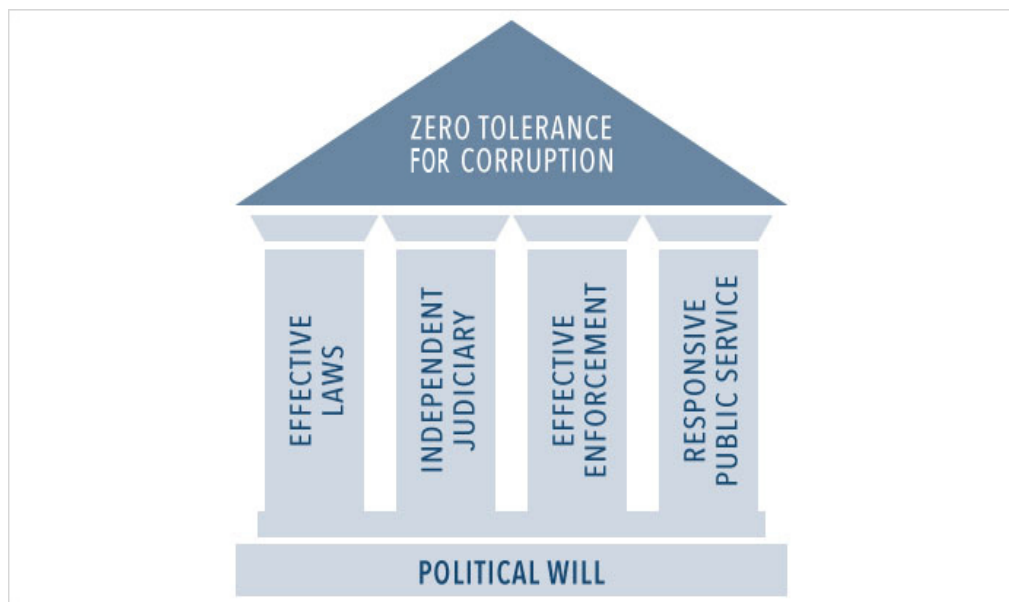


Figure 4.6

Source: Corrupt Practices Investigation Bureau<sup>72</sup>

The political will of corruption eradication in Singapore can be seen by determining to build an incorruptible and meritocratic government, and took decisive and comprehensive action to stamp out corruption from all levels of society in Singapore. As a result of the commitment and

<sup>71</sup> *Op. Cit.*, p. 1.

<sup>72</sup> Corrupt Practices Investigation Bureau, "About Corruption", <https://www.cpiib.gov.sg/about-corruption/corruption-control-framework>, accessed on November 3<sup>rd</sup> 2019, at 17.00.

leadership of political government, a culture of zero tolerance against corruption has become ingrained into the Singaporean psyche and way of life.

The effort of Singapore to eradicate corruption is not limited to public sector. Since 1970s CPIB had taken action against corruption in the private sector. In this regard, Singapore is a pioneer. The subject of corruption is not only member of community (private sector) that involved in bribing public officers but also a member of the community bribes another member of the community. In the modern economy, corruption in both the public and private sectors is increasingly dynamic and is inter-coupled. The failure to effectively control corruption in one sector will increase the overall corruption situation so that it cannot ignore both sectors.

The provisions of anti-corruption laws in Singapore can be found in the following acts of parliament that are Prevention of Corruption Act Chapter 241 (PCA), the Corruption, Drug Trafficking and other Serious Offences (Confiscation of Benefits) Act, Chapter 65A (CDSA), and Chapter IX of the Penal Code, Chapter 224 (PC). Corruption in Singapore is broadly defined as a bribe offered in return for a favor. The bribe can be in the form of monetary or non-monetary nature. Under the PCA, the term “gratification” is used to refer to bribes. Section 2 of the PCA defines this term as including the following:

- a. money or any gift, loan, fee, reward, commission, valuable security or other property or interest in property of any description, whether movable or immovable;
- b. any office, employment or contract;
- c. any payment, release, discharge or liquidation of any loan,
- d. obligation or other liability whatsoever, whether in whole or in part;
- e. any other service, favor or advantage of any description whatsoever, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary or penal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of any right or any official power or duty; and
- f. any offer, undertaking or promise of any gratification within the meaning of the paragraphs above.

Private-to-private corruption is covered by the legal framework in Singapore. The provisions of Sections 5 and 6 of the PCA are wide enough and cover acts of corruption in a private. The Section 5 of the PCA contains the general prohibition against corruption, makes it an offence to give and receive bribes that states punishment for corruption;

Any person who shall by himself or by or in conjunction with any other person

(a) corruptly solicit or receive, or agree to receive for himself, or for any other person; or

(b) corruptly give, promise or offer to any person whether for the benefit of that person or of another person,

any gratification as an inducement to or reward for, or otherwise on account of

(i) any person doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed; or

(ii) any member, officer or servant of a public body doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body is concerned,

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 5 years or to both.

Similarly, Section 6 of the PCA prohibits corrupt transactions with agents, makes it an offence for an agent to give and receive bribes in relation to his/her principal affairs. Section 6 states punishment for corrupt transactions with agents if:

(a) any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act



in relation to his principal's affairs or business, or for showing or forbearing to show favor or disfavor to any person in relation to his principal's affairs or business;

(b) any person corruptly gives or agrees to give or offers any gratification to any agent as an inducement or reward for doing or forbearing to do, or for having done or forborne to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favor or disfavor to any person in relation to his principal's affairs or business; or

(c) any person knowingly gives to an agent, or if an agent knowingly uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal,

he shall be guilty of an offence and shall be liable on conviction to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 5 years or to both.

Since then, numerous cases have been brought under Sections 5 and 6 of the PCA that cover public and private sector offences. In fact, private sector corruption cases out- number the public sector cases.

Cases involving private sector individuals continued to form the majority, or 88%, of all the new cases registered for investigation by the CPIB in 2018.

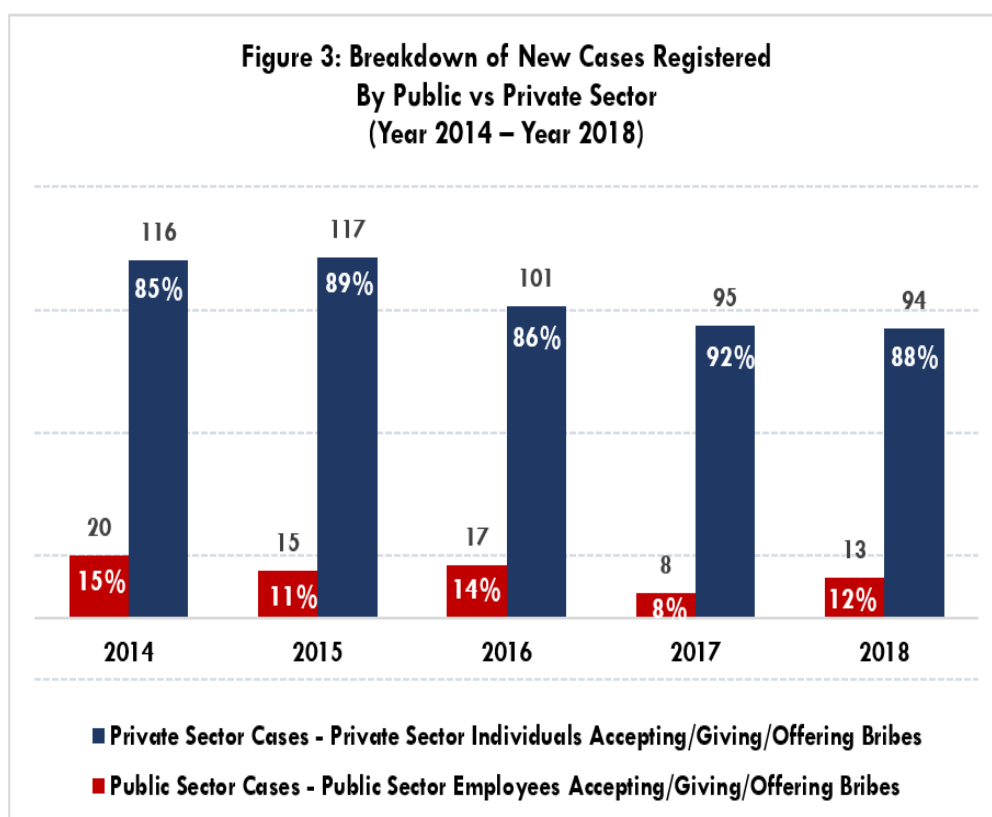


Figure 4.7

Source: Corrupt Practices Investigation Bureau<sup>73</sup>

Private sector individuals constituted the majority of individuals prosecuted in Court. In 2018, 112 individuals were charged in Court for offences investigated by the CPIB. Of these, 96% were private sector individuals.

<sup>73</sup> Corrupt Practices Investigation Bureau, “Statistics of Corruption” <https://www.cpi.gov.sg/singapore-remains-one-least-corrupt-countries-world>, accessed on November 3rd 2019, at 20.00.

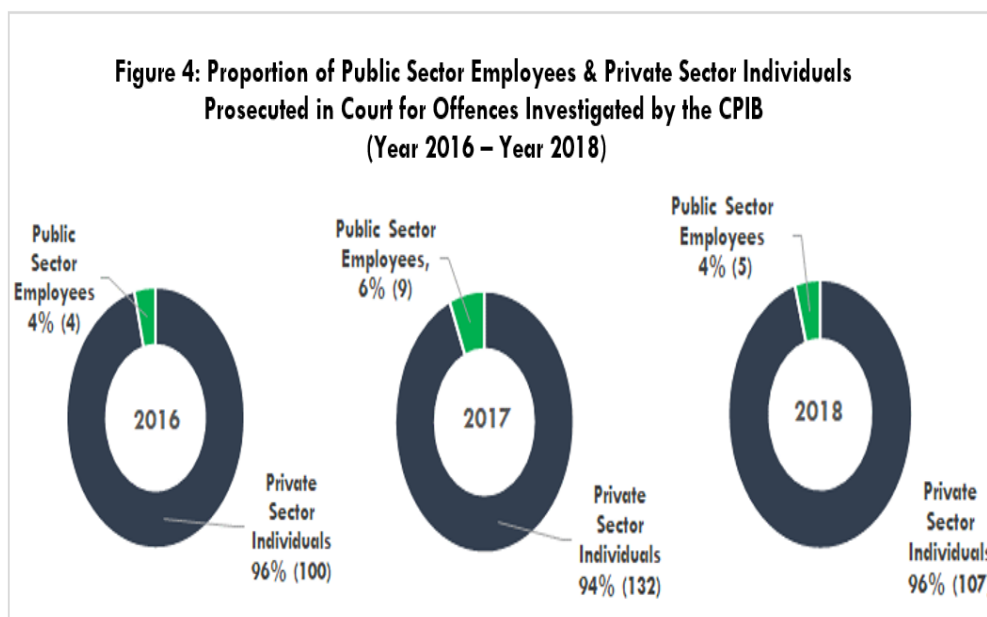


Figure 4.8

Source: Corrupt Practices Investigation Bureau<sup>74</sup>

Furthermore, corruption eradication of Singapore is not only conducted by legal enforcement but also preventive measures. It can be seen by the launch of the Singapore Standard (SS) ISO 37001 on Anti-Bribery Management Systems, A Practical Anti-Corruption Guide for Businesses in Singapore (PACT) and Public Education and Community Outreach Efforts.

### 3. Independent Commission Against Corruption (ICAC) Hong Kong

Hong Kong suffered from corruption that spread in the 1960s and 1970s. Corruption is considered a necessary crime and a way to get things done (a way of life).<sup>75</sup> The timely establishment and effectiveness of the Independent Commission Against Corruption (ICAC) on 15 February 1974 with enactment of the Independent Commission Against Corruption

<sup>74</sup> *Ibid.*

<sup>75</sup> I. Scott, 2011, *Hong Kong's Independent Commission Against Corruption: The Evolving Model*, Hong Kong, Global Handbook of Research and Practice in Corruption, p. 401.

Ordinance (Cap 204) contributed significantly to the development of “clean government”.<sup>76</sup> Since its establishment, ICAC has embraced the three-pronged approach that is law enforcement, prevention and community education to fight corruption. With the support of the Government and the community, Hong Kong has now become one of the cleanest places in the world.

Index of Economic Freedom, Heritage Foundation has ranked Hong Kong 1<sup>st</sup> with score 90.2, sustaining its status as the world’s freest economy in the 2019 and ranked 1st among 43 countries in the Asia–Pacific region.<sup>77</sup> The Transparency International (TI) Corruption Perceptions Index (CPI) has ranked Hong Kong 14<sup>th</sup> out of 180 countries with a score of 76<sup>78</sup> and The Political and Economic Risk Consultancy (PERC) 2018 Report on Corruption in Asia, Hong Kong is consistently ranked the 3<sup>rd</sup>.<sup>79</sup> Hong Kong has consistently remained in the band of the top 20 economies with very low levels of corruption in the world.

The ICAC is established by guaranteed in Article 57 of the Basic Law of the Hong Kong Special Administrative Region as an independent organization under a civilian Commissioner, whose impartiality and freedom from official pressures and influence would be ensured by his

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<sup>76</sup> Choi, J. W., 2009, “Institutional Structures and Effectiveness of Anticorruption Agencies: A Comparative Analysis of South Korea and Hong Kong”, *ASIAN Journal of Politics*, Vol. 3 No. 3, p. 195.

<sup>77</sup> The Heritage Foundation, 2019, *Index of Economic Freedom 2019*, Washington D.C., The Heritage Foundation Secretariat, p. 1.

<sup>78</sup> Transparency International, 2018, *Op. Cit.*, p. 2.

<sup>79</sup> Asian Intelligence, 2018, *an Independent Fortnightly Report on Asian Business and Politics*, Hong Kong, Political and Economic Risk Consultancy Ltd., p. 1.

position being separate from the Public Service. Its operational independence is the single most powerful demonstration of the Government's determination to combat corruption. The Commissioner is accountable directly to the Chief Executive and this ensures that the ICAC is free from any interference in conducting their investigations. ICAC is not part of the Civil Service. The ICAC functions as an independent organization in terms of power, structure, personnel and finance. Below are the organization Structure of ICAC:

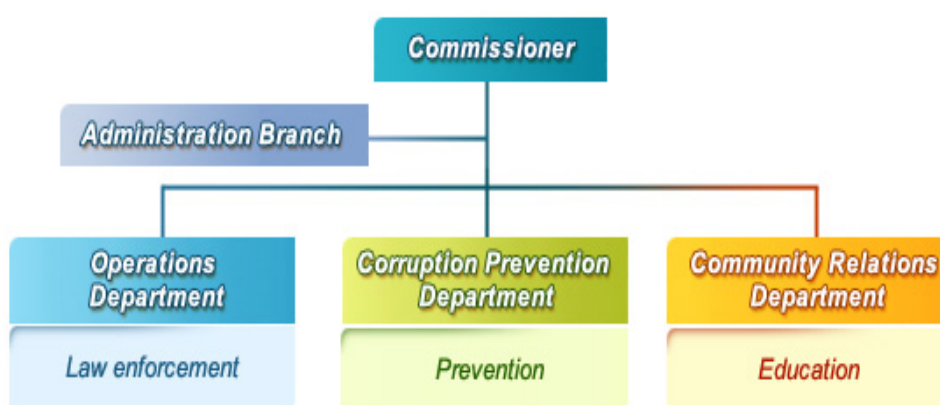


Table 4.9

Source: Independent Commission Against Corruption<sup>80</sup>

The Commission carries out its anti-corruption mission through the three-pronged approach, each supported by an Administrative Branch. The three pronged strategy consists of three separate departments: the Operations Department (law enforcement) to investigate corruption both public and private sector: the Corruption Prevention Department (prevention) to examine the systems and procedures in the public sector, to

<sup>80</sup> Independent Commission Against Corruption, "About" <https://www.icac.org.hk/en/about/struct/index.html>, accessed on November 2<sup>nd</sup> 2019, at 20.00.

identify corruption opportunities and to make recommendations to plug the loopholes; and the Community Relations Department (education) to educate the public against the evil of corruption and to enlist their support and partnership in fighting corruption.

Hong Kong has comprehensive legislation to deal with corruption. The Prevention of Bribery Ordinance (POBO) is the main anti-corruption legislation in Hong Kong. The ICAC is responsible for enforcing the POBO and empowered to investigate corrupt practices. After completion of investigations, the power to prosecute is vested with the Department of Justice in deciding whether the results of the investigations should lead to prosecution. The separation of powers ensures that no case is brought to the courts solely on the judgment of the ICAC. Hence, a clean and dignified judiciary in Hong Kong rules independently on each and every case.

The POBO is divided into five parts: Part I (Sections 1–2) deals with the interpretation provisions; Part II (Sections 3–12) with substantive offences; Part II (Sections 13–18) with power of investigation; Part IV (Sections 19–26) with evidence; and Part V (Sections 28–35) with miscellaneous provisions. In relation to substantive offences, prescribed officers are subject to Sections 3, 4, 5 and 10 of POBO, employees of public bodies are subject to Sections 4 and 5, while Section 9 is designed for the private sector that states corrupt transactions with agents:

- (1) Any agent who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his
  - (a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or
  - (b) showing or forbearing to show, or having shown or forborne to show, favor or disfavor to any person in relation to his principal's affairs or business,shall be guilty of an offence.
- (2) Any person who, without lawful authority or reasonable excuse, offers any advantage to any agent as an inducement to or reward for or otherwise on account of the agent's
  - (a) doing or forbearing to do, or having done or forborne to do, any act in relation to his principal's affairs or business; or
  - (b) showing or forbearing to show, or having shown or forborne to show, favor or disfavor to any person in relation to his principal's affairs or business,shall be guilty of an offence.
- (3) Any agent who, with intent to deceive his principal, uses any receipt, account or other document-
  - (a) in respect of which the principal is interested; and
  - (b) which contains any statement which is false or erroneous or defective in any material particular; and

- (c) which to his knowledge is intended to mislead the principal, shall be guilty of an offence.
- (4) If an agent solicits or accepts an advantage with the permission of his principal, being permission which complies with subsection (5), neither he nor the person who offered the advantage shall be guilty of an offence under subsection (1) or (2).
- (5) For the purposes of subsection (4) permission shall
  - (a) be given before the advantage is offered, solicited or accepted; or
  - (b) in any case where an advantage has been offered or accepted without prior permission, be applied for and given as soon as reasonably possible after such offer or acceptance, and for such permission to be effective for the purposes of subsection (4), the principal shall, before giving such permission, have regard to the circumstances in which it is sought.

The ICAC places equal emphasis on public and private sector corruption. The rationale is that there should not be double standards in society. Private sector corruption can cause as much damage to society as like public sector. In fact, cases of private sector corruption out number the public sector cases.



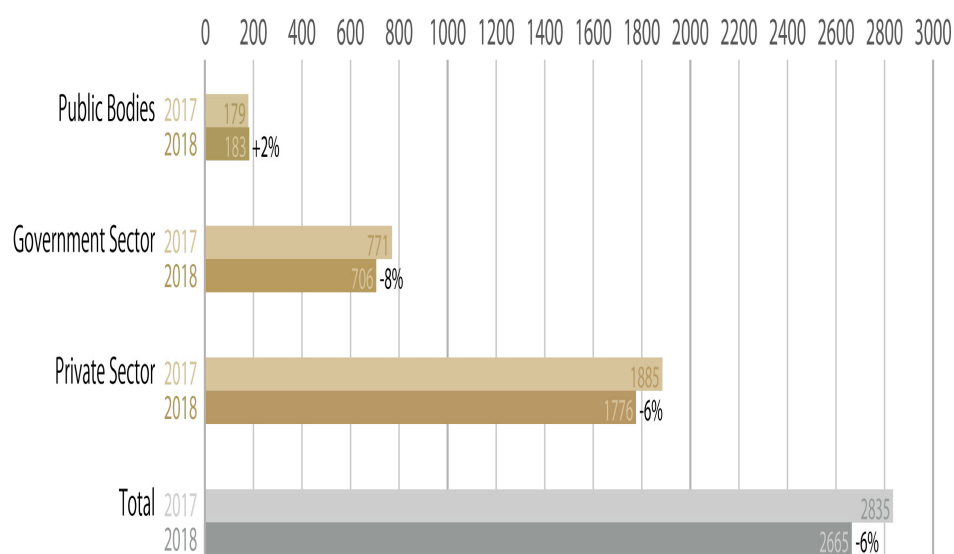


Figure 4.10

Source: Independent Commission Against Corruption<sup>81</sup>

Effective enforcement against private sector corruption can be seen as a safeguard for foreign investment and ensures Hong Kong maintains a level playing field in its business environment. As for, there are three pillars of anti-corruption strategies in private sector namely legislation, regulatory requirements, and Support and services rendered by the ICAC. In addition, political will, adequate resources, partnership approach and community support are as a part of the key of Hong Kong in combating corruption.

### C. Regulating Private-to-Private Corruption in Indonesia

There are two measures for preventing corruption in the private sector.<sup>82</sup> One channel is internal to the company and includes the

<sup>81</sup> Independent Commission Against Corruption, “Corruption Figures”, <https://www.icac.org.hk/en/rc/figures/data/index.html>, accessed on November 2<sup>nd</sup> 2019, at 21.00.

<sup>82</sup> Sööt M-L, 2016, *Private-to-Private Corruption: Taking Business Managers’ Risk Assessment Seriously when Choosing Anti-Corruption Measures*, France, OECD Integrity Forum, p. 6.

establishment of auditing procedures, codes of conduct, training programs, guidelines on specific issues and action plans for how the management will tackle the issue, should a case arise.<sup>83</sup> The second channel is external to the organization and includes regulation on whistleblowing, disclosure of information about allegations and effective law enforcement.<sup>84</sup> International, regional and national anti-corruption frameworks have historically focused on corruption in the public sector than private sector. However, in recent years, there have been a number of initiatives aimed at preventing and criminalizing private-to-private corruption. This trend is more evident at the national and regional level than at the international level.

At the international level, various instruments treat private-to-private corruption differently. The United Nations Convention Against Corruption requires countries solely to ‘consider’ criminalizing corruption of private-to-private sector.<sup>85</sup> The Organization for Economic Co-operation and Development’s (OECD’s) anti-bribery convention addresses only the bribing of public officials.<sup>86</sup> But, there is pressure from the International Chamber of Commerce to prevent and prohibit private-to-private corruption.<sup>87</sup> And the Council of Europe’s Criminal Law Convention on Corruption requires countries to prohibit private-to-private sector corruption.<sup>88</sup>

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<sup>83</sup> Antonio Argandona, *Op. Cit.*, p. 11-16.

<sup>84</sup> Hauser C. and Hogenacker J., 2014, “Do Firms Proactively Take Measures to Prevent Corruption in Their International Operations”, *European Management Review*, Vol. 11 No. 2, p. 223–237.

<sup>85</sup> See Article 21 on Bribery in Private Sector of the United Nation Convention Against Corruption.

<sup>86</sup> International Chamber of Commerce (ICC), *Op. Cit.*

<sup>87</sup> *Ibid.*

<sup>88</sup> See Article 7 and 8 of the Criminal Law Convention on Corruption of 1999.

At the national level, private corruption is dealt with in different ways. Even if a country does not have a law specifically addressing commercial bribery as a form of corruption, other laws may be available to punish such actions.<sup>89</sup> These laws can be based on different theories for regulating behavior. This patchwork of available rules comes with different standards for evidence collection and culpability, however, failing to provide a coherent basis for tackling private-to-private corruption.<sup>90</sup> Overall, private-to-private corruption is an area in need of further exploration. At a minimum, a dialogue is necessary on the policy goals behind prohibiting private-to-private corruption, which will influence the nature of any laws that nations may enact.

However, there is an understanding that countries would benefit from a specific law regulating corruption in the private sector. Firstly, it would leave less space for loopholes and increase predictability for companies operating in the country. Secondly, it may help raise awareness on the social costs of private corruption, contributing also to increased business ethics.<sup>91</sup> Fighting private-to-private corruption will be a key element of worldwide efforts to create an upper level for all market participants, to build public and private sector trust in the rule of law and to lowering the transaction costs.<sup>92</sup> In

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<sup>89</sup> G. Heine, B. Huber and T. Rose, 2003, *Private Commercial Bribery: A Comparison of National and Supranational Legal Structures*, Paris, International Chamber of Commerce, p. 22.

<sup>90</sup> Hess D., 2009, *Corruption in the Value Chain: Private-to-Private Corruption in Global Corruption Report Corruption and the Private Sector 2009*, Germany, Transparency International, p. 23.

<sup>91</sup> *Ibid.*

<sup>92</sup> International Chamber of Commerce (ICC), *Op. Cit.*

addition, in order to build strong integrity, there should be no differentiation between corruption in the private and public sector.

Moreover, there are several issues that should be addressed when regulating private-to-private corruption to make sure that corrupt behavior within the private sector is prevented, detected and punished namely:

#### 1. Preventive Measures

Preventive measures, such as accounting, auditing and bookkeeping requirements as well as enhancing transparency with respect to the identities of persons who play important roles in the creation, management or operations of corporate entities, are important in creating a transparent business environment.<sup>93</sup> Transparency International contends that such measures can mitigate the risk of corruption while public reporting by companies on their anti-corruption programs allows for increased monitoring by stakeholders and the public at large, thereby making companies more accountable.<sup>94</sup>

#### 2. Scope of Offence

The scope of a private-to-private corruption offence should be drafted broadly to encapsulate a wide range of behaviors. For example, for the offence of commercial bribery, the offence should cover both active and passive bribery, committed directly or

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<sup>93</sup> Division for Treaty Affairs, 2012, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, Vienna, United Nations Office on Drugs and Crime, p. 36-38.

<sup>94</sup> Transparency International, 2014, *Transparency in Corporate Reporting: Assessing the World's Largest Companies*, German, Transparency International, p. 1-2.

indirectly, of any undue advantage which may be something tangible or intangible, pecuniary or non-pecuniary, for that person or a third party.<sup>95</sup>

### 3. Broad Scope of Perpetrators

The offence should be broadly worded to cover all individuals who direct, manage or work for the private sector in any capacity, including intermediaries.<sup>96</sup>

### 4. Liability of Legal Person

Serious and sophisticated crime is frequently committed by, through or under the cover of legal entities, such as companies, corporations or charitable organizations. Complex corporate structures can effectively hide the true ownership, clients or specific transactions related to serious crimes. Introducing legal liability, in parallel with prosecution of the natural person, lifts this opacity and may also have a deterrent effect.<sup>97</sup>

### 5. Effective Sanction

Sanctions must be effective, proportionate and dissuasive, especially considering the large amounts of money that can be involved in private-to-private corruption.

### 6. Broad jurisdictional reach

As many companies trade globally, it is important that anti-corruption measures effectively reflect the international nature of

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<sup>95</sup> Division for Treaty Affairs, *Op. Cit.*, p. 104-106.

<sup>96</sup> Martini M., *Op. Cit.*, p. 5.

<sup>97</sup> Division for Treaty Affairs, *Op. Cit.*, p. 108.

business. For this reason, regulation of private-to-private corruption should have broad extra-territorial reach.

#### 7. Private sector whistleblower legislation

Prevention and criminalization of corrupt practices needs to be supported by measures and mechanisms that enable detection of corrupt behavior. Generally, public sector employees have greater whistleblowing protection than those in the private sector. However, it is important that whistleblowing protection be afforded to those in the private sector.

Based on the description of regulating private-to-private corruption above, it will discuss and formulate the corruption eradication method of private sector in Indonesia by developing the authority of Corruption Eradication Commission Indonesia in handling corruption cases in private-to-private sector.

*The first*, there is a limitation on the use KPK as a political tool to eradicate corruption. This can be seen in limited authority of the KPK in handling private-to-private sector corruption cases.

In fact, corruption in the private-to-private sector is conceptually, theoretically, and practically included as a category of corruption. Therefore, UNCAC and several states regulate private-to-private corruption.

Lesson from CPIB Singapore that has established effective anti-corruption from a country that rampant corruption becomes one of the least corrupt countries in the world. The strategy of Singapore consists of four

pillars of corruption control such effective laws, independent judiciary, effective enforcement, and responsive public service which are supported by strong political will.

The political will of corruption eradication in Singapore can be seen by The effort of Singapore to eradicate corruption is not limited to public sector. Since 1970s CPIB had taken action against corruption in the private sector. In this regard, Singapore is a pioneer. Singapore determined to build an incorruptible and meritocratic government, and took decisive and comprehensive action to stamp out corruption from all levels of society in Singapore. As a result of the commitment and leadership of political government, a culture of zero tolerance against corruption has become ingrained into the Singaporean psyche and way of life.

In addition, ICAC Hong Kong is one of the earliest jurisdictions to criminalize private sector corruption. With the three pronged strategy consists of three separate departments: the Operations Department (law enforcement) to investigate corruption both public and private sector: the Corruption Prevention Department (prevention) to examine the systems and the Community Relations Department (education) to educate the public against the evil of corruption and to enlist their support and partnership in fighting corruption.

The ICAC places equal emphasis on public and private sector corruption. The rationale is that there should not be double standards in society. Private sector corruption can cause as much damage to society as like

public sector. Effective enforcement against private sector corruption can be seen as a safeguard for foreign investment and ensures Hong Kong maintains a level playing field in its business environment. As for, there are three pillars of anti-corruption strategies in private sector namely legislation, regulatory requirements, and Support and services rendered by the ICAC.

Based on the success of both anti corruption agencies in combating corruption especially in the field of private-to-private corruption, Indonesia needs to regulate private-to-private corruption and develop the authority of KPK in handling corruption cases in private-to-private sector.

*The second*, the limited number of human resources and budget. The number of KPK employees was 1,652 in 2018.<sup>98</sup> With a population of Indonesia ± 265 million people, the KPK's human resources are relatively small. Meanwhile, as an illustration of the condition of the comparison of the number of employees with the population of the country in several ACAs in the comparison of the number of ICAC employees with the population of Hong Kong is 1400<sup>99</sup> compared to 7,4 million<sup>100</sup> and the comparison of CPIB employees with Singapore's population is 220<sup>101</sup> compared to 5,6 million.<sup>102</sup>

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<sup>98</sup> Komisi Pemberantasan Korupsi, "Pejabat Struktural", <https://www.kpk.go.id/id/tentang-kpk/pejabat-struktural>, accessed on November 23<sup>rd</sup> 2019, at 23.00.

<sup>99</sup> Independent Commission Against Corruption, "About", <https://www.icac.org.hk/en/about/struct/index.html>, accessed on November 24<sup>th</sup> 2019, at 19.00.

<sup>100</sup> Census and Statistic Department "Hong Kong Statistic Population", <https://www.censtatd.gov.hk/hkstat/sub/so20.jsp>, accessed on November 24<sup>th</sup> 2019, at 19.10.

<sup>101</sup> Corrupt Practices Investigation Bureau, "About Us", <https://www.cpiib.gov.sg/about-us/our-work/organisational-structure>, accessed on October 24<sup>nd</sup> 2019, at 19.30.

<sup>102</sup> Department of Statistics Singapore, "Singapore population stats", <https://www.singstat.gov.sg/find-data/search-by-theme/population/population-and-population-structure/latest-data>, accessed on November 24<sup>th</sup> 2019, at 20.00.



As well as KPK's budget, in the 2015-2019 period tends to fluctuate and its portion is very small in the APBN (less than 0,0004% annually) (Ministry of Finance, 2019).<sup>103</sup> In 2019, KPK's budget request was only approved at around 67%. For 2019, KPK has proposed a budget of IDR 1.9 trillion to target the number of 200 cases handled, but DPR stated that the budget ceiling for KPK was IDR 813 billion.

The funding figures for corruption eradication activities are considered very small compared to CPIB Singapore and ICAC Hong Kong. According to Former Commissioner at the Independent Commission Against Corruption (ICAC) Bertrand de Speville, the country that succeeded in eradicating corruption at least allocated 0.05% of the total state budget. Whereas an adequate budget allocation for KPK is an important reference for the Government's political will in combating corruption.

*Lastly*, besides both method above, it needs to make effective laws, prevention, enforcement, education, public service, partnerships and increase human resources, accountability and integrity of KPK, underpinned by strong political will.

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<sup>103</sup> Kementerian Keuangan, "APBN 2018" accessed on November 24<sup>th</sup> 2019, at 21.00. <http://www.anggaran.kemenkeu.go.id/content/Publikasi/NK%20APBN/2018%20Buku%20II%20Nota%20Keuangan%20Beserta%20APBN%20TA%202019.pdf>. p,77.