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The Urgency of Criminal Liability For Beneficial Owners In Corporations Based on Presidential Regulation No. 13 of 2018

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Abstract: The issue of accountability of beneficial owners despite juridical Article 6 paragraph 2 of the Anti-Money Laundering Law arises because Article 6 paragraph 2 of the Anti-Money Laundering Law does not provide clarity on whether beneficial owners can be considered as corporations, considering that beneficial owners are outside the corporate structure. The focus of the issue revolves around the criminal accountability of Beneficial Owners in Corporations if they engage in Money Laundering and efforts to prevent money laundering activities carried out by the beneficial owners of corporations based on Presidential Regulation No. 13 of 2018. The urgency of Presidential Regulation No. 13 of 2018 regarding the application of the principles of beneficial ownership in corporations in the prevention and eradication of money laundering is to provide transparency regarding the definition of beneficial owners, their position, policy principles, and objectives. The legal basis for the criminal accountability of beneficial owners in corporations related to money laundering faces a vacuum of regulations, making it difficult for law enforcement to establish a foundation focusing on beneficial owners as controllers of corporations, which is not accommodated in current law. This creates a legal loophole that allows them to engage in money laundering without criminal accountability.

Keywords: Accountability, Beneficial Owners, Corporations, Money Laundering

INTRODUCTION

Money laundering offenses that occur within corporations often involve Beneficial Owners as the main perpetrators. Beneficial Owners are individuals or groups who de facto own, control, or benefit from the corporation, even though their names are not officially listed in the company's documents. Beneficial Owners can exploit the corporate structure by using the corporation as a means to launder money from criminal activities, conducting complex transactions, and channeling funds through bank accounts associated with the corporation.

Countries must take action to prevent the misuse of legal entities in Money Laundering offenses. Countries should ensure that there is adequate, accurate, and timely information about Beneficial Owners and corporate control that can be obtained or accessed promptly by the

relevant authorities. In particular, countries that have legal entities that can issue bearer shares or nominee shareholder certificates, or that allow nominee shareholders or nominee directors, should take effective measures to prevent abuse in Money Laundering and Corporations. Countries should consider measures to facilitate access to Beneficial Owner information and control by financial institutions and non-financial business entities.¹

Corporations can be utilized both directly and indirectly by perpetrators of money laundering offenses who are the Beneficial Owners of the proceeds of money laundering. Until now, regulations regarding the implementation of principles regarding Beneficial Owners of Corporations have not been established.² In practice, corporations can be exploited to conceal funds derived from illegal activities through a series of complex transactions. This may involve the use of fictitious companies or fake bank accounts to facilitate the money laundering process. Therefore, serious and collaborative efforts in combating money laundering are needed among the government, supervisory institutions, and the corporations themselves to protect the integrity of the financial system and prevent the misuse of corporations as a means of money laundering involving Beneficial Owners.

The issue lies in Presidential Regulation Number 13 of 2018, which only regulates the registration mechanism and does not address criminal accountability. However, the position of the Beneficial Owner in the regulation states that the Beneficial Owner has the right, based on Article 4 paragraph (1) letter (e) of Presidential Regulation Number 13 of 2018, to have authority or power that can influence and control the corporation without requiring authorization from any party. The issue of money laundering arising from Beneficial Owners in corporations is based on the legal provisions of Article 4 paragraph (1) letter (g) of Presidential Regulation Number 13 of 2018, stating that the Beneficial Owner is the actual owner of the funds under the ownership of corporate shares. This means that the existence of funds given to the corporation, in reality, is owned by the Beneficial Owner. However, the Beneficial Owner, in managing the funds of the corporation, is overseen by the structural components of the company, such as directors and commissioners, acting as legal entities running the corporation. Therefore, the strong authority held by the Beneficial Owner in the corporation becomes the root cause of money laundering in the corporation.

The issue of corporate criminal liability in imposing additional criminal sanctions on corporations still faces obstacles, namely the legal vacuum regarding the criteria for imposing sanctions, such as freezing business activities, revocation of licenses, dissolution, and corporate takeover. This raises questions about the criteria that must be met before these sanctions can be applied, thus hindering the process of imposing additional sanctions on corporations. This legal vacuum will result in ambiguity in efforts to prevent and enforce money laundering laws carried out by the Beneficial Owners of corporations.

Law of the Republic of Indonesia Number 1 of 2023 concerning the Criminal Code (hereinafter referred to as the Criminal Code) based on Article 46 states that a Crime by a Corporation is a crime committed by executives who hold a functional position in the organizational structure of the corporation or individuals who have a working relationship or based on other relationships acting for and on behalf of the corporation or acting in the interests of the corporation within the scope of its business or activities, both individually and collectively.³ According to Article 47, in addition to the provisions stipulated in Article 46, a Crime by a Corporation can be committed by a person giving orders, a controller, or a Beneficial Owner of the Corporation who is outside the organizational structure but can control the Corporation. Based on the translation of Article 46, "functional position" refers to a person who has the authority to represent, make decisions, and apply supervision over the Corporation,

¹ FATF, 2019, *Best Practices on Beneficial Ownership for Legal Persons*, Paris: FATF, h. 10

² *ibid*, h. 209

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including those in a position to order, participate in, induce others to commit a crime, or assist in such criminal activities, particularly in the banking sector. Furthermore, in the explanation of Article 47 of the Criminal Code, "controller" is defined as "any person who has the power or authority to determine the policies of the Corporation or has the authority to carry out the policies of the Corporation without requiring authorization from superiors".⁴

The lack of clarity regarding the true owners in a corporation involved in Money Laundering leads to a legal vacuum in imposing criminal accountability on the corporation in cases of the Anti-Money Laundering. This condition poses obstacles for law enforcement authorities in their efforts to prevent money laundering by identifying individuals or entities responsible for the criminal acts. As a result, Beneficial Owners, as legal subjects and the actual hidden owners, can evade legal accountability for the Anti-Money Laundering, potentially causing negative impacts on the country's economic stability. Money laundering crimes involving Beneficial Owners in a corporation, due to

the absence of clear regulations related to money laundering offenses, become a serious issue. Continuous occurrences of the Anti-Money Laundering cases make Beneficial Owners the primary actors behind controlled corporations. When legal issues arise in such cases, the legal position of Beneficial Owners, which is not explicitly regulated regarding the impacts within corporations, requires a strong foundation for preventing and combating money laundering.

Based on the background outlined above, the issues to be examined are twofold: first, the urgency of regulating the policy in Presidential Regulation Number 13 of 2018 concerning the Implementation of the Beneficial Ownership Principles in Corporate Money Laundering Crimes; and second, the legal basis for the criminal accountability of Beneficial Owners within corporations when involved in money laundering activities.

RESEARCH METHOD

The research methods used in this proposal are methodological, systematic and structurally consistent so that in the future it is hoped that with the methods used, this proposal can be scientifically justified. This type of research, namely legal research, is a process carried out in order to solve a legal problem in this research. This research requires the ability to analyze legal problems, find legal rules, legal principles, and legal doctrines to answer legal problems that arise in this research. In writing this proposal, the type of research used is normative juridical. This normative juridical research is research that examines the applications, rules, or norms in applicable positive law. This type of normative juridical research is carried out by examining and analyzing the substance of statutory regulations, theoretical literature that is in harmony with the legal issue being discussed.⁵ namely the urgency of criminal liability of Beneficial Owners in Corporations in committing criminal acts of money laundering.

DISCUSSIONS

The Urgency of Policy Regulations in Presidential Decree Number 13 of 2018 concerning the Application of the Principle of Beneficial Ownership of Corporations in the Crime of Money Laundering

The urgency of regulating beneficial ownership as regulated in Presidential Decree Number 13 of 2018 concerning the Implementation of Beneficial Ownership from Corporations does have a legal basis. There are two legal principles that form the basis for the formation of this policy, namely the principle of legal certainty and the principle of

⁴ M. Arief Amrullah, 2003, *Politik Hukum Pidana dalam Perlindungan Korban Kejahatan Ekonomi di Bidang Perbankan*. Malang: Bayu Media Publishing, h. 208

⁵ Peter Mahmud Marzuki, 2016, *Penelitian Hukum Edisi Revisi, Cetakan ke12*, Jakarta, Kencana, h. 60

transparency. These two principles are the basis for forming this policy. If you consider the legal considerations, firstly, in the context of the Anti-Money Laundering, it can threaten the stability and integrity of the economic and financial system, as well as endanger the foundations of social, national and state life. Second, based on international standards in the field of preventing and eradicating the Anti-Money Laundering, it is necessary to have provisions and mechanisms for identifying Beneficial Owners from Corporations so that accurate and up-to-date information regarding Beneficial Owners is obtained. Third, that corporations can be used as a means, either directly or indirectly, by perpetrators who are the beneficial owners of the Anti-Money Laundering proceeds. Currently there are no regulations, so it is necessary to regulate the application of the principle of recognizing beneficial owners from corporations.

The birth of Presidential Decree Number 13 of 2018 then further the substance of the regulations adopting the concept of a Multi-pronged approach in implementing Beneficial Ownership. This approach allows Indonesia to use one or more mechanisms, such as the Registration Approach, the Company Approach, and the Existing Information Approach, to ensure that information regarding the Beneficial Ownership of a company is obtained by the company and is available at designated locations in their country. In contrast, a multi-directional approach using multiple sources of information is often more effective in preventing misuse of legal entities for criminal purposes and implementing measures that make the Beneficial Ownership of legal entities more transparent.⁶ The diversity and availability of information sources increases legal certainty of access to information, and helps reduce problems with the accuracy of information from certain sources.

Flexibility in the Beneficial Ownership Mechanism refers to the ability or freedom provided by the Multi-pronged approach concept for Indonesia to use more than one mechanism in identifying and documenting the Beneficial Ownership of a company. In other words, this approach does not limit Indonesia to just one particular method, but rather provides the option to adopt several approaches at once. The advantage of flexibility in the context of the Beneficial Ownership Mechanism, which allows the use of more than one approach or mechanism, involves the aspect of being responsive to Market Dynamics which can change rapidly.⁷ By having the option to use various mechanisms, countries can be more responsive to such changes. This flexibility allows authorities to adapt Beneficial Ownership identification strategies according to market evolution and economic needs. The financial circumstances of companies and individuals can vary widely. By using approaches that suit specific types of businesses or sectors, governments can accommodate these differences. This is important to ensure that beneficial ownership identification rules remain relevant and effective in a changing financial environment.

Identifying beneficial ownership can be a complicated and complex task. Each mechanism has its own advantages and disadvantages. By having the flexibility to choose the best approach in a given situation, authorities can overcome the challenges and complexities that may arise.⁸ This allows for more effective and efficient use of strategies. Remember, each sector or industry may have unique characteristics that require a special approach. This flexibility allows authorities to adapt their approach according to the specific context, thereby increasing the likelihood of successful implementation.

Based on the principle of transparency, a decision is taken and its implementation is carried out in a manner or mechanism that follows the rules or regulations set by an institution. Transparency can also mean that information relating to the institution must be easily and freely available and can be accessed by those affected. policies implemented by an institution. Transparency can also mean that transparency must be built within the framework of free flow

⁶ FATF, *Op, Cit*, h. 19-20

⁷ *Ibid*, h. 21

⁸ *Ibid*, h. 22

of information, the information is easy to access, and the information must be provided adequately and easily understood so that it can be used as a monitoring and evaluation tool. The principle of transparency is something that is real, clear, open and can be accounted for. The concept of transparency is needed and required to be carried out in institutions or public bodies that have an interest in many people. This needs to be done as a form of initial supervision of every action that has been or will be taken by each particular institution.⁹

Based on the basic principles of transparency above, efforts are made to increase transparency through the implementation of mechanisms such as the Registration Approach, Company Approach, and Existing Information Approach regarding the beneficial ownership of a company. The Registration Approach by requiring companies to register their Beneficial Ownership, authorities can have direct access to this information. This step creates transparency because the data is openly available and can be accessed by interested parties, including competent authorities and the general public.¹⁰ The Company's approach of allowing companies to monitor and report their own Beneficial Ownership creates internal transparency. The Company has an obligation to ensure that the information is accurate and up to date. This can provide a better understanding of the ownership structure and prevent the continuation of misinformation or attempts to hide true ownership. An existing information approach using existing information sources, such as business records or other documents, to identify Beneficial Ownership can also increase transparency. This approach takes existing data and integrates it into the identification process, reducing the potential for gaps or inaccuracies.

Entities included in the definition of Corporate Owners that have share ownership of 25% plus one share, or an ownership interest of more than 25% held by an individual, will be an indication of direct ownership. Entities included in the definition of a corporation whose share ownership is 25% plus one share, or ownership interests of more than 25% are held by a corporate entity under the control of an individual, or by several corporate entities under the control of the same individual, is an indication of indirect beneficial ownership. Ultimately, it is natural persons who must be identified and entered into the register as Beneficial Owners of the entity, regardless of how many layers of ownership there are.¹¹ If, after exhausting all possible means and provided there is no reason to suspect, no natural person is identified as a Beneficial Owner, or if there is any doubt that the identified person is a Beneficial Owner, the natural person holding the position of Senior Managing Officer shall be recorded in the register as Beneficial Owner.

Legal Basis for Criminal Liability of Beneficial Owners in a Corporation If They Commit the Crime of Money Laundering

The legal basis for juridical criminal liability, the imposition of criminal penalties against Corporations is regulated in the provisions of Article 6 paragraph (1) of the the Anti-Money Laundering Law which states that "In the event that Anti-Money Laundering as referred to in Article 3, Article 4 and Article 5 is carried out by a Corporation, the punishment is given to the Corporation and/or Corporate Control Personnel", further Article 6 paragraph (2) of the Money Laundering Law, criminal offenses are imposed on corporations if the crime of money laundering is: committed or ordered by corporate control personnel; carried out in order to fulfill the aims and desires of the Corporation; carried out in accordance with the duties and functions of the perpetrator or giver of the order; and carried out with the aim of providing benefits to the Corporation. Based on the provisions of Article 6 of the Anti-Money Laundering Law above in its explanation, the scope of what the Corporation says also includes organized

⁹ Andi Safriani, 2020, "Telaah Terhadap Asas Transparansi Dalam Pengelolaan Dana Desa" *Jurisprudentie*, 7(1), h. 63

¹⁰Brown, C. 2003, *Beneficial Ownership And The Income Tax Act*, Ottawa : Canadian Tax Journal, h. 69

¹¹. Sutan Remy Sjahdeni, 2007, *Pertanggungjawaban Pidana Korporasi*, Jakarta : PT. Grafiti Pers, h. 53

groups, namely structured groups consisting of 3 (three) or more people, whose existence is for a certain period of time, and acts with the aim of carrying out one or more actions. criminal acts regulated in this Law with the aim of obtaining financial or non-financial support, either directly or indirectly.

Corporate criminal responsibility is actually regulated in the Anti-Corruption Law, which regulates the formulation of basic criminal sentences that are different from the Criminal Code, namely the imposition of two types of basic crimes which are imperative-cumulative in nature and the imposition of two types of basic crimes simultaneously which are imperative-facultative in nature.¹² The Corruption Law regulates a new type of additional crime in Article 18 paragraph (1), namely confiscation of tangible or intangible movable property; payment of compensation money that is as much as possible equal to the assets obtained from criminal acts of corruption; closure of all or part of the company for a maximum period of 1 (one) year; and revocation of all or part of certain rights or elimination of all or part of certain benefits that have been or may be provided by the Government to prisoners. Apart from these two differences, the Corruption Law also accommodates punishment for corporations involved in criminal acts of corruption. If a criminal act of corruption is carried out for and on behalf of a corporation, then the criminal charges and impositions can be imposed on the corporation and/or its management.¹³

The problem of criminal responsibility for Beneficial Owners as a result of a legal vacuum is that in a juridical sense, it is difficult to deem Beneficial Owners as part of the parties subject to criminal liability because the provisions of Article 6 paragraph (2) of the Anti-Money Laundering Law do not specify who is meant by the management of a Corporation. so that it can impose criminal charges against a corporation if it commits or orders the Anti-Money Laundering to be carried out by Corporate Control Personnel. Therefore, criminal liability for corporations is difficult for beneficial owners to be held accountable as a result of strong suspicions of the Anti-Money Laundering.¹⁴

Criminal liability for profiteers in companies is a big challenge, considering that Article 6 paragraph (2) letter (a) of Anti-Money Laundering Law is intended to regulate criminal sanctions against corporations in the context of the Anti-Money Laundering, does not provide a clear definition or specific criteria regarding who is considered Personnel. Corporate Controller. This clarity is the main thing that is missing and creates juridical difficulties in determining criminal responsibility for Beneficial Owners. So that law enforcement officials and competent authorities will face difficulties in identifying who actually has control or significant influence in the management of the Corporation. Ambiguity in the law creates difficulties in law enforcement. The authorities do not have a strong juridical basis to determine whether the Beneficial Owner should be responsible for the Anti-Money Laundering carried out by personnel who have power within the Corporation.¹⁵

The clear section on criminal liability for beneficial owners in the Anti-Money Laundering Law creates problems in determining the elements of criminal acts such as legal subjects that can be held criminally liable. This is inseparable from the inability of the Anti-Money Laundering Law to provide strict criteria for determining who is considered to be a corporation controller. This creates uncertainty in determining whether beneficial owners have a significant role or control in the policies and operations of the Corporation. Because without clear criteria, law enforcers and competent authorities have difficulty establishing criminal

¹² Adami Chazawi, 2016, *Hukum Pidana Korupsi di Indonesia*, Jakarta: PT. Rajagrafindo Persada, h. 327

¹³ Erlina, 2020, "Analisis Regulasi Pemilik Manfaat (Beneficial Ownership) Pada Yayasan Pendidikan". *AlAdl*, 13(1), h. 113

¹⁴ Burhan Jatmiko, Paramita Prananingtyas, 2023, "Kajian Yuridis Ketentuan Mengenai Pemilik Manfaat (*Beneficial Owner*) Perseroan". *Notarius*, 16(1), h. 244

¹⁵ *Ibid*, h. 246

responsibility for beneficial owners in the context of the Anti-Money Laundering. This difficulty involves identifying the role and level of involvement of beneficial owners in criminal acts involving corporations. The lack of criteria has an impact on law enforcement in determining the status of beneficial owners who should be the brains of the Anti-Money Laundering, because without concrete guidance, law enforcers do not have a clear basis for determining whether beneficial owners should be held accountable for criminal acts carried out by personnel who are considered to regulate the Corporation.¹⁶

The main problem in determining the elements of a criminal act for criminal liability against beneficial owners in a corporation results in this lack of specificity causing variations in interpretation by law enforcement, courts and authorities. Various interpretations of who is considered to be the controller of the Corporation may arise, which in turn may affect uniformity and consistency in the handling of cases. The absence of clear guidance can create uncertainty in law enforcement.¹⁷ Law enforcement may have difficulty determining whether the Beneficial Owners have sufficient control to be considered controllers of the Corporation and whether they may be held criminally liable. Due to this lack of specificity, more detailed legal clarification is needed to provide definite guidance regarding who is included in the requirements for Corporate Control Personnel. This clarification can help reduce confusion and increase clarity in law enforcement. Beneficial Owners may face legal uncertainty due to ambiguities that may impact their decisions and actions in the context of ownership and control of the Corporation.

CONCLUSION

The policy urgency of Presidential Decree Number 13 of 2018 discusses the application of the principle of Beneficial Ownership to Corporations in preventing and eradicating the Anti-Money Laundering to provide transparency regarding Beneficial Owners, their positions, policy principles and objectives. By adopting the concept of a multi-pronged approach, Indonesia allows the use of various mechanisms, such as registration, company and existing information approaches, to increase the transparency of beneficial ownership of a company. The obligation of beneficial owners to identify and report their holdings aims to prevent money laundering and terrorist financing, with the Central Bank as the institution that monitors compliance and takes action if there is non-compliance.

The legal basis for criminal liability of Beneficial Owners in Corporations related to the Anti-Money Laundering faces a legal vacuum, which makes it difficult for law enforcers to establish a basis for focusing on Beneficial Owners as controllers of Corporations which has not been accommodated in current law, giving rise to legal loopholes that allow them to commit the Anti-Money Laundering without criminal liability. In the application of law to the criminal liability of Beneficial Owners in Corporations, there is an unclear definition of Corporate Control Personnel in the the Anti-Money Laundering Law, creating juridical difficulties in determining the criminal liability of Beneficial Owners. The identification doctrine, which emphasizes the culpability of key individuals in the Corporate structure, forms the basis of the criminal liability of Beneficial Owners.

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¹⁷ *Ibid*, h. 22

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