

# *Evaluation of Corporate Crime Liability for Perpetrator of Business Crime in Order to Achieve Fair Business Competition in Indonesia*

Budi Suhariyanto

Mahkamah Agung Republik Indonesia, Jakarta - Indonesia  
penelitihukumma@gmail.com

**Abstract-** Along with the trend of economic globalization and the dynamics and the development of private enterprises, the corporation has a major contribution in improving the national economy, but in reality there are some corporation committing various criminal acts in business. Existing legislation is still considered inadequate to serve as guidelines in sentencing the corporation. Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition has set the forbidden acts for corporations as business actors so that they can be convicted. However, these existing arrangements do not give confirmation about who is responsible for the criminal acts of the corporation. Can its managers also be combined or separated about their criminal liability? Because in the case of certain business crimes it can happen, both administrators and corporate get profit. Would not be wise if they are not given a sanction on their evil deeds while restoring losses caused by their crime. In practice, law enforcement experienced difficulties in proving fault of a corporation on business crime created by its administrator. The weakness implication of this corporate crime prevention causes unfair business competition growing. The next implication disrupts the investment climate (investors will shift their investment out of the country) and finally Indonesia inclusive economic and competitive development will be difficult to materialize. Therefore we need an evaluation of corporate criminal liability for business crime perpetrator in order to realize the fair business competition in Indonesia.

**Keywords-** *Corporate Criminal Liability, Business Crime, Fair Business Competition*

## I. INTRODUCTION

Along with the trend of economic globalization and the dynamics and the development of private enterprises (corporation), it has opened up business opportunities but has yet to make the whole of society to be able to participate in the development of various economic sectors (General Explanation of Law No. 5 of 1999). The corporation has a major contribution in improving the national economy, but in reality there are some corporation committing various criminal acts (*corporate crime*) having the loss impact to the state and society (The preamble letter a Supreme Court Regulation No. 13 of 2016). This condition is exacerbated by the unfair competition between corporations that have an impact to destabilize the country's economy.

In business circles there are cultural anomie of success which implies that corporate crime is believed to be rational behavior that can justify any means on the basis of economic principles to develop a business advantage and when compelled to be unlawful considered as unfortunate mistakes believed not to contain a social stigma in the environment [1]. If the process of law enforcement against corporate crime then the administrator is defined as perpetrator and gets punishment, while the corporation (which has received the benefit of administrator's crime) is free from criminal liability claims. It's been a lot of legislation in Indonesia governing corporate criminal prosecution, but until now their effectiveness is still far from expectations.

In practice, law enforcement experienced difficulties in proving fault of a corporation on business crime created by its administrator. Existing legislation is still considered inadequate to serve as guidelines in sentencing the corporation. The weakness implication of this corporate crime prevention causes unfair business competition growing. The next implication disrupts the investment climate (investors will shift their investment out of the country) and finally Indonesia inclusive economic and competitive development will be difficult to materialize. Therefore, we need an evaluation of corporate criminal liability for business crime perpetrator in order to realize the fair business competition in Indonesia.

## II. RESEARCH METHOD

To answer and discuss the problems that become the research object above, the author uses the method of normative legal research using statutory approach and conceptual approaches. Statutory approach is used to determine the hierarchy and principles in legislation as well as to determine the ratio legis and the ontological basis [2] of corporate criminal liability for business crime perpetrator. While the conceptual approach is used to assess evaluation of corporate criminal liability for business crime perpetrator in order to realize the fair competition associated with the opinions and doctrines of legal experts [3]

### III. FINDINGS AND DISCUSSION

#### *1. Existence of Corporate as Business Crime Perpetrator*

Economic globalization has encouraged the corporate role in the governance of human life increasing [4]. In the face of competition, the corporation is faced with the discovery of new technologies, marketing techniques, and efforts to expand or dominate the market. This situation can result in corporate action to spy on his rival, imitate, forge, steal, bribe, and organize conspiracy on pricing or marketing area. In short, because of the encouragement of competition, corporations can and often committed a crime in order to achieve objectives [5] namely to benefit as much as possible [6] by any means, including unlawfully. In this case the corporation committed a business crime.

Hoerber provides some forms of business crime, among others: (a). Unlawfully opening a business, such as opening the enterprise solely for the purpose of turning off another businessman who is his enemy; (b). Preventing or interfering with the contract; (c). Insulting or libeling the good name of someone or another company (defamation) or libeling the quality of goods from other companies (slander of quality or trade libel); (d). Unfair trade practices by means of fraudulent marketing, infringing trade mark or trade name, patent or copyright infringing, and violating trade secrets [7].

Business crime mentioned above can be performed by and on behalf of the corporation, if it is not addressed by the government, it will have an impact not only on the losses suffered by its competitors (other corporations), but also impact on the economy of the country and welfare of the community. Another effect caused by a corporate crime in this business field is the change of "interest" of the businessmen, namely from efficiency in production to efficiency in their attempts to manipulate the public and the manipulation of the government in achieving the goal to obtain the desired benefits [8].

To tackle business crime in the form of monopoly and unfair competition, the Indonesian government issued Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. Article 1 point 5 of this law determines the corporation or business entity is one of the businessman subject (other than an individual). Principal punishment in the form of fines and an additional punishment in the form of business license revocation or termination of activities or certain actions that cause losses on the other party, can be imposed on corporations that make monopolistic practices and unfair business competition (Article 48 and Article 49).

Court is authorized to impose punishments to corporate business players which violate terms. Before being processed at court, police and attorney perform investigation and prosecution at first. Laws do not provide

the elucidation of reporting mechanism or transfer of monopoly crime and unhealthy business competition from Business Competition Supervisory Commission (KPPU) to police. In this matter, it is interpreted to use criminal code procedures (KUHAP) but then a further issue emerges that KUHAP does not regulate corporation as a legal subject. Therefore, it can be said that legal vacuum exists in dealing with corporations as the perpetrators of monopoly crime and unhealthy business competition.

#### *2. Constraints in Prosecution of Corporate Criminal Liability for Business Crime Perpetrator in Indonesia*

Indonesia has had a lot of legislation which puts the corporation as a subject of a criminal act that can be held accountable to them. But ironically, the corporate form of criminalization policy of the existing legislation is still diverse, for example in terms of providing corporate sense, the formulation of the offense, and the determination of criminal sanctions [9], as well as to anyone of the corporate responsibility claimed. In addition procedures and corporate examinations as criminals are still unclear (Preamble point C Supreme Court Regulation No. 13 of 2016) so that law enforcement agencies encounter difficulties and obstacles in taking action against the corporation as perpetrator of a criminal act (Including business crime).

Although it has been mentioned as one of the legal subjects in Law No. 5 of 1999, but does not stipulate the procedure and examination of the corporation as a perpetrator of criminal monopoly and unfair competition so that law enforcement does not have an adequate legal basis to process the prosecution of corporate criminal liability. This is due to the existence of Article 143 section (2) point a of the Procedure of Indonesian Criminal Code (KUHAP) that has defined the formal requirements of indictments that contain full name, place of birth, age or date of birth, gender, nationality, place of residence, religious and suspect work. KUHAP only regulates the legal subject of persons (persoon), while on the legal subject of corporate, KUHAP does not regulate. So it becomes a problem, namely how to seat the corporation as a suspect or the accused, both in the investigation phase concerning the preparation of the Investigation Report and in the prosecution phase concerning the identity of the accused and the information it provides.

Supposedly the corporation as a legal entity is determined to have a separate legal identity. The legal identity of a corporation must be separate from the identities of the shareholders, directors, and other organs. The provisions concerning the formal requirements of the identity in the Indictment for the corporation as a subject of criminal law to be the accused is not specified in the Procedure of Indonesian Criminal Code (KUHAP). Defects in formulating the identity of the accused in the Indictment resulted in the indictment to be canceled by a judge [10]. To fill the void of corporate criminal procedure code, then the Attorney General issued

Attorney General Regulation No. 028/A/JA/10/2014 on Guidelines for Handling Criminal Cases With Corporate Law subject (Perja) and the Supreme Court also issued Regulation of the Supreme Court No. 13 of 2016 on Procedures for Handling Criminal Cases of Corporate (Perma), Nevertheless Perja and Perma have limitations because their binding power prevails institutionally and are not allowed to organize things that are substantive and contrary to the existing law (KUHAP and Law No. 5 of 1999).

### 3. *Evaluation of Corporate Criminal Liability for Perpetrator of Business Crime in Order to Achieve Fair Business Competition*

The issue of ineffectiveness of punishment for corporate as perpetrator of business crime comes from the law that is less comprehensive to set criminal liability system. It is necessary for revision of regulatory of corporate criminal liability system in order to guarantee the implementation of a competitive, fair market and to support the welfare of the community. Against the corporations that do business in manipulative, bribery and violating the law, they should be given firm action so that there is no repetition of similar actions and it aims to restore fair competition order. In addition, through the legal reform it could also create an incentive or encouragement for the public to participate in paying attention to corporate behavior [11] in the competition.

Law No. 5 of 1999 has set the forbidden acts for corporations as business actors so that they can be convicted. However, these existing arrangements do not give confirmation about who is responsible for the criminal acts of the corporation. Can its managers also be combined or separated about their criminal liability? Because in the case of certain business crimes it can happen, both administrators and corporate get profit. Would not be wise if they are not given a sanction on their evil deeds while restoring losses caused by their crime. In this case of the change of Law No. 5 of 1999 it is necessary to set up that if the business crime is committed by a corporation then the criminal sanction can be imposed to corporate and / or its managers. Furthermore, the criteria should be explained how the business crime is relevant to be accounted for by the corporation, for example:

- 1) performed or ordered by the management of the corporation;
- 2) carried out in order to meet the intent and purpose of the corporation;
- 3) carried out in accordance with the duties and functions of the perpetrator or giver of the order; and
- 4) done with the intent to benefit the corporation.

Renewal of Law No. 5 of 1999 is also necessary to regulate corporate sentencing guidelines ranging from the initial investigation until the decision process. It is

necessary for regulations on corporate representative by the management in terms of fulfilling the summon and the provision of information, both at the level of investigation, prosecution and trial in court. In addition, it should be stipulated that prior to impose criminal sanctions, it should be considered the matters raised by Clinard and Yeager, namely: (1). The degree of loss to the public; (2). The level of complicity by high corporate managers; (3). The duration of the violation; (4). The frequency of the violation by the corporation; (5). Evidence on intent to violate; (6). Evidence of extortion, as in bribery cases; (7). The degree of Notoriety engendered by the media; (8). Precedent in law; (9). The history of serious violation by the corporation; (10). Deterrence potential; and (11). The degree of cooperation evinced by the corporation [12].

It should also be regulated in a revision of Law No. 5 of 1999, namely the improvement of types of punishment. In addition to principal punishment in the form of fines and additional penalty of revocation of business licenses or termination of activities or certain actions that cause losses on the other party, against the corporate committing practice of monopoly and unfair competition can be imposed also additional penalty in the form of the announcement of the judge's ruling, freeze of partial or all of corporate business activities, dissolution and/or prohibition of the corporation and the corporate takeover by the state. Fourth additional penalty to be included in the revision of the regulation, their existence is crucial to provide a deterrent effect against corporate as perpetrator of business crime and also functions as a precaution.

Indeed, things in improving regulatory described above, partially to have been a domain governed by the draft of Indonesian Criminal Code as a master of general regulator of the criminal code. But as long as it is not clear when the endorsement is realized because it is very complex problems in the revision, then it is better that Law No. 5 of 1999 is renewed in advance, especially related to corporate criminal liability system. If the regulatory changes of corporate criminal liability cannot also immediately be fixed, then the corporate crime prevention in the field of business cannot be effected. Consequently unfair competition is increasingly rampant and destabilizes the country's economy and social welfare.

#### IV. CONCLUSION

Basically, business crime can be committed by and on behalf of the corporation. If the business crime committed by the corporation is not addressed, it will have an impact not only on the losses suffered by its competitors (other corporations), but also resulted in the creation of unfair competition. Law No. 5 of 1999 has set the forbidden acts for corporations as business actors so that they can be convicted. However, these existing arrangements do not adequately address the criminal responsibility system and corporate sentencing guidelines so that law enforcement agencies have constraints in tackling business crime

committed by the corporation. The renewal of Law No. 5 of 1999 related to corporate criminal liability system is needed in order to streamline the prevention of business crime that has led to the order of business competition becomes unfair.

#### REFERENCES

- [1] Muladi and Sulistyani, Diah. *Pertanggungjawaban Pidana Korporasi*, Bandung: Alumni, 2015.
- [2] P.M. Marzuki, *Penelitian Hukum*, Jakarta: Kencana, 2014.
- [3] Panggabean, H.P. *Penerapan Teori Hukum dalam Sistem Peradilan Indonesia*, Bandung: Alumni, 2014.
- [4] L., Salman. *Anatomi Kejahatan Korporasi dan Penanggulangannya*. *Jurnal Hukum*. 1. 2, 1994.
- [5] I.S. Susanto, *Kejahatan Korporasi*. Semarang: BP Diponegoro University. 1995.
- [6] Kristian. *Hukum Pidana Korporasi: Kebijakan Integral (Integral Policy) Formulasi Pertanggungjawaban Pidana Korporasi Di Indonesia*. Bandung: Nuansa Aulia. 2014.
- [7] Aridhayandi, M. Rendi. Kajian tentang Penerapan Sanksi Pidana terhadap Pelaku yang Melakukan Perbuatan Curang dalam Bisnis Dihubungkan dengan Pasal 379a Kitab Undang-Undang Hukum Pidana, *Iuridica Dialogia Journal*, 8,2, 2017. 80
- [8] IS. Susanto, *Kejahatan Korporasi di Indonesia Produk Kebijakan Rezim Orde Baru*. Inauguration speech presented at the ceremonial reception in the office of Associate Professor of Law at the Faculty of Law, Universitas Diponegoro. Semarang, October 12, 1999.
- [9] Sjawie, F. Hasbullah. *Direksi Perseroan Terbatas serta Pertanggungjawaban Pidana Korporasi*. Bandung. Aditya Citra Bhakti, 2013.
- [10] N.A. Alfia, A. Samekto and Trihastuti, Nanik. Tanggung Jawab Perusahaan Transnasional dalam Kebakaran Hutan di Riau dalam Perspektif Hukum Internasional, *Diponegoro Law Journal*. 5, 3, 2016.
- [11] E.L. Sahetapy. Pengaruh Etika Bisnis terhadap Kejahatan Korporasi dalam Lingkup Kejahatan Bisnis. *Jurnal Manajemen dan Kewirausahaan*, 12, 1, 2010.
- [12] M.B. Clinard & P.C. Yeager. *Corporate Crime*. London. Colier Macmillan Publishers.