

THE IDEA OF PREVENTING CORPORATE CORRUPTION THROUGH DEFERRED PROSECUTION AGREEMENT (DPA) IN INDONESIA

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Abstract

Nowadays, corporate corruption cases handled by Indonesian Corruption Eradication Commission (KPK) reached 90%. From 2004 to 2016, corruption in the form of bribes amounted to 50.9% of all corruption types. Corporate involvement is typically in the form of *Complicity* and nowadays may result any development. However corporation that are criminally punished are very low in percentage, therefore Supreme Court Decree or PERMA No.13 of 2016 is expected as a repressive solution to the problem by way of formalizing corporate criminal procedural law. According to the authors, the commitment of preventing corporate corruption attributed to the nature of contemporary corporations is far more important than such repressive measures. So that the authors offer the Deferred Prosecution Agreement (DPA) mechanism as a preventive measure to combat the corporate corruption in Indonesia. DPA was originally practiced by *common law* countries, but it is not impossible to be applied in *civil law* countries like Indonesia. The proof is that Indonesia has also adopted many concepts of criminal law from the *common law* state. Thus this article will discuss several things, namely: (1) some *civil law* concepts adopted by the *common law* system that indicate Indonesia's opportunity to implement DPA (2) The idea of preventing corporate corruption contained in the DPA, and (3) some notes on the weaknesses and advantages of DPA if it is applied in Indonesia and some criticism to the PERMA No.13 of 2016 is also analyzed. Comparative approach of law and literature study, especially between *civil* and *common law* state, was chosen to answer the problem. Furthermore, all data obtained were analyzed qualitatively.

Keywords: Deferred prosecution agreement, Corruption, Corporation

1. INTRODUCTION

The criminal act of corruption, causing an enormous loss to the state, potentially hinders the national development. This is evident from the number of cases that occurred from 2011 to 2015, wherein the figures for the respective years during that period are 436 cases, 401 cases, 560 cases (Lamanauw, 2014), 629

cases (Husodo, 2015), and 550 cases (Egi, 2016). The number of cases in many instances is not directly proportional to the amount of state losses. The following figures illustrates the amount of state losses due to corruption for the respective years during the period from 2011 to 2015, i.e. IDR 2.1 trillion (Indonesia Corruption Watch, www.antikorupsi.org), IDR 10.4 trillion (Indonesia Corruption Watch, 2013), IDR 7.3 trillion (Indonesia Corruption Watch, 2013), IDR 5.29 trillion (Husodo, 2015), and IDR 3.1 trillion (Egi, 2016). The biggest loss was recorded in 2012, wherein the amount equaled 36.89% of the total amount of losses recorded for the entire period from 2011 to 2015 even though there were only 401 cases in that year. Besides the percentage, the amount of state losses each year, which always reaches trillions of rupiahs, demonstrates the massive damage caused by corruption that reaches a total of 28.19 trillion rupiahs in five years. Until now the figures on corruption cases have been largely centered on the responsibility of the natural person (*natuurlijk persoon*), or in another word, the focus is on the subject of the crime. However, the crime itself continues to undergo a metamorphosis, both in terms of the mode of operations and the offender(s) who perpetrate the act. As it turned out, an act of corruption perpetrated by a natural person (*natuurlijk persoon*) can also be carried out by a corporation. The Fifth UN Congress on the Prevention of Crime and Treatment of the Offender in 1975 and the Seventh Congress in 1985 declared the emergence of a new dimension of crimes committed by corporations involving respected business persons (Swartha, 2015, p.6), and obviously such an involvement is quite detrimental to the national economy (Topan, 2009, p.12). Despite being involved in the crime, the burden of recovering the state loss is only shouldered by the individuals even though large corporations might contribute more to the recovery of the loss.

In Indonesia, corporate involvement in the practice of corruption is evident from a number of cases handled by KPK (*Corruption Eradication Commission*). The Commission's data from 2016 revealed that the institution so far had processed 146 cases, in which all the suspects were corporate managements (Yuntho, 2017). All of them were found guilty and convicted in the court of law and imprisoned; however, the corporations remain untouched and continue operating until today (Yuntho, 2017). It shows that the patterns of corporate involvement in corruption cases are quite diverse, and since a corporation cannot physically carry out such an act, the answer, at least theoretically, is to associate the corporation in the conspiracy to commit a criminal act.

As mentioned previously the types of corruption in Indonesia are quite diverse—corruption acts in Indonesia can be classified at least into seven different categories (Hamzah, 2013, pp.3-14). Based on the findings on the field, the predominant offense in corruption-related cases is bribery. From 2004 to 2016, most of the cases investigated by KPK were bribery (50.9%), followed by cases related to procurement of goods and services (28.7%), and misappropriation of budget (8.5%) (Widjojanto, 2017). The Chair of KPK also states that a number of corporations were involved in 90% of the cases handled by the Commission, either as the main offender or as the persons who collectively perpetrated the act or as the parties who aided and abetted the main offender by providing facilities to commit the said crime. The mode of operations include, among others, bribing certain officials to get projects from the state or attempting to influence the outcome of a certain policy (Widjojanto, 2017). Nonetheless, until now only one court judgment on corporate corruption case that has reached a final and legally binding status (*wherein all venue for appeals have been exhausted*), i.e. the corruption case involving PT. Giri Jaladhi Wana.

The main issue is that in addition to the transformation of corporation as the subject in the criminal act of corruption, the approaches used by the criminal justice system are still showing some weaknesses. One of the references that clearly points to such an imperfection is the persistent and massive loss incurred by the state. Therefore, ideas pertaining to the prevention of corporate corruption need to be strengthened, and one of such ideas is the Deferred Prosecution Agreement (DPA) scheme.

Since the Deferred Prosecution Agreement (DPA) scheme is practiced in countries that use the common law system such as the United States and United Kingdom, it is quite obvious that a number of adjustments are necessary before it can be applied to Indonesia, which uses the civil law system. A comparison study on criminal law practices in these countries could be carried out to explore the possibility of applying the DPA scheme in Indonesia

2. PREVENTING THE CORRUPTION

Crime prevention may take form either as a preventive measure or a repressive action, wherein a preventive measure is an early attempt to prevent a crime from occurring (Lopa, *Undang-undang Pemberantasan Korupsi Law on Corruption Eradication*, 2001, p.16). A preventive measure covers all the attempts to prevent a crime from occurring in the first place (the first crime) or to prevent a criminal act from recurring (Atmasasmita, 2010, p.66) or commonly referred to as a general prevention (*generale preventie*) and a special prevention (*speciale preventie*).

As an initial step, a preventive measure is crucial in the struggle to eradicate corruption in a rational manner. A strong proponent of a rational application of criminal law is Peter Hoefnagels (Hoefnagels, 1973, p.57). A rational application of criminal law basically means that criminal law should not be used as an instrument to intimidate (Reksodiputro, 2017); it is only one of the means we use to fight crime. Therefore, it should be used judiciously. Even when it is absolutely necessary to apply the provisions of criminal law, it is still necessary to consider the final goal. Within the context of eradicating corruption, recovering the state loss should be the primary and ultimate goal.

The long and arduous history of the struggle to eradicate corruption in Indonesia is evident from the content of corruption-related offenses in the KUHP (Criminal Code), and in the *Peraturan Pemberantasan Korupsi Penguasa Perang Pusat (Regulation of the Central War Authority on the Eradication of Corruption)* of the Army and the Navy, Law No. 24 (PRP) of 1960 *juncto* Law No. 3 of 1999 *juncto* Law No. 20 of 2001 on the Eradication of the Criminal Act of Corruption (Hamzah, *Pemberantasan Korupsi Melalui Hukum Pidana Nasional dan Internasional, Eradicating Corruption Using the National and International Criminal Law*, 2014, pp.29-66). The status of corporation as the subject in the criminal act of corruption is also changing, case in point, Law No. 3 of 1971 does not explicitly recognize corporate responsibility even though it contains a reference to legal entities (Hamzah, *Pemberantasan Korupsi Melalui Hukum Pidana Nasional dan Internasional, Eradicating Corruption Using the National and International Criminal Law*, 2014, p. 84). Not until the enactment of Law No. 31 of 1999 *juncto* Law No. 20 of 2001 do we have provisions that specifically govern corporate responsibility.

Nevertheless, within the practice of the Indonesian criminal court, only recently in 2011 was a corporation found guilty in the court of law when the District Court of Banjarmasin convicted a corporation for a criminal act of corruption. From then on, law enforcement officials claimed that they have had to confront numerous obstacles when prosecuting corporations. Hence, the number of corporations convicted of committing corruption-related offenses remains quite small despite the relatively high number of cases investigated by KPK.

As time goes by, in addition to establishing KPK as an institution to fight corruption, Indonesia is increasingly aware of the importance of preventing corruption, for example, by ratifying the United Nation Convention against Corruption (UNCAC), building international cooperation, etc. However, there is also a continuous effort to seek out more variations of measures that could be used to fight corruption and eventually recover the state financial loss. The variations offered by the DPA scheme in conjunction with the repressive measures are one of them. To that end, a DPA is expected to provide a maximum preventive measure, either as general prevention (involving other corporations) or as a special prevention (the corporation itself)

3. SOME OF THE COMMON LAW CONCEPTS ADOPTED BY CIVIL LAW THAT MAY PROVIDE AN INDICATION OF INDONESIA'S OPPORTUNITY TO APPLY DPA

The Deferred Prosecution Agreement (DPA) is not a familiar term in the existing Indonesian law. Nonetheless, the DPA scheme is widely used in the United States and United Kingdom. The main reason these two countries use the DPA scheme is to overcome the weaknesses with respect to enforcing criminal law on corporations, such as inefficiency in time, effort and cost (Grasso, 2016, p.4) and reasons pertaining to corporate participation in criminal law. Moreover, prosecuting a corporation through the criminal justice system does not provide any guarantee that the corporation will never repeat the same offense, whereas the DPA scheme is able to accommodate that contingency.

The United Kingdom introduced the use of the DPA scheme through Schedule 17 of the Crime and Courts Act 2013, meanwhile in the United States, it was enacted through the Foreign Corrupt Practice Act (FCPA) and currently Australia is reviewing the possibility of applying the DPA scheme in its criminal justice system. As for the scheme itself, it is an agreement reached between a prosecutor and an organization, which could be prosecuted, under the supervision of a judge. The agreement allows a prosecution to be suspended for a defined period provided the organization meets certain specified conditions (Office).

The concept of the DPA scheme originates from the common law family; however, this should not close the possibility of its application in Indonesia that uses the civil law system. Comparison studies on legal system have enabled the convergence of the two systems; therefore, the separation of these two systems is not an absolute matter. Louis F. Del Duca is of the opinion that comparative law has long been concerned with the phenomenon of convergence between the different legal traditions (Hermida, Vol.13, Fall 2005, p.164). A convergence occurs when a country accepts a concept from a different legal tradition, for instance by considering their provincial and universal benefits (Reichel, 2002, pp.3-7). In general, civil law, which from time to time performs case studies, is the product of such a convergence (Yusron, 2010, p.689).

The products of convergence within the context of our national criminal law are the concept of justice collaborator and whistleblower. The two concepts were introduced into the existing criminal justice system, following the discovery of some advantages in the fight against crime, i.e. through the mechanism of witness protection.

The term justice collaborator is often seen interchangeable with whistleblower by the public. It is true that both of them cooperate with law enforcement agencies by providing crucial information pertaining to a specific criminal case; however, they have different legal statuses. A whistleblower is a witness who reported a specific crime, whereas a justice collaborator is an actual perpetrator of the crime who cooperates with law enforcement agencies.

Witness protection scheme was first used in the United States in the 1970s. This legal procedure was used in the fight to dismantle the organized crime of the mafia at the time when such an endeavor could turn into a life-threatening situation to anyone cooperating with the police. This in turn drove the US Department of Justice to set up the witness protection program (Semendawai, 2016).

Joseph Valachi (an Italian-American mafia member) was the first member of the mafia to cooperate with law enforcement agencies in the fight to bring down the organized crime. He was in fear that he would be killed by a more powerful member of the mafia (Vito Genovese). Valachi was eventually protected by 200 law enforcement officers (Semendawai, 2016). Soon after, in 1970, the law on organized crime control started to provide the US Attorney General with the power to protect witnesses who cooperate with law enforcement agencies in serious criminal cases (Semendawai, 2016). The above example shows that a concept used by other legal traditions may also be used in the civil law tradition such as in Indonesia.

4. SOME NOTES ON THE ADVANTAGES AND DISADVANTAGES OF DPA

4.1. A Misuse of the Concept of Legal Due Diligence

Due diligence in a broad sense refers to the level of judgment, care, prudence, determination, and activity that a person would reasonably be expected to do under particular circumstances (Magee, 2017). In corporate law, due diligence is the process of conducting an intensive investigation of a corporation as one of the first steps in a pending merger or acquisition. Therefore, legal due diligence refers to all actions pertaining to the legal consequences that will occur as the result of corporate business activities.

Legal due diligence is akin to a double-edged sword because on the one hand, it is an obligation that must be fulfilled by a corporation so it will be regarded as doing its share in preventing a criminal act from occurring. On the other hand, a corporation may also use the process to shield itself from becoming entangled in criminal law. Furthermore, in its practice in the United States, there is a possibility that the outcome of the due diligence process may be tainted (either consciously or unconsciously) by owners, managers, and researchers who stand to benefit personally or professionally from the proposed activity (Magee, 2017). Furthermore, law enforcement officials in Indonesia need to be briefed in the procedure so that they will be able to go head to head against the offense of knowledgeable global corporate lawyers. A disparity in capacity between corporate lawyers and law enforcement officials may result in loopholes that will lead to an abuse of the DPA scheme, specifically within the context of legal due diligence

4.2. A Mutualistic Symbiosis Between Law Enforcement Officials and Corporation

M Hazel Croall states that the relationship between law enforcement officials and business players is characterized by its enduring nature; therefore, a persuasive approach will always be better as opposed to a harsh prosecution (under criminal law) (Croall, 2007, p.109).

Prosecution will actually alienate the business players from the legal system. In the event of a criminal wrongdoing, then the step to be taken is to ask the business player perpetrating the crime to correct or recover the damages he/she has caused. This may be approached by offering "verbal advice, warnings and cautions to more formal written notices requiring improvements and formal cautions, in what has been characterized as a "graded letter system" (Croall, 2007, p.109). In simpler words, a corporation is required to participate in the prevention of a criminal act, and non-compliance shall be grounds for criminal prosecution.

Preventing the occurrence of a criminal act under the DPA scheme will bring certain advantages to law enforcement officials. These advantages stem from the very characteristics of corporate crimes, which are low in visibility, complex, diffused responsibility and victimless, hard to detect and prosecute, and coupled with some ambiguous national law (Ali, 2013, pp.8-9). Law enforcement officials on their own would be hard pressed to solve such a case. Meanwhile, the Indonesian criminal justice system maintains a principle of quick execution, a simple procedure with a low cost as outlined in the *Penjelasan Umum Kitab Undang-*

Undang Hukum Acara Pidana (KUHP) (General Explanation of the Code of Criminal Procedure) and Law No. 48 of 2009 on Judicial Power.

On the other hand, corporations also retain their rights for privacy by keeping confidential corporate documents. Detection and prosecution of a corporation will obviously require a disclosure of such documents, which may be detrimental to the corporation. Moreover, the reputation of a corporation might very well be ruined during the process. For that reason, a corporation for all practical purposes is “forced to volunteer” to act in compliance with the regulation or the principle of good corporate governance. Such a voluntary aspect is supported by DPA’s character, which is favorable to the corporation, i.e. it tries to avoid complicated court proceedings that may bring down the corporation’s stock price, ruin its reputation, or increase its risk of bankruptcy. DPA is also expected to minimize the risk of recurring offense by a corporation (prevention) (Grasso, 2016, p.9).

5. THE IDEA OF PREVENTING CORPORATE CORRUPTION THROUGH DPA: THE PARTIAL ADOPTION BY INDONESIAN LAW

Steps under the DPA scheme need to be offered in Indonesia, considering that the objective of the Anti-Corruption Law is to not only punish the offenders, but also recover the state loss. Focusing the efforts on recovering the state loss will put more emphasis on preventing the loss from occurring in the first place. In addition to preventing the state loss, the DPA scheme also balances the business interest and the need to enforce the law.

As declared by Transparency International, in a global and complex market place, trust and integrity are the paramount importance for business. Successful enterprises know how important it is to build trust among employees, customers, business partners and other stakeholders. These are the principles that will ensure the sustainability of a business (KPK, 2016). Integrity building such as this needs to be disseminated to corporations as business players. The technical term used under the DPA scheme is “corporate reputation”, which is crucial for the survivability of the business. The concrete form in the implementation of this measure is through formulating a corporate compliance program. This will force the corporation to take a self-cleaning measure on its corporate management, financial management, and on aspects related to legal due diligence. A failure to carry out these steps may lead to a criminal prosecution on the grounds that the corporation fails to carry out the measures to prevent a criminal act from occurring. As outlined in PERMA (*Regulation of the Supreme Court*) No. 13 of 2016 on the Procedure for Managing Corporate Corruption Case, corporate faults may be determined based on three aspects as follows:

- a. The corporation is profited or benefitted from the said criminal act, or the criminal act in question is perpetrated in the interest of the corporation;
- b. The corporation is allowing the occurrence of the said criminal act; or
- c. The corporation failed to take the necessary preventive measures, to prevent the bigger impact, and to ensure a compliance with the prevailing laws and regulations to prevent the occurrence of a criminal act.

PERMA No.13 of 2016 on the Procedure for Managing Corporate Corruption Case was initially intended simply as a technical guideline with respect to the procedure for prosecuting corporate corruption case. However, as it turns out, the definition of corporate’s omissions is also included in the guideline; therefore, it gives the impression that the said PERMA also defines the substantive criminal law.

Even though the format of the regulation that defines the corporate faults is a PERMA, the substance is quite important because obviously it is more than technical problems. In all fairness, it would be better if such an important matter were accommodated within the provisions of a Law because the objective is to reinforce the efforts to prevent the occurrence of criminal act through criminal law norms. The reinforcement occurs because the entire criminal justice system or CJS (from the police, public prosecutor, judge, and lawyer) will refer to the prevailing Law, whereas PERMA shall only serves as a guideline for the court as the end point of CJS.

In addition to PERMA, RKUHP (Draft of the Criminal Code) of 2015 during its reviews in 2017 also defined a number of points that clearly show the internalization of the DPA scheme, namely Article 57A that states in prosecuting a corporation, the following aspects must be taken into account:

- a. the severity of the damages incurred to the public;
- b. the level of involvement of the corporate leaders in the crime;
- c. the duration of the crime;

- d. the frequency of the crime;
- e. the willfulness in part of the corporation to commit the crime;
- f. whether the crime involves a public official;
- g. public reaction;
- h. jurisprudence;
- i. the corporation's track record in committing a criminal act;
- j. whether the corporation has the potential to be improved or not; and/ or
- k. how far the corporation is cooperating in the investigation of the crime.

The above aspects were also taken into account in the implementation of the DPA scheme in the United Kingdom. It was referred to a test prior to entering a DPA (Grasso, 2016, p.9). The difference between the US and the UK in the implementation of DPA, in the UK, the court is more involved with respect to the aspect of supervision before adapting the DPA scheme, during the implementation of the DPA scheme, and when supervising the implementation of the DPA scheme. In other words, each country will have a different method for implementing and supervising the implementation of the DPA scheme; however, the fundamental idea is the same, i.e. under the DPA scheme a corporation is requested to participate in the prevention of corporate crimes by undertaking a number of preventive measures.

Consideration with respect to the frequency of the crime, corporate involvement in the crime, willfulness of the corporation to commit the crime, and the corporation's track record in crime—are actually pointing to the attempt to prevent the act of corporate corruption from occurring. Nonetheless, the idea of DPA is only partially and not fully applied in the Indonesian RKUHP (Draft of the Criminal Code).

6. CONCLUSION

Corruption act committed by a corporation may be prevented by applying the DPA scheme. Prevention of corruption may be achieved because corporations are required to comply with the provisions of the criminal law that govern their behavior and if the corporations act otherwise, it will serve as grounds for criminal prosecution. Compliance with the law has a voluntary nuance on one side and compulsory or obligatory nuance on the other. The voluntary side reflects a corporate's good faith to participate in the efforts to prevent corruption. Meanwhile the compulsory side requires a corporation to act in a trustworthy manner, in line with the principle of good corporate governance. From the business perspective, acting in a trustworthy manner will ensure the sustainability of a business, while from the political perspective on corruption, it will prevent the occurrence of the state loss. The idea to prevent the criminal act of corruption, albeit partially, is already contained in the RKUHP (Draft of the Criminal Code) of 2015 and the PERMA (*Regulation of the Supreme Court*) No. 13 of 2016.

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