

IMPLEMENTATION OF THE DEFERRED PROSECUTION AGREEMENT (DPA) CONCEPT IN HANDLING CORPORATE CRIME IN THE LAWS OF INDONESIA AND OTHER COUNTRIES

Metty Murni Wati Ibrahim¹, Jovita Irawati², Jamin Ginting³, Nelson Pardamean Purba⁴

Universitas Borobudur Indonesia¹

Universitas Pelita Harapan, Indonesia²

Universitas Pelita Harapan, Indonesia³

Universitas Jayabaya, Indonesia⁴

Email: angelibrahim@yahoo.com¹, jovitairawati@gmail.com², jamin.ginting@uph.edu³, nelsonpurba1976@gmail.com⁴

ABSTRACT

This research uses a normative empirical research method that combines a normative analysis approach with empirical methods to explore certain legal issues that discuss the concept of a Deferred Prosecution Agreement (DPA) as an alternative dispute resolution in corporate crime cases in Indonesia, taking into account the experiences of the United States and the United Kingdom. The main focus is to identify the advantages and disadvantages of DPA implementation in Indonesia, including maintaining corporate reputation, minimizing the risk of bankruptcy, and resolving cases efficiently. The weaknesses of DPA in Indonesia include its vulnerability to abuse of authority and the absence of specific regulations governing its use.

Keywords: Deferred Prosecution Agreement (DPA); Corporate Crime; Dispute Resolution

Introduction

Deferred Prosecution Agreement (DPA) is an agreement between the prosecutor and the company or defendant in a corporate crime case where the prosecutor agrees to delay or suspend criminal prosecution as long as the defendant meets certain agreed terms and criteria (Hotmaulana Hutauruk, 2013). This concept is generally applied in countries with a common law legal system, such as the United States and England. In practice, the DPA gives prosecutors the flexibility to pause or suspend criminal proceedings against certain companies or individuals involved in corporate crimes, such as financial fraud, money laundering, or other violations of corporate law. The main purpose of the DPA is to encourage cooperation from companies or individuals in investigating and uncovering crimes that occur, as well as to allow companies to improve their legal policies and practices without having to face lengthy and costly court proceedings (Harkrisnowo, 2019).

Conditions usually stated in a DPA include payment of fines or restitution to affected parties, implementation of changes in company policy, independent oversight of company activities, and cooperation in the investigation and prosecution of other

perpetrators involved. In the case of companies, the DPA may also include the establishment or improvement of a compliance program to prevent future violations of the law (Merenda & Irwin, n.d.). The implementation of DPA in several countries has provided significant benefits, such as speeding up the case resolution process, avoiding the risk of company bankruptcy, and obtaining additional sources of income for the government through the payment of fines or restitution. However, there is also criticism of the use of DPA, especially regarding transparency and accountability in the law enforcement process, as well as the possibility that DPA could be considered a form of evasion of sanctions that should be applied fairly and firmly (Oded, 2011).

The implementation of Deferred Prosecution Agreements (DPA) as an alternative in handling corporate crime cases raises several important considerations regarding its advantages and disadvantages, especially if applied in Indonesia by comparing experiences in countries such as the United Kingdom and the United States. One of the primary advantages of DPA is its ability to avoid potential bankruptcy or insolvency of corporations due to harsh formal prosecution in the criminal realm. With DPA, companies can collaborate with law enforcement authorities to resolve cases cooperatively without going through court proceedings, and without facing consequences that may significantly damage the business. It allows companies to continue operating and prevent widespread negative impacts on employees and other stakeholders.

Additionally, DPA can expedite case resolutions and reduce the costs of lengthy legal processes. Companies willing to cooperate with authorities can obtain legal certainty more quickly and focus on internal improvements and the prevention of future violations. Experiences in the UK and the US have shown that DPA has become an effective tool for addressing corporate crime without sacrificing the financial stability of companies. However, there are also drawbacks and criticisms of DPA implementation. Some are concerned that DPA could be seen as a lenient form of legal treatment towards corporations committing serious violations. Criticisms also arise regarding the transparency of the DPA negotiation process and the risk of conflicts of interest that may arise. Additionally, there are ethical questions about whether settlements outside the court provide adequate justice to the victims of corporate crime (Triwijaya, Fajrin, & Nurrahma, 2020).

In the context of Indonesia, experiences from other countries can provide inspiration for developing a concept for implementing DPA that is suitable for local conditions and needs. The undertaking of DPA in Indonesia should consider principles of justice, transparency, and accountability while ensuring that the interests of the public and victims of corporate crime remain a priority. A comparative study of experiences in the UK and the United States can provide a deeper understanding of how DPA can be effectively and sustainably implemented in Indonesia.

Research Method

The normative empirical research method is an approach that combines normative analysis with empirical methods to explore specific legal issues. This approach involves

two main components: first, normative analysis related to legal research, which entails studying legal aspects such as regulations, doctrines, and court decisions to understand the relevant legal framework. Second, the empirical approach involves collecting empirical data directly or through case studies to test or support hypotheses that arise from normative analysis (Ishaq, 2017). By integrating both approaches, the normative empirical methodology enables researchers to gain a comprehensive understanding of legal issues, not only from theoretical and normative perspectives but also from practical viewpoints based on collected empirical evidence. The approach can be applied in the context of researching the implementation of Deferred Prosecution Agreements (DPA) in Indonesian law and comparing it with other countries, by exploring relevant legal frameworks and testing the effectiveness of DPA based on empirical data related to the experiences of countries that have adopted it.

Approach

The legislative approach and the analytical (interpretative) approach are two different yet complementary approaches in legal research. The legislative approach involves the study and analysis of applicable legal texts, including laws, government regulations, and court decisions. This approach emphasizes understanding written legal provisions and the prevailing legal structure. On the other hand, the analytical approach refers to the interpretation and analysis of these legal texts, considering social, political, and economic contexts. The analytical approach enables researchers to explore the meaning and implications of legal provisions, as well as identify gaps or issues that may arise in their implementation (Purwati, 2020). By integrating these two approaches, researchers can attain a comprehensive understanding of the relevant legal framework and apply critical analysis to the legal issues under investigation, including within the context of researching the implementation of Deferred Prosecution Agreements (DPA) in Indonesian law and its comparison with other jurisdictions. This approach enables researchers not only to comprehend the formal aspects of legal regulations but also to explore practical implications and potential improvements in their implementation.

Result and Discussion

Deferred Prosecution Agreement (DPA) as a form of handling corporate crime

The occurrence of corporate crime often entails significant ramifications, leading to societal distress. Moreover, corporate wrongdoing is frequently met with criminal sanctions, which, however, do not adequately redress the harm suffered by society. Therefore, an alternative dispute resolution mechanism, such as deferred prosecution agreements (DPA), becomes imperative. DPA represents an informal agreement between defense counsel or defendants and public prosecutors, aimed at establishing mandatory requirements for the offenders to fulfill. While the Deferred Prosecution Agreement (DPA) scheme originates from the Common Law legal system, its implementation in Indonesia, which follows the civil law legal system, remains plausible. Comparative studies between legal systems have facilitated the convergence or harmonization of principles from both systems. Consequently, this research will

explore the concept of DPA in the context of corporate criminal offenses. To develop the concept of deferred prosecution in Indonesia, the author will conduct a comparative analysis between the provisions of Deferred Prosecution Agreements as stipulated in the Bribery Act 2010 in the United States and the Crime and Courts Act 2013 in the United Kingdom (Sprenger, 2015).

Table 1
DPA Arrangement Concept

Concept	Amerika	England
Legal subject	Rechtspersoon and natuurlijkpersoon	Rechtspersoon
Court involvement	Only prosecutors are involved	Jury involvement is required
Investigation	It is permissible to ask for outside help	Special investigators are not allowed to involve outside parties
Prosecution	Federal prosecutors and state prosecutors	Only a prosecutor is appointed
Criminal acts that can be resolved through DPA	All but the cases involved national security, foreign affairs, and state officials	Bribery crimes and corporate crimes

In the United States and the United Kingdom, Deferred Prosecution Agreements (DPAs) are utilized as alternative dispute resolution mechanisms specifically for criminal offenses committed by corporations (Recht Persoon). However, in the United States, besides being applicable to corporations, DPAs can also involve individuals (natuurlijk persoon). The author tends to recommend the concept of DPAs applied in the UK, where DPAs can only be utilized against corporations. This preference arises from the significant impact criminal prosecution against corporations can have on the company, as evidenced by the case of Volkswagen, which faced criminal fines. The repercussions extend beyond the company's financial losses, affecting public trust and impacting employees, such as the mass layoffs experienced by Volkswagen due to stock price declines and public boycotts (Sinaga, 2021).

In the United States, the resolution of cases using Deferred Prosecution Agreements (DPA) is carried out by prosecutors without directly involving the court. The court merely functions as a supervisory body monitoring the progress of ongoing cases. On the other hand, in the UK, the decision on whether a case will be settled through a DPA or not depends on the jury's decision in court. Furthermore, even the terms that defendants must fulfill in a DPA are determined at the request of the court's jury. In the UK, the court's jury plays a significant role in making decisions and findings of fact that will be applied by the judge. The investigative process in the United States has evolved well, where investigators can seek assistance from external parties for investigations. Although the law does not specifically define who constitutes an

"external party," the author concludes that this may equate to expert assistance in Indonesia. On the other hand, in the UK, investigative rules are more closed, where investigators are not allowed to involve external parties. The limitation aims to avoid external party intervention in investigations conducted by specifically appointed investigators, thus ensuring that investigators maintain high integrity and can work independently (Mutiara, 2019).

The DPA concept that can be applied in Indonesia includes (Iqbal, 2020):

1. Corporate Cooperation Agreement

Without external pressure or intervention, prosecutors may offer corporations to agree to a Deferred Prosecution Agreement (DPA) as a form of accountability for their wrongdoings. Case resolutions through DPAs are conducted confidentially and should not be publicized, as legal cases involving corporations often have the potential to damage public trust. The impacts could range from stock value declines, and decreased consumer confidence in the company's products, to potential boycotts by the public. The primary principle of the DPA concept is to resolve legal issues in a manner that minimizes the risk of bankruptcy or insolvency of a company.

2. Oversight by Judges

In the confidential resolution of cases through Deferred Prosecution Agreements (DPA), the role of judges in overseeing this process becomes crucial. As the implementers of the DPA process, prosecutors are obligated to regularly report case developments to the judge. This is aimed at preventing legal abuses and ensuring that the case resolution process through DPA remains in line with the principles of justice. The presence of judges as overseers helps ensure that the primary objective of the DPA, which is to satisfy the interest of justice, is effectively achieved.

3. Setting Agreement Duration

To ensure swift and efficient case resolution in the context of Deferred Prosecution Agreements (DPA), it is important to establish a deadline for resolution to be adhered to by corporations. In DPAs, which are alternative dispute resolution mechanisms, the resolution deadline can refer to Article 48 of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. According to this article, corporations are required to fulfill their obligations within a maximum of 180 days from the signing of the DPA agreement, allowing for an efficient and effective resolution process.

4. Agreement Clauses

Within the consent agreement, there are clauses outlining requirements that corporations must fulfill. Prosecutors will suspend the prosecution process against the corporation if the corporation is willing and capable of meeting these requirements. Formal prosecution will be waived if the corporation successfully fulfills all agreed-upon requirements. However, if the corporation fails or is unable to meet the requirements, prosecutors may proceed with formal prosecution. The conditions that can be stipulated in the agreement may refer to the last provisions of the Criminal Code, particularly Article 120. Examples of these conditions include

compensation payments, restitution for criminal acts, fulfillment of neglected obligations, customary obligation enforcement, job training financing, asset forfeiture or proceeds obtained from criminal acts, and specific license revocations.

5. Considerations for DPA Usage

Before deciding whether a corporate criminal case will be resolved through penal or non-penal processes (via Deferred Prosecution Agreement/DPA), prosecutors must consider various conditions stipulated in the Draft Criminal Code (KUHP). These considerations include:

- a) Level of Loss or Impact Inflicted: If the loss or impact inflicted is significant, then the case can be resolved through the DPA mechanism. However, if the loss is relatively small (below 1 billion) and its impact is not significant, resolving the case through DPA is not recommended.
- b) Level of Corporate Executive Involvement: If corporate executives are involved in a criminal offense, they should be held accountable. The principle of "Societas delinquent nonpotest" should be applied to determine the criminal responsibility of corporate executives.
- c) Duration of the Criminal Offense: If the criminal offense has been ongoing for a long time continuously, thus the impact and benefits obtained by the corporation are significant. In this case, resolution through penal processes is more advisable because there is no corporate goodwill to rectify itself.
- d) Frequency of Corporate Criminal Offenses: The frequency of criminal offenses is also related to the impact and benefits derived from the crime. Prosecutors need to consider whether resolution through DPA is viable by considering the frequency of criminal offenses.
- e) Nature of Criminal Offense: Criminal offenses can be attributed to corporations if they are intentionally committed by individuals affiliated with the corporation to benefit the corporation.
- f) Involvement of Officials: In cases involving government officials, resolution through DPA is not recommended and should be settled through penal processes.
- g) Legal and Justice Values in Society: It is important to explore the legal and justice values that exist in society to avoid controversial or unacceptable decisions.
- h) Corporate Track Record: The corporate track record from its establishment to the history of violations committed also needs to be considered to assess the corporation's compliance with regulations.
- i) Impact of Prosecution on the Corporation: It needs to be predicted whether prosecution will harm the corporation's health, reputation, and public trust. If prosecution has the potential to damage the corporation, resolving the case through DPA can be considered an alternative.

By considering all these conditions, prosecutors can make the right decision on whether corporate criminal cases will be resolved through penal processes or Deferred Prosecution Agreements (DPA) outside the court.

Advantages and Weaknesses of Implementing Deferred Prosecution Agreement (DPA) in Indonesia

There are advantages and disadvantages to implementing a deferred prosecution agreement (DPA) in Indonesia, including (McAuliffe, 2014):

1. Advantages

a) Preservation of Corporate Reputation and Trust

Corporate reputation is a key factor in the business world, as reputation, whether positive or negative, serves as a crucial indicator of a company's success. According to Transparency International, in the complex global market, trust and integrity are paramount for businesses. Companies that understand the importance of building trust among employees, customers, business partners, and other stakeholders can achieve sustainability in their business endeavors. Strengthening corporate integrity is essential to safeguarding the reputation and continuity of a company's business operations. Resolving legal issues through Deferred Prosecution Agreements (DPAs) confidentially can help maintain the company's reputation, thereby supporting its health and continuity.

b) Minimization of Corporate Bankruptcy

Prosecution against corporations can have chain reactions that not only threaten the bankruptcy of the corporation but also lead to the loss of consumer trust, withdrawal of business partners by withdrawing capital or selling corporate shares, and so forth. These chain reactions can be serious, as experienced by corporations like Siemens and Volkswagen. Due to the decline in stock value, business partners withdrew their investments, consumers boycotted their products, and both companies were forced to carry out mass layoffs of hundreds of thousands of employees across their subsidiaries worldwide. These impacts not only affect national economies but also have international economic repercussions, leading to new unemployment.

c) Efficient, Simplified, and Cost-effective Case Resolution

Resolving cases through court proceedings (Penal suggestion) is often considered the death knell for corporations due to its lengthy nature. During the trial process, corporations are often hindered from conducting their business activities as they await decisions from the court. Conversely, the concept of resolving issues through Deferred Prosecution Agreements (DPAs) as an alternative outside the court can be swift. DPAs involve prosecutors and corporations in resolving issues without the need for lengthy court proceedings. The role of the judge is merely to oversee the DPA process.

d) Prosecutors Given Authority to Regulate Agreement Content

If the corporate crime results in losses to victims or society, prosecutors can include crucial clauses in the agreement such as compensation payments to compensate for the material losses suffered by the victims. Additionally, clauses regarding the obligation to make reparations can be stipulated if the crime results in damage or losses that need to be rectified. If the company fails to fulfill the

agreed-upon obligations, clauses regarding the enforcement of neglected obligations can be applied. One of the crucial clauses is to regulate the confiscation of property or profits obtained from the criminal offense to eliminate the benefits derived from such criminal activities.

2. Weakness

a) Vulnerability to Abuse of Authority

The first weakness of the Deferred Prosecution Agreement (DPA) concept is its susceptibility to abuse of authority. In some cases, prosecutors or authorities authorized to negotiate DPAs may misuse their authority unfairly or unethically. For instance, there is a risk that prosecutors may use DPAs for political or personal interests, or provide special treatment to certain corporations or individuals without proper consideration. Such abuse of authority can undermine the integrity of the judicial system and diminish public trust in the legal process.

b) Abuse of Authority by the Maker Based on a Specific Position or Office

DPAs are also vulnerable to abuse of authority by parties involved in their creation, especially based on their specific position or office. For example, if the party negotiating the DPA has personal interests or ties to certain corporations, this can influence their decisions in setting the terms of the DPA. Such abuse of authority can lead to disparities in legal treatment and undermine justice.

c) Lack of Specific Regulations or *Lex Specialis*

Another weakness of the DPA concept is the lack of specific regulations or *lex specialis* that clearly govern the procedures, criteria, and limitations in the use of DPAs. It can result in legal uncertainty and varied interpretations in the application of DPAs in different cases. Without clear guidelines, there is a risk that DPAs may be applied inconsistently or not in line with proper legal principles. Therefore, the development of more specific and clear regulations regarding the use of DPAs is essential to maintain transparency and integrity in law enforcement.

Conclusion

In addressing corporate crimes, the Deferred Prosecution Agreement (DPA) emerges as a significant alternative dispute resolution mechanism, especially in cases involving substantial losses or impacts and corporate entities. Although rooted in the common law system, the application of the DPA concept in Indonesia, which operates under a civil law system, remains feasible through comparative studies between the two legal frameworks. The DPA concept entails an informal agreement among public prosecutors, attorneys, and defendants to establish terms to be fulfilled by corporations. In the UK, DPAs are exclusive to corporations, whereas in the US, they may involve individuals as well. However, the British approach is preferable as corporate prosecutions can significantly affect companies and society. In the US, the DPA process involves prosecutors without court involvement, whereas in the UK, it requires a jury to determine if a case can be resolved through a DPA. Other factors such as the duration and frequency of offenses, as well as legal values within society, also constitute crucial considerations

before deciding whether corporate criminal cases should be settled through criminal proceedings or DPAs outside the courtroom.

The employment of Deferred Prosecution Agreements (DPAs) in Indonesia offers significant advantages in safeguarding corporate reputation and trust, minimizing the risk of corporate bankruptcy, and resolving cases swiftly, simply, and cost-effectively. Through DPAs, legal issues can be resolved confidentially without protracted court proceedings, enabling corporations to focus on their business activities. Additionally, prosecutors have the authority to regulate the contents of DPA agreements, including crucial clauses such as compensation payments and the forfeiture of proceeds from criminal activities. However, there are weaknesses in DPA implementation, including susceptibility to abuse of authority by involved parties, both politically and personally, as well as a lack of specific regulations clearly delineating DPA usage procedures and criteria. To ensure fairness and integrity in law enforcement, the development of more specific regulations related to DPA usage is necessary to ensure transparent processes aligned with correct legal principles.

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