วารสารนิติศาสตร์

ปีที่ ๔๓ ฉบับที่ ๑ มหาวิทยาลัยธรรมศาสตร์

"พิธีเปิดตึกโดม วันที่ ๔ กรกฎาคม พ.ศ. ๒๔๗๕"
ภาพจากหอจดหมายเหตุ มหาวิทยาลัยธรรมศาสตร์

THAMMASAT LAW JOURNAL
Vol. 43 No. 1

ประวัติศาสตร์ธรรมศาสตร์ คือ ประวัติศาสตร์ของประชาชน

สำนักกฎหมายทรัพย์สินทางปัญญา

สัตยะพล แอนด์ พาร์ทเนอร์ส

SATYAPON & PARTNERS LIMITED

140 อาคารแปซิฟิค เพลส ชั้น 9 ห้อง 909 ถนนสุขุมวิท เขตคลองเตย กรุงเทพมหานคร 10110

โทร : 0-2254-8858 โทรสาร : 0-2254-2550

Website: http://www.satyapon.com E-mail: satyapon@satyapon.com

ดร. สัตยะพล สัจจเดชะ

น.บ. (ธรรมศาสตร์), น.บ.ท., LL.M. (U. of Miami), M.C.L. (George Washington U.)

ดุษฎีบัณฑิต (กิตติมศักดิ์) สาขานิติศาสตร์ (มธบ.)

สุขเปรม สัจจเดชะ

น.บ. (เกียรตินิยมอันดับหนึ่ง) (อัสสัมชัญ), น.บ.ท.

วท.บ. (วิทยาการคอมพิวเตอร์) (มหิดลวิทยาลัยนานาชาติ)

ประกาศนียบัตรบัณฑิต (กฎหมายทรัพย์สินทางปัญญา) (ธรรมศาสตร์)

LL.M. (Business Laws, English Program) (Thammasat)

กฤชวัชร์ ชัยนภาศักดิ์

น.บ. (เกียรตินิยมอันดับสอง) (ธรรมศาสตร์), น.ม. (จุฬาฯ)

ประกาศนียบัตรหลักสูตรกฎหมายทรัพย์สินทางปัญญาฯ (ศาลทรัพย์สินทางปัญญาฯ)

เกรียงศักดิ์ สุขิตานนท์

น.บ. (ธรรมศาสตร์), ประกาศนียบัตรบัณฑิต (กฎหมายธุรกิจ) (ธรรมศาสตร์)

กฤษณะ มิ่งทองคำ

น.บ. (เกียรตินิยมอันดับหนึ่ง เหรียญทอง) (มธบ.), น.ม. (มธบ.)

ประกาศนียบัตรหลักสูตรกฎหมายทรัพย์สินทางปัญญาฯ (ศาลทรัพย์สินทางปัญญาฯ)

ประกาศนียบัตรผู้เชี่ยวชาญด้านกฎหมายทรัพย์สินทางปัญญาชั้นสูง รุ่นที่ 2 (ศาลทรัพย์สินทางปัญญาฯ)

นิติธร วิทูรนพรุจ

น.บ. (เกียรตินิยมอันดับหนึ่ง เหรียญทอง) (มธบ.)

ประกาศนียบัตรผู้เชี่ยวชาญด้านกฎหมายทรัพย์สินทางปัญญาชั้นสูง รุ่นที่ 2 (ศาลทรัพย์สินทางปัญญาฯ)

จตุภัทร ลิมประพฤทธิ์กุล

ศศ.บ. (เกษตรศาสตร์), น.บ. (รามคำแหง)

ชยุตม์ ศรีทิพโพธิ์

น.บ. (ธรรมศาสตร์)

ชัชตะวัน อัมพร

น.บ. (เกียรตินิยมอันดับสอง) (ธรรมศาสตร์)

สุญาดา เข็มทอง

น.บ. (ธรรมศาสตร์)

เณริศา สัตโกวิท

วท.บ. (ชีวเคมี, บูรพา), วท.ม.(พันธุวิศวกรรม) (เกษตรศาสตร์)

เครื่องหมายการค้า • สิทธิบัตร • ลิขสิทธิ์

วารสาร ปีที่ ๔๓ ฉบับที่ ๑ มีนาคม ๒๕๕๗

นิติศาสตร์

Vol. 43 No. 1 March 2014

วารสารนิติศาสตร์

ปีที่ ๔๓ ฉบับที่ ๑ (มีนาคม ๒๕๕๗)

เจ้าของ

คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ ท่าพระจันทร์ กรุงเทพฯ ๑๐๒๐๐
โทรศัพท์ ๐-๒๖๙๖-๕๑๐๘, ๐-๒๖๙๖-๕๔๗๖ โทรสาร ๐-๒๖๙๖-๕๑๐๘
Faculty of Law, Thammasat University, Prachan Rd., Bangkok 10200
Tel. 0-26965108, 026965406 Fax. 0-2626-5108

ราคาจำหน่ายเล่มละ ๑๒๕ บาท (สมัครสมาชิกวารสาร ปีละ ๔ ฉบับ ๔๐๐ บาท
พิมพ์ที่ โรงพิมพ์มหาวิทยาลัยธรรมศาสตร์ ,พ.ศ. ๒๕๕๗. โทรศัพท์ ๐-๒๕๖๔-๓๑๐๕ โทรสาร ๐-๒๕๖๔-๓๑๑๙

บทบรรณาธิการ

สวัสดีท่านผู้อ่านวารสารนิติศาสตร์ ผมได้รับการแต่งตั้งให้เป็นบรรณาธิการวารสารนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์อีกครั้งหนึ่ง หลังจากเคยเป็นแล้วเมื่อปี พ.ศ. ๒๕๕๔ เมื่อสมัยที่มีการฉลองครบรอบ ๔๐ ปีวารสารนิติศาสตร์

ในปีนี้ วารสารนิติศาสตร์ ปีที่ ๔๓ พ.ศ. ๒๕๕๗ ก็ตรงกับการฉลองวาระสำคัญอีกครั้งหนึ่ง คือ การฉลองครบรอบ ๘๐ ปี ของมหาวิทยาลัยธรรมศาสตร์ โดยมหาวิทยาลัยได้จัดกิจกรรมครบรอบ ๘๐ ปีในชื่อว่า "๘ ทศวรรษ อภิวัฒน์สังคมไทย" รายละเอียดการจัดงานฉลองปรากฏในเว็บไซต์งานฉลอง ๘๐ ปีของมหาวิทยาลัย ที่ http://thammasat80.tu.ac.th/

ในฉบับที่ ๑ นี้ ผมได้นำรูปพิธีเปิดตึกโดม เมื่อวันที่ ๙ กรกฎาคม พ.ศ. ๒๔๗๙ มาเป็นภาพหน้าปกเพื่อรำลึกถึงเหตุการณ์สำคัญของมหาวิทยาลัยในอดีต ซึ่งภาพดังกล่าวเป็นรูปเก่าหายาก โดยได้รับความกรุณาจากหอจดหมายเหตุ มหาวิทยาลัยธรรมศาสตร์ ผมขอขอบคุณหอจดหมายเหตุไว้ ณ ที่นี้

บทความวิชาการกฎหมายยังคงเข้มข้นเช่นเดิม โดยเริ่มจาก **"ผลกระทบของกฎหมายโรมันที่มีต่อประมวลกฎหมายแพ่งและพาณิชย์: กรณีศึกษาข้อจำกัดสิทธิแห่งเจ้าของอสังหาริมทรัพย์ซึ่งกฎหมายกำหนดไว้"** โดย **ศาสตราจารย์ ดร.ประชุม โฉมฉาย "การศึกษากฎหมายไทยที่เกี่ยวกับการอนุวัติตามอนุสัญญาว่าด้วยสิทธิคนพิการ พ.ศ. ๒๕๕๐"** โดย **ศาสตราจารย์วิริยะ นามศิริพงศ์พันธุ์ "'French Sunshine Act' : กฎหมายเพื่อ 'ความโปร่งใส' ในความเกี่ยวพันระหว่าง 'แพทย์หรือผู้ประกอบวิชาชีพด้านสาธารณสุข' กับ 'บริษัทยา'"** โดย **ผู้ช่วยศาสตราจารย์ ดร.นนทวัชร์ นวตระกูลพิสุทธิ์ "ศาลรัฐธรรมนูญเยอรมันกับหลักการจำกัดอำนาจตนเองของฝ่ายตุลาการ"** โดย **อาจารย์ ดร. ต่อพงศ์ กิตติยานุพงศ์ "ปัญหานิติวิธีที่ศาลรัฐธรรมนูญใช้ในคำวินิจฉัยที่ ๑๕/๒๕๕๕"** โดย **อาจารย์อานนท์ มาเม้า "การระงับสิ้นไปของสิทธิในลิขสิทธิ์หลังการจำหน่ายครั้งแรก: ดุลยภาพแห่งสิทธิระหว่างเจ้าของลิขสิทธิ์และผู้บริโภค"** โดย **อาจารย์วุฒิ ศรีธีระวิศาล** และ **คุณเอกรินทร์ วิริโย** และเรื่องสุดท้าย **"ข้อตกลงยืดเวลาผูกขาดสิทธิบัตรยา"** โดย **คุณวิมล สิทธิโอสถ**

นอกจากนี้ยังมีบทความภาษาอังกฤษหนึ่งเรื่อง ชื่อ **"Anti Money Laundering Regime in Indonesia : Prevention and Eradication Perspectives"** โดย **ดร. Go Lisanawati** อาจารย์แห่งมหาวิทยาลัย Surabaya ซึ่งเป็นมหาวิทยาลัยคู่สัญญาที่มีความร่วมมือทางวิชาการกับมหาวิทยาลัยธรรมศาสตร์

ส่วนสุดท้ายของฉบับนี้ ประกอบด้วย **"ฎีกาวิเคราะห์ คำพิพากษาฎีกาที่ ๖๓๗๔/๒๕๕๖"** โดย **อาจารย์สาวตรี สุขศรี** และ **"ปกิณกะกฎหมาย"** โดย **อาจารย์มาติกา วินิจสร**

ขอให้ท่านผู้อ่านสนุกกับการอ่านบทความในวารสารนิติศาสตร์ และพบกันใหม่ฉบับที่ ๒ ครับ

ปกป้อง ศรีสนิท
บรรณาธิการ

วารสารนิติศาสตร์

ปีที่ ๔๓ ฉบับที่ ๑ (มีนาคม ๒๕๕๗)

สารบาญ

THAMMASAT LAW JOURNAL

Vol. 43 No. 1 (March 2014)

CONTENTS

Articles

Case Notes

Legal Varieties

Anti money laundering regime in Indonesia: Prevention and eradication perspectives

*Go Lisanawati**

บทคัดย่อ

การกระทำความผิดมูลฐานที่เพิ่มขึ้นในปัจจุบันเป็นตัวกระตุ้นให้การกระทำความผิดฐานฟอกเงินมีความก้าวหน้ายิ่งขึ้น เกือบทุกประเทศในโลกต้องเผชิญปัญหาอย่างเดียวกันในการเพิ่มขึ้นของการกระทำความผิดฐานฟอกเงิน อินโดนีเซียในฐานะสมาชิกประเทศที่ได้ประกาศตัวสู้กับการฟอกเงินมีหน้าที่ป้องกันให้ประเทศปราศจากการฟอกเงิน ปัญหาในประเทศอินโดนีเซียนอกจากที่จะต้องจัดการกับการฟอกเงินแล้วยังมีปัญหาการคอร์รัปชั่นโกงกินอีกมากมาย นับจากนี้ประเทศอินโดนีเซียจึงต้องมองให้ดีว่าควรที่จะสร้างระบบแบบใดขึ้นมาเพื่อทำให้อินโดนีเซียเป็นประเทศที่ปราศจากการกระทำความผิดมูลฐานและการกระทำความผิดอื่นที่เป็นผลตามมา

คำสำคัญ: ระบบต่อต้านการฟอกเงิน, การป้องกันอาชญากรรม, การกำจัดอาชญากรรมจนหมดสิ้น

* Lecturer, Faculty of Law, University of Surabaya

Abstract

The increasing of the predicate crimes nowadays has triggered the development of the money laundering crime itself. Almost every country in this world facing the same problems in the increases of money laundering crime. As a member of country which have been declared to fight against money laundering, Indonesia has a responsibility to keep the country clean from money laundering. The problem in Indonesia is not only Indonesia has to deal with money laundering, but also with the number of corruption and fraud in Indonesia. Henceforth Indonesia needs a good perspective of what kind of regime that should be build by Indonesia to establish a country which is clean from predicate crimes and follow up crimes.

Keywords: Anti Money Laundering Regime, Prevention of crime, Eradication of crime

INTRODUCTION

Money laundering as one of serious crimes nowadays has been accepted as world threat of global economy. Money laundering has been attracting perpetrator to do since in the money laundering scheme itself will assist peoples to generate all kinds of "seems legitimate' property of crime. The definition of Money Laundering itself shall increase since the manifestation of the essence of the crime itself. There is no certain definition about Money Laundering that has been agreed by the experts. Most of them have their own definitions.

In the perspectives of security, M. Dillon, in Valsamis Mitsiligas, explains:

> ... no place for industry, because the fruit thereof is uncertain and consequently no Culture of the Earth, no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of the moving and removing such thingsas require much force, no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish and short[1]

In line with that explanation, J. Tuchman Mathews and R.B.J Walker in Valsamis Mitsilegas, mentions that security as a new threat encompassing 'resource, environmental and demographic issues' to the definition of the meaning of security in relation to 'social, cultural, economic and ecological processes, as well as to geopolitical threats from foreign powers'[2]

Jeffrey Robinson mentioned:

> "Laundering" perfectly describes what takes place: illegal, or dirty, money is put through a cycle of transactions and comes out the other end as legal, or clean, money. In other words, all traces of illegality are scrubbed away by a succession of transfers and deals, so that those some funds reappear as legitimate income".[3]

---

[1] Valsamis Mitsilegas. 2003. **Money Laundering Counter Measures in the European Union: A New Paradigm of Security Governance versus Fundamental Legal Principles**. Netherlands: Kluwer Law International, p.1

[2] **Ibid**, p.3

[3] Jeffrey Robinson. 1996. **The Launderymen**. New York: Arcade Publishing, p.4.

Based on the Jeffrey Robinson's opinion, Money Laundering is a complex proceeds of crime since Money Laundering is using any means necessary to concealing or hiding or converting or transferring or anything which may replace dirty money into clean money. Financial Action Task Force in the G-7 Summit Meeting in Paris, remind about Money Laundering as below:

> The goal of a large number of criminal acts is to generate a profit for the infividual or group that carries out the act. Money Laundering is the processing of these criminal proceeds to disguise their illegal origin. This process is of critical importance, as it enables the criminal to enjoy these profits without jeopardising their course.
>
> Illegal arms sales, smuggling, and the activities of organised crime, including for example drug trafficking and prostitution rings, can generate huge sums. Embezzlement, insider trading, bribery, and computer fraud schemes can also produce large profis and creat the incentive to "legitimise" the ill-gotten gains through Money Laundering.
>
> When a criminal activity generates substansial profit, the individual or group involved must find a way to control the funds without attracting attention to the underlying activity or the persons involved. Criminals do this by disguising the the source, changing the form, or moving the funds to a place where they are less likely to attract attention[4]

Constructing the meaning of Money Laundering activity based on the explanation of FATF above will show that Money Laundering activity is complex and dangerous. Money Laundering is not only dealing with the increasing of the predicate crimes, but also with the dealing with the wealth of nation.

In this sense, Indonesia as one of the countries which may get the impact of Money Laundering in every field, not only as a victim, but also wellknown as the heaven of Money Laundering, is highly concerned with the prevention and eradication of Money Laundering itself. Since the ratification of the Vienna Convention, Indonesia shows the will to protect citizen and the world from the Money Laundering. In 2002, Government of Indonesia started to criminalize Money Laundering into the Law number 15 of 2002 concerning Money Laundering. One year later, in 2003, through the

---

[4] Sutan Remy Sjahdeini. 2007. **Seluk Beluk Tindak Pidana Pencucian Uang dan Pembiayaan Terorisme**. Jakarta: Grafiti, p.3.

Law Number 25 of 2003, Indonesia has revised the law of Money Laundering. The consideration of the amandment itself mention:

a. Whereas crime resulting in large amounts of Assets is increasing, both crime committed within the territory of the Republic of Indonesia as well as crime committed outside the State's borders;

b. Whereas the origins of Assets that are the proceeds from such crime are concealed or disguised by various methods known as Money Laundering

c. Whereas Money Laundering must be prevented and eradicated in order to minimize the intensity of crime resulting in or involving great amounts of Assets in order to safeguard national economic stability and state security

d. Whereas Money Laundering is not only a national crime but also a transnational crime, therefore it has to be eradicated among other things by engaging in regional or international cooperation through bilateral or multilateral forums

On its will to prevent and eradicate Money Laundering, Indonesia has to fight with the condition between what is written in the statute and what happens in the action. In almost 7 years of its implementation, Government of Indonesia is still facing with the evaluation which shows that Indonesia is no longer able to be categorized as a cooperative countries and territories to comply with the International Standard to Eradicate Money Laundering. in 2010 through the Law Number 8 of 2010 concerning the Countermeasure and Eradication of Money Laundering, Indonesia is trying to be a good country which really comply to eradicate Money Laundering. In its consideration, The Law Number 8 of 2010 explains:

a. Whereas Money Laundering does not only threaten the stability of economy and the integrity of financial system, but it also can endanger the essential values of the social life, nationhood and statehood based on Pancasila and the Constitution of the State of the Republic of Indonesia Year 1945

b. Whereas the prevention and countermeasure of the crime of Money Laundering requires a firm legal basis to ensure the legal certainty, effectiveness of legal enforcement, as well the search and return of the proceeds of crime Assets

c. Whereas Law Number 15 of 2002 on the Crime of Money Laundering as has been amanded with law Number 25 of 2003 requires to be adjusted with the growth of legal enforcement requirement, practice, and international standard, as result, it requires to be amanded with the new one.

Some subjects which are arranged in the new law shall be strengthened with the good concept and understanding to achieve a good implementation in its practices. This paper will explain how Indonesia through its Law Number 8 of 2010 shows the effort to prevent and eradicate Money Laundering.

Criminalization of Money Laundering In the Perspective of Indonesian Anti Money Laundering Act

The complexity of Money Laundering is actually taking the core issues of the prevention and eradication effort of the nation. Various crimes committed by the perpetrators within the territory of a country or accross the borders of another country are increasing. In Indonesia, the predicate crimes have been listed in the Article 2 of the Law Number 8 of 2010, which:

The proceeds of crime shall be Assets derived from the following criminal acts:

a. Corruption
b. Bribery
c. Narcotic
d. Psychotropics
e. Labor smuggling
f. Immigrant smuggling
g. In banking field
h. In capital market field
i. In insurance field
j. Customs
k. Excise
l. Human trafficking
m. Illegal fire arms trading
n. Terrorism
o. Kidnapping
p. Burglary
q. Embezzlement
r. Fraud
s. Money counterfeiting
t. Gambling

u. Prostituting

v. In taxation field

w. In forestry field

x. In environment field

y. In marine and fishery field

z. Other criminal act for which the prescribed with the imprisonment for 4 (four) years or more

Of which is committed in the territory of the Republic of Indonesia and on the outside of the territory of the Republic of Indonesia and such criminal act is the criminal act according to the Indonesian Law.

Further in the Article 2 (2) of Law Number 8 of 2010 then regulate:

Assets which are recognized or of which are reasonably alleged to be used and/or directly or indirectly used for the terrorism activity, terrorism organization, or individual terrorism shall be equalized as the result of criminal act as set forth in subparagraph (1) point n above

By the I aw Number 9 of 2013, Indonesia has been regulate the law on counter financing terrorist.

Through the listed of predicate crimes which are mentioned in Article 2, it can be understood that predicate crime varies in forms. According to the Indonesian Financial Transaction and Analyze Center (or known as PPATK) in its Statistic shares that the highest predicate crime of Money Laundering is came from Corruption and Fraud[5]. The perpetrator(s) of the predicate crimes which generates crime in the form of property or money, is actually trying to conceal or hide the origin or the source of the money or property. In this sense, the perpetrator(s) is also as the offender of Money Laundering, which in any manners will try to complicate its tracing by the law enforcement agents. In the end, the perpetrator will freely to use such Assets or money or property both for legal and illegal activity.

In the general elucidation of the Law Number 8 of 2010, paragraph 2, mention:

In the concept of anti Money Laundering, the perpetrator and the resuly of criminal act can be known through the tracing and henceforth such result of criminal act shall be confiscated for the state or returned to the entitled one. In the event that

---

[5] Pusat Pelaporan dan Analisis Transaksi Keuangan. 2013. **Buletin Statistik Anti Pencucian Uang dan Pendanaan Terorisme**, Volume 41/Thn IV/2013, Juli 2013, p.11.

the confiscated asstes belongs to the perpetrator or the criminal organization can be confiscated or seized, by itself can decrease the level of criminalitu. Therefore, the effort of prevention and eradication of the criminal act of Money Laundering requires the strong legal basis to ensure the legal certainty, effectiveness if the legal enforcement as well for tracing and returning the Assets of which are the result of the criminal act.

The part of general elucidation above has been strengthening method to prevent and eradicate Money Laundering, by using asset recovery approach. The Law Number 8 of 2010 then regulate the way of seizure and confiscation. The method shall be adequate and proper with the meaning of Money Laundering and its development.

As mentioned above, there is no universal definition of Money Laundering. The United Nation Convention Against Illicit Traffic in Narcotics, Drugs, and Psychotropic Substances of 1988, mentioned Money Laundering as:

The convertion of transfer of property, knowing that such property is derived from any serious (indictable) offence of offences, or from act of participation in such offence of offences, for the purpose of concealing or disgusing the illicit of the property or of assisting any person who is involved in the commission of such an offence of offences to evade the legal consequences of his action; or the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to or ownership of property, knowing that such property is derived frim a serious (indictable) offence of from an act participation in such an offence or offences.

Pamela H. Bucy explains that "Money Laundering is the concealment of the existence, nature of illegal source of illicit fund in such a manner that the funds will appear legitimate if discovered"[6]. Inter alia with the definition above, Council Directive of 10 June 1991 on prevention of the use of the financial system for the purpose on Money Laundering (91/308/EEC) giving the explanation about Money Laundering as well as:

Money Laundering means the following conduct where committed intentionally:

- The conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is

---

[6] Pamela H. Bucy. 1992. **White Collar Crime: Case and Materials**, St. Paul Minn: West Publishing Co, p. 128

involved in the commission of such activity to evade the legal consequences of his action

- The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from criminal activity or from an act of participation in such activity

- The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from criminal activity or from an act of participation in such activity

- Participation in, association to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the actions mentioned in the forgoing paragraphs

- Knowledge, intent or purpose required as an element of the above mentioned activities may be referred from objective factual circumstances

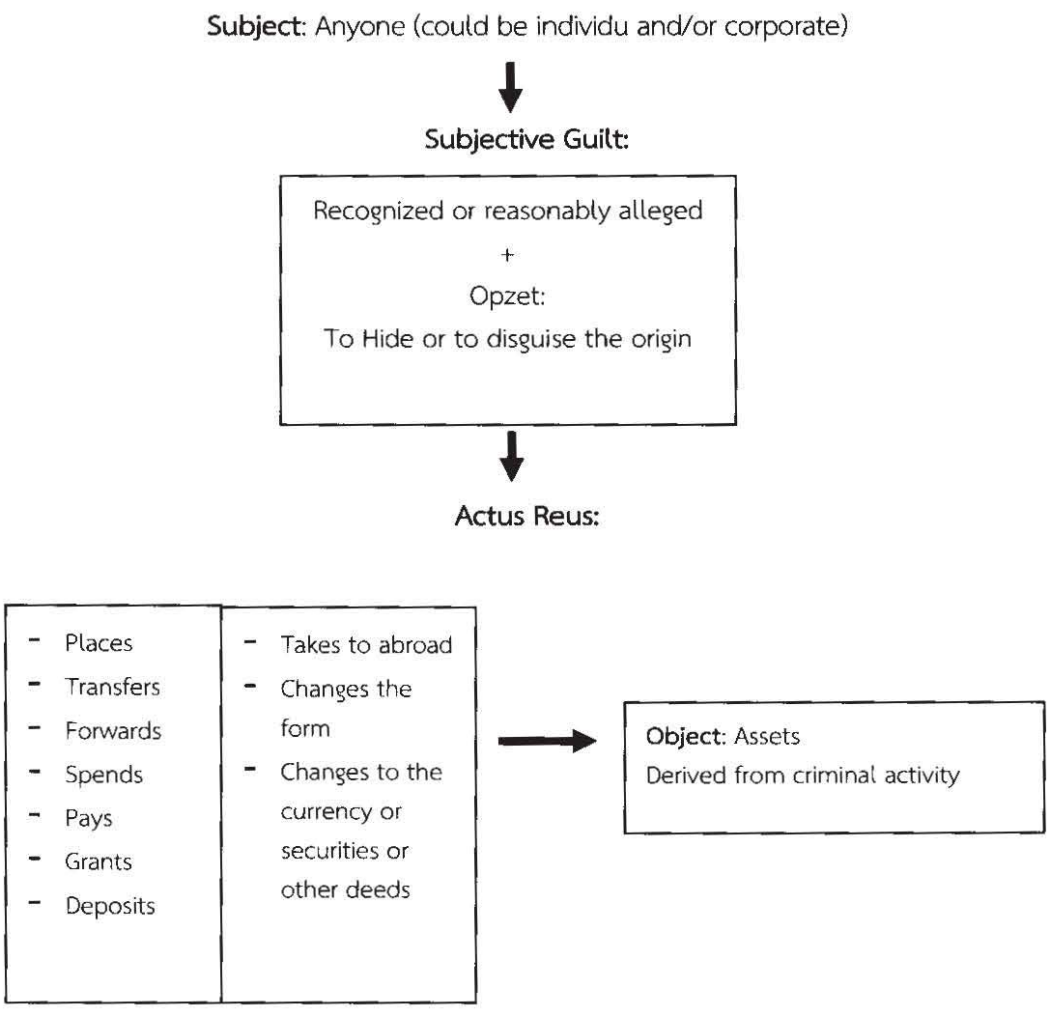
The elements of Money Laundering crime is actually mentioned by the Council Directive above requires subjective guilt in the form of intentionally, aside the objective elements in the forms of such of activities above.

In the Article 1 number 1 Law Number 8 of 2010 mention: "Money Laundering means any action that meets the elements of criminal action in accordance with the provision herein". The criminal act of Money Laundering then defined in the 3 meaning in the Law Number 8 of 2010, that are in the Article 3, Article 4, and Article 5. As mention in Article 3, Money Laundering is in the meaning of:

> Anyone, who places, transfers, forwards, spends, pays, grants, deposits, takes to the abroad, changes the form, changes to the currency or securities or other deeds towards the Assets of which are recognised or of which are reasonably alleged as the result of criminal action, as set forth in the Article 2 subparagraph (1) with the purpose to hide or to disguise the origin of Assets, shall be subject to be sentenced due to the criminal act of Money Laundering with the imprisonment for no longer than 20 (twenty) years and fine for no more than IDR 10,000,000,000 (ten billion rupiah)

Article 3 is categorized as the active Money Laundering, where the perpetrator of predicate crime is directly becomes the perpetrator of Money Laundering. From the approach of Money Laundering perspective, the perpetrator of predicate crime is trying to ensuring that the property or Assets which they generates from their criminal activity

shall be protected in safe way. The elements of crime as mention as in the Article 3 could be describe in the diagram below:

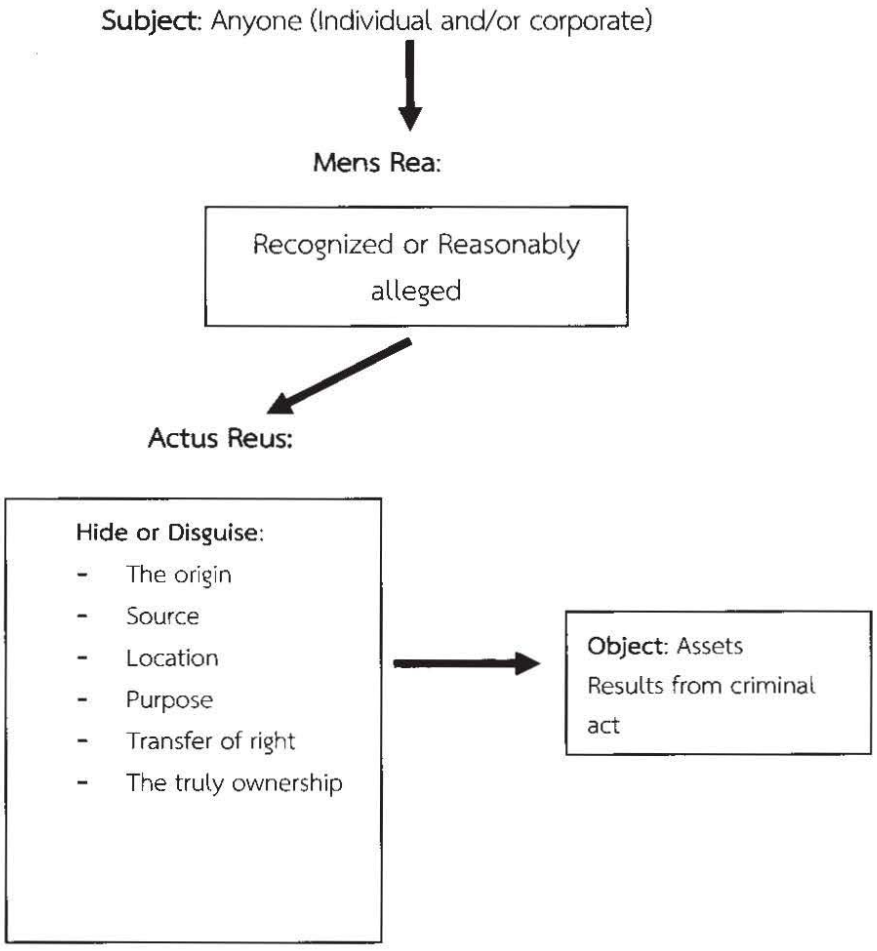


Article 4 Law Number 8 of 2010 criminalized anyone involved in the form of giving assistances or facilitating the Money Laundering effort of a perpetrator which he knows that the money or assets is a result from criminal activity. In other words, this facilitator of Money Laundering is not the perpetrator of predicate crime. Article 4 regulate:

> Anyone, who hides, or disguises the origin, source, location, purpose, transfer of right or the truly ownership of the Assets that are known by him or of which are reasonably alleged as the result of criminal act, as set forth in Article 2 subparagraph (1), shall be subject to be sentenced due to the criminal act of

Money Laundering with the imprisonment for no longer than 20 (twenty) years and fine no more than IDR 500,000,000 (five hundred billion rupiah)

The construction elements of crime of Article 4 can be shown from the diagram as described below:



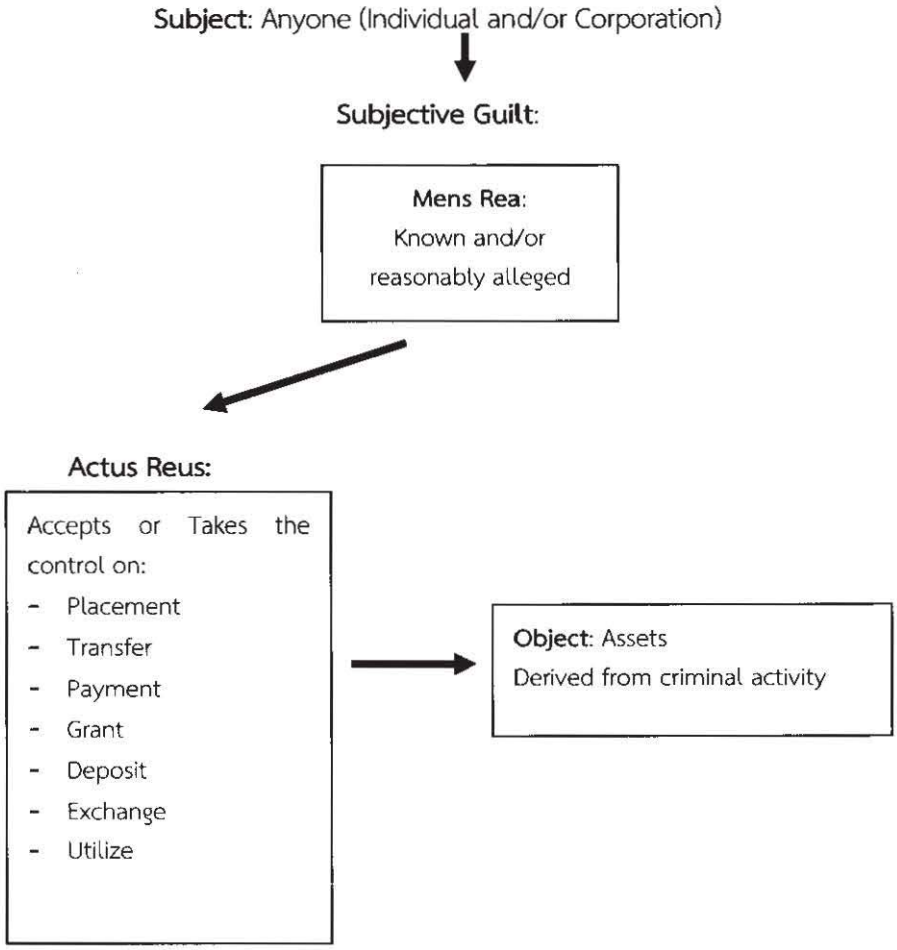
Article 5 of Law Number 8 of 2010 regulates:

(1) Anyone, who accepts or who takes the control on placement, transfer, payment, grant, deposit, exchange, or utilize the Assets of which are known by him or of which are reasonably alleged as the result of the criminal act, as set forth in Article 2 subparagraph (1), shall be subject to be sentenced with the imprisonment for no longer than 5 (five) years and fine for no more than IDR 1,000,000,000 (one billion rupiah)

(2) Provision as set forth in subparagraph (1) above shall not be applicable for the Reporting Parties who carries out the obligation of report as set forth herein

Article 5 above criminalize any person (individual and/or corporate) who receives any form of action of Money Laundering from the perpetrator of predicate crime. Hence Article 5 is commonly categorized as passive Money Laundering. It means anyone who know or reasonably alleged an assets which derived from the criminal activity, and he receives or takes all the effort of the perpetrator as mentioned in Article 3 and 4 to do Money Laundering. The goal of regulating Article 5 is actually to prevent active perpetrator of Money Laundering and/or the facilitator of Money Laundering in shifting all the property or assets to other person which he trust (usually their family or relatives). Article 5 is not applicable to the Reporting Parties as mentioned in the Article 17, which carries out the obligation of report.

Article 5 above could be understood by the diagram below:



There were some changes regarding to the formulation of Money Laundering from Law Number 25 of 2003 and Law Number 8 of 2010. The Article 4 is the newest criminalized formulation of Money Laundering. The criminalization under Article 3, 4, and 5 of this Law Number 8 of 2010 is in the accordance with the 40 + 9 recommendation revised of the FATF (FATF AML/CFT 40 + 9 Recommendation), which in its explanation has warns to country to measures the intent and knowledge required to prove the offence of Money Laundering is consistent with the standards set forth in the Vienna and Palermo Conventions, including the concept that such mental state may be inferred from objective factual circumstances. Article 4 and 5 are regulated as a means to responds to the factual circumstances which appears in Indonesia recently which tends to the converting of the illegal funds to other person by the offender of predicate crimes.

Article 6 of Law Number 8 of 2010 mention:

(1) In the event that Corporation commits the criminal crime of Money Laundering as set forth in Article 3, Article 4, and Article 5, the sentence shall be subject to the Corporation and/or Corporate Control Personnel

(2) Sentence shall be subject to the corporation in the event that the criminal act of Money Laundering:

a. is committed or ordered by the Corporate Control Personnel;

b. is committed in the framework of the objectives and purposes of the Corporation;

c. is committed in according with the function of perpetrator or the person who give the order; and

d. is committed to give benefit for the Corporation

As mentioned as the subject person in the Money Laundering, Corporation could be the perpetrator of Money Laundering. In order to prosecute corporate, it is important to know the liablity of the corporation. Hence the theory of corporate criminal responsibility shall be implemented.

Article 7 of Law Number 8 of 2010 regulates:

(1) Primary sentence, which is sentenced to the Corporation, shall be the fine sentence for no more than IDR 100,000,000,000 (One hundred billion rupiahs)

(2) In addition, other than fine sentence as set forth in subparagraph (1) above, against for Corporation shall also be sentenced with additional sentence as follow:

a. Announcement of judge's verdict;

b. Suspension on the overall or partial business activity of the Corporation;

c. Revocation of the business licence;

d. Dissolution or restriction of the Corporation

e. Confiscation of the corporation's Assets for the State; and/or

f. Corporation take over by the state

Law Number 8 of 2010 does not only criminalize act of Money Laundering as mentioned in the Article 3, 4, and 5, but also other number of criminal act which is called as other criminal act of which associated with the criminal act of Money Laundering. It is regulates in the Article 11 until Article 16, such as Anti Tipping off.

Compliances Obligation of Reporting Parties and Its Monitoring

Money Laundering as explained above can be understood as the process of concealling of the illegal nature of criminal proceeds, to generate legitimate appearances of proceeds of crime. Financial Intelligence Analysis Units Malta in its worksheet paper, mention:

> Generally, Money Laundering is described as the process by which the illegal nature of criminal proceeds is concealed or distinguised in order to lend a legitimate appearance to such proceeds. This process is of crucial importance for criminals as it enables the perpetrator to make legitimate economic use if the criminal proceeds. When a criminal activity generates substantial income, the individual or group involved must find a way to control the funds without attracting attention to the underlying activity or to the persons involved. Criminals do this by disguising the sources, changing the form or moving the funds to a place where they are less likely to attract attention.
>
> Traditionally, three stages were identified for the process of Money Laundering – the placement stage, the layering stage and the integration stage...
>
> It should be noted that the three-stage model is rather simplistic and does not accurately reflect every type of Money Laundering operation. In fact, a modern explanation of Money Laundering moves away from the tradition three-stage concept and focuses more on the concealment or disguise of the origin of the illicit money.[7]

One of the method which has been developed to prevent and eradicate Money Laundering is by using the Prudential approaches.

Based on the general elucidation of the Republic of Indonesia Law Number 8 of 2010, paragraph 3 and 4, it is clear that banking system and goods and services provider have the important roles in the prevention and eradication of Money Laundering. In completely, paragraph 3 and 4 mention:

> The treasuring process of Assets derived from criminal acts in generally conducted by Financial Institutions through certain mechanism arranged by law and regulation. Financial Institutions plays the important roles, especially in implementing the principle of customer due diligence and in reporting certain transaction to financial intelligence unit as analyze material and proceeds to investigator.

---

[7] Financial Intelligence Analysis Units Malta. 2011. "Implementing Procedures Issued By The Financial Intelligence Analysiss Unit in Terms of the Provisional of the Prevention of Money Laundering & Funding of Terrorism Regulation". ***Worksheet Paper***. 20th of May 2011, p.12.

Financial institution not only assist law enforcement process, but also protect themselves from all risks caused by criminal offender which used financial institution as a vehicle and target to launder the money derived from criminal act, such as operational risks, legal, transaction, and reputation. Good risks management will brings financial institution to optimized their role, and then make the stabled and trusted financial systems. Based on the explanation above, it can understood that Banking systems and other financial institutions play important roles in the process of prevention and eradication of money laundering, and also of financing of terrorism. Banking system and financial system shall implement the risk based approach to prevent economic loss of the state caused by the crimes mentioned before.[8]

FATF in its Guidance on the risk-based approach to combating money laundering and terrorist financing High Level Principles and Procedures mention:

Adopting a risk-based approach implies the adoption of a risk management process for dealing with money laundering and terrorist financing. This process encompasses recognising the existence of the risk(s), undertaking an assessment of the risk(s) and developing strategies to manage and mitigate the identified risks.

A risk analysis must be performed to determined where the money laundering and terrorist financing risks are the greatest. Countries will need to identify the main vulnerabilities and address them accordingly. Institutions will need to identify higher risk customers, products and services, including delivery channels, and geographical locations. These are not static assessments. They will change over time, depending on how circumstances develop, and how threats evolve.[9]

Article 17 of Law Number 8 of 2010 regulates about the reporting parties, which includes Financial Services Provider (FSP) and Goods and Other Services Provider (GSP) Completely those reporting parties are:

---

[8] Go Lisanawati. 2012. "Customer Due Diligence and Its Role To Prevent The Global Economic Threat: Indonesian Anti Money Laundering Perspectives", ***Article***, Online Journal of South East Asian Journal on Business, Economic, and Law (SEAJBEL) Volume 1, December 2012, link: klibel.com/journal-publications/seajbel-vol1/, p.8.

[9] FATF-GAFI. 2007. "Guidance on The Risk-Based Approach To Combating Money Laundering and Terrorist Financing: High Level Principles and Procedures", ***Article***, p. 2, link website: www.fatf-gafi.org

(1) The Reporting Party includes as follow:

1. Bank;
2. Finance company;
3. Insurance company and insurance broker company;
4. Pension company;
5. Securities company;
6. Investment manager;
7. Custodian;
8. Trustee;
9. Postal service as the current account service provider
10. Trader of foreign currency
11. Card basis payment device service provider
12. E-money and/or e-wallet service provider
13. Cooperation that performs activity of saving and loan
14. Pawn shop
15. Company that runs in the field of commodity future trading, or
16. Remittance service provider

(2) Provider of Goods and/or other services

1. Property company/property agent;
2. Motor vehicle dealers;
3. Gems, jewelry, and precious metal dealers;
4. Antique and artistic stuff dealers; or
5. Auction house

Under the Law Number 8 of 2010, the reporting parties have an obligation to apply the Know Your User Principles which is stipulated by the Supervisory and Regulatory institution. In this scheme, the willingness to comply from Reporting parties will impact to the successfulness of the prevention measurement. In the prudent perspectives, the compliance of the reporting parties will detect all the laundering way of the offender in order to hide or disguise the source of property of the predicate crimes. Actually the principle of Know Your User shall be implemented during (as mention in the Article 18 (3)):

a. Performing business relationship with the User;

b. There is a suspicious financial transaction activity using Indonesian Rupiah (IDR) and/or other foreign currency whose value at least or equal to IDR 100,000,000 (one hundred million rupiahs);

c. There is a suspicious financial transaction of which is associated with the criminal action of Money Laundering and financing of terrorism; or

d. The reporting parties questions information provided by the User.

This principle is actually in the same meaning with the Principle of Know Your Customer with the newest obligation to implement Customer Due Diligence (CDD) and Enhance Due Diligence (EDD).

When performing the business relationship with the User, Bank as a Financial Service Provider as set forth in Article 17 subparagraph (1) point a, has an obligation to terminate the business relationship with the user in the event that: a. The user refuses to apply the principle of know your user; or b. The Financial Service Provider questions the validity of the information provided by the user (Article 22 subparagraph (1)). The Law on Anti Money Laundering itself then mention that such business relationship termination activity above shall be categorized as the Suspicious Financial Transaction. (Article 22 subparagraph (2)).

Suspicious Financial Transaction, as regulated in the Article 1 number 5, means:

a. Financial transaction of which is diverging from its profile, characteristic, transaction pattern habits of the User in question;

b. Financial transaction of which is made by the User that is reasonably suspected to be made for the purpose of avoiding the report of the transaction in question of which is mandatory performed by the Reporting Party in accordance with the provision herein;

c. Financial transaction of which is made or aborted to be made using Assets that are alleged comes from the criminal act; or

d. Financial transaction of which is required by the INTRAC (Indonesian Transaction Report and Analyze Center) to be reported by the Reporting Party due to the involve the Assets that are alleged comes from the criminal act.

For this compliances requirement, the Supervisory and Regulatory Institution will be in the institution which supervises and stipulates regulation in need. Article 1 number 17 mention: "Supervisory and Regulatory institution shall be the institution that possesses the authority to supervise, to regulate, and/or to impose punishment to

the Reporting Party". Hence, the compliances perspectives will carry sanction/punishment which may be imposed to the Reporting Party who is unwilling and/or unable to comply with their obligation. Supervisory compliance means "the series of activity of the Supervisory and Regulatory Institution as well INTRAC to ensure the compliance of the Reporting Party on the report obligation under this Law, through issuing the provisions or guidelines of the report, performing compliance audit, observing the obligation of the report, and imposing the punishment". This Supervisory and Regulatory Institution is the new institution which was created by this new Law on Anti Money Laundering, which has obligation to supervises the compliances of Reporting Party related with the obligation to reporting some transaction as mention in the Article 18 (3) above.

The Principle of Know Your User as mention in the Article 18 (5), will includes:

a. User identifiaction;
b. User verification, and
c. Performing monitoring to the user's transaction

Article 19 then regulates:

(1) Anyone who performs transaction with the Reporting Party shall be obliged to provide the correct identity and information of which are required by the Reporting Party and at least includes personal identity, source of funds, and purpose of the transaction through filling the form of which is provided by the Reporting Party and attaching the supporting document

(2) In the event that such transaction is made for the other party, anyone as set forth in the subparagraph (1) shall be obliged to provide information regarding on the personal identity, source of fund, and purpose of the transaction of the other party in question.

According to Article 18 and Article 19 above, it is an obligation to be implemented by the reporting parties to the User who want to do transaction. Law Number 8 of 2010 isobliged Reporting Party to implement the principle of Know Your User to any whom represents the User. Article 20 regulates:

(1) The Reporting Party shall be obliged to know that the User who performs the Transaction with the Reporting Party is acting for him/herself or for and on behalf of the other

(2) In the event that the Transaction is made for him/herself or for and on behalf of the other, the Reporting Party shall be obliged to request for the information regarding on the identity and supporting document from the user and the other in question.

(3) In the event that the identity and/or supporting document of which is provided as set forth in subparagraph (2) is incomplete, the Reporting Party shall be obliged to refuse the transaction with such person.

The Revised 40 + 9 AML/CFT Recommendation of FATF number 5 itself mention that:

Financial institutions should undertake customer due diligence measures, including identifying and verifying the identity of their customers, when:

- establishing business relations;
- carrying out occasional transactions: (i) above the applicable designated threshold; or (ii) that are wire transfers in the circumstances covered by the Interpretative Note to Special Recommendation VII;
- there is a suspicion of Money Laundering or terrorist financing; or
- the financial institution has doubts about the veracity or adequacy of previously obtained customer identification data.

The customer due diligence (CDD) measures to be taken are as follows:

a) Identifying the customer and verifying that customer's identity using reliable, independent source documents, data or information.

b) Identifying the beneficial owner, and taking reasonable measures to verify the identity of the beneficial owner such that the financial institution is satisfied that it knows who the beneficial owner is. For legal persons and arrangements this should include financial institutions taking reasonable measures to understand the ownership and control structure of the customer.

c) Obtaining information on the purpose and intended nature of the business relationship.

d) Conducting ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institutions knowledge of the customer, their business and risk profile, including, where necessary, the source of funds

Further, CDD measurement shall be taken in the form of Enhance Due Diligence (EDD) when there is a high risk of customer. The Revised 40 + 9 AML/CFT Recommendation explains:

> Financial institutions should apply each of the CDD measures under (a) to (d) above, but may determine the extent of such measures on a risk sensitive basis depending on the type of customer, business relationship or transaction. The measures that are taken should be consistent with any guidelines issued by competent authorities. For higher risk categories, financial institutions should perform enhanced due diligence. In certain circumstances, where there are low risks, countries may decide that financial institutions can apply reduced or simplified measures.

Moreover, the EDD shall be strictly implemented related with the Politically Expose Persons (PEPs). About PEPs, FATF in its recommendation number 6 mention:

Financial institutions should, in relation to politically exposed persons, in addition to performing normal due diligence measures:

a) Have appropriate risk management systems to determine whether the customer is a politically exposed person.

b) Obtain senior management approval for establishing business relationships with such customers.

c) Take reasonable measures to establish the source of wealth and source of funds.

d) Conduct enhanced ongoing monitoring of the business relationship.

Customer Due Diligence (CDD) here is the prudent measurement which becomes the main measurements which shall be taken in order to prevent Money Laundering. Other obligation shall be implemented by Reporting Party, is as mentioned in the Article 23 subparagraph (1), which obliged the reporting of:

a. Suspicious financial transaction;

b. Cash financial transaction in sum of IDR 500,000,000 (Five hundred million) and/or in foreign currency whose value is equal, which is made in single time transaction or in several time transaction within 1 (one) working day; and/or

c. Fund transfer Financial Transaction from and/or to the abroad

Further provision of fund transfer shall be in accordance to the Law Number 3 of 2011 concerning Funds Transfer. The cash financial transaction itself shall be excluded towards:

a. Financial Transaction of which is made between the Financial Service Provider and the central bank and the government;

b. Transaction for the payment of salary and pension; and

c. Other transaction of which stipulated by the Head of INTRAC or upon the request of the Financial Service Provider that is agreed by the Head of INTRAC (Article 23 subparagraph (4))

This obligation to exclude the transaction which have been made by those parties mentioned in the Article 23 subparagraph (4) impose administrative santion in term of the failure of the Financial Service Provider to make and store list of the excluded transaction as set forth.

For the goods and/or other Service Provider party as set forth in Article 17 subparagraph (1) point b, is also subjected to comply with obligation of reporting. Article 27 of the Law Number 8 of 2010 regulate:

(1) The goods and/or other service provider as set forth in Article 17 subparagraph (10 point b, shall be obliged to sumbit the report of Transaction that is performed by the user using currency whose value is at least or the equal to IDR 500,000,000 (Five hundred million) to INTRAC

(2) Transaction report as set forth in subparagraph (1) above, shall be submitted within 14 (fourteen) working days since the Transaction is occured

(3) The goods and/or other service provider who does not sumbit the transaction reports as set forth in subparagraph (1) and (2), shall be subject to the administrative sanction.

The compliances scheme as mentioned in this Law on Anti Money Laundering is designed to the prevention measurement of Money Laundering. Hence it needs the institution to supervise the reporting parties compliances. As describe before, there is an Institution which is name is Supervisory and Regulatory Institution. It definition as mentioned in the Article 1 number 17, there will be 2 institution which inter alia, that are Supervisory and Regulatory Institution and/or INTRAC. In case the supervisory and regulatory institution for specific Reporting Party is not established yet, the supervison and regulatory obligation is in INTRAC authority.

Article 31 of the Law Number 8 of 2010 mention:

(1) Compliance Supervison towards the report obligation for the Reporting Party, as set forth in Article 17 subparagraph (1), shall be implemented by the Supervisory and Regulatory Institution and/or INTRAC

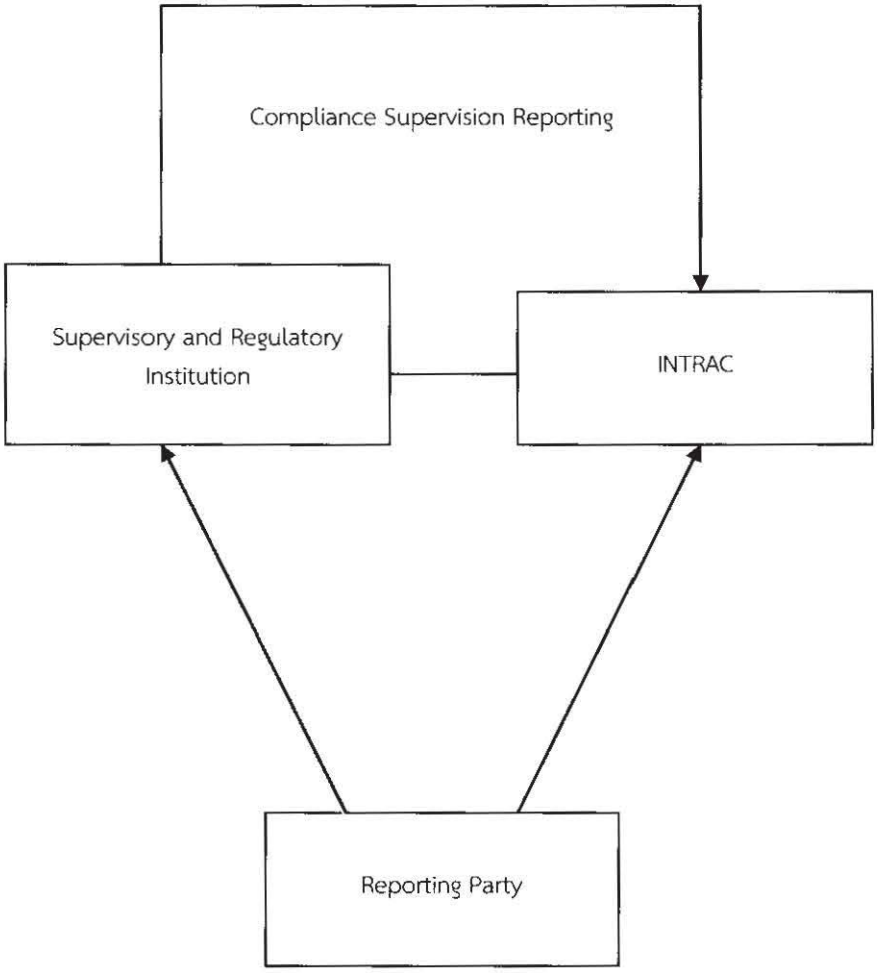
(2) In the event that the Compliance supervision towards the report obligation as set forth in subparagraph (1) above or the Supervisory and Regulatory Institution has not been established, the Compliance Supervision towards the report obligation shall be implemented by INTRAC

(3) The implementation result of the Compliance Supervision of which is implemented by the Supervisory and Regulatory Institution as set forth in subparagraph (1) shall be submitted to INTRAC.

(4) Procedures of the implementation of Compliance Supervision, as set forth in subparagraph (1) and (2), shall be set by the Supervisory and Regulatory Institution and/or INTRAC with its authority.

Article 32 of Law Number 8 of 2010 regulate: "In the event that Supervisory and Regulatory Institution finds the Suspicious Financial Transaction of which is not reported by the Reporting Party to INTRAC, the Supervisory and Regulatory Institution immediately submits such finding to INTRAC". From the provision in articles above, it can be shown that there is a vertical and a horizontal coordination between the authority of INTRAC and Supervisory and Regulatory Institution, as this chart below[10]:

[10] Go Lisanawati. 2012. "Telaah Atas Eksistensi Lembaga Pengawas dan Pengatur Menurut UU Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang, UU Bank Indonesia dan UU Otoritas Jasa Keuangan", ***Article***, Buletin Hukum Perbankan dan Kebanksentralan Volume 10, Nomor 1, Januari – April 2012, p. 33


Compliance Supervision Reporting
Supervisory and Regulatory Institution
INTRAC
Reporting Party

Assets Freezing, Seizing, Confiscating Schemes Under Law Number 8 of 2010

Asset forfeiture and Assets recovery as a tool to combat Corruption and Money Laundering which takes place as the heart in its implementation of the law enforcement. Article 51 United Nation Convention against Corruption (UNCAC) mention: "The return of Assets is identified as a fundamental principle of UNCAC, and States Parties are required to afford one another the widest measure of cooperation and assistance in this regard". Theodore S. Greenberg et.al in this regard explains:

To enable implementation of this principle, UNCAC outlines menchanism for the :ecovery of illicait acquired Assets and international cooperation regarding the tracing, freezing, seizing, forfeiture, and return of looted Assets, including:

- Adequate procedures to ensure that financial institutions pay particular attention to suspicious activity involving the private banking accounts of prominent public officials and their family members and close associates (vide Article 52)

- Procedures that permit a State Party to participate as a privat litigant in the courts of another State Party, allowing the state to recover corruption proceeds as a plaintiff in its own action, as a claimant in a forfeiture proceeding, or as a victim for purposes of court ordered restitution (vide Article 53)

- Domestic legislation that enables a state to recognize a foreign forfeiture order and to freeze and forfeit Assets derived from corruption in a foreign state through its own investigations (vide Article 54); and

- Measures to allow NCB asset forfeiture, particularly in cases of death, flight, or other cases (vide Article 55)[11]

In the perspectives of Asset Forfeiture, there are two type of forfeiture, Non Conviction Based (NCB) Forfeiture and Criminal Forfeiture. This scheme of forfeiture is used to recover or return the proceeds of crime which has been derived from predicate crimes. There is a fundamental difference between NCB Forfeiture and Criminal Forfeiture, which is in what of that which be forfeited. Criminal Forfeiture is concerning about the way to prove that the offender is guilty, while NCB will prove that

---

[11] Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, and Larissa Gray. 2009. **Stolen Asset Recovery: A Good Practices Guide For Non-Conviction Based Asset Forfeiture**. Washington DC: The International Bank for Reconstruction and Development/The World Bank, p. 9

the Assets or property or money is related with the crime which has been committed by the offender. It means in Criminal Forfeiture, it absolutely requires a procedure of criminal trial and conviction. NCB Forfeiture is an in rem, but criminal forfeiture is an in personam. The objective of both forfeiture scheme is to do forfeiture of the proceeds (property and/or Assets). About the objective of forfeiture, Muhammad Yusuf explains:

Ruang lingkup illicit enrichment dianggap lebih luas dari ruang lingkup hukum pidana karena illicit enrichment menjangkau bidang hukum harta kekayaan (property law). Illicit enrichment mencoba untuk menjangkau harta kekayaan yang diperoleh dari hasil aktivitas ilegal dan pelanggaran atas social order of property. Dalam hal ini, tujuan dari asset forfeiture dari illicit enrichment tidak hanya menghukum pelaku tindak pidana atau pelanggar peraturan, tetapi juga mencabut hak kepemilikan pelanggar atas aset yang diperoleh dari hasil kejahatan atau sarana-sarana illegal, penyalahgunaan dana-dana publik, korupsi, dan lain-lain...

Di sisi lain, asas praduga tidak bersalah tetap diutamakan dan pelanggar hukum mempunyai hak untuk memberikan bukti baru untuk menentang keputusan-keputusan yang dibuat dalam proses asset forfeiture. Pada umumnya, orang dengan sumber pendapatan yang sah tidak mempunyai masalah untuk membuktikan asasl usul harta kekayaan[12]

(Translation: The scope of illicit enrichment is assuming broader than the scope of criminal law since illicit enrichment is reach of property law. Illicit enrichment is trying to reach the property which acquired from the illicit activity and social order of property violance. In this sense, the goal of asset forfeiture from illicit enrichment is not only condemned perpetrator of the crime or violation, but also to remove the ownership's right of the violator through the Assets which acquired from the proceeds of crime or illegal facilities, abuse of public funds, corruption, etc...

In other view, the praesumption of innocence is still prioritize and the law violator has right to provide all the new proof to against the Assets forfeiture process steps which may take. In generally assumption, people with the legal source of funds will have no problem to proof the source of their wealth)

Theodore S. Greenberg then explains:

---

[12] Muhammad Yusuf. 2013. **Merampas Aset Koruptor: Solusi Pemberantasan Korupsi di Indonesia**. Jakarta: Kompas Media Nusantara, p. 154-155

Nonetheless, the requirement of a criminal conviction means that the government must be establish guilt 'beyond a reasonable doubt' or such that the judge is 'intimately convinced' (intimate conviction). Criminal forfeiture systems can be object-based, which means that the prosecuting authority must prove that the Assets in question are proceeds or instumentalities of the crime. Alternatively, they can be value-based regimes, which allow for the forfeiture of the value of the offender's benefit from the crime, without proving the connection between the crime and the specific object of property.[13]

According to that opinion, it is a must to implement all the forfeiture measurement in order to combat Money Laundering, as the same way to recover the asset of corruption. Law Number 8 of 2010 in its provision mention that there are some forfeiture measurement which implemented in this law.

Under Chapter VIII with the title of Investigation, Prosecution, and Examination of the Law Number 8 of 2010, there are some asset recovery measurement which is implemented by Indonesian Government. Article 69 is actually mention the regime of the Money Laundering proved mechanism. Money Laundering as an independent crime (sui generis). Even though it is a proceeds of crime, but Money Laundering does not depend on the provability of predicate crimes. Explicitly, Article 69 mention: "In order to eligible for conducting the investigation, prosecution, and examination in the trial against the criminal act of Money Laundering, prior it is shall not obliged to evidence the origin criminal act".

Article 70 regulate:

(1) The investigator, prosecuting attorney, or the judge shall be authorized to request the Reporting Party to perform the postponement of transaction of which is known or of which is reasonably alleged as the result of criminal act.

(2) The order of investigator, prosecuting attorney, or judge as ser forth in subparagraph (1), shall be implemented in written and clearly included regarding on matters as follow:

a. Name and designation of the person who order the postnement;
b. Identity of anyone whose transaction will be postponed
c. Reason of transaction postponement; and
d. Place at which the Assets are

[13] Theordore S. Greenberg, Linda M. Samuel, Wingate Grant, and Larissa Gray. ***Op.Cit.***, p. 13

(3) The postnement of transaction as set forth in subparagraph (1) shall be implemented within no longer than 5 (five) working days

(4) The Reporting Party shall be obliged to implement the postponement of transacation after the warrant/requesting letter for the postponement of transaction is received from the investigator, prosecuting attorney, or the judge.

(5) The Reporting Party shall be obliged to submit the minute of implementation pf the transaction postponement at no longer than 1 (one) business day after the implementation of Transaction postponement

Inter alia with Article 26, there is also a postponement mechanism that shall be applied by Financial Service Provider, in case of:

- Performs the Transaction of which is reasonably alleged using Assets of which come from the criminal act as set forth in Article 2 subparagraph (1)
- Has account to gather Assets of which come from the criminal act as set forth in Article 2 subparagraph (1); or
- Is known and/or is reasonably alleged using fake document

From both article 26 and Article 70, it can be understood that transaction which performs something reasonably alleged is being a subject to be postponed. This postponement has differences on the party who will implement the postponement. Article 26 is addressing to the Financial Service Provider, but Article 70 is addressing to the Reporting Party.

Other mechanism of Assets forfeiture under the Law Number 8 of 2010 is known as Blocking, which is mention in Article 71:

(1) The investigator, prosecuting attorney, or judge shall be authorized to order the Reporting Party to block the Assets of which are known or of which are reasonably alleged as the result of criminal act

a. From everyone who has been reported by INTRAC to the investigator
b. From the suspect; or
c. From the defendant

(2) The order of investihator, prosecuting attorney, or judge as set forth in subparagraph (1), shall be implemented in written and clearly included regarding on matters as follow:

a. Name and designation of the investigator, prosecuting attorney, or judge;
b. Identity of anyone who has been reported by INTRAC to the investigator;

c. Reason for the blocking; and

d. Place at which the Assets are

(3) The blocking as set forth in subparagraph (1) above, shall be performed within no longer than 30 (thirty) business day

(4) In the event that the blocking period as set forth in subparagraph (3) ends, the Reporting Party shall be obliged to end the blocking by law

(5) The Reporting Party shall be obliged to implement the blocking shortly after receiving warrant of blocking from the investigator, prosecuting attorney, or judge

(6) The Reporting Party shall be obliged to submit the minute of blocking implementation to the investigator, prosecuting attorney, or judge who orders the blocking within no longer than 1 (one) day since the blocking implementation.

(7) The blocked Assets should be remain in the Reporting Party in question.

The blocking of Assets can come from the request of three paries, which can be come from the reporting of INTRAC, from the suspect, and/or the defendant. For that reason, there is a reversal burden of proof which obliged the defendant to apply. Article 77 mention "For the interest of examination in the trial, the defendant shall be obliged to prove that his/her Assets is not for the result of criminal act". Article 78 then mention:

(1) When the examination in the trial as set forth in Article 77 above, the judge orders the defendant in order to evidence that his/her Assets are not from or are not associated with the criminal act as set forth in Article 2 subparagraph (1)

(2) The defendant evidences that his/her Assets are not from or are not associated with the criminal act as set forth in Article 2 subparagraph (1) through proposing the sufficient items of evidences.

The Law on anti Money Laundering in Indonesia burdened to defendant to prove that the conviction of Money Laundering to their Assets are not a result of and/or not associated with the criminal act as mentioned in the Article 2 subparagraph (1). The role of prosecuting attorney in this criminal court is still active, even though the burden of proof is in the defendant party.

Article 79 subparagraph (4) further regulate: "In the event that the defendant passed away before the verdict is decided and there are the evidence of which strong enough that the defendant has committed has committed the criminal act of Money Laundering, upon the demand of prosecuting attorney the judge decides to perform

confiscation against the Assets confiscated". In the elucidation of Article 79 subparagraph (4) of the Law on Anti Moeny Laundering explains: "This provision shall be intended to prevent of their(s) of the defendant acquire the Assets of which are the result of criminal act. In addition, it is an effort to return the Assets of the state treasury in the event that such criminal action adverse the state finance". Hence the process of confiscation is starting in the trial event. For the establishment of confiscation could not be applied for legal effort (Article 79 subparagraph (5)). The law on Anti Money Laundering is a concern and response to the importance of asset recovery which is needed in the scheme of regain the loss in state's finance.

Article 81 of the Law on Anti Money Laundering mention "In the event that it has obtained the evidence that strong enough that there is still the Assets of which have not been confiscated, the judge orders the prosecuting attorney to perform the confiscation against the Assets in question".

Conclusion

Anti Money Laundering regime in Indonesia is now play an important roles in order to recover all the Assets which have been lost from Indonesia, the Assets which has been moved by the perpetrator using Money Laundering scheme to other place and other countries. The approach which was chosen by Indonesia is by using the prevention and eradication approaches. The prevention approaches is being built by focusing to the compliances of the Reporting Party to implementing the customer due diligence and enhance due diligence. In the perspective of eradication, Indonesia is trying to strengthening the mechanism of Assets recovery.