

The Idea of Implementing a Deferred Prosecution Agreement with the Anti-Bribery Management System in Corruption Crime Management by Corporations in Indonesia

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Abstract: Corporations are entities that have a large role in society, there are many positive roles to life, but not a few negative existences of activities that arise, including corruption. The purpose of this article is to analyze the implementation of the Deferred Prosecution Agreement (DPA) with the Anti-Bribery Management System (ABMS) in dealing with Corruption by Corporations in Indonesia. The method used in this article is normative juridical legal research. This article concludes ways to eradicate corrupt acts carried out remarkably, in turn experiencing obstacles in terms of the functioning of criminal law, even it can be said to be counter-productive. This is a concrete step towards the idea of implementing DPA as a restorative approach in the context of tackling corruption acts committed by corporations. By using the Anti-Bribery Management System (ABMS), it is expected that corrective steps will be obtained from the corporation.

Keywords: Corruption, Corporations, DPA, ABMS.

INTRODUCTION

The industrial revolution and the increasing world population are influential factors in developing the role of corporations in society. Individual scale producers may not be able to meet the daily needs of many people, these needs require the role of corporations that have the resources to produce large quantities of goods and services (Clinard and Yeager, 1980). Modern corporations not only take part in supplying the basic daily needs of people, such as food, housing, and clothing, but they also dominate all aspects of life such as civil, traditional, or ways of life in society. Corporations control the world monetary system, which involves banks, capital markets, large amounts of public money, and natural resources such as oil and gas. Also, in several countries, private corporations are also involved in activities that are the main task of the government. For example, in the US and Great Britain, private corporations run private prisons, based on contracts between the government and corporations (Maradona, 2018).

Apart from the positive influence of the corporation on society, negative things from corporate activities have emerged. As a business entity, a corporation is established with the main objective to achieve the greatest profit for the corporation or corporation owner. Instead of following good corporate governance to

make a profit, some corporations gain profits illegally and cause harm to society (Yusuf, 2013). In general, the methods used by corporations to obtain illegal profits are such as fraud, cases related to the environment, consumer crime, and also includes corruption (Januarsyah *et al.* (2020).

Corruption in Indonesia has been so severe, widespread, well-known everywhere, and is considered by some to be a way of life. This phenomenon requires eradication that must be done extraordinary, because it is realized that the impact of corruption is very large and widespread, in addition to detriment of the country's finances or the country's economy, it also impedes the growth and continuity of national development that demands high efficiency. Corruption, which has been considered to only occur in the public service sector and involves the state apparatus, in fact also occurs in the business world and involves actors from their elements (individuals and corporations) (Murphy, 2011).

To find out the level of corruption in Indonesia is at least reflected in the Corruption Perception Index (CPI) issued by Transparency International. The survey conducted showed that Indonesia's score was 38 had not experienced a significant increase until 2018. The results were certainly not encouraging, compared to countries that were perceived as clean from corrupt practices, such as Denmark 88, New Zealand 87, and Singapore 85, even Malaysia, which is an allied country for Indonesia, has a better GPA score of 47.

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In line with the development of technological progress, the forms and modus operandi of criminal acts of corruption have also developed varied. Seeing this reality, the United Nations has initiated international conventions related to corruption. The convention is the United Nations Convention Against Corruption (UNCAC) which was ratified at the Diplomatic Conference in Mexico in December 2003 which was later ratified by Indonesia through Law No. 7 of 2006 concerning Ratification of the 2003 United Nations Convention Against Corruption, this shows that Indonesia has committed itself in the international community to eradicating corruption. The logical consequence is that Indonesia has legal instruments to be proactive in efforts to eradicate corruption (Maradona, 2018).

The proactive attitude in efforts to eradicate corruption in Indonesia led by the Corruption Eradication Commission (KPK) together with the Prosecutor's Office, and the Police have gained appreciation from the general public, with Law No. 31 of 1999 concerning Eradication of Corruption Crimes jo. Law No. 20 of 2001 concerning Amendments to Law No. 31 of 1999 concerning the Eradication of Criminal Acts of Corruption, many corruption perpetrators were sentenced to prison. However, according to Maradona (2018), the other important purpose of the law has proven to have not been successful in recovering significant state financial losses.

There have been controversial events that have occurred in Indonesia, for example, the Texmaco Case which was charged with committing a criminal act of corruption, through a criminal path resulting in factories being closed down and factory workers being forced to terminate employment, thereby increasing the number of unemployed, and the factory becoming scrap metal so the country loses foreign exchange and tax revenue.

The settlement of the case is very different when compared to the Rolls-Royce case. which began with the British Anti-Corruption Institute, the Serious Fraud Office (SFO), found a conspiracy to commit corruption and bribery by Rolls-Royce in China, India, and other markets including Indonesia. The company has pleaded guilty and apologized unconditionally so that the British Court ordered the Rolls-Royce company to pay a fine and a fee of 497 million pounds (around 8.1 trillion rupiahs). In this case, the government through its law enforcement agencies allows the company to pay large fines to avoid criminal prosecution through a deferred prosecution agreement (DPA).

Deferred Prosecution Agreement is the Prosecutor's authority to prosecute corporate and business crimes, but agreed to postpone or not prosecute provided the corporation is willing to fulfill the conditions and conditions set by the Prosecutor. The terms and conditions agreed between the Prosecutor and the corporation are subsequently outlined in an agreement so that it is referred to as the Suspension Agreement (Xiao, 2013).

During the DPA process, each corporation can still conduct business relationships with partners or carry out production activities or provide services to customers who need company goods services. In the case of corporations that are working on housing and residential projects, for example, they can continue to develop their projects during the DPA process so that they pay attention to the survival of the workforce. Likewise, public funds that have paid a down payment and bought shelter will be maintained, and banks will continue to support project financing without worrying about criminal legal processes (Funk and Boutros, 2019).

On the other hand, DPA makes prosecutors not only prosecute solely from the normative juridical aspects but also can enable Prosecutors to thoroughly reform the governance and business process of a corporation. During the specified period agreed in the DPA, law enforcement officers can supervise a company to carry out substantial internal reforms voluntarily to build governance and corporate compliance with statutory provisions. Besides, the Prosecutors will also feel helped by the cooperative attitude of the corporation in uncovering cases involving corporate entities (Alexander and Cohen, 2015).

DPA can be offered by the Public Prosecutor when the corporation has indicated a willingness to cooperate with criminal investigations, acknowledge certain facts and accept various conditions that will serve as sanctions, corrections, and consequences of the said activity. The terms of the agreement can impose one of many legal obligations on the corporation, including the implementation of the legal compliance program or what is meant here is the anti-corruption legal compliance program (Sprenger, 2011). The implementation can be used with the Anti-Bribery Management System as contained in SNI (Indonesian National Standard) ISO 37001: 2016.

One of the guidelines for determining the application of policies, procedures, and organizational controls

against bribery risk is SNI ISO 37001: 2016 concerning the Anti-Bribery Management System (ABMS). This SNI (Indonesian National Standard) is an identical adoption of ISO 37001: 2016 on Anti-Bribery Management Systems Requirements With Guidance For Use, compiled by Technical committee 03-02 and discussed at the national consensus meeting in Jakarta on 10 November 2016.

Researchers rarely research the implementation of the Deferred Prosecution Agreement with the Anti-Bribery Management System (SNI ISO 37001: 2016) in tackling Corruption by corporations in Indonesia. One of them, who examines this theme is Ahmad Iqbal (2020) with the title of implementing a deferred prosecution agreement in Indonesia as an alternative to solving economic crimes committed by corporations. This research concludes that DPA is used to accelerate recovery for losses of crimes that have been reserved and return of assets. DPA has the opportunity to be applied in Indonesia by making changes in laws and regulations and the basis of thinking of law enforcers in dealing with these issues if they want to implement DPA in Indonesia. Whereas in this study, the concept of the Deferred Prosecution Agreement (DPA) will be combined with the Anti-Bribery Management System, which aims to tackle Corruption by Corporations in Indonesia.

METHOD

This research is descriptive, juridical normative to illustrate the idea of implementing the Deferred Prosecution Agreement with the Anti-Bribery Management System (SNI ISO 37001: 2016) in Corruption Crime Countermeasures by Corporations in Indonesia, then an analysis is carried out on this matter. The study was conducted using literature data (secondary data research) in the form of primary legal materials, secondary legal materials, and tertiary legal materials. The statutory approach and concept are carried out by examining all laws and regulations as well as relevant legal concepts that are relevant to the legal issues under study.

RESULTS AND DISCUSSIONS

Corporations are legal subjects that can be convicted if they commit a criminal act of corruption. Article 26 of UNCAC which has been ratified by Indonesia emphasizes the importance of each participating country of the convention to have regulations governing corporate liability if committing

criminal acts of corruption in the form of effective, proportionate and prohibited criminal, civil and administrative sanctions, including monetary sanctions (Ferguson, 2017).

The Corruption Crime Act has set out prohibited acts and criminal threats for corporations if they commit corruption, but in terms of the number of corporations that are legally processed and found guilty of committing corrupt acts, it is still very limited. This condition is the background of the issuance of Supreme Court Regulation No. 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporations (hereinafter referred to as Supreme Court Regulation No. 13 of 2016) (Susanti *et al.*, 2018). This Supreme Court Regulation provides procedural legal guidelines for handling corruption cases involving corporations. One of the articles which are quite important in the judge's judgment on corporate mistakes contained in Article 4 Paragraph (2), namely: a) The corporation can benefit or benefit from the crime or the crime is committed in the interests of the corporation; b) Corporations allow criminal acts to occur; or c) The corporation does not take the necessary steps to prevent, prevent greater impact and ensure compliance with applicable legal provisions to avoid criminal acts.

There are at least three cases of acts of corruption involving corporations as suspects/defendants/convicts namely: Cakrawala Nusadimensi Company, Giri Jaladhi Wana Company, and Duta Graha Indah/Nusa Construction Engineering Companies. Based on this, in terms of criminal law policies in force in Indonesia, it has explicitly stipulated that corporations, both in the form of legal entities and non-legal entities, are prohibited from committing corrupt acts as regulated in the Corruption Crime Act. However, the regulation does not yet stipulate that corporations are required to prevent corruption or follow an anti-corruption legal compliance program. This condition can be one of the reasons for the lack of corporate initiatives to conduct corruption prevention programs or anti-corruption legal compliance programs.

The legal compliance program, especially concerning SNI ISO 37001: 2016, is very important for Indonesia, which is very possible if it wants to implement the DPA idea for tackling corruption by corporations. In the DPA concept as a restorative approach, it is an approach with a settlement model where the public prosecutor (Prosecutor) can offer a postponement of the prosecution to the corporation not

to sue him in court, in return for the corporation recognizing his actions and agreeing to voluntarily pay fines and compensation for certain losses to the country.

Also, by using this DPA, the corporation must undergo a corporate compliance program and the appointment of a supervisor or corporate advisor. The intended compliance program is important so that the DPA continues to reflect the special deterrence known in criminal law. It has been stated that DPA is a restorative approach, besides that DPA is also expected to provide another approach, namely: corrective and rehabilitative approaches. Both approaches are particularly focused on a corrective approach, this is an approach that emphasizes that corporations as perpetrators of corruption can improve themselves in the future. A concrete step that must be taken is by implementing the Anti-Bribery Management System (hereinafter referred to as ABMS) (SNI ISO 37001: 2016).

The scope of ABMS in the context of corporate organizations is as a system that can stand alone or can be integrated with the entire management system, ABMS has detailed requirements and provides guidance for establishing, implementing, maintaining, reviewing, and improving the system of relationships with organizational activities as follows: a) Bribery in the public, private and non-profit sectors; b) Bribery by the organization; c) Bribery by personnel acting on behalf of the organization or for its benefit; d) Bribery by a business partner of an organization acting on behalf of the organization or for its benefit; e) Bribery by organizational personnel in connection with organizational activities; f) Bribery of the organization's business partners in connection with organizational activities; and g) Direct and indirect bribery, such as offering or receiving bribes through or by third parties (Mulyana, 2019).

ABMS only applies to bribery which is a typology of criminal acts of corruption in Indonesia, which determines requirements and provides a management system guide designed to assist organizations in preventing, detecting, and preventing bribery as well as complying with legislation relating to anti-bribery and voluntary commitments according to the activity. Therefore, ABMS is not specifically aimed at fraud, cartels, and anti-violations of competition, money laundering, or other activities related to corrupt practices.

Although it only applies to bribery, each organization can expand the scope of a management system to include other activities including corruption that have a state financial loss. In this case, the requirements contained in ABMS are general so that they can be used for all organizations or parts of an organization, regardless of the type, size, and nature of activities, both for the public, private or non-profit sectors. The organization must determine internal and external issues that are relevant to the objectives, as well as those that can affect its ability to achieve the desired results of the anti-bribery management system.

Issues determined by the organization, including a) size, structure, and delegation of decision making authority of the organization; b) the location and sector in which the organization operates or anticipate operations; c) the nature of the scale, and complexity of the activities and operations of the organization; d) the organization's business model; e) entities where the organization has control and the entity that exercises control over the organization; f) business partners of the organization; g) the nature and extent of interaction with public officials; and h) statutory regulations, contractual regulations, as well as professional obligations and duties.

The organization must determine the stakeholders and relevant requirements for ABMS. When determining the scope of anti-bribery, the organization must consider internal and external issues, the requirements, and the results of bribery risk assessments. As such, each organization must establish, document, implement, maintain, and continuously review, and if necessary improve its anti-bribery management system, including the processes and interactions needed, following the requirements of this standard. ABMS will contain actions designed to identify and evaluate risks from, and to prevent, detect and respond to bribery.

To ensure that ABMS runs, each organization must carry out bribery risk assessments regularly. The risk assessment is carried out by identifying reasonable organizational bribery risks, as well as analyzing, assessing, and prioritizing identified bribery risks. Besides, a risk assessment is also carried out by evaluating the suitability and effectiveness of the controls in the organization to reduce the risk of bribery being assessed. In this case, the organization must establish criteria for evaluating the level of risk of bribery and must consider the policies and objectives of the organization (Olsen, 2010).

Furthermore, in this ABMS there must be a function of compliance and anti-bribery planning. On this occasion, top management must assign to the anti-bribery compliance function the responsibility and authority to a) oversee the design and implementation of the organization's anti-bribery management system; b) provides guidance and guidance for personnel on anti-bribery management systems and issues related to bribery; c) ensure that the anti-bribery management system complies with the requirements of this standard; and d) report the performance of the anti-bribery management system to the steering committee and top management and other compliance functions.

When planning an anti-bribery management system, each organization must consider issues that refer to requirements, identify risks, and increase opportunities intended to: a) provide reasonable certainty that the anti-bribery management system can achieve the intended target; b) prevent, or reduce, undesired influences relevant to anti-bribery policies and objectives; c) monitor the effectiveness of the anti-bribery management system; d) achieve continuous improvement.

Each organization must plan actions to address bribery risks and opportunities for improvement, as well as how to integrate and apply these actions in the anti-bribery management system process and evaluate the effectiveness of those actions. Organizations must set anti-bribery management system objectives at relevant functions and levels. The objectives of the anti-bribery management system must be consistent with the anti-bribery policy, measured, taking into account applicable factors, and monitored to be communicated and updated. The organization must store documented information from the objectives of the anti-bribery management system (Deming, 2014). When planning how to achieve the objectives of the anti-bribery management system, the organization must determine what will be done, what resources are required, who will be responsible, when the targets will be achieved, how the results will be evaluated and reported, and who will impose sanctions or penalties.

In some countries, anti-corruption programs are run through compliance programs and can be used as a reference or consideration in deciding a case to alleviate penalties or reduce fines against corporations that commit violations specifically related to criminal acts of corruption (Loughman and Sibery, 2012). This kind of program is certainly related to the contents of the agreement stated in the DPA. The correct anti-

corruption program approach needs to be chosen by the corporation because there is no one anti-corruption program that is suitable for all forms and conditions of the corporation (no one size fits all), given that each corporation has different characteristics from each other (Tarun and Tomczak, (2019).

However, by taking important points from the instructions of the international and existing anti-corruption system in Indonesia, in developing an anti-corruption program there are at least 5 (five) important things that must be considered and must be owned by corporations in developing compliance programs, including a) Understanding regulations, business characteristics and related parties; b) Commitment and support from leaders and management to carry out anti-corruption programs; c) Risk assessment is carried out to develop an appropriate anti-corruption program; d) Implementation of compliance procedures and programs, including training and communication, due diligence, reporting of violations and monitoring of implementation; and e) Evaluation and continuous improvement.

Biegelman and Biegelman (2010), mentioned that there are 3 (three) approaches that can be used in building anti-corruption programs so that the business environment with a low level of risk can be realized, namely through: a) Internal approach through risk assessment, implementation of anti-corruption policies and compliance programs and provision anti-corruption rules; b) External approach, i.e. sharing policies, experiences, best practices with stakeholders; and c) A collective action approach, by reaching out to other business partners in the same industry and other stakeholders through joint activities. Collective action is needed because internal programs implemented by corporations face a competitive, financially risky environment that cannot affect the business environment, so collective action is needed to help create a common understanding of creating a business environment with a low risk of corruption.

Manacorda (2014) states that collective action benefits corporations by combining strengths (including with competitors) together with the government (authorities) and civil society organizations to create common goals for creating a fair and equal market and to minimize opportunities and the risk of corruption.

CONCLUSION

Based on the results and discussion as outlined, that has been explicitly established in a legislation

policy related to the prohibition of corruption committed by corporations that do so can be criminally accounted for. However, policies and regulations in Indonesia do not require corporations to follow the legal compliance program in this case ABMS SNI ISO 37001: 2016. This is a concrete step towards the idea of implementing DPA as a restorative approach in the context of tackling corporate criminal acts of corruption committed by corporations. By using ABMS, corrective steps from the corporation are expected.

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