

Supervision of Beneficial Owners in Limited Liability Companies (Comparative Study of Indonesia-Germany Law)

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ABSTRACT

The purpose of this study is to find out and analyze the general beneficial owner regulation in Germany, specifically related to fines, information transparency, and the role of Notaries in the registration of beneficial owner information and to know and analyze what Indonesia can implement lessons to improve beneficial owner regulations beforehand. The type of research in this study is normative juridical. Based on the research that has been done, the results obtained are. As for the learned that Indonesia can learn from Germany, namely the application of fines for parties who do not register beneficial owner information, then provide a separate container to hold beneficial owner information data, and provide access for other parties to register the beneficial owner where so far, it can only be done by a Notary

INTRODUCTION

The concept of beneficial ownership (BO) was initially introduced in the 1942 tax treaty between Canada and the United States. In Indonesia, beneficial ownership is referred to as "Pemilik Manfaat." In numerous instances observed in developing nations, these countries face an annual loss of approximately 1 trillion US Dollars or about 10 thousand trillion Rupiah due to criminal activities stemming from the misuse of beneficial ownership practices across borders. Several cases involve companies with ambiguous ownership structures. This ambiguity arises from the lack of transparency concerning beneficial ownership (BO) information in shell companies. The non-disclosure of information regarding BO assets can lead to a loss of economic potential and state income. This occurs because taxpayers exploit opportunities for tax avoidance.

In light of the incurred losses, authorities in different regions worldwide are increasingly advocating for the disclosure of such information. A recent notable development on the global stage was the Panama Papers scandal, which exposed over 11.5 million classified documents originating from law firms and corporate asset management service providers, particularly Mossack Fonseca. These documents unveiled confidential information about illicit activities carried out by a small group of individuals who exploited their status as beneficial owners.

Consequently, the transparency of beneficial ownership (BO) or the disclosure of BO information has become a global demand, endorsed by countries and supported by various international forums such as the G-20, OECD, and other economic and development cooperation platforms. As a member of the G-20, Indonesia, in 2014, committed to a High-Level Principle on Beneficial Ownership and Transparency. This principle underscores the significance of transparency, ensuring the availability of accurate beneficial ownership (BO) information that can be accessed by authorized institutions. BO is often also referred to as "Pemilik Manfaat" within a corporation or business entity. As a follow-up to the G-20 country meeting, the government enacted Presidential Regulation No. 13 of 2018 on the Application of the Principle of Recognizing the Beneficiary Owners of Corporations in the Context of Prevention and Eradication of Money Laundering and Terrorism Funding Crimes ("Perpres No. 13 of 2018"). This regulation mandates the disclosure of beneficial ownership for companies, primarily aimed at eliminating and preventing all activities associated with money laundering and the financing of terrorism.

Despite the existence of previous beneficial ownership (BO) regulations, the concept itself remains relatively unfamiliar, not only to the general public but also to practitioners. Consequently, there are still numerous shortcomings related to BO implementation. These include issues such as the lack of sanctions for companies failing to register their BO, as well as uncertainties regarding transparency measures. Furthermore, a gray area exists concerning the role of Notaries, as they indirectly assume authority over all BO registrations due to the requirement that corporate registration processes be conducted through a Notary. It's important to note that the Notary is not directly responsible if the

registered information is incorrect or if there's negligence in dating BO information, potentially leading to the risk of criminalization.

Indonesia can gain valuable insights from countries that have successfully implemented beneficial ownership (BO) regulations, with Germany serving as a notable example. Germany shares a similar legal system with Indonesia, as both follow civil law. In Germany, BO regulations include provisions for financial penalties imposed on companies failing to register their beneficial owners. Additionally, the transparency measures surrounding BO in Germany and the active role of notaries in BO registration are aspects that Indonesia may find beneficial to emulate. Given these factors, Germany stands as a reference country for Indonesia in formulating and implementing its own BO rules. Learning from Germany's experience contribute to the development of effective regulations that enhance transparency, compliance, and accountability in Indonesia's business landscape.

The regulations concerning beneficial ownership (BO) in Germany are derived from modifications to the European Union's money laundering regulations, specifically the Fourth EU Anti Money Laundering Directive. Following the introduction of BO regulations in the European Union, Germany amended the Geldwäschegesetz on October 1, 2017, initiating the implementation of BO registration on December 27, 2017. For companies that have registered for BO this will be accessible on the website www.transparenzregister.de. Regarding information related to this BO itself Germany does not do transparency as a whole, only relevant parties are allowed to access the information.

In Germany, companies are required to furnish legal information pertaining to beneficial ownership (BO), a process that is typically facilitated by a notary. This legal information related to BO is then provided to fulfill regulatory requirements. Indeed, the role of a notary in Germany closely resembles that in Indonesia. Notaries in both countries are responsible for creating authentic deeds, including those related to the establishment of companies and their subsequent amendments. Following the creation of an authentic deed, it is registered at the commercial register in Germany. If the company fulfills the predetermined criteria, the authentic deed is then endorsed, officially recognizing the entity as a legal entity. This process aligns with the standard procedures for establishing and validating companies in both legal systems.

In this article, the author undertakes an examination of the regulations pertaining to beneficial ownership (BO) in Germany. The goal is to assess whether the advantages embedded in these regulations could serve as a pilot framework for BO regulations in Indonesia, which is currently in the early stages of development in this area. Furthermore, the study delves into the role of the Notary in the context of BO in Germany, drawing comparisons with the Notary's role in Indonesian BO framework. This comparative analysis aims to shed light on potential best practices and inform the evolution of BO regulations in Indonesia. Based on the short explanation, the author formulates the problems as follows :

Q1. How are lessons learned or learning points from BO arrangements in Germany implemented in Indonesia?

LITERATURE REVIEW

Enforcement of Progressive Law

In the legal-positivism tradition, widely adopted in today's democracies, law is conceived as a product of legislation. Law consists of legal regulations generated through the national legislative process. The law is valid solely because it has been established in the form of legal regulations, regardless of whether its content is just or unjust. In this system, legal actors (bureaucracy and judges), in accordance with the doctrine in analytical jurisprudence, are merely tasked as conduits of the law.

The use of legal-positivism thinking, in situations where legal legislation is elitist, will lead to the widening of economic disparities (injustice) and an increase in poverty (unwelfare) among the people. This is because the congestion of democracy under the pressure of neoliberalism will result in laws produced through the legislative process leaning towards the interests of the elite while neglecting justice and the well-being of the general populace. Therefore, for its recovery, innovative efforts are required to discover legal concepts that are more inclined toward justice and the well-being of the people.

According to Satjipto Rahardjo, the law should serve humanity, not the other way around. The quality of law is determined by its ability to serve the well-being of humanity. This is the concept of progressive law, which adheres to the ideology of pro-justice and pro-people law. Progressive law is offered as a solution to overcome the crisis in the current global era. The dedication of legal practitioners plays a crucial role in this recovery. Legal practitioners should possess empathy and concern for the suffering experienced by the people and the nation. The interests of the people (well-being and happiness) should be the central orientation and ultimate goal of legal administration.

The process of change is no longer centered around regulations but rather on the creativity of legal practitioners in actualizing the law in the right space and time. Legal practitioners can creatively bring about changes to existing regulations without waiting for regulatory amendments (changing the law). A poorly drafted regulation does not have to hinder legal practitioners from delivering justice to the people and seekers of justice because they can provide a fresh interpretation of a regulation.

Interessenjurisprudenz firmly rejects legalistic and narrowly abstract juridical considerations that are done in a detached and in abstracto manner. It does not commence the examination from a black-and-white interpretation of regulations but rather from the context and specific cases outside the textual narrative of the rules themselves. This is because justice cannot be directly found through logical-formal processes. Justice is instead obtained through intuition. Therefore, logical-formal arguments are sought after justice is determined to frame the juridical-formal decisions believed to be fair.

In the concept of progressive law, the law does not serve itself but rather aims for objectives beyond itself. This contrasts with the tradition of analytical

jurisprudence, which tends to exclude the external world such as humans, society, and their well-being. Therefore, progressive law should be responsive. Legal regulations will always be connected to social objectives that go beyond the textual narrative of the rules.

Progressive law, with logic similar to Legal Realism, views and assesses the law based on the social objectives it seeks to achieve and the consequences that arise from its operation. From an ethical perspective, this approach can be termed teleological ethics. This teleological way of thinking does not dismiss the importance of the law. Rules are important, but they are not the ultimate measure; priority is given to objectives and consequences. Therefore, the central question in teleological ethics is whether an action stems from a good purpose and whether an action with a good purpose also has good consequences.

Progressive law prioritizes objectives and context over the text of rules, thus discretion plays a crucial role in legal administration. Thomas Aarons formulates discretion as: "...power authori"y conferred by law to action on the basis of judgement or conscience, and its use is more on the idea of moral than law." In the context"of discretion, legal administrators are required to choose wisely how they should act. The authority vested in them by official rules serves as a basis for pursuing a wise approach to their duties based on moral considerations rather than formal provisions. Weston states, "decision-making "as been termed the selection of the best, the most practical, or satisfactory course of action."

The applicatio" of progressive law, primarily directed towards legal practitioners, is expected to guide the laws produced through the legislative process, which tends to be elitist, towards the interests of justice and the well-being of the general populace.

METHODOLOGY

This study with the title "Overview Of The "eneficial Owner Regulation And The Role Of Notary In Corporate Registration (Comparative Study Between Indonesia And Germany)" is a type of no"mative juridical research that aims to get a complete picture of a matter according to the human views studied with reference to the relevant legal provisions. Normative legal research involves the exploration of legal rules, principles, and doctrines to address a specific legal issue. The outcomes of legal research can take the form of arguments, theories, or novel concepts that serve as recommendations for resolving the problem at hand. Soetandyo Wignjosoebroto describes doctrinal legal research, which falls under the umbrella of normative legal research, as an examination of laws that are created and developed based on the doctrines embraced by their creators. In doctrinal legal research, the aim is to identify the correct solution by referring to established truths and legal prescriptions found in legal texts or religious scriptures (depending on personal beliefs) in accordance with the adopted doctrine. This type of study seeks to provide normative legal guidelines grounded in jurisprudence and is characterized as both prescriptive and applied science.

RESULT AND DISCUSSION

Lesson Learn for Beneficial Owner Regulations in Indonesia

Some Constraints in Implementing Beneficial Owner Rules in Indonesia as a Basic Reason for the Need for Lesson Learn from Germany.

In Indonesia, the regulations concerning beneficial ownership (BO), specifically outlined in Perpres No. 13 of 2018, have been operational for approximately a year. Consequently, it is evident that there is an ongoing necessity for extensive socialization efforts targeting practitioners, academics, and the general public to enhance awareness and understanding of these regulations.

The outcomes of interviews with multiple practitioners shed light on various challenges encountered in the implementation of BO regulations. Notably, there is a pervasive lack of socialization and educational initiatives directed toward the public on matters related to BO. This deficiency contributes to obstacles, as many stakeholders may not be fully informed about the requirements and implications of the regulations.

Furthermore, interviews reveal a notable hesitancy among notaries and clients in soliciting or providing information about beneficial ownership. This reluctance has created a situation where the inclusion of Beneficiary Owner (BO) details is indirectly compelled within the corporate registration process.

These insights underscore the imperative of addressing existing gaps in knowledge and awareness regarding BO regulations in Indonesia. Comprehensive socialization campaigns, educational programs, and targeted communication strategies are essential to ensure that practitioners, academics, and the wider public are well-informed and actively engaged in compliance efforts. Additionally, efforts should be directed towards creating an environment where notaries and clients feel encouraged to participate in the disclosure of BO information, streamlining the corporate registration process and promoting transparency.

Ridwan Khairandy, an expert in Commercial Law at Universitas Islam Indonesia, asserts that Indonesia's legal system predominantly concentrates on the realm of legal ownership. Consequently, the country requires considerable time to adequately prepare and adapt for the more comprehensive regulation of beneficial ownership (BO). Currently, Indonesia's legal system primarily addresses legal ownership, leaving certain gaps that corporations may exploit in their business practices.

These gaps in regulations pertaining to legal ownership create opportunities for corporations to navigate their activities. Therefore, the implementation of BO regulations in Indonesia, as outlined in Perpres No. 13 of 2018, faces challenges in achieving comprehensive and effective execution. The observation suggests that there is still work to be done to enhance and refine the implementation of BO regulations in Indonesia, aligning them with the evolving needs of the legal and business landscape.

Hence, it can be inferred that challenges in implementing regulations concerning beneficial ownership (BO) have led to a situation where these rules have encountered stagnation and limited progress. This analogy aligns with Scholten's assertion: "A law that remains unenforced essentially loses its status as law." This comparison underscores the idea that the effectiveness of laws depends not only on their existence in legal texts but also on their successful

application in practice. The current hurdles in the implementation of BO regulations highlight the need for concerted efforts to overcome obstacles and ensure the practical enforcement of these legal provisions." In essence, it can be asserted that the functioning of the law is contingent upon human action. Those individuals serving as lawmakers have the responsibility to not only enact laws but also to actively execute and implement them. Through this process, the law is set in motion, fulfilling its intended purpose and function.

Lesson Learn Or Reference Material for Beneficial Owner Regulations in Indonesia

Based on the insights presented in the previous section, it is evident that the regulation of Beneficial Ownership (BO) in Indonesia requires additional enhancements and strengthening in various aspects. Drawing lessons from other countries that have successfully implemented BO rules, such as Germany, can provide valuable guidance. One key takeaway is the implementation of sanctions for violators.

As highlighted in the initial problem statement, the BO regulation in Germany, outlined in the *Geldwäschegesetz* (GWG), not only imposes sanctions for those involved in money laundering but also introduces administrative penalties in the form of fines for individuals obligated to register the BO in the Transparency Register. This multifaceted approach to sanctions serves as a notable lesson for Indonesia.

Incorporating robust sanctions within the regulatory framework can act as a deterrent and enhance the effectiveness of BO regulations. It not only addresses serious offenses like money laundering but also ensures compliance with the registration requirements, promoting a more transparent and accountable business environment. This lesson from Germany underscores the importance of a comprehensive and enforceable regulatory framework for beneficial ownership in Indonesia.

The clear and unequivocal statement of sanctions indicates a strong commitment to achieving the effective implementation of the regulation by the public, particularly corporate entities. The imposition of sanctions serves as a form of repressive social control employed by the government, establishing rules to regulate societal dynamics. These sanctions play a crucial role in exerting pressure on the community, emphasizing the imperative of compliance. Individuals and corporations are compelled to adhere to the rules, recognizing that failure to do so will result in repercussions in the form of sanctions. This approach reinforces the seriousness of the regulatory framework and promotes a culture of obedience within the community.

Not only in Germany, but most developed countries that have rules on the BO also provide clear sanctions for violators. The inclusion of explicit sanctions provisions serves to underscore the importance for every obligated party to accurately report Beneficial Ownership (BO) information and maintain discipline in regularly updating such information. The existence of sanctions acts as a self-enforcing mechanism, ensuring that parties comply with BO reporting requirements. This not only emphasizes the gravity of adhering to regulations but also incentivizes accurate and timely BO disclosures.

A second lesson that Indonesia can glean from Germany's approach to Germany's regulations is the establishment of an independent entity to manage and house BO information. Germany has implemented the Transparency Register, an online platform designed for corporations to input BO-related information centrally. This approach aims to consolidate and centralize BO information efficiently.

In Indonesia, a similar centralized and online system exists for administrative processes in the realm of business entities, known as AHU Online in the Administration of Business Entity (SABU). This system falls under the jurisdiction of the Ministry of Law and Human Rights of the Republic of Indonesia (Kemenkumham). The presence of such a centralized platform streamlines the BO reporting process, making it more accessible, transparent, and conducive to effective regulatory oversight. Indonesia can thus draw from Germany's model to its own centralized mechanisms for managing BO information.

The third aspect that Indonesia can learn from Germany regarding Beneficial Ownership (BO) rules is the role of the Notary in the registration process. In Germany, the Notary does not need to input BO information directly but serves as a representative party for the relevant corporation. In contrast, Perpres No. 13 of 2018 in Indonesia allows founders, management, or other authorized parties (aside from notaries) to input BO data. However, in practice, only Notaries can act as applicants and log in to AHU Online, deviating from the stipulations in Article 18 paragraph (3) letters a and c.

To address this, having a separate platform for BO information could facilitate provisions that eliminate the requirement for Notaries to directly input BO information. This would, in turn, ease the burden of responsibility on Notaries, as they would not be obligated to register BO through their professional position. Given the susceptibility to data fraud when capturing or tracing BO information, such a change could mitigate the legal risks for Notaries and contribute to a more efficient and secure registration process.

CONCLUSIONS AND RECOMMENDATIONS

Based on the results of the study accompanied by the discussion listed in the previous chapter, there are 2 (two) conclusion points that can be drawn from this paper, including:

- a. The regulation regarding BO in Germany is generally regulated in the *Geldwäschegesetz / GwG* (German Anti Money Laundry Act) where the substance of this regulation regulates money laundering and other elements to eradicate that specific criminal act. The role of the Notary himself in this BO rule is to make a deed related to the corporation and register it along with the BO data owned by the corporation, but in Germany, it is possible for a settlement by mediation and affiliation that can be done by a notary. *GwG* also arranged for a special forum to collect data or information about this BO, namely the Transparency Register so that the input of information on this BO could be done centrally. Although there is a separate forum regarding this BO, it does not necessarily make information about this BO accessible to the public, access will be given to agencies for legal proceedings, inputting

parties, as well as other agencies with an interest in it (such as Advocates and Notaries). If these BO registration obligations are not complied with or the BO information that has been entered is not updated regularly, there will be sanctions imposed on the corporation starting from € 100,000 (one hundred thousand Euros) to € 1,000,000 (one million Euros).

- b. There are 3 (three) things that can be modeled (lesson learned) from BO arrangements in Germany to be implemented in Indonesia. First, Indonesia must provide clear sanction provisions so that the obligation to input BO information contained in a corporation is not underestimated. Second, Indonesia must have its place to store information about the BO, as well as the Transparency Register owned by Germany. Third, it does not make the Notary solely the party that can register this BO information because until now both SABU and SABH for corporate and BO registration can only be accessed by parties who have accounts that are notaries.

REFERENCES

_____, 2013, *Sosiologi Suatu Pengantar*, Jakarta, Rajawali Press

Andreas Richter, *The New Transparency Register In Germany*, Insights, Vol. 4, No. 11, December 2017.

ACAMS, *European Union Directives*, accessed on <https://www.acams.org/aml-resources/eu-fourth-aml-directive/>

Bafin (*Federal Financial Supervisory Authority*), *Geldwäschegesetz/Money Laundering Act (GwG)*

European Commission, *Types of law*, accessed on https://ec.europa.eu/info/law/law-making-process/types-eu-law_en

Fredrik Hagmann, 2017, *Beneficial Ownership - A Concept in Identity Crisis*, Lund University, Lund.

G-20 AntiCorruption Working Group, *Guide to Beneficial Ownership Information: Legal Entities and Legal Arrangements*, accessed on https://star.worldbank.org/sites/star/files/g20_bo_country_guide_germany.pdf

Hukum Online, *Panama Papers Hingga Offshore Leaks, Skandal Yang Melibatkan Law Firm* accessed on, <https://www.hukumonline.com/berita/baca/1t5704efc5c2031/panama-papers-hingga-offshore-leaks--skandal-yang-melibatkan-law-firm>

Hengeler Mueller, *Key Information Regarding The Transparency Register Under Section 18 Et Seq. The German Anti-Money Laundering Act (Geldwäschegesetz, „Gwg“) – New Obligations Of Companies And Shareholders*, Agustus 2017.

Melchers Law Firm, 2017, *The new version of the German Anti-Money Laundering Act following the implementation of the fourth EU money-laundering directive, the execution of the EU money transfer regulation, and the reorganization of the Central Office for Financial Transaction Investigations*, p. 1, accessed on <https://ally-law.com/wp-content/uploads/2017/09/Newsletter-German-Anti-Money-Laundering-Act.pdf>

Maryati Abdullah, *Menguak Beneficial Owner, Menguak Kamufase Ekonomi*, accessed on <<https://pwyp-indonesia.org/id/155817/menguak-beneficial-ownership-membongkar-kamufase-ekonomi/>

Peraturan Presiden [No. 13 Tahun 2018](#) tentang Penerapan Prinsip Mengenali Pemilik Manfaat dari Korporasi Dalam Rangka Pencegahan dan Pemberantasan Tindak Pidana Pencucian Uang dan Tindak Pidana Pendanaan Terorisme

P. Scholten, Nederlands Burgelijk, *Handleiding tot de Boefening van het Nederlandsch Burgelijk Recht, Algemene Deel*, dalam Satjipto Rahardjo, 1980, *Hukum dan Masyarakat*, Angkasa, Bandung Journal/E-books/PDF sources

Reindold, GEIMER, 2000, *XXII International Congress Of Latin Notaries Report Of The German Delegation: The Circulation Of Notarial Acts And Their Effect In Law*, Bundesnotakammer, Muenchen

Soerjono Soekanto, 1986, *Pengantar Penelitian Hukum*, Universitas Indonesia, Jakarta