

The Challenges on Beneficial Ownership Disclosure in Indonesia: A Study of the Enactment of Presidential Regulation No. 13 of 2018 on the Application of Know-Your-Beneficial-Ownership Principles by Corporations for the Prevention and Eradication of Money Laundering and Terrorism Financing

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Keywords: Beneficial Ownership, Disclosure, Transparency.

Abstract: The Indonesia Government passed Presidential Regulation No. 13 of 2018 on the Application of Know-Your-Beneficial Ownership (BO) Principle by Corporations for the Prevention and Eradication of Money Laundering and Terrorism Financing. Under this regulation, each corporation must determine the BO information of its business entity in order to create transparency as the obligation for Indonesia as a state member of the Financial Action Task Force (FATF) in implementing global standards for anti-money laundering and combating the terrorism financing. The information to be collected and disclosed includes the BO's full name, identity number or driver license or passport number, date of birth, nationality, address or domicile and taxation identity number. These set of information considered as personal data that protected by laws. While the registration and submission of those information filed by the company's shareholders or its executive boards, a public notary or an authorized agency, it still remains vague since the issue on its system readiness and also lack of coordination with some government agencies. As a result, there might be delay or rejection on the new company establishment when there is suspected, withheld or concealed on BO data. This paper aims to discuss the implementation of Presidential Regulation No.13 of 2018 specifically on the incorporation of BO registering and submitting process, secondly, whether the BO disclosing process might face issues on transparency specifically in the access of BO information, the issue on database and the right to privacy.

1 INTRODUCTION

Beneficial Ownership (hereinafter BO) concept has been known since 1977 when the Organization for Economic Co-operation and Development (OECD) first introduced the OECD Model Tax Convention. Although OECD put the BO, but the debate over the scope and interpretation of BO remains a discussion for decades.

Based on recent development in 2016, OECD has set definition as follow : a beneficial owner is the natural person who is ultimately entitled to the benefits accruing from the beneficial ownership of the securities, and/or has power to exercise controlling influence over the voting rights attached to the shares (even if the legal title is held by another person) (OECD, 2016). Although in general BO is related to the natural person, but BO can also be a legal person

as long as the ultimate owner is a state or state owned enterprise. Compared to other Asian countries, Indonesia is lagging behind in regulatory framework regarding BO. In a country like Hong Kong, China, Malaysia, Thailand and Singapore, the regulatory framework has regulated BO both *de facto* and *de jure*. De Jure means that regulations specify clearly about who qualifies as BO, usually measured by the percentage of share ownership. Meanwhile *de facto* related to a situation or condition that stipulated in regulation where a person can be qualified as BO.

In Indonesia, the concept of BO initiated as subject of discussion after the media preach about leaked Panama Papers in which a list of 2.619 Indonesian's ranges from tycoons to public officials and Attorney General Fugitive (Firmansyah, 2016). The Government of Indonesia then made a policy on Tax Amnesty initiated by Sri Mulyani, Minister of

Finance of Indonesia. Although this policy was success to collect tax revenues from private property disclosure, the repatriation of the program was far from the target. In the end of tax amnesty program, only 147 trillion rupiah is collected from 1.000 trillion rupiah targeted by the Ministry of Finance (Maulia & Suzuki, 2017). This is showing that many wealthy individuals are placing their assets abroad by disguising the identity of the asset owners through the shell company. The obvious consideration is to avoid taxes by utilizing regulations in tax haven country.

Therefore, on March 5, 2018, President Joko Widodo responded by enacting Presidential Regulation No. 13 of 2018 concerning the Implementation of Principles of Recognizing the Beneficial Ownership of Corporations for the Prevention and Eradication of Money Laundering and Terrorism Financing (hereinafter BO Regulation). This regulation is government's response in urgency of protection for the company and its shareholders, legal certainty to assess criminal liability and to recover assets (Alecci, 2018). Although at this moment still in the level of Presidential Regulation but this is a fairly reactive step by the government. According to Indonesia legal system, Presidential Regulation is an instrument that is not strong as the Act. One of the disadvantages is regarding enforceability since the Presidential Regulation does not have sanctions as a force of coercion. Moreover, there is still a need to harmonize with other regulation, considering that for the implementation of database BO coordination is required with the cross-sectoral authority. By using statute and conceptual approach, this paper will address two main issues, first the implementation of BO Regulation specifically in the incorporation of BO registering and submitting process; secondly, the challenges on BO disclosing process.

2 DISCUSSION

2.1 The Urgency of BO Disclosure

After revealing Indonesian company listed on panama papers, Indonesian authority begun to response the need of BO Regulation. Before BO regulation enacted, judicial authority has introduced new opinion regarding BO that go beyond the "Piercing the Corporate Veil" doctrine. This could be found on recent judgments in the Sitorus Case and Rifuel Ltd. Case (Videotron Case).

In 2017, Indonesia Supreme Court ruling on Labora Sitorus Case (Case No. 1081/K/Pid.Sus/2014)

made a turning point for a new development of BO. Sitorus was an active police officer who controls the company in illegal logging and fuel smuggling activities. Rotua Ltd. was established in October 2010 as a company engaged in wood working and furniture. As an active police officer, he is forbidden by the law to run a company. Sitorus appointed the nominee director and his wife as a non-executive director (commissioner). The company begun to operate under his command until finally the business activities are uncovered by the authorities. The Financial Transaction Report and Analysis Center (PPATK) detected transactions more than 1.5 trillion rupiahs (approximately US\$ 146 Million) in his account (Somba & Dharma, 2013). The money came from the transactions of two companies and several business entities controlled by Sitorus. From the PPATK report it was found that the money was came from buying and selling illegal timber and fuel smuggling. Shortly afterwards, the police responded by investigating the "fat" account of Sitorus. No evidence found that Sitorus is the shareholder, director nor employee of the company.

The case was brought to District Court of Papua by prosecutor on 2015. The court gave two years in prison sentence and 50 million rupiah fine. The prosecutor was dissatisfied with that verdict and lodging an appeal to High Court. The High Court's upheld District Court verdict and gave 8 years prison sentence, but the money laundering crime cannot be proven. However, Artidjo Alkostar, the head judge of Supreme Court panel has different opinion. The court ruled that even Sitorus is not formally a shareholder or director of the company, but he has a power to appoint the director. The court also sought that Sitorus in fact has power and authority that is very significant and very decisive in decision making and company policy. Thus, the Supreme Court aggravates the sentence into 15 years in prison because the money laundering was clearly proven.

In other case, Supreme Court also overturns the district court decision regarding the responsibility of nominee director. The Case No 980K/Pid.Sus/2015 was about Hendra Saputra who is the director of Imaji Media ltd., a company that won a tender of videotron in Ministry of Cooperatives. Hendra was an office boy in Rifuel ltd., one of the companies also owned by Riefan Avrian. It was later revealed that Riefan is the son of the Minister of Cooperation and Small Medium Enterprises, Syarif Hasan. Riefan was using the name of Hendra to be used as a nominee director in Imaji Media ltd. In 2012, Imaji Media Ltd. and Rifuel Ltd. are participated in tender of videotron in Ministry of Cooperatives. Rifuel ltd. did not win

the tender; however, Imaji Media Ltd. won the tender. Although Reifan name cannot be found in the company as a shareholder nor director but in fact he runs the company in that project. The videotron project finished but the specifications are not agreed as in tender document. Under the audit from The Audit Board of Republic of Indonesia (Badan Pemeriksa Keuangan/BPK) in 2013, BPK has found difference in payments of almost 5 billion rupiahs in total. Supreme Court ruling that act committed by Hendra as a director are not based on the wishes of the defendant (*mens rea*), but merely used by Riefan who is his employer at Rifuel Ltd. The court finally releases the defendant from all lawsuit and ordered defendant to be released from detention.

2.2 BO Criteria in Indonesia

Under BO Regulation, the definition of BO can be categorised based on the owners' ability to exercise right or power to control corporation such as the right to appoint or dismiss a board of directors, board of commissioners, management, or supervisor of the corporation. Further, an individual who has the ability to control the corporation is entitled to and/or receives the benefits of the corporation, whether directly or indirectly. Thirdly, an individual who is the true owner of the fund or shares of the corporation and/or fulfils the criteria referred to BO Regulation.

The ambit of BO Regulation is not only for company but also other business entities including those which not considered as a legal person. Below is the matrix of the BO criteria according to the BO Regulation:

Table 1: BO Criteria according to BO Regulation

Limited Liability Company (LLC)	<ul style="list-style-type: none"> a. holds shares of more than 25% to a limited liability company as stated in the articles of association; b. has a voting rights of more than 25% to a limited liability company as stated in the articles of association; c. receive a profit or profit of more than 25% of the profit or profit earned by a limited liability company per year; d. has the authority to appoint, supersede, or dismiss members of the board of directors and members of the board of commissioners; e. has the authority or power to influence or control a limited liability company without having to obtain authorization from any party; f. receive benefits from a limited liability company; and/or
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	<ul style="list-style-type: none"> g. the true owner of the fund for the ownership of shares of limited liability company.
Foundation	<ul style="list-style-type: none"> a. has a separated asset of more than 25% on the foundation as stated in the articles of association; b. has the authority to appoint or dismiss the supervisor, board, and supervisor of the foundation; c. have the authority or power to influence or control the foundation without having to obtain authorization from any party; d. receive benefits from the foundation; and/or e. the true owner of funds of other assets or inclusion in the foundation.
Cooperatives	<ul style="list-style-type: none"> a. receives dividends more than 25% of the profits or profits derived by the cooperative per year; b. have direct or indirect authority, may appoint or dismiss the cooperative's management and supervisor; c. has the authority or power to influence or control the cooperative without having to obtain authorization from any party; d. receive benefits from cooperatives; and/or e. the true owner of the capital over cooperative capital.
Limited Partnership	<ul style="list-style-type: none"> a. has capital and/or goods deposited more than 25% as stated in the deed of the establishment; b. receive a profit of more than 25% of the partnership profits; c. have the authority or power to influence or control the partnership without having to obtain authorization from any party; d. receive benefits from a partnership; and or e. the true owner of funds on capital and/or the value of goods deposited in a partnership.
Partnership	<ul style="list-style-type: none"> a. has deposited paid up capital of more than 25% as stated in the engagement agreement of the lyrical partnership; b. receive a profit or profit of more than 25% of the profits derived by the firm's annually; c. has the authority or power to influence or control the firm's fellowship without having to obtain authorization from any party; d. receive benefits from the partnership; and/or e. the true owner of the capital and/or assets paid up as partnership capital.

BO disclosure mechanism is carried out by self-reporting method. Every corporation must identify BO based on criteria in the BO Regulation (see table 1). Pursuant to article 12 BO Regulation, there are three categories, namely: a. BO has been identified; b. BO has not been identified; or c. BO has not been verified. After being identified, the corporation must make a document that determines who becomes the BO of the corporation. This information is submitted to Company Registry Authority (hereinafter SABH - Sistem Administrasi Badan Hukum).

Article 18 par. 3 BO Regulation stipulated that the information may submit by: a. the founder or manager of corporation; b. Public Notary; or c. other party authorized by the founder or manager of corporation. However, in order to fill the information on SABH, not every person has access authorization. Only registered Notary can submit the BO information through SABH channel. The information in SABH can be accessed by public using website www.ahu.go.id. Each company profile can be downloaded including BO data.

2.3 The Challenge of Transparency on BO Disclosure

Transparency is the main element for the investors to ensure that they put their money in the right place. Thus the transparency is also important to contribute economy for the country. Therefore, discover the person who gets the beneficial of the corporations ultimately will make the country as a perfect place for the investor to do business. Furthermore, it also will help the government to prevent and stop the misuse of companies and give sanction to who responsible doing the illegal activities (Kingdom, 2014).

However, there are other concerns on the transparency issue for disclosing such as access to BO information and database and the privacy issue. These three issues will be explained further below.

2.3.1 Access to Data/Information

In many countries, information on the BO (in addition to the legal owner) of a corporate vehicle is not available as it is not collected and sufficiently verified at the time the corporate vehicle is created, nor at any stage throughout its existence (FATF, 2014). Furthermore, a study found that issue for transparency BO depends on the integrating all data related to BO (Nuruliza, 2016). Those data are financial transaction, banking, taxes, legal data corporate ownership and even further population and civil registration. These data are contributed for

polymaking to overlook of state revenue (Rini, 2016).

Before BO Regulation was enacted, the access to BO data can be reached through Kustodian Sentral Efek Indonesia/Indonesian Central Securities (KSEI). The disclosure procedure is based on annual report of companies listed on the stock exchange (BAPEPAM, 2012). This annual report is available on the Indonesia Stock Exchange website. However, the information on the website was remaining insufficient since it did not provide information in English. As a result, the intended information to provide access to the stakeholders, investors, issuers and other public companies could not efficient and adequate (Nuruliza, 2016).

As BO Regulation enacted in 2018, there is an obligation for the corporation to provide information of their BO. Corporations are required to appoint a person-in-charge who will responsible for the implementation of identification and verification over BO. Identification is undertaken through the collection of personal information of BO, while verification is undertaken to assess the conformity between the BO information and other supporting documents (Lie, et al., 2018).

Regarding to the access of BO information, it should be observed further since the provided annual report of the corporations will be just formality for the corporations to comply with, or whether it will provide the Authorized Agency with the power and the legal grounds to require corporations to structure or re-structure their investment or shareholding composition in the manner acceptable to the Authorized Agency (Lie, et al., 2018).

2.3.2 BO Database

Based on the FATF study, the lack of accurate information on BO was utilized by the perpetrators to conduct criminal acts (Keuangan, 2018). By enacting BO Regulation, the Indonesian Government took precautionary measure and prevention to tackle such criminal acts. While based on study of Transparency International (TI) on Corruption Perceptions Index 2017, there are more than two-thirds countries scored below 50 (International, 2017). The number indicates that there is no progress in many countries in ending corruption. Fraud, corruption, organised crime and tax evasion are enabled by anonymous shell companies, thus the access to data or database on who owns what, the harder it will be for corrupt individuals to hide (Ownership, 2019).

A centralized database is believed to help preventing such crimes. By implementing an

adequate set of data protection law, the database system might limit business activities (Cosgrove, 2018). The standardization and centralized collection and maintenance of BO record or data would allow data controllers to disclose certain data to help authorities in investigation. This legitimate action surely would increase the transparency in revealing BO. Thus, it is needed that the integration among BO data related.

In a fact, there are certain technical and bureaucracy matters in incorporating such related data. In Indonesia, different information is hold by different authorities/ministries. For example, banking account is hold by bank, legality of company is hold by Ministry of Law and Human Rights, taxpayer identification numbers is hold by Ministry of Finance, while civil registration number is hold by Ministry of Internal Affairs. It is very easy to individual or group of individual possess certain licenses in certain sector. Since there is no integrated data system yet, the result will appear as struggle to expose the truth owner for responsible in certain sector.

Certainly, creating transparency in BO disclosure will need collaboration from such government authorities in term of seeking single database. Furthermore, the need of single identification number should be prioritised.

2.3.3 The Privacy Issue

Privacy has first been defined as a legal concept as the right to be let alone (Warren & Brandeis, 1890). The long debate on privacy has brought more interpretation as the right to choose seclusion from the attention of the other (Solove, 2008). In the context of BO disclosure, the information contains in BO is personal data (Informatics, 2016). In this case, the process of disclosing will be clearly removing the nature of the BO itself. The benefit of anonymity and privacy might not be enjoyed for the owner.

However the privacy issue in BO's disclosure is still debatable. Hence, BO Regulation should be considered as a foundational element that can strengthen the community's efforts to address corruption, fraud, organised crime and tax evasion (Pradhan, 2018).

In the Indonesia context, the right to privacy is guaranteed by the Constitution. Therefore, the disclosing process should be construed to guarantee the reputation of the owner. Indeed, there is should be 'balancing principle' since the right to privacy might be limited in order to respect others right (Taufik, 2011).

In line with that, in disclosing such BO information, the authorities must follow the disclosing principles to ensure that the right to privacy would not be infringed as stated on Article 2 Data Protection Regulation.

3 CONCLUSION

As the Labora Sitorus case and Panama Paper scandal has illustrated, the cases were increasingly attractive to reveal BO in Indonesia. Although the Government of Indonesia has enacted BO Regulation, there are concerns on the BO disclosure process. The corporations oblige to provide a person-in-charge who will be responsible for implementing the principles on BO disclosure namely identification and verification over personal information of BO. The problem is arising when comes to the implementation of BO Regulation. The challenge lies in corporate compliance in disclosing BO. Another challenge are the access to the BO information that remains limited, the absence of BO database since there is no single identification number which cause bureaucracy problem among responsible authorities and the last is the issue on privacy over disclosing personal data.

Responding to the concerns above, the transparency issue in revealing BO would be the main key to the authorities by ensuring the data protection principles while corporations must comply with all existing regulations.

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