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# The Implications of the Passive Money Laundering Regulation Are Formulated With the Form of Guilt Pro Parte Dolus Pro Parte Culpa

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**ABSTRACT**

Article 5 paragraph (1) of Law Number 8 of 2010 between passive money laundering carried out by intention and passive money laundering committed due to negligence is threatened with the same punishment or known as pro parte dolus pro parte culpa. Even though theoretically, the form of guilt intention has a heavier gradation than the form of guilt negligence. This article aims to analyze the implications of form of guilt pro parte dolus pro parte culpa in the regulation of passive money laundering. This article uses a normative legal research method with a conceptual approach, statute approach, and case approach. Theoretically, the results obtained are the implication of the form of guilt pro parte dolus pro parte culpa in the regulation of passive money laundering is contrary to the theory of guilt and proportionality theory of crime, while practically the implication is that there is a disproportionate imposition of criminal charges. The results of the writing of this article can be useful as material in improving the regulation of passive money laundering in the future.

Keywords: Implication; Passive money laundering; Form of Guilt; Pro parte dolus pro parte culpa.


## 1. Introduction

As Packer puts it, there are three core problems in criminal law, namely offense, guilt, and punishment. (Packer, 1968). Guilt is the primary condition for the perpetrator of an act against the law to be punished. The doctrine of guilt is a fundamental problem in criminal law because it relates to the quality of the intense criminal perpetrator of a criminal offense, whether or not the perpetrator of a criminal act is convicted depends on whether or not there is a guilt in him, under the fundamental principle in criminal law, namely the principle of no punishment without guilt or recognition with geen straf zonder schuld. The equivalent of this adage in Latin is actus non facit reum nisi mens sit rea,

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whereas, in Britain and the United States, this principle reads an act does not make a person guilty unless his mind is guilty (Sofyan & Azisa, 2016).

The principle of geen straf zonder schuld is considered fundamental because in this principle, the foundation of humanity is laid down in the form of the legal protection of human rights (Amrullah, 2003).

The operationalization of the principle of no punishment without guilt is manifested in two forms of guilt known in criminal law: intention (dolus) and negligence (culpa). In the doctrine, intention and negligence have different gradations. The intention has a heavier gradation than negligence. The consequence of this situation is that a criminal act committed by intention will be punished with a more solemn sanction than a criminal act committed due to negligence. This situation follows the postulate, which reads animus homis est anima scripti, which means that someone's intention is the essence of an act (Hiariej, 2016).

However, what happens in the formulation of the criminal act of passive money laundering as regulated in Article 5 paragraph (1) of Law Number 8 of 2010 concerning the Prevention and Eradication of the Crime of Money Laundering is not so, between the criminal act of passive money laundering committed by intention and the criminal act of passive money laundering committed due to negligence shall be punished with the same punishment, This can be seen from the element of "he knows or should reasonably suspect " in Article 5 paragraph (1) Law Number 8 of 2010, the phrase “he knows” was the equivalent of intention (dolus), while the phrase “should reasonably suspect” was the equivalent of negligence (culpa), such offense formulations are known as pro parte dolus pro parte culpa. For more details, can see the formulation of Article 5 paragraph (1) of Law Number 8 of 2010 as follows:

Anyone who receives or controls the placement, transfer, payment, grant, donation, safekeeping, exchange, or use of assets which he knows or should reasonably suspect is the result of a crime as referred to in Article 2 paragraph (1) shall be sentenced to imprisonment of 5 (five) years and a maximum fine of Rp. 1.000.000.000, 00 (one billion rupiahs).

Therefore clearly, such a problem can be seen as a dogmatic phenomenon of law that is contrary to the principle of law, especially concerning the principle no punishment without guilt, the operation of which is manifested in two forms of guilt, namely intention (dolus) and negligence (culpa), which is intentional has a heavier gradation than negligence (Chazawi, 2014).

Criminal law experts have also considered the weakness of pro parte dolus pro parte culpa form of guilt. Romli Atmasasmita said, in the context of the criminal act of money laundering, which uses the formula "which he knows or should reasonably suspect," it is contrary to the dolus or culpa doctrine (Atmasasmita, 2017). Likewise, Remmelink and Niebor stated that the pro parte dolus pro parte culpa offense's formulation has one weakness: both the negligence variant and the deliberate variant will be threatened with the same punishment (Remmelink, 2003).

Departing from this background, the purpose of this study is to determine and analyze the implications of the passive money laundering crime formulated in the pro parte dolus pro parte culpa form of guilt.

The ideas offered in this article, in the revision of the anti-money laundering law in the future, the regulation of the criminal act of passive money laundering, which is carried out by intention, and passive money laundering, which is carried out due to negligence, must be formulated separately. Each of them is given the threat of criminal sanctions proportionally according to the gradation of the guilt. In this connection, Hart argued, sometimes the legislature will mark off a greater maximum penalty for things done with a certain intention than for the same thing done without that intention (Hart, 2008).

This article's ideas can be justified for their originality, and no one has had such a statement. Therefore, this idea is essential for improving the anti-money laundering law in the future, given the implications of the pro parte dolus pro parte culpa form of guilt in passive money laundering arrangements profound.

In conducting the analysis discussed in this article, the author uses doctrinal law research methods, which will be explained more comprehensively in a separate section. The main findings are theoretical and practical implications for the formulation of passive money laundering provisions in the form of pro parte dolus pro parte culpa. The theoretical implication is that pro parte dolus pro parte culpa form of guilt contradicts the theory of guilt and the theory of criminal proportionality, while the

practical implication is that it creates the potential for passive money laundering which is deliberately punishable lighter than that committed due to negligence, of course this is an injustice which real.

In this article, we will discuss comprehensively the research methods used, the theoretical and practical implications of the pro parte dolus pro parte culpa error in the formulation of passive money laundering, and finally, describe the conclusions and recommendations that can be given.

## 2. Research methods

This article uses doctrinal legal research with statute approach, conceptual approach, and case approach. In this case, the authors use secondary data in the form of primary legal materials, namely statutory regulations and court decisions, and secondary legal materials in the form of literature relevant to the issues raised in books and journals.

## 3. Result and discussion

### 3.1. Theoretical implications of the form of guilt pro parte dolus pro parte culpa in the formulation of the crime of passive money laundering

In legal science, a theory is in the middle layer, namely between legal dogmatics at the lowest level and legal philosophy at the top layer. The logical consequence of the "middle" role of legal theory bridges the legal philosophy, which is very abstract in nature of all the theoretical reflections of legal studies, and dogmatic legal science whose studies are limited to positive law in a particular state legal system. Thus, the legal theory occupies a "middle role" in the legal science layer's theoretical discipline (Atmadja & Budhiarta, 2018).

The consequence of the construction of stratified layers of legal science in a hierarchical system, namely between legal philosophy, legal theory, and legal dogmatics, makes legal philosophy as meta-theory of legal theory and legal theory as meta-theory of legal dogmatics. (Bruggink, 1999). What is meant by meta-theory is a discipline whose object of study is another science (Gijssels & Hoecke, 2000), or more easily understood as a science whose object is other sciences (Efendi et al., 2016). Thus, the object of the study of legal theory is legal dogmatics, and the legal theory itself is the object of the study of legal philosophy.

Given the position of legal theory as a meta-theory of legal dogmatics and positive law as part of legal dogmatics, legal dogmatics should be under legal theory. In this case, legal theory acts as das sollen, while legal dogmatics acts as das sein. As stated by Munir Fuady, legal dogmatic discusses legal issues concerning the applicable positive legal regulations so that it is "as is" (das sein). In contrast, the legal theory does not analyze law concerning the applicable positive law, but rather refers to theoretical arguments through deep reasoning, so that in contrast to dogmatic legal science, legal theory sees law as "what should be" (das sollen) (Fuady, 2013).

The legal theory aims to explain "such should be the law", this legal theory is more theoretical than legal dogmatic and has a broader horizon. The legal theory sees and analyzes law from the outside of the law (interdisciplinary), which is different from legal dogmatic, which does it within the law itself (Efendi et al., 2016).

Consequently, if there are deviations in legal dogmatics, it is the legal theory that serves as a means of control. Legal theory will become a tool to straighten out the deviations that occur, even as a guardian, so that legal dogmatics do not deviate from what it should be. Sidharta said that one scope of legal theory is criticism of positive legal norms (Sidharta, 2013). In this context, if there is a positive law that is not true, it is the legal theory that is tasked with exposing the untruth.

This conception relates to the inherent analytical function of legal theory. The analytical function of legal theory is carried out through an attempt to dissect the role and performance of language in the law, the structure of legal norms, its institutions, and how legal order is established (Kusumohamidjojo, 2016). Likewise, the theories that develop in criminal law also function to analyze the dogmatics of criminal law, which in concrete terms can be in the form of criminal law regulations or court decisions on criminal cases.

In the science of criminal law, theoretically, negligence is considered lighter than intentional so that it is directly proportional to the weight of the criminal sanction (strafmaat), that is, offenses that

have the form of negligence are punishable by a lighter criminal sanction than those that have the form of deliberate guilt, thus under the principle of proportionality.

Starting from legal theory's function in analyzing legal dogmatics, the provisions as formulated in article 5 paragraph (1) of Law Number 8 of 2010, especially concerning the form of guilt formulated pro parte dolus pro parte culpa will be seen from a theoretical perspective. In this case the analysis is directed at a review of the form of guilt pro parte dolus pro parte culpa in Article 5 paragraph (1) of Law Number 8 of 2010 from the perspective of guilt theory and criminal proportionality theory.

The existence of an element of error " which he knows or should reasonably suspect " in the formulation of Article 5 paragraph (1) of Law Number 8 of 2010 indicates that the offense was formulated in the form of guilt pro parte dolus pro parte culpa. With this formulation, there will be two possibilities, namely: First, the offender knows that what has been received, controlled, or used is the proceeds of the criminal act, thus the maker of the offense deliberately. Second, the offender should suspect that what is received, controlled, or used is the proceeds of the criminal act, meaning that the offender does not know what has been received, controlled, or used is the proceeds of the crime, in this case the author did his deed because of negligence. Strictly speaking, the offense can be committed either by intention or because of negligence.

Meanwhile, the offense's sanction is a maximum imprisonment of five years and a maximum fine of one billion. The threat of criminal sanctions in the formulation of the article only applies to individuals as the offender. This means that the offense was either committed intentionally or committed because the threat of negligence was the same: maximum imprisonment of five years and a maximum fine of one billion.

In connection with the crime of money laundering that corporations can also carry out, the threat of criminal sanctions is different from individual perpetrators. For corporate actors, the provisions referred to in Article 7 paragraph (1) of Law Number 8 of 2010, namely the principal punishment imposed on the corporation, is a fine of up to Rp. 100.000.000.000,00 (one hundred billion rupiahs).

So, what distinguishes between individuals and corporations as perpetrators of passive money laundering is the criminal threat. For individuals, the threat of punishment is imprisonment and a cumulative fine, while in corporations, the threat of punishment is single, namely a fine. Nevertheless, both individuals and corporations as perpetrators of the criminal act of passive money laundering have similarities, namely whether they do it by intention or because of negligence. The weight of the criminal threat is not differentiated..

As mentioned earlier, theoretically, the form of intentional guilt and the form of negligence guilt have different gradations so that the weight of the threatened sanctions should also be differentiated based on the principle of proportionality.

Andrew von Hirsch mentioned, the principle of proportionality is said to be a requirement of fairness (Hirsch, 1992). If so, reducing its role in determining penalties would make the resulting scheme less just (Hirsch, 1992). Thus it can be emphasized that the threat of disproportionate criminal sanctions is a real injustice.

Therefore, the principle of no punishment without guilt and proportionality must stand side by side and cannot be separated from one another. From the doctrine of no punishment without guilt in the context of theory, it has given birth to forms of guilt, namely intention and negligence, both of which have different natures. And from this difference there is contained in it a proportion which is a reflection of the gradations in each form of guilt.

Even, according to Fletcher, these two principles are important principles of justice, this is evident in his opinion which mentions two important principles of justice; first, that only the guilty should suffer conviction and punishment; and, secondly, that the extent of punishment should be proportionate to the crime committed (Fletcher, 2000). Therefore, it is forbidden to impose criminal sanctions on an innocent person at the level of implementation. The imposition of criminal sanctions must be measured based on the size of guilt made by the offender (Zulfa & Adji, 2011).

Andrew von Hirsch mentioned a desert model is a sentencing scheme that observes the proportionality principle: punishments are scaled according to the seriousness of crimes (Hirsch, 1992). Meanwhile, according to Douglas Husak, criminal justice should implement a theory of desert, which requires inter alia that the severity of the punishment should be proportionate to the crime's

seriousness (Husak, 2003). According to the criminal proportionality theory/ desert theory, the sentence must be proportional to the offense's severity. The severity of the crime's seriousness depends on two things: the losses incurred due to the offender's actions and guilt. So, the conception of separation between criminal acts and guilt adopted by dualistic theory is still relevant in determining the seriousness of offenses.

In the context of the formulation of Article 5 paragraph (1) of Law Number 8 of 2010, the substance is in one act, namely passive money laundering, which consists of two forms of guilt. Thus, because there is only one aspect of the act, there is no other action that can be compared to determine the level of seriousness, therefore to assess the level of severity, it is enough to compare the aspects of guilt alone, namely between intention and negligence. Of course, forms of intentional guilt are taken more seriously than forms of negligence guilt.

Based on this premise of thinking, the proportionate formulation of criminal sanction should be clearly distinguished between passive money laundering carried out by intention and passive money laundering, which is carried out due to negligence. Of course, for passive money laundering which is done by intention, the threat of heavier sanctions is formulated.

Finally, it can be said that theoretically, the implications of the form of guilt pro parte dolus pro parte culpa in the formulation Article 5 paragraph (1) of Law Number 8 of 2010 are contrary to the theory of guilt and also the theory of criminal proportionality. Even if it is drawn at a more philosophical level, the article's formulation is contrary to the principle of guilt and the principle of proportionality.

The basis of the argument is, because the issue of legal principles is at the level of legal philosophy (Marzuki, 2014), and as the layers of legal science, legal theory is at a level below the legal philosophy, then consequently the legal philosophy is a meta-theory of legal theory. Thus the theory of guilt is a derivation of the principle of guilt and also the theory of criminal proportionality is a derivation of the principle of proportionality.

Because it deviates theoretically, then the form of guilt pro parte dolus pro parte culpa in the formulation of Article 5 paragraph (1) of Law 8 of 2010 can be said to be a form of weakness in the formulation stage. With this weakness, it will have a domino effect, which will also impact the application and execution stages.

Remmelink and Nieboer have implicitly thought of the theoretical implication of the formulation of a pro parte dolus pro parte culpa offense. They state that the formulation of a pro parte dolus pro parte culpa offense has one weakness: the culpa variant and the dolus variant will be threatened with the same punishment (Remmelink, 2003). The same thing was also stated by Romli Atmasasmita, in the context of the criminal act of money laundering, which has used a formula, other than "knowing it," it is "should be able to suspect," which is contrary to the dolus or culpa doctrine. (Atmasasmita, 2014).

### 3.2. Practical implications of the form of guilt pro parte dolus pro parte culpa in the formulation of the crime of passive money laundering

In this discussion, the author will analyze the product at the legislative policy stage when it is applied in the realm of applicative/ judicial policy, what is meant in this case is when the provisions regarding the crime of passive money laundering, which contain the form of guilt pro parte dolus pro parte culpa are applied at the level of adjudication process practice. The limited money laundering cases that were tried, primarily passive money laundering, were an obstacle for the author to collect court decisions relevant to this research. The decisions that will be analyzed are decisions against individuals as perpetrators. This is due to the lack of punishment against corporations in general. The basis for these decisions is still using Law Number 15 of 2002. However, it does not diminish the essence of the issues raised in this study, because in Law Number 15 of 2002 and the most recent law, namely Law Number 8 of 2010, the provisions concerning the crime of passive money laundering are both formulated in the form of guilt pro parte dolus pro parte culpa. The decisions are as follows:

1. Decision Number 38/PID.B/TPK/2012/PN.JKT.PST (after this referred to as Case I), the position cases are as follows:

In 2002 UMAR ZEN (53 years) in his position as President Director of PT. Terang Kita has obtained a Letter of Credit (LC) facility from Bank Mandiri worth Rp. 140.000.000.000, 00, which as the guarantor of the LC is PT. Askrindo. When the LC was due, it turned out that PT. Terang Kita could not

complete its obligations so that Bank Mandiri immediately withdrawing deposits of the PT. Askrindo at Bank Mandiri. In connection with the non-repayable LC, UMAR ZEN as the Director of PT. Terang Kita asked SUHARSONO as the Director of Guarantee of PT. Askrindo to provide bailout funds to PT. Terang Kita, who SUHARSONO then introduced, UMAR ZEN to RENE SETYAWAN, the Director of Finance and Information Technology of PT. Askrindo, until then, the request for the bailout can be granted. However, UMAR ZEN could not return this bailout fund, even PT. He asked Askrindo to buy the promissory note belonging to PT. Terang Kita. To cover losses due to LC underwriting and unpaid bailout funds, PT. Askrindo agreed to buy the promissory note belonging to PT. Terang Kita, with the calculation, that the purchase of promissory notes can provide benefits to PT. Askrindo. However, it turned out that UMAR ZEN was also unable to complete its obligation to buy back the promissory note and was unable to return the bailout fund and unable to pay the LC that failed to pay to PT. Askrindo. Around September 2004, at the Radin Ancol Hotel, North Jakarta, UMAR ZEN as the Director of PT. Terang Kita had a meeting with RENE SETYAWAN and ZULFAN LUBIS, who served as Head of Finance and Accounting Division of PT. Askrindo, UMAR ZEN, requested that PT. Askrindo is willing to buy Medium Term Notes to replace and convert PT. Terang Kita's obligations to PT. Askrindo, which was originally a bailout fund and promissory note. At the meeting, RENE SETYAWAN and ZULFAN LUBIS decided to agree to convert the bailout and promissory note into a Medium Term Note for 3 (three) years. However, UMAR ZEN still could not complete its obligation to buy back the Medium Term Note in the amount of Rp. 89.000.000.000,00 along with the interest of Rp. 25.880.814.011,00 and paid the underpaid LC issuance guarantee amounting to Rp. 22.169.201.601 to PT. Askrindo, so that PT. Askrindo suffered a loss and could not provide further bailout funds to UMAR ZEN as the Director of PT. Terang Kita. Later, UMAR ZEN again asked to be given funds to complete the promissory note and Medium Term Note to PT. Askrindo, it turned out that the request was again approved, but the mechanism was provided through investment or placement of funds by PT. Askrindo to the Investment Manager (MI), in the form of KPD (Fund Management Contract), Stock Repo, Mutual Funds, and bonds to the Investment Manager (MI), whereas both ZULFAN LUBIS and RENE SETYAWAN and also UMAR ZEN themselves knew that PT. Askrindo is no longer allowed to provide funds to those concerned. Then, because the BUMN Investment Manager Company (MI) could not carry out the investment, an Investment Manager was chosen, namely PT. Reliance Aset Management (PT. RAM), PT. Jakarta Aset Management (PT. JAM), PT. Jakarta Investment (PT. JI), and PT. Jakarta Securities (PT. JS). UMAR ZEN agreed to provide management fees of 4,5% per year to Investment Managers. During the period 5 January 2006 to 9 September 2008, The loan funds were obtained by PT. Terang Kita from the Investment Manager is Rp. 133.768.750.000,00, which was placed or controlled by UMAR ZEN by transfer to the account of PT. Aluco at Bank BCA with account number 002.304.0911 and to accounts in the name of PT. Terang Kita at Bank Mandiri Cimanggis Branch with account number 157.0000019555. The loan is designed so that UMAR ZEN can obtain funds from PT. Askrindo, which was made as if PT. Askrindo conducts investment fund placements. The funds by UMAR ZEN are used for several things, namely: pay PT. Terang Kita's obligations to PT. Askrindo, namely buying back the promissory note, returning the bailout fund, and paying the LC that failed to pay to PT. Askrindo Rp. 65.000.000.000, 00, transferring payment obligations to PT. Jakarta Investment (PT. JI) of Rp. 35.000.000.000, 00, the rest is used for working capital and its interests. So that in this case, it has resulted in financial losses to the State Cq. PT. Askrindo Rp. 133.768.750.000,00.

In the Case I Decision, it is stated that UMAR ZEN has been legally and convincingly proven guilty of committing the criminal act of corruption jointly and continuously as regulated and is subject to criminal sanctions in Article 2 paragraph (1) juncto Article 18 of Law Number 31 of 1999 concerning Corruption Eradication juncto Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Corruption Eradication juncto Article 55 paragraph (1) of the Criminal Code juncto Article 64 paragraph (1) of the Criminal Code and commits the crime of money laundering as regulated and is subject to criminal penalties in Article 6 paragraph (1) letter a of Law Number 15 of 2002 as amended by Law Number 25 of 2003 concerning the Crime of Money Laundering juncto Article 55 paragraph (1) of the Criminal Code juncto Article 64 paragraph (1) of the Criminal Code. The penalties imposed are imprisonment for 5 (five) years and a fine of Rp. 300.000.000,00 (three hundred million rupiahs) subsidiary imprisonment for 3 (three) months and compensation of Rp. 62.500.000.000, 00

(sixty-two billion five hundred million rupiahs). However, in conducting the analysis, the author will limit the crime of passive money laundering.

2. Decision Number 535 K/Pid.Sus/2014 (After this referred to as Case II), the position case is as follows:

RADEN MAS JOHANES SARWONO, STEFANUS FAROK NURTJAHJA and UMAR MUCHSIN as managers of PT. Nusa Utama Sentosa was appointed as the party that manages and carries out the land transfer process between TOTO KUNTJORO KUSUMAJAYA as the PT's Director. Graha Nusa Utama (PT. GNU), the investor/buyer with the Fatmawati Foundation as the land owner. As the basis for the transfer of the land is the deed of a cooperation agreement for the transfer of land rights on Jalan Fatmawati covering an area of ± 22 Ha which was made in KARTONO Notary dated 18 November 2003, No. 225. Furthermore, RADEN MAS JOHANES SARWONO, STEFANUS FAROK NURTJAHJA, and UMAR MUCHSIN signed a receipt for receiving funds from PT. GNU. Funds received by RADEN MAS JOHANES SARWONO, STEFANUS FAROK NURTJAHJA and UMAR MUCHSIN from TOTO KUNTJORO KUSUMAJAYA as Director of PT. GNU in the form of a check or bilyet giro from account number 1022-0000221147-001 in the name of PT.GNU at Bank Century Senayan, Central Jakarta. During the period 2003 to 2005, there were at least 51 (fifty-one) transactions of checks or bilyet giro deliveries with a total amount of approximately Rp. 40.900.000.000, 00 (forty billion nine hundred million rupiahs), whereas it was known by RADEN MAS JOHANES SARWONO, STEFANUS FAROK NURTJAHJA, and UMAR MUCHSIN that PT. GNU does not own assets, and there are no operational activities in the fields of services, trade, construction, land transportation, industry, agriculture, and printing. It turned out that the funds received were funds from the proceeds of criminal acts of fraud and embezzlement of Century Bank customers by ROBERT TANTULAR.

In Decision Case II it is stated that RADEN MAS JOHANES SARWONO, STEFANUS FAROK NURTJAHJA and UMAR MUCHSIN have been legally and convincingly proven guilty of committing a criminal act of taking part in receiving or controlling the placement, transfer, payment of assets, which he knows or should reasonably suspect is the result of a criminal act and sentenced to each in the form of imprisonment for 6 (six) years and a fine of Rp.1.000.000.000, 00 (one billion rupiahs) subsidiary to 3 (three) months in prison.

In case I and case II above, although both were indicted and decided upon the criminal act of passive money laundering if we pay close attention, there are also fundamental differences, namely concerning the fulfillment of the element "which he knows or should suspect" in Article 6 paragraph (1) of Law Number 15 Year 2002. The authors will explain the difference in the question in the description below.

One of the judges' legal considerations in Case I was as follows:

Considering that to consider the 3rd element, namely "that which he knows or should reasonably suspect is the result of a criminal act", it is necessary to pay attention to the following facts:

a. That the Defendant was the President Director of PT. Terang Kita knows that he may no longer receive funds from PT. Askrindo;

b. Whereas from the witnesses BENNY A. SITUMORANG, MARKUS SURYAWAN explained that at the end of December 2005 at the Sheraton Media Hotel Jalan Gunung Sahari there was a meeting between ZULFAN LUBIS, ERVAN FAJAR MANDALA, TENGKU HELMY AZWARI, JOSEP GINTING, BENNY ANDREAS, MARKUS SURYAWAN, IAN WISAN, ALFAN SUSANTO, and Defendant UMAR ZEN. And at that time, there was an agreement between the Defendant and ZULFAN LUBIS, ERVAN FAJAR MANDALA, TENGKU HELMY AZWARI, JOSEP GINTING, BENNY ANDREAS, MARKUS SURYAWAN, IAN WISAN, ALFAN SUSANTO, namely:

1) PT. Askrindo will place funds/investments to the Investment Managers: PT. Reliance Asset Management (PT. RAM), PT. Harvestindo Asset Management / PT. Suprasurya Asset Management (PT.HAM / PT. SAM) and PT. Jakarta Asset Management / PT. Jakarta Investments (PT. JAM / PT.JI) in the form of a Fund Management Contract (KPD), and ZULFAN LUBIS instructed each Investment Manager to make a KPD offer letter to PT. Askrindo worth Rp. 10.000.000000,- (ten billion rupiah) and the Defendant to prepare the promissory note.

2) The Defendant knew that the Investment Managers did not have an underlying for the placement of funds he obtained from PT. Askrindo, does not own shares, does not have a prospectus

and investments in mutual funds and funds entrusted to sell bonds are also not returned by the Investment Manager because all of the placement of funds in the form of investment is solely a fabrication to get funds belonging to PT. Askrindo, so it is not an actual investment.

3) The defendant agreed to provide a management fee of 4,5% per year to the Investment Managers (PT. RAM and PT. JAM / PT. JI).

4) The Defendant asked the Investment Manager to immediately give/transfer the investment funds to the Defendant UMAR ZEN on the same day after receiving funds from PT. Askrindo.

c. That after the meeting, according to the defendant's request, PT. Askrindo places funds with the Investment Manager, and then the Investment Manager: PT. RAM and PT. JAM / PT. JI / PT. JS distributes funds to PT. Aluco and PT. Terang Kita.

Considering that from the facts described in letters a-c above, it can be seen that Defendant in receiving the transfer of assets in the form of money as considered in element 2, it turns out that he knows or should reasonably suspect the result of a crime in which the placement of funds from PT. Askrindo is opposed to the law and is detrimental to the State's finances or is the result of a criminal act of "corruption", so that the Defendant's action fulfills Element 3 of the Second indictment "which he knows or should reasonably suspect is the result of a criminal act."

Looking at the legal considerations in the Case I mentioned above, it shows that the defendant knew that he was not allowed to receive funds from PT. Askrindo and the defendant also knew that the funds received were the result of fabrication and an evil conspiracy so that the defendant could still receive a loan from PT. Askrindo. Strictly speaking, in the context of passive money laundering, it can be said that the defendant knew that the funds he received were the proceeds of crime, in this case, corruption. Thus, although the legal considerations were not explicitly stated, it was clear that the defendant had an intentional element when receiving funds which were the proceeds of crime. In other words, the act committed by the defendant was a criminal act of passive money laundering, which was committed by intention.

Meanwhile, in Case II, the judges' legal considerations when deciding on the case were as follows:

Concerning the position of the defendants in the case, it was not directly related to Robert Tantular as the predicate crime, but the defendants had a money laundering relationship with Toto Kuncoro, who was also the perpetrator of money laundering from Robert Tantular's funds;

That the Defendants knew that PT. GNU had no assets and no operational activities, so the defendants should have known or should have suspected that the funds received by the defendants were from Ir. Toto Kuntjoro Kusumajaya as Director of PT. GNU from account number 1022-0000221147-001 on behalf of PT. GNU at Bank Century Senayan, Central Jakarta was the result of a criminal act.

That the Defendants received funds from Toto Kuntjoro because the Defendants had been appointed by the Fatmawati Foundation to offer Fatmawati Foundation assets to Toto Kuntjoro as the President Director of PT. GNU, and PT. NUS and also the Chairman of the Foundation know that PT. GNU has no activities.

Starting from the legal considerations above, it can be seen that the defendants did not know directly if the funds received were the proceeds of a criminal act. Knowledge of the absence of activity at PT. GNU is not necessarily an excuse that the defendants knew about the funds received from PT. GNU is derived from a criminal act. In the legal considerations there is the phrase "Defendants should have known or should have suspected", diction "should" in everyday language contains the opposite meaning of the verb attached to it, for example: "he should apologize", the fact is he has not or did not apologize. Likewise, the phrase "should have known" can in fact, be in the form of not knowing. In this connection, Sudarto once mentioned that if someone does not do what he should do, this is the basis for saying that he is negligent. (Sudarto, 2013).

In this legal consideration, the phrase " should have known " is an alternative to the phrase " should have suspected " that is connected with the conjunction "or", according to the author's opinion, between " should have known " and " should have suspected " does not have a difference in principal meaning, for that it can be said that both of them are identical and both are another formulation of the form of negligence. It is different if the phrase used is "know or should have suspected ". If this is used,

the diction "know" in the phrase is the equivalent of deliberate action, and the diction "should have suspected " is the equivalent of negligence.

From this logic of thinking, it can be said that the actions committed by the defendants were a criminal act of passive money laundering committed because of negligence.

The essence of the description above briefly is in Case I, which is a criminal act of passive money laundering which is deliberately sentenced to imprisonment for 5 (five) years and a fine of Rp. 300.000.000,00 (three hundred million rupiah), while in Case II, a criminal act of passive money laundering committed due to negligence, is sentenced to a prison sentence of 6 (six) years and a fine of Rp. 1.000.000.000, 00 (one billion rupiahs). For more details, see the following table:

Table 01.

*Comparison of the penalties imposed on Decision Number 38/PID.B/TPK/2012/PN.JKT.PST and Decision Number 535 K/Pid.Sus/2014*

| | Case I<br>Decision Number 38/PID.B/TPK/2012/PN.JKT.PST | Case II<br>Decision Number 535 K/Pid.Sus/2014 |
|---|---|---|
| Form of guilt | intention | negligent |
| imprisonment | 5 years | 6 years |
| Fines | Rp. 300.000.000,00 | Rp. 1.000.000.000, 00 |

Source: Author Creativity

The fines imposed on both decisions are not under the criminal penalty in Article 6 paragraph (1) of Law Number 15 of 2002, namely a minimum fine of five billion rupiahs and a maximum of fifteen billion rupiahs. Both decisions are criminal fines which dropped under a special minimum threat. However, what concerns the author is not the fines that have been imposed but rather the imprisonment imposed.

Based on the criminal proportionality theory, which requires a balance between crime and the seriousness of the crime, it should be the criminal act of passive money laundering which is committed deliberately receives heavier sanctions than the criminal act of passive money laundering which is committed due to negligence. However, with the form of guilt pro parte dolus pro parte culpa in the formulation of a passive money laundering crime, the opposite occurs that is, the criminal act of passive money laundering which is committed deliberately is sentenced to a lighter sentence than the criminal act of passive money laundering which is committed due to negligence, as happened in Case I and Case II above. This is essentially a disproportionate form of punishment.

Though Andrew von Hirsch and Andrew Ashworth said, proportional sentencing is designed to avoid unjust results (Hirsch & Ashworth, 2005). On the contrary manner, disproportionate punishment will result in injustice. In the theory of justice introduced by Aristotle, one of them is vindicative justice. This justice applies to the field of criminal law where punishment should be adjusted to the crime that has been committed. This benchmark of vindicative justice is the principle of no punishment without guilt, in the sense that everyone is punished or must pay a loss under the severity of the mistake (Atmadja, 2013). In connection with the discussion of this section, to reflect justice, the punishment imposed on the crime of passive money laundering committed by intention is heavier than the criminal act of passive money laundering committed due to negligence. This is relevant to what Hart said. The law will be fair only if it reflects the differences between people and their actions and treats different cases differently (Safa'at, 2016).

A similar opinion was also expressed by E. Sumaryono, who stated that something is called fair if it is honestly under the proportions. Proportion is equality, so if what is fair is proportional, it also means equality (Sumaryono, 1995).

When connected with the cases described above, the strictness of Case I and Case II's decisions indicates a real injustice. And the existence of such a decision is a practical implication of the form of guilt pro parte dolus pro parte culpa in the crime of passive money laundering.

## 4. Conclusions and recommendations

The theoretical implication of the formulation of the criminal act of passive money laundering in the form of guilt pro parte dolus pro parte culpa is this formulation contradicts the theory of guilt and criminal proportionality. Meanwhile, the practical implications of the formulation of the criminal act of passive money laundering in the form of guilt pro parte dolus pro parte culpa are the imposition of disproportionate punishment, namely the criminal act of passive money laundering, which is committed because of negligence, is punishable by a more severe punishment than the passive money laundering which is committed by intention, this phenomenon is a form of injustice at the level of practice. In the revision of laws governing the crime of money laundering in the future, the formulation of the criminal act of passive money laundering is carried out by intention, and the criminal act of passive money laundering is carried out due to negligence must be separated. The threat of sanctions against them must be proportional. The threat of sanctions against the criminal act of passive money laundering committed by intention must be heavier than the threat of sanctions against the criminal act of passive money laundering committed due to negligence. With this idea, the implication is that it reflects the value of fairness in regulating passive money laundering in the future.

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