The Implementation of the Deferred Prosecution Agreement Concept to Corruption by Corporations with the Anti-Bribery Management System (SNI ISO 37001: 2016)

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DOI: https://doi.org/10.22304/pjih.v8n2.a4

Submitted: March 3, 2021 |Accepted: July 6, 2021

Abstract

Prevention of corruption is one of legal reform agendas that has been implemented by the Indonesian government. However, there is a gap in the main objective of the prevention to restore the country's financial losses. Returning state's financial losses is not easy. There are needs of a new paradigm to maximize the return of state financial losses caused by corruption. In the United Kingdom, the Serious Fraud Office used the Deferred Prosecution Agreement to handle Rolls-Royce's alleged corruption offenses. One of the requirements is a legal compliance program that the corporation must obey. This study conducted in a form of a descriptive study. It employed normative juridical research type with statute and conceptual approaches, as well as legal comparison. The data was collected through literature studies before subsequently analyzed qualitatively. The results show that the implementation of the concept of deferred prosecution on corruption crimes committed by corporations with anti-bribery management system (SNI ISO 37001: 2016) is stated in the legislation policy related to the prohibition of corruption crimes committed by corporation. Any corporations can be held criminally accountable. However, policies and regulations in Indonesia do not require corporations to follow the legal compliance program.

Keywords*:* corporate corruption, deferred prosecution agreement, ISO.

Penerapan Konsep Perjanjian Penundaan Penuntutan terhadap Tindak Pidana Korupsi yang Dilakukan Korporasi dengan Sistem Manajemen Anti Penyuapan (SNI ISO 37001: 2016)

Abstrak

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Pencegahan tindak pidana korupsi merupakan salah satu program reformasi di bidang hukum yang telah dilaksanakan oleh pemerintah Indonesia. Namun, terdapat kesenjangan dalam tujuan utama penanggulangan tindak pidana korupsi yaitu mengembalikan kerugian keuangan negara. Dalam pengembalian kerugian keuangan negara tidak semudah yang dibayangkan, sehingga perlu adanya paradigma baru sebagai upaya untuk memaksimalkan pengembalian kerugian keuangan negara akibat tindak pidana korupsi. Penanganan tindak pidana korupsi yang dilakukan Serious Fraud Office di Inggris terhadap korporasi Rolls-Royce dengan menggunakan Deferred Prosecution Agreement, yang mana dalam salah satu klausul nya dikehendaki, adanya program kepatuhan hukum yang wajib diikuti oleh korporasi. Penelitian ini bersifat deskriptif dengan jenis penelitian yuridis normatif, menggunakan pendekatan perundang-undangan (statute approach) dan pendekatan konseptual (conceptual approach), dan pendekatan perbandingan hukum (legal comparison). Data dikumpulkan melalui studi kepustakaan, kemudian dianalisis secara kualitatif. Hasil penelitian menunjukkan bahwa Penerapan Konsep Perjanjian Penundaan Penuntutan terhadap tindak pidana korupsi yang dilakukan korporasi dengan Sistem Manajemen Anti Penyuapan (SNI ISO 37001: 2016) secara eksplisit telah ditetapkan dalam kebijakan legislasi terkait dengan larangan tindak pidana korupsi yang dilakukan oleh korporasi, dan korporasi yang melakukannya dapat dipertanggungjawabkan secara pidana. Namun kebijakan dan regulasi di Indonesia tidak mewajibkan korporasi untuk mengikuti program kepatuhan hukum, dalam hal ini Sistem Manajemen Anti Penyuapan SNI ISO 37001: 2016.

***Kata Kunci**: korupsi korporasi, ISO, perjanjian penundaan penuntutan.*

A. Introduction

One of the significant problems faced by Indonesia is a corruption. It evolved and has even become a continuing problem. Zainuri says that corruption in this country has spread to all aspects. This phenomenon has penetrated not only areas perceived as hotbeds of corruption but also the institutions that previously were not taken into account. In fact, the financial scandals in some state institutions were disclosed one by one.[1]

Corruption in Indonesia is almost like a lifestyle. There are various views on corruption emerged from dialogue, supervision of the competent authorities, news reports, etc. In this regard, Transparency International conducts periodic surveys on Indonesian corruption. The monitoring results give a score 37 for Indonesia. This value has decreased compared to 2018, when Indonesia got 38, 2019 (40) and 2020 (37).[2]

The numbers are very useful information for evaluation of the corruption eradication in Indonesia. Compared to the previous year, 2019, the numbers in2020 are slightly decreased. The Indonesia Corruption Watch (ICW) provides an

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1 Mochamad Ramdhan Pratama and Mas Putra Zenno Januarsyah, "Upaya Non-Penal dalam Pemberantasan Tindak Pidana Korupsi," *Jurnal Ius Constituendum*, Vol. 5, No. 2, 2020, p. 242.

2 Transparency International, "Corruption Perception Index," https://ti.or.id/corruptionperception-index-2020/, accessed on February 2021.

example. State's losses due to corruption reached Rp. 39.2 trillion in Semester I of 2020. On the other hand, the total fines imposed by the panel of judges on the defendants were around Rp102,985,000,000; and the replacement money were Rp625,080,425,649, US$128,200,000, and SG$2,364,315. –totaling around Rp3 trillion. There is a disparity in the recovery of state's financial losses. It is almost similar to the previous year. In the first semester of 2019, the total state's losses due to corruption practices amounted to Rp2.132 trillion, while the imposition of replacement money is only around Rp183,000,000,000 billion.[3]

Based on monitoring by Transparency International and ICW, increase in uncontrolled corruption does not only affect state losses and the national economy. It also affects the life of the nation and the state. Corruption is a violation of social and economic rights of the people. It can no longer be classified as an ordinary crime; it has become an extraordinary crime. Therefore, efforts to eliminate corruption can no longer be "in the ordinary way". Extra-ordinary enforcements are needed.[4]

The legal foundation on humans or corporations are stipulated in Article 2 paragraph (1) and Article 3 of the Law Number 31 of 1999 in conjunction with the Law Number 20 of 2001 on the Eradication of Criminal Acts of Corruption (known as the UU PTPK – *Undang-Undang Pemberantasan Tindak Pidana Korupsi*). These two formulations formally regulate the existence of state financial losses as an element of corruption.[5] This is related to the development of the subject of criminal acts, which were initially only person individuals (*Natuurlijke Persoon*). In reality, legal entities can also be the subjects of criminal acts (*Rechtspersoon*).

Although it has been recognized that a legal entity is the subject of a criminal act, it is important to understand that a corporation is a term commonly used by criminal law and criminology experts in relation to other fields of law, especially civil law. A legal entity (in Dutch: *rechtspersoon*) is a legal creation that refers to the existence of a body that has been given the status of a legal subject, in addition to human legal (*Natuurlijke Persoon*).[6]

Nowadays, the development of Indonesian law has expanded the range of criminal law subjects. Currently, it does not only cover individuals but also corporations. In addition to the Criminal Code, now there are some laws regulating the subjects. They are, among others, namely the Law of Corruption Eradication, the Law Number 8 of 2010 on the Prevention and the Eradication of Money

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3 CNN Indonesia, "Kerugian Negara Akibat Korupsi 39,2 T di 2020", https://www.cnnindonesia.com/nasional/20200930124534-12-552660/icw-kerugian-negara-akibat-korupsi-rp392-t-di-2020, accessed on February 2021.

4 Mas Putra Zenno Januarsyah, "Penerapan Prinsip Ultimum Remedium dalam Tindak Pidana Korupsi," *Jurnal Yudisial*, Vol. 10, No. 3, 2017, p. 264.

5 Mas Putra Zenno Januarsyah, "Penerapan Asas Ultimum Remedium terhadap Tindak Pidana Korupsi yang Terjadi di Lingkungan BUMN Persero," *Jurnal Wawasan Yuridika*, Vol. 1, No. 1, 2017, p. 25.

6 I Dewa Made Suartha, *Hukum Pidana Korporasi, Pertanggungjawaban Pidana dalam Kebijakan Hukum Pidana Indonesia*, Malang: Setara Press Kelompok Intrans Publishing, 2015, pp. 4-5.

Laundering Crimes, the Law Number 11 of 2008 in conjunction with the Law Number 19 of 2016 on the Information and Electronic Transactions, the Emergency Law Number 7 of 1995 on Economic Crimes, the Law Number 8 of 1995 on Capital Markets, and the Law Number 32 of 2009 on Environmental Protection and Management.

Corruption eradication is the Government reform agenda in the field of law. Since corruption has an impact on the significant state's financial losses; and can certainly hinder national development, several methods have been taken by the government and law enforcement officials to reduce the corruption. However, the process of dealing with corruption takes a long time and adds to the problem of law enforcement of corruption in Indonesia. The government has performed many efforts to restore state finances, both through laws and regulations and the newly institutions formed for the purpose.[7]

The resolution of criminal acts of corruption in Indonesia is still weak both in terms of structure, instruments, and management. It originates from state administration practices, lack of supporting instruments in the form of laws and regulations, and the absence of good management principles.[8] This study mainly aims to examine whether the concept of the differed prosecution agreement can be applied in Indonesia. The Law Number 7 of 2006 on the Ratification of the United Nations Convention Against Corruption (UNCAC), Article 26 paragraph (4), states that Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions. If non-criminal sanctions are effectively and proportionally considered more efficient according to law enforcement and judges, the use of criminal law can be considered and ruled out.

Indonesia once faced controversial issue of the Texmaco Case. Texmaco was accused of committing a criminal act of corruption. Criminal prosecution resulted the factory shutdown; and the workers were forced to lay off their jobs. The situation caused the increase of unemployment; while the factory turned into a scrap. The state lost foreign exchange and tax revenue. The resolution of the case was very different compared to the Rolls-Royce case. The British anti-corruption agency Serious Fraud Office (SFO) discovered a conspiracy to commit corruption and bribery by Rolls-Royce in China, India, and other markets (including Indonesia). The company has pleaded guilty and apologized unconditionally so that a British Court ordered Rolls-Royce company to pay a fine and costs totaling £497 million (approximately Rp8.1 trillion). In this case, the government through its law

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7 Febby Mutiara Nelson, *Plea Bargaining dan Perjanjian Penundaan Penuntutan dalam Tindak Pidana Korupsi*, Jakarta: Sinar Grafika, 2020, p. 1

8 Wicipto Setiadi, "Korupsi di Indonesia (Penyebab, Bahaya, Hambatan dan Upaya Pemberantasan, serta Regulasi)," *Jurnal Legislasi Indonesia*, Vol. 15, No. 3, 2018, p. 252.

enforcement officers allows the company to pay a large fine to avoid criminal prosecution through the Deferred Prosecution Agreement.

A deferred prosecution agreement can be offered by a public prosecutor when a corporation has indicated its willingness to cooperate with criminal investigations, acknowledged certain facts, and accepted various conditions that will serve as sanctions, remedies, and consequences. The terms of the agreement can impose one of a number of legal obligations on the corporation, including the implementation of a legal compliance program. In other words, it is an anti-corruption legal compliance program. The implementation can be used with the Anti-Bribery Management System as contained in SNI ISO 37001: 2016.

One of the guidelines to determine the implementation of organizational policies, procedures, and controls against bribery risk is SNI ISO 37001: 2016 on Anti-Bribery Management System (SMAP – *Sistem Manajemen Anti Penyuapan*). This standard is an identical adoption of ISO 37001: 2016 on Anti-Bribery Management Systems Requirements with Guidance for Use, which was prepared by the Technical Committee 03-02 and was discussed at the national consensus meeting in Jakarta on November 10, 2016.

Some corporations that are suspects/accused/convicts of corruption cases are, among others, PT Giri Jaladhi Wana, PT Nusa Konstruksi Enjiniring (previously named PT Duta Graha Indah), PT Offistarindo Adhiprima, PT Nindya Karya, PT Tuah Sejati, PT ME, PT PS, and PT Putra Ramadhan. Up to now, the cases involving corporations as perpetrators of criminal acts of corruption have been rarely brought forward with criminal sanctions with permanent legal force. In fact, based on the cases handled by the Corruption Eradication Commission, it is not uncommon for corporations to take part in the bribery crime.

Based on the events above, one of the objectives of corruption eradication in Indonesia is to restore state financial losses for the benefit of the people and anticipate various crises in various fields. Optimizing the return of state financial losses is also the basis for the formulation of punishment for corporations committing corruption. However, in practice, there are obstacles to recover state financial losses through criminal prosecution of corporations committing corruption. In fact, some corruption cases initiated by corporate management who carry out corrupt activities for and on behalf of and for the benefit of the corporation.

Based on the background above, this study formulated the problem in a question: Is the concept of a Deferred Prosecution Agreement Concept to Corruption by Corporations through the Anti-Bribery Management System (SNI ISO 37001: 2016) has already been regulated in Indonesian legislation?

Studies on the concept of agreement to defer prosecution of corruption has received a number attention. They are, among others, Nelson, who studied return of state financial losses based on the use of deferred prosecution agreement; and Iqbal, who studied the implementation of prosecution suspension agreements in

Indonesia as an alternative for settlement of economic crimes perpetrated by corporation.

This study has significance difference compared to the two studies. Both studies do not have substantial similarities with this study. Thus, this study has a novelty aspect. This study aims to reveal whether the concept of the deferred prosecution agreement against corruption committed by corporation with the use of Anti-Bribery Management System (SNI ISO 37001: 2016) has been regulated in the provisions of the legislation.

B. The Concept of Deferred Prosecution Agreement of Corruption Crimes by Corporation

Corporate crimes are quite serious, especially those that are related to the state's economy. Its investigations, prosecutions, and trials are also costly, slow, and complex. In this regard, innovation is needed to provide faster, more effective, and proportional alternative. The innovation must also have high legal certainty. Such innovation has been developed in the United States, the United Kingdom, and several other states. The innovation is deferred prosecution agreement.[9]

Deferred Prosecution Agreement is a new concept that has been developed in the United States and the United Kingdom to resolve problems of corporate crimes. The United Kingdom and the United States have introduced the deferred prosecution agreement system. The United States applied the system, and it is still limited to corporate crimes. They cover crimes that are labor-intensive, time-consuming, and costly, and difficult evidence. For this reason, the deferred prosecution agreement appears as an alternative in tackling corporate crimes so that it does not need to be entered into the Criminal Justice System.[10] In other words, the deferred prosecution agreement can be made if there is an admission of guilt from the defendant. The application of deferred prosecution agreement is closely related to the position and authority of prosecutor. In this case, the defendant (the corporation) and the Public Prosecutor may conduct negotiations discussing the public prosecutor's policy to stop the case allegedly committed by the corporation, if the judge has agreed to the agreement made by the prosecutor with the defendant or his legal advisor.

The mechanism of the deferred prosecution agreement will not destroy the reputation of corporation because the case does not linger through the courts from the first stage, appeal, to cassation. Corporate employees will also not become victims because the company does not collapse, and its shares do not fall and can still work in the company. Corporation is still subject to sanctions that must pay fines and other costs to the state. The state benefits more quickly from fines to recover state losses. Corporation also accepts the consequences to improve their

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9 Michael Bisgrove and Mark Weekes, "Deferred Prosecution Agreement: A Practical Consideration," *Criminal Law Review*, Issue 6, 2014, p. 1.

10 Febby Mutiara Nelson, *op.cit*., p. 83.

management and compliance with state regulations because the agreement may cover several conditions. The prosecutor has broad discretion to negotiate. There is a list of acts that cannot use the concept, including state security, foreign affairs, two or more serious crimes committed by individuals, or public affairs/trust violation by state officials.

Compared to other agreements, which are also used to settle cases involving corporation, the deferred prosecution agreement has substantial differences because it contains the components: (1) the corporation's commitment to pay a combination of criminal fines, civil penalties, and restitution; (2) the obligation of corporation to cooperate with ongoing investigations; and (3) the commitment of the corporation to adopt a management system designed to ensure compliance with the agreement and to correct the misconducts. Some prosecution agreements require corporations to select independent corporate monitors who are authorized to monitor compliance systems and to ensure the compliance with agreements.[11]

In addition, corporation is required to accept the corporate compliance program plan and the appointment of a corporate supervisor or advisor. If the corporation fails to fulfill the agreement made with the prosecutor, the corporation will be sued as a defendant in court. With the model, the settlement of corruption and the return of state financial losses can be carried out more quickly.

The deferred prosecution agreement in the United Kingdom entered into force on February 24, 2014. It was introduced in Section 45 and Schedule 17 of the Crime and Courts Act 2013 (CCA 2013). It aims to provide prosecutors with additional tools to tackle economic crimes in England and Wales that too often go without redress. In the United Kingdom, the deferred prosecution agreement is defined as "…an agreement reached between a prosecutor and an organization which could be prosecuted under the supervision of a judge." The deferred prosecution agreement is simply a probation for the corporation.[12] The process includes three stages: (1) negotiation, containing statements of facts, expiration date, and court involvement; (2) approval, where prosecutor asks the Crown Court to assess whether the points of the Agreement reflect "fairness, rationality and proportion"; and (3) enforcement, where the agreement takes effect but the public prosecutor feels that the corporation does not comply. In the last case, the public prosecutor may request a reassessment from the Crown Court.[13]

The SFO said it considered the implementation of the deferred prosecution agreement, which suggests it has been used to considerable effect in the United States. In general, the agreement serves for a corporation that is suspected of being required to: (1) to admit full guilt and agree to a statement of fact outlining the offence; (2) not to make public statements that are inconsistent with

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11 *Ibid,* p. 67.

12 Sharon Oded, "Deferred Prosecution Agreements: Prosecutorial Balance in Times of Economic Meltdown," *The Journal for Social Justice*, Vol. 2, 2011, pp. 5-6.

13 Michaels Bisgrove and Mark Weeks, *op.cit.*, p. 4.

statements of fact and to cooperate in further criminal proceedings against individuals; (3) to pay civil fines and provide compensation to victims; and (4) to introduce improved compliance procedures to prevent future criminal offences.

In return, the deferred prosecution agreement will specify a period between one and five years during which the corporation will not be prosecuted, provided all conditions are met. Benefits include encouraging perpetrators to self-report and admit responsibility for corporate crimes while providing an efficient and cost-effective way to handle appropriate cases as an alternative to court.

In line with the above description, the Indonesian criminal justice system needs to be reevaluated and reoriented to adapt the deferred prosecution agreement model to optimize the return of state losses due to Corruption Crimes. This idea is also based on the alignment of the deferred prosecution agreement with the provisions in UNCAC that each participating country is obliged to consider providing a reduced sentence for suspects/defendants who want to cooperate in solving corruption crimes with law enforcement officials for the sake of law. In addition, this model also adheres to legal certainty and benefits. Because of being a dual track system, the deferred prosecution agreement also remains in the corridor of settlement through the SPP.

If the deferred prosecution agreement is used in Indonesia, there should be arrangements in the form of laws and regulations, whether by separate laws or the Criminal Code to be reference to material criminal law and the criminal procedural code. The Criminal Procedure Code is a reference to formal criminal law. Therefore, law enforcement officials have legal authority to carry out the deferred prosecution agreement. It is not solely at the discretion of prosecutor. In addition, considering that this mechanism requires the ability of the law enforcement officials on case complexity and the law enforcement officials' integrity, a code of conduct is needed. It should contain all matters to be complied with. It must also contain sanctions for the violation conducted by law enforcement official in the process.

There is a logical consequence if the agreement is implemented in Indonesia. Several laws and regulations on corruption eradication containing material criminal law and formal criminal law need to be reevaluated and reoriented. They must have the spirit not to prioritize prosecution over prevention. The concrete form of the re-evaluation and reorientation in question is based on the revision of various provisions, both partially and completely, especially in the Law of Corruption eradication to provide space for the implementation of the deferred prosecution agreement, especially to eliminate provisions that make perpetrators of corruption crimes prefer to be punished rather than to return state financial loss. Furthermore, the application of the agreement in Indonesia is in line with the legal politics of the government and law enforcement officer to further streamline corporate criminal liability, especially in economic criminal acts, including corruption.

Based on the description above, the deferred prosecution agreement in the criminal justice process, as regulated in the Criminal Procedure Code, currently requires a long settlement process. Therefore, cases that have not been resolved can be accumulated and the criminal justice process is not effective and efficient. The law on the implementation of the criminal justice process requires a simple, fast, and low-cost implementation. Indonesia needs an implementation with the following consideration.

1. The deferred prosecution agreement that will be implemented in Indonesia must consider the Indonesian judicial system, constitutional structure, and legal tradition. The role of court in the agreement process must be taken into consideration because of the doctrine of separation of powers and constitutional provisions regarding the role and function of the court. The impact of regulatory and compliance burdens on corporation that require additional costs also needs to be considered. Therefore, it is necessary to compare whether the formal route of the agreement is more economical and effective.
2. Types of crimes that allow the deferred prosecution agreement are serious crimes. They include, but not limited to, fraud, bribery, and money laundering. In such case, is it necessary to make a special law for the purpose?
3. The deferred prosecution agreement is only applied to corporation. It is possible to have a preventive effect and the possibility of prosecuting employees (company organs). However, since it is limited to corporation, it is possible that individual subject is reluctant to report them for fear of being punished. The agreement mechanism should cover corporate employees.
4. The role of court will be critical to the agreement. The involvement of the judiciary body in the agreement can really build trust. The discretion does not have to be as broad as in the United States, but neither should it be overly cautious.
5. The success of the deferred prosecution agreement will be greatly influenced by the willingness and attractiveness of self-reporting. Certainty and predictability of the deferred prosecution agreement process is also required. Steps to achieve certainty include starting from law enforcement in determining the terms of the agreement, and the factors or reasons for prosecutor to invite corporation to enter into the agreement. The public interest must also be considered. The interest consists of the prevention of future acts, saving the cost of prosecuting and impeaching, the existence of restitution to victims, the seriousness of the violation, and the history of the corporation.
6. The deferred prosecution agreement must strike a balance between the interests of building public trust and pursuing fraudulent corporations.
7. In the United States, the results of internal corporate assessments can be trusted and used for negotiations. On the one hand, this does help state's

human resources. On the other hand, the validity and accuracy of the information is also questionable. Therefore, it is necessary to determine the parameters or points of fact that must be submitted by the corporation.

8. Violation of the deferred prosecution agreement allows corporations to be fined and even prosecuted in formal courts. Supervision is carried out by an independent appointed by defendant and approved by the state.
9. To increase public confidence, the concept of deferred prosecution agreement in Indonesia may require the terms of the agreement to be in the public interest and to be fair, reasonable, and proportionate.[14]

Simultaneously, negotiation between public prosecutor and corporation in agreement process require.

1. Statement of facts regarding the alleged violation;
2. Ensuring the accuracy of information during negotiations;
3. Ensuring deal-makers act in good faith;
4. An acknowledgment of responsibility for the act and if repeated within the agreement period that they can be tried;
5. An obligation to cooperate with current or future investigations;
6. The consequences for the defendant if it commits another violation;
7. Defendant to be prohibited from making factual statements that contradict the agreement;
8. Expiration date; and
9. Other requirements as follows:
   a. Paying fine;
   b. Paying the claimant's reasonable fees;
   c. Providing compensation to victims;
   d. Disapproval of any gains derived from such errors; and/or
   e. No bonus payments; and
   f. Implementation or improvement of corporate compliance and/or restitution programs for victims.[15]

In comparison, the United States has implemented a system of deferred prosecution agreement that is limited to corporate crime, which appears as an alternative to tackling corporate crime. Therefore, it does not have to be included in the Criminal Justice System. In other words, the deferred prosecution agreement is a filter for cases that enter the criminal justice system, considering the good faith of the corporation. Public prosecutors use the mechanism to make agreements with corporations committing economic crimes (white collar crime). By stating the agreement to fulfill the obligations contained in the agreement, the prosecutor

[14] Febby Mutiara Nelson, *op.cit.*, p. 357.
[15] *Ibid,* p. 359.

then suspends the prosecution so that it cannot proceed to the adjudication stage.[16]

The deferred prosecution agreement continues to develop (gradual process). Based on the concept, it is only applied to corporation. The current deferred prosecution agreement is based on the 1992 Salomon Brothers Case. In 1975, the deferred prosecution agreement was only a tool for judges, not prosecutors. The deferred prosecution agreement mechanism emerged in the United States after the Enron case also ensnared auditor Arthur Anderson. Another example of the implementation of deferred prosecution agreement (incorporated with the NPA) in the United States has been widely carried out. There are eleven agreements in 2008, 32 agreements in 2009, 31 agreements in 2010, and 100 agreements in 2015.[17]

The deferred prosecution agreement is made at the discretion of public prosecutor and is carried out before the trial. The public prosecutor considers the impact on innocent third parties when criminal proceedings are filed, compensation to victims, and the voluntary compliance program. The prosecutor can use corporate confession at the trial if the deferred prosecution agreement fails. The deferred prosecution agreement is carried out under limited judicial oversight. The agreement is submitted to the court and asks the judge to accept it, not to solve the case by judicial hearing. Once the agreement is approved by the court, there is no obligation to publish the agreement. However, it is usually publicly available.

The deferred prosecution agreement initiated by the SEC must be published on the SEC website. In the context of supervising the implementation of the compliance plan, an independent supervisor carries out the supervisory work. The costs are borne by the corporation as the actor. If the corporation fails to fulfill its obligations under the agreement, the public prosecutor can file a claim in a formal court. The prosecutor has broad discretion in negotiable offenses. There are a series of unknown offenses in the agreement, including state security, foreign affairs, two or more serious crimes committed by individuals, or state officials who violate public affairs/trust.[18]

In the United States, the Suspension of Prosecution Agreement can be applied in the following situations: "...an admission of facts, an agreement of cooperation, a specific duration for the agreement, and an agreement to monetary and non-

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16 Sharon Oded, *op.cit.*, pp. 69-70.

17 Christopher A. Wray and Robert K. Hur, "Corporate Criminal Prosecution in a Post-Enron World: the Thompson Memo in Theory and Practice," *American Criminal Law Review*, Vol. 43, No. 3, 2006, p. 1096.

18 Public Consultation Paper, *Improving Enforcement Options for Serious Corporate Crime: Consideration of a Deferred Prosecution Agreements Scheme in Australia*, Australian: Australian Government/Attorney-General Department, 2016, pp. 11-12.

monetary sanctions". The most commonly sanctions are restitution, fines, probation, appointment of monitors, and termination of responsible individual.[19]

According to the Thomson Memorandum, the criteria for prosecutors to use a deferred prosecution agreement are different from the standard for prosecutors in conducting ordinary prosecutions.[20] They are the nature and seriousness of the offense:

1. The depth of corporate internal violations and senior management involvement;
2. History of criminal, civil, and regulatory enforcement;
3. The timeliness and voluntarism of the corporation and the intention to cooperate in investigation process;
4. Presence and adequacy of internal compliance and corporate governance systems, as well as program development;
5. Management actions to discipline and mitigate violations, pay restitution, and cooperate with government agencies;
6. The consequences of the guarantee, such as disproportionate losses for shareholders, retirees, and employees who are not proven guilty; and
7. Sufficient remedies in either prosecution of individuals responsible for violations or enforcement of other regulations.

Thomson's memorandum later became the basis for amendments to the United States' Principles of Federal Prosecution of Business Organizations. The objective is to respect the cooperative attitude and independence through soft choices such as the NPA (Non-Prosecution Agreement). In the deferred prosecution agreement, public prosecutor can terminate prosecution if the corporation fulfills mutually agreed compliances. Compliance will continue to be monitored. Deferred prosecution agreement poses several problems for corporations that pay up to $52 million as independent monitors to avoid prosecution. Therefore, it is very possible that there is the potential for corporations to deviate from this system.

In the United States, the Attorney General's Office implements the deferred prosecution agreement by means of a memorandum to fill the formal legal vacuum on the agreement. They are as follows.[21]

1. *The Holder Memo*. In 1999, assistant prosecutor Eric Holder formulated the practice of corporate willingness to cooperate with the Department of Justice in cases where corporation must be held accountable for actions of an agent,

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19 Cindy R. Alexander and Mark A. Cohen, *Trend in the Use of Non-Prosecution, Deferred Prosecution, and Plea Agreements in the Settlement of Alleged Corporate Criminal Wrongdoing*, Virginia: Law and Economic Center of George Mason University School of Law, 2015, p. 1.

20 Polly Sprenger, *Deferred Prosecution Agreements: The Law and Practice of Negotiated Corporate Criminal Penalties*, UK: Sweet & Maxwell, 2015, p. 13.

21 Ellis W. Martin, "Deferred Prosecution Agreements: Too Big to Jail and The Potential of Judicial Oversight Combined with Congressional Legislation," *North Carolina Banking Institute*, Vol. 18, No. 2, 2013, pp. 456-466.

regardless of whether the corporation has internal policies prohibiting such actions. The doctrine is *respondent superior*.

2. *The Thompson Memo*. Responding to the Andersen crisis, Deputy Public Prosecutor Larry Thompson issued a memorandum "Principles of Federal Prosecution of Business Organizations" to make the prosecutor's authority broader and reducing lack of transparency and the potential for many violations of constitutional rights. The memorandum also contains two important things: cooperative corporations will be given an (1) advantage that may affect its (2) existence.
3. *The McNulty Memo*. This memorandum replaces and revises the "Thomson Memorandum". In 2012, The Public Prosecutor Paul McNulty issued a memorandum of "Principles of Federal of Business Organization". Here the attorney-client privilege waiver is no longer necessary to see its cooperative nature during the investigation. There are no significant changes from this memorandum, especially the power of prosecutors to pressure corporations during investigations.
4. *The Filip Memo*. In 2008, Deputy Public Prosecutor Mark Filip revised the "United States Attorney Manual (Memo Filip)". The public prosecutor can conduct investigations based on "relevant facts" to assess the compliance status of the corporation. As a result, corporation may still restrict attorney-client privileges to disclose these facts. The parameters to determine cooperative corporation are unclear and may be beyond the scope permitted by law.

The involvement of judges in the deferred prosecution agreement process is to be counterweight to the interests of both corporation and prosecutor. Corporation will not be treated too leniently, and prosecutors cannot act arbitrarily in the process, but the court cannot intervene both sides.

In 2009, a guide to negotiate in the agreement process was made for prosecutors. The results of the amendments to the Rapid Judiciary Act include.

1. Whether the deferred prosecution agreement is fair and reasonable in relation to the actions;
2. Whether the corporation has committed similar acts before;
3. Whether the individual perpetrators associated with the act are individually prosecuted;
4. Whether the fine will prevent them from committing similar acts in the future and punish their past actions;
5. Whether the corporation can survive financially in the formal accusation; and
6. Whether the corporation measures corporate recovery measures that at least encourage prevention and recovery efforts.[22]

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[22] *Ibid,* p. 478.

C. Implementation of The Deferred Prosecution Agreement to Postpone the Prosecution of Corruption Crimes Committed by Corporations through the Anti-Bribery Management System (SNI ISO 37001: 2016)

The implementation of deferred prosecution agreement must meet two scales. The scales will be considered by public prosecutor to determine whether a case is appropriate with the concept. The scales in question are evidence and public interest. The evidence here is intended to prove that the corporation has committed a criminal act of corruption. Public interest is based on the criminal acts committed by the corporation. It covers the mistakes and the size of the losses resulted from the corruption.[23] The examples are the cases of PT Cakrawala Nusadimensi, PT Giri Jaladhiwana, and PT Nusa Construction Engineering. Before the establishment of the Supreme Court Regulation Number 13 of 2016 on the Procedures for Handling Criminal Cases by Corporation, the cases had been tried with unclear procedure and process. There was legal uncertainty. This condition is the background for the issuance of the Supreme Court Regulation Number 13 of 2016 on the Procedures for Handling Criminal Cases by Corporation.[24] The regulation provides guidelines for procedural law for handling corruption cases involving corporation. Article 4 paragraph (2) of the regulation explains as follows.

1. The corporation gains or benefits from the crime, or the crime is intended for the benefit of the corporation.
2. The corporation permits the occurrence of a crime.
3. The corporation does not take the necessary steps to prevent a greater impact and to ensure compliance with applicable legal provisions to avoid the occurrence of criminal acts.

Based on the Consideration of the Supreme Court Regulation Number 13 of 2016, letter c, many laws in Indonesia place corporation as subject of criminal act that can be held accountable but cases with corporate legal subject submitted in criminal proceedings are still very limited. One of the reasons is the process and procedures for examining corporation as a perpetrator of criminal act is still not clear. Therefore, it is deemed necessary to provide guidelines for law enforcement officers in handling criminal cases committed by corporations.

Such conditions of uncertainty can trigger very serious legal problems. It is possible to take extraordinary legal remedies, review proposed by many parties, especially corporate convicts, by bringing a novum in the form of the Supreme Court Regulation Number 13 of 2016, especially on the “unclear” editorial which is stated in the preamble to letter c.

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[23] Serious Fraud Office & Crown Presecution Service, “Deferred Prosecution Agreements Code of Practice”, https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf, accessed on June 2021.

[24] Dwi Siska Susanti (et.al), “Korporasi Indonesia Melawan Korupsi: Strategi Pencegahan,” *Jurnal Antikorupsi Integritas,* Vol. 4, No. 2, 2018, p. 211.

Corporate criminal liability in relation to criminal acts of corruption is regulated in Article 20 of the Law of Corruption Eradication, this means that corporate criminal liability has been accepted in the Law. The acceptance of a corporation as a perpetrator of corruption that are responsible for a criminal act of corruption enables the corporation to be prosecuted. When a corporation becomes a suspect of a corruption act, the deferred prosecution agreement can be used. Public prosecutor may implement a deferred prosecution to the corporation on the condition that the corporation admits its actions and agrees to voluntarily pay a fine and compensation of a certain amount of money to the state.

There are at least three cases of corruption involving corporations as suspects/defendants/convicts. They are cases of PT Cakrawala Nusa Dimensi, PT Giri Jaladhi Wana, and PT Duta Graha Indah/PT Nusa Konstruksi Enjiniring. The current Indonesian Law of Corruption Eradication clearly states that corporations are prohibited from committing criminal acts of corruption. However, the regulation does not require corporations to prevent corruption or participate in anti-corruption law compliance programs.

The Indonesian criminal justice system should be oriented to the deferred prosecution agreement. This is in accordance with the law enforcement model against corruption that is determined: the return of state losses due to corruption and providing a reduction in punishment for the suspect or defendant. The principle of opportunity in the Indonesian law enforcement model still does not accommodate the provisions of the UNCAC. The principle of opportunity in Indonesia determines that prosecutor has the authority not to proceed with criminal cases.

Hamzah explains that the prosecutor may not prosecute criminally if the prosecution cannot be carried out or should not be carried out.[25] The attorney general is the only party who can terminate case, according to Article 35 letter c of the Law Number 16 of 2004 on the Office of Prosecutor. The connection with the deferred prosecution agreement is that, in negotiation with corporation, the prosecutor cannot stop the case but to override it with a certain time limit. The prosecutor also considers the public interest in the implementation of the agreement. If the cooperation does not fulfill conditions that have been negotiated, the criminal case can be continued.

Deferred prosecution agreement within the framework of prosecution as a subsystem of the SPP also has a strategic position in the implementation of deferred prosecution Agreement. In general, deferred prosecution agreement is related to each stage of implementation of the prosecutor's authority to conduct detention, pre-prosecution, preparation of indictments, criminal charges, and legal remedies. The most extreme conditions for the role of the Public Prosecutor is that

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[25] Ferdy Saputra, "Analisis Yuridis Penerbitan Surat Perintah Penghentian Penuntutan oleh Kejaksaan Dikaitkan dengan Asas Oportunitas dan Undang-Undang No. 16 Tahun 2004 tentang Kejaksaan RI," *USU Law Journal*, Vol. 2, No. 1, 2014, p. 113.

the public prosecutor must apply problem-oriented approaches. This is not a simple matter because it will shift the paradigm of the public prosecutor, which has been considered as “case processors” to become “problem solvers”, which involve the community. Prosecutors have so far tended to continue to settle cases through a formal criminal justice process to obtain court decisions that have permanent legal forces rather than restorative models.

The use of deferred prosecution agreement should not be limited by the value of state financial losses of more than 1 billion. This makes the implementation is limited to state financial losses that are relatively high. It will make the agreement minimal and inflexible to be implemented. The argument is of course based on the existence of special minimum provisions on imprisonment and criminal fines in the Law of Corruption Eradication, which makes any state financial losses will ensnare the perpetrators of Corruption Crimes. This will have consequences that state financial losses incurred because the actors tend to be small. However, because they are not covered by the mechanism of the agreement, the perpetrators of the Corruption Crime, in this case the corporation, will get stigmatization and retaliation for the imposition of a punishment that is not commensurate with their actions.

Deferred prosecution agreement is the most ideal model to optimize the return of state financial losses due to Corruption. The deferred prosecution agreement that will be implemented in Indonesia must consider the Indonesian judicial system, constitutional structure, and legal tradition. The role of court in the agreement process must be taken into consideration because of the doctrine of separation of powers and constitutional provisions regarding the role and function of the court. The impact of regulatory and compliance burdens on corporation that require additional costs also needs to be considered. Therefore, it is necessary to compare whether the formal route of the agreement is more economical and effective.

Deferred prosecution agreement can be applied to corruption case committed by corporation. It is an effort to optimize the return of losses from the corruption committed by corporation. The agreement is marked by the change in the principle of corruption eradication from *primum remedium* to *ultimum remedium*. The means of criminal sanctions are used after other means of administrative and civil sanctions are no longer effective and efficient. The main purpose is to make corporation cooperative to return state financial losses without having to face prosecution before the court.

In addition, the deferred prosecution agreement has also received space to be implemented and used with the consequence of a legal policy from the state. Therefore, the implementation of the agreement has legal certainty. This is also supported by the argument that the functionalization of criminal law, especially in cases of corruption, must prioritize ideals rather than law. Radbruch proposes three values: justice, certainty, and expediency. This argument makes the

agreement applicable with emphasis if it is for corporation and the prosecution suspension agreement on a case-by-case basis.

Furthermore, the deferred prosecution agreement reflects a restorative approach. The agreement also adopts another approach, which are corrective and rehabilitative approach. The concrete form of the corrective and rehabilitative approach is the existence of a corporate obligation to participate in a compliance program. The compliance program is implemented based on the Law Number 40 of 2007 on Limited Liability Companies. It requires corporations to comply with the principles of Good Corporate Governance (GCG) in carrying out the activities.

To focus on corruption and bribery, the International Standardization Organization (ISO) has compiled the international standard ISO 37001: 2016 Anti-Bribery Management System. The National Standardization Body has adopted The system to become SNI 37001: 2016 Anti-Bribery Management System. This standard requires compliance with anti-bribery clauses related to organizational context, leadership, planning, support, operations, performance evaluation, and corrective action. This standard can also be implemented and become part of a corporate anti-corruption compliance program.

This compliance program is important so that the deferred prosecution agreement still reflects the special deterrence that has been recognized in criminal law. The deferred prosecution agreement is a restorative approach. It is expected to provide a different approach: corrective and rehabilitative. Both approaches focus more on corrective approach, which emphasize that corporations as perpetrators of corruption can improve in the future. The specific step that must be taken is the application of the Anti-Bribery Management System (hereinafter referred to as SMAP – *Sistem Manajemen Anti Penyuapan;* SNI ISO 37001: 2016). The scope of SMAP, in the context of a corporate organization, is a system that can stand alone or can be integrated with all management systems. The SMAP details requirements and provides guidance for establishing, implementing, maintaining, reviewing, and improving a system of relationships with organizational activities. They are:

1. Bribery in the public, private, and not-for-profit sectors;
2. Bribery by the organization;
3. Bribery by personnel acting on behalf of the organization or for its benefit;
4. Bribery by business associates of an organization acting on behalf of the organization or for its benefit;
5. Bribery by organizational personnel in connection with organizational activities;
6. Bribery of the organization's business partners in connection with the organization's activities; and

7. Direct and indirect bribery, such as offering or accepting bribes through or by third parties.[26]

Basically, SMAP only covers bribery; and bribery is a type of corruption in Indonesia. it determines requirements and provides management system guidelines. It aims to help organizations to prevent, detect, and deal with bribery and to comply with laws and regulations related to anti-bribery and voluntary commitments. Therefore, SMAP is not only used for fraud, cartel, and anti-competition violations, money laundering and other activities related to corrupt practices.[27]

Although it only applies to bribery, any organization can expand the scope of the management system to cover other activities, including corruption resulting in state financial losses. In this case, the requirements of the SMAP are general in nature and therefore can be used for all organizations or parts of organizations, regardless of the type, size, and nature of their activities, be it the public sector, private sector, or not-for-profit sector. The organization shall identify internal and external issues related to its objectives that may affect its ability to achieve the expected results of the anti-bribery management system. Issues defined by the organization include:

1. Size, structure, and delegation of decision-making authority from the organization;
2. The location and sector in which the organization operates or anticipated operations;
3. The nature of the scale, and complexity of the organization's activities and operations;
4. The organization's business model;
5. The entity over which the organization has control and the entity that exercises control over the organization;
6. The organization's business partners;
7. The nature and extent of interaction with public officials; and
8. Laws and regulations, contract regulations, and professional obligations and duties.[28]

An organization shall determine the stakeholders and requirements associated with the SMAP. In the determination of the scope of anti-bribery, the organization should consider internal and external issues, requirements, and results of the bribery risk assessment. Therefore, each organization shall continuously establish, record, implement, maintain, and review the matters, in accordance with the

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[26] Asep N. Mulyana, *Perjanjian Penundaan Penuntutan Dalam Kejahatan bisnis*, Jakarta: Grasindo, 2019, pp. 263-264.

[27] *Ibid.*

[28] *Ibid,* pp. 264-265.

requirements of this standard, and, where necessary, improve its anti-bribery management system, including the processes and interactions.

To ensure the operation of the SMAP, each organization should conduct a regular bribery risk assessment. Risk assessment is carried out by identifying the organization's reasonable organizational bribery risk and analyzing, assessing, and determining the identified bribery risk. In addition, a risk assessment is also carried out by evaluating the suitability and effectiveness of existing controls in the organization to reduce the assessed bribery risk. In these cases, the organization should establish standards for evaluating the level of bribery risk and should consider the organization's policies and objectives.

In addition, the SMAP must have a compliance program and anti-bribery planning function. In this regard, top management should assign anti-bribery compliance responsibilities and functions to:

1. Oversee the design and implementation of the organization's anti-bribery management system;
2. Provide direction and guidance to personnel on anti-bribery management systems and bribery issues;
3. Ensure that the anti-bribery management system complies with the requirements of this standard; and
4. Report the operation of the anti-bribery management system to the steering board, top management, and other compliance functions.[29]

To plan an anti-bribery management system, each organization should consider requirements and identify risks and opportunities for improvement to:

1. Provide reasonable assurance that the anti-bribery management system can achieve its intended objectives;
2. Prevent or limit the unintended influence of anti-bribery policies and objectives;
3. Monitor the effectiveness of the anti-bribery management system; and
4. Achieve continuous improvement.[30]

Each organization should plan its bribery risks and opportunities for improvement, as well as how to integrate and implement these actions into the anti-bribery management system process and evaluate the effectiveness of these measures. The organization shall establish the anti-bribery management system objectives at appropriate functions and levels. The objective of the anti-bribery management system must be in line with the anti-bribery policy, measurable, considering the prevailing factors, and monitored to be communicated and updated. The organization shall maintain documented information about the

[29] *Ibid,* p. 268.
[30] *Ibid,* p. 269.

objectives of the anti-bribery management system. To achieve the objectives of the anti-bribery management system, the organization must determine what will be done, what resources will be needed, and who will be responsible.

In some states, anti-corruption programs are implemented as a part of a compliance program and can be used as a benchmark or consideration to cut off a case to reduce punishment or reduce fines against corporations that commit violations, especially those related to corruption. This kind of program is certainly related to the contents of the agreement of the agreement. Corporation must choose the right approach to anti-corruption program that fits all and corporate conditions (no one size fits all), given that each corporation has different characteristics from one another. However, taking important points from the guidelines of the international anti-corruption system and that already exists in Indonesia, there are at least five important things that must be considered and must be owned by corporations in building compliance programs. They are:

1. Understand regulations, business characteristics, and related parties;
2. Involvement and support from leadership and management in the implementation of anti-corruption programs;
3. A risk assessment carried out to formulate an appropriate anti-corruption program;
4. Implementation of compliance procedures and programs, including training and communication, due diligence, reporting of violations and monitoring of implementation; and
5. Continuous evaluation and improvement.[31]

The World Bank concludes that there are three approaches that can be used in building an anti-corruption program. It can make a low-risk business environment be implemented by:

1. Internal approach through risk assessment, implementation of anti-corruption policies and compliance programs, and provision of anti-corruption rules;
2. External approach, namely sharing policies, experiences, best practices with stakeholders; and
3. Collaborative approach, by reaching out to other business partners in the same industry and other stakeholders through joint activities. Collective action is needed because internal programs implemented by corporations face a financially risky competitive environment, and cannot affect the business environment, therefore collective action is needed to help create a common understanding in creating a low-risk business environment.[32]

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31 Dwi Siska Susanti, *op.cit.*, p. 218.

32 World Bank, *Fighting Corruption Through Collective Action: A Guide for Business*, Washington, DC: The World Bank, 2008, p. 14.

Mantovani states that collective action benefits corporations by combining forces with each other (including competitors) with governments (authorities) and civil society organizations to create a common goal of creating fair and equal markets and minimizing the opportunities and risks of corruption.[33]

D. Conclusion

The concept of deferred prosecution agreement on the corruption committed by corporation is carried out at the negotiation stage. It is determined by public prosecutor before the trial. The defendant voluntarily negotiates with the prosecutor to tackle corporate crimes. If the prosecutor is of the opinion that if a criminal charge is filed, it will affect an innocent third party. Involvement of judges in the process balances the interests of corporations and prosecutors. However, the court may not intervene on either side. The model of deferred prosecution agreement in Indonesia in the future must also meet the conditions of the people who still doubt the credibility of law enforcement officers. Therefore, the existing model must be open, monitored. The accountability must be strengthened; and the information obtained in each agreement must be explained and accounted for.

The concept of deferred prosecution agreement on the corruption committed by corporation with the Anti-Bribery Management System (SNI ISO 37001: 2016) has been expressly stipulated in the legislative policy related to the prohibition of corruption committed by corporation. The corporations that do so can be held criminally accountable. However, policies and regulations in Indonesia do not require corporations to participate in a legal compliance program. In this case, the SMAP of the SNI ISO 37001: 2016 is a concrete step towards the idea of the implementation of the concept of deferred prosecution agreement on the corruption committed by corporation in the context of corruption committed by corporations.

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