

Topic: Human Right Issues of Artificial Intelligence (AI) Gaps and Challenges, and Affected Future Legal Development in Various Countries

## **Liability at the Layering Stage by Beneficial Owners in Relation to the Crime of Money Laundering**

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**Abstract.** *The concept of establishing a corporation without displaying the Beneficial Owner or the owner of the capital is actually increasingly widespread in business practices along with the development of the investment world in the form of investment in limited liability companies, both domestic and foreign. The Beneficial Owner of a company or corporation is not always associated with money laundering. However, in the current regime, the Beneficial Owner is very concerned because they are often untouched by the law in its enforcement. The purpose of the research conducted by the author is how to identify the modus operandi used by the Beneficial Owner and how the criminal liability of the Beneficial Owner in money laundering crimes and other crimes. The research method used by the author in this research is the juridical analysis method with the approach of examining legislation, cases, and doctrines or views of experts. The results of the research in this paper are that the identification of the modus operandi used by the Beneficial Owner at the layering stage and the identification of who the Beneficial Owner of a corporation is can be found through the existence or linkage in the organizational structure in the corporation, as well as the criminal liability of the Beneficial Owner.*

**Keywords :** *Beneficial; Corporations; Laundering; Money; Owner.*

### **1. Introduction**

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The concept of Beneficial Owner was first introduced in 1966 in a provision within an agreement between the UK and the USA governing the avoidance of double taxation. In addition, this concept is also found in The Organisation for Economic Cooperation and Development (OECD). The concept of Beneficial Owner in the OECD Model has been regulated since 1977 in relation to dividends (Article 10), interest (Article 11), and royalties (Article 12). However, since its first mention in the OECD Model in 1977, the concept of Beneficial Owner still lacks clarity as of today.

Regarding Beneficial Owner (Beneficial Owner), several expert opinions can be found explaining this concept. Vogel states that a Beneficial Owner is an individual or group who has the right or authority to determine the use of capital or assets held for the benefit of others or to determine the use of the results or profits from the capital or assets. Herman states that a Beneficial Owner is an ownership that is not only registered as the legal owner, but also has the right or authority to make decisions about what will be done with the property in their control.

Money Laundering ('TPPU') is a criminal act where the perpetrator attempts to conceal or disguise the origin of illicit wealth (dirty money) to make it difficult for law enforcement to trace, which is later used for both legal and illegal activities. In general, TPPU is committed by the majority of those who have high status in society (white-collar crime). This cannot be separated from the reality that the nature of money laundering crimes is organized and transnational. The urgency of this criminalization is none other than to maintain the stability and integrity of the economic and financial system in Indonesia. On the other hand, the problem faced in criminalizing money laundering is the difficulty of detecting this crime with the emergence of increasingly complex methods, so strict law enforcement is needed to handle it.

In the layering phase, a beneficial owner is a party who directly or indirectly owns or controls an asset or financial transaction. In the layering process, money launderers will utilize the role of the beneficial owner to conceal the origin of the funds. Therefore, the beneficial owner must be responsible for the money they own or control, especially if the money comes from a criminal act.

The liability of Beneficial Owners in the layering stage is regulated in Law Number 8 of 2010 concerning the Prevention and Eradication of Money Laundering Crimes (UU PPTPU). Article 12 of the Law on Money Laundering Prevention (UU PPTPU) states that any person who commits the crime of money laundering by placing, transferring, transferring, concealing, or disguising the origin of money that is known or suspected to come from a criminal offense, including the

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Beneficial Owner, can be punished with imprisonment for a maximum of 20 years and/or a maximum fine of 10 billion rupiah.

## **2. Research Methods**

The problem raised in this study uses a normative legal research method, which uses secondary data where the data is obtained indirectly including primary legal materials. The data obtained is then collected through a documentary or library research data collection technique by collecting data based on the legal materials that have been used in this study, and analyzed using a qualitative data analysis technique. As one of the research objectives is prediction, it aims to provide a description of the findings obtained in this study and also to find conclusions that are correct and scientifically accountable.

## **3. Results and Discussion**

### **3.1. The Use of Beneficial Ownership Structures in Money Laundering.**

One of the methods that can be used to commit TPPU is by using nominees and Beneficial Owners. A nominee is someone who represents the interests of another party. A nominee is different from a proxy because they become the owner of an object that includes interests or rights arising from an obligation that is different in its management, while the proxy never becomes the owner of the object including the interests managed by the nominee.<sup>1</sup> The use of a nominee structure will involve two parties, namely the nominee and the beneficiary. The nominee is the party that represents the interests of the beneficiary, while the beneficiary is the actual owner. Indonesia is one of the countries that does not recognize the validity of nominees in its regulations. However, in practice, nominees are widely used in several business transactions. In Indonesia, the use of nominee and Beneficial Owner structures is often used in the context of share ownership.

Indonesia's attention to the practice of using Beneficial Owners for money laundering purposes has been regulated by the principle of "Know Your Customer" (KYC) as stipulated in Article 36 of Law Number 8 of 1995 concerning the Capital Market (UUPM). In addition to being regulated in the UUPM, the KYC principle is also regulated in the Decree of the Head of Bapepam and LK Number Kep-476/BL/2009 concerning the Customer Recognition Principle by Financial Service Providers in the Capital Market Sector along with Regulation Number V.D.10 which is its

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<sup>3</sup> Gunawan Widjaja, "Nominee Shareholders dalam Perspektif UUPT Baru dan UU Penanaman Modal Baru serta Permasalahannya dalam Praktik" Jurnal Hukum dan Pasar Modal, Volume III Edisi 4, (August-December 2008), P. 43

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attachment, which was then revoked and declared invalid by OJK Regulation No. 22/POJK.04/2014 concerning the Customer Recognition Principle by Financial Service Providers in the Capital Market Sector (POJK 22/2014).

POJK 22/2014 regulates the obligation for Financial Service Providers (FSPs) in the capital market sector to implement the Know Your Customer (KYC) principle and have KYC implementation guidelines in which a special unit responsible for its implementation is designated as part of the organizational structure. In this regard, the board of directors and commissioners are obliged to provide active supervision.

This information disclosure is also regulated by OJK Regulation No. 11/POJK.04/2017, which mandates reporting to the OJK regarding the ownership and any changes in ownership of shares in a Public Company, both directly and indirectly. This reporting obligation also applies to Beneficial Owners who own at least 5% of the paid-up capital in the Public Company.

In relation to the prevention of ML/TF, the OJK has also regulated this matter in OJK Regulation No. 12/POJK.01/2017 concerning the Implementation of Anti-Money Laundering (AML) and Counter-Terrorist Financing (CTF) Programs in the Financial Services Sector. In this regulation, the provisions related to AML and CTF that are regulated by each financial services sector, including the Capital Market, are harmonized in an integrated manner, including but not limited to, among others, the differences in regulations between each financial services sector, the independence and responsibility of the person in charge of implementing the AML and CTF program, information and supporting documents for Customer Due Diligence (CDD) and Enhanced Due Diligence (EDD) procedures, and the imposition of sanctions. In POJK 12/POJK.01/2017, there is an obligation for PJK to identify and verify Beneficial Owners. Regarding the technical implementation of this POJK 12/POJK.01/2017, it is regulated in SEOJK 47/SEOJK.04/2017 concerning the Implementation of Anti-Money Laundering and Combating the Financing of Terrorism Programs in the Capital Market Sector.

### **3.2. Criminal Liability of Beneficial Owners: A Legal Perspective.**

To identify the form of accountability that can be imposed on a Beneficial Owner, it is important to identify the perspective of the act that caused the loss. If the loss falls within the criminal realm, specifically TPPU (Money Laundering Crime), then accountability is determined based on material truth. Material truth is the true and complete truth of a criminal case through the proper and honest application of the provisions of the Criminal Procedure Law. Material truth can be interpreted as the principle of seeking the true truth based on the existing legal facts.

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The Beneficial Owner can be used as an instrument to commit criminal acts. From the criminal law perspective, the Beneficial Owner can be held accountable by expanding what has been done and what is intended. This has been recognized by the creators of the Criminal Code ("KUHP") and the Anti-Money Laundering Act (TPPU). Indonesian criminal law recognizes an extension of criminal liability which is often referred to as participation (*deelneming*). Moeljatno stated that what is meant by participation is when more than one person is involved in the occurrence of a crime. According to him, not everyone involved can be said to be participants in the meaning of Articles 55-56 of the Criminal Code, because everyone has their own category that must be met. This corresponds to the division made by Zevenbergen, Van Hamel, Simons, and Vos, who stated that there are two categories of participants, namely:<sup>2</sup>

- a. Participants who are self-employed (*zelfstandige deelnemers*)
- b. Participants who are not self-employed (*onzelfstandige deelnemers*)

The inclusion as expressed by Moeljatno falls into the second category, namely participants who cannot stand alone. The inclusion in the perspective of criminal law has two functions, namely:

- a. The purpose of this provision is to prevent someone from escaping criminal liability simply because they were not a direct participant in the crime. It is unjust if, in a criminal act, there is a person who has the intention to commit the crime by ordering or persuading another to do it, and that person cannot be prosecuted or punished because the instigator or persuader (intellectual perpetrator) did not commit the act or did not cause the consequence prohibited in the criminal provision.
- b. The inclusion of provisions in the general provisions is intended to summarize the common elements of almost every offense, both general offenses found in the Criminal Code (KUHP) and special offenses found outside the Criminal Code

Barda Nawawi provides an explanation regarding the two viewpoints on the criminal nature of complicity :<sup>3</sup>

- a. As a basis for expanding the criminal liability of a person (*Strafausdehnungsgrund*), complicity is viewed as a matter of criminal responsibility.

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<sup>3</sup> Barda Nawawi Arief, 1993, *Sari Kuliah Hukum Pidana II*, Badan Penyedia Bahan Kuliah Fakultas Hukum Undip, Semarang, p. 28.

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b. As a basis for expanding the criminalization of an act (Tatbestandausdehnungsgrund).

The difference between the two views is that the first view considers the expansion of liability to be based on the person being held criminally liable, while the second view considers it to be a tort. Basically, the majority of criminal law experts agree that the inclusion falls under the first view.

In participation, there are four types of statements recognized from Article 55 of the Criminal Code, namely for those who :<sup>4</sup>

- 1) "To order to do something"<sup>5</sup>
- 2) "Participating"<sup>6</sup>
- 3) "Encourage to do / motivate to do"<sup>7</sup>
- 4) "To assist/To help"

Essentially, these four forms of involvement can be applied to Beneficial Ownership. This has a similar concept and purpose to the initial formation of Beneficial Ownership in Indonesia and is fully recognized by Indonesian policymakers. Looking at the existing regulations in the Anti-Money Laundering Act (UU TPPU), the expansion of criminal liability is also agreed upon. This can be seen from the formulation in Article 10 of the UU TPPU which states: "Any person who, within or outside the territory of the Unitary State of the Republic of Indonesia, participates in an attempt, assistance, or conspiracy to commit money laundering shall be punished with the same penalty as referred to in Articles 3, 4, and 5. (underlined by the author)" In the formulation of Article 10, there is only an additional expansion of criminal liability through conspiracy. That the term "conspiracy" in the UU TPPU according to Article 1 paragraph 15 is 'an act of two or more people who agree to commit money laundering'. Thus, both the Criminal Code (KUHP) and the UU TPPU itself can essentially ensnare participants who misuse Beneficial Ownership to commit criminal acts. This is in line with the spirit of criminal law to seek material truth itself.

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<sup>4</sup> Lobby Loeqman, 1996, *Percobaan, Penyertaan, dan Gabungan Tindak Pidana (Buku 2)*, Universitas Tarumanegara-UPT Penerbitan, Jakarta, p. 60.

<sup>5</sup> Surastini Fitriasih, 2006, *Penerapan Ajaran Penyertaan dalam Peradilan Pidana Indonesia* (Studi Terhadap Putusan Pengadilan), Disertasi Doktor Universitas Indonesia, Jakarta, p. 106-107.

<sup>6</sup> *Op Cit*, Hal. 36.

<sup>7</sup> Lamintang, 1990, *Dasar-Dasar Hukum Pidana Indonesia*, PT. Sinar Baru, Bandung, p. 638.

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#### 4. Conclusion

Money laundering (TPPU) commonly occurs at the layering and integration typology stages because the proceeds of crime have entered the capital market financial system. One of the methods that can be used to carry out TPPU in the capital market is by using the Beneficial Owner practice. The Beneficial Owner regulation has been regulated in Presidential Regulation 13/2018. The method for identifying Beneficial Owners can be done by looking at the existence or relationship of parties in the corporate organizational structure, tracing parties outside the corporation that control the corporation, and tracing financial transaction flows that lead to the party receiving the benefits as the Beneficial Owner from the crimes committed by a corporation. The application of the Know Your Customer (KYC) principle is expected to anticipate the possibility of money laundering (ML) methods using Beneficial Owners. Existing regulations still allow for the possibility of customers not providing accurate or complete information when filling out securities account opening forms. Presidential Regulation 13/2018 has defined the parties that can be categorized as Beneficial Owners. Beneficial Owners remain accountable for ML according to Article 55 of the Criminal Code and Article 10 of the Anti-Money Laundering Law, as their responsibility is based on material truth. Based on the conclusions above, the author provides the following suggestions: Law enforcement agencies should be more active in detecting suspected money laundering in the capital market by considering the stages of the typologies involved. Regulations are needed regarding the individual accountability of Beneficial Owners who commit money laundering in the capital market to eradicate the problem to the actual perpetrators. Improve synergy between OJK, PPATK, the Indonesian Institute of Financial Intelligence (IFII), and financial intelligence agencies from other countries in order to prevent money laundering, especially in the capital market sector. Further regulation on Beneficial Owners in the capital market sector needs to be stipulated in a separate regulation to avoid overlapping and misinterpretation of the relevant articles.

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