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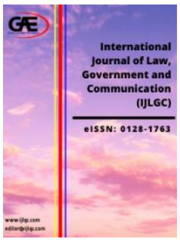

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CRIMINAL LIABILITY OF CORPORATE SHAREHOLDERS

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Abstract:

Corporations in the form of Limited Liability Companies in Indonesia are regulated in Limited Liability Company Law No. 40 of 2007 concerning Limited Liability Companies, this Law regulates the liability of corporations and/or shareholders who commit acts against the law, but the liability that can be asked of shareholders does not exceed existing shares. This study uses normative legal research methods. The data used are secondary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials. For data analysis, the qualitative jurisdictional analysis method was used. From this research, it can be found that law enforcement against shareholders who commit acts against the law can be upheld and the outcome is that the action against the law which was originally a civil action and then turned into a criminal act. By using the Piercing, the corporate veil doctrine, shareholders who commit acts against the law can be sentenced to criminal and all their assets to cover the financial losses of the state due to their actions. It is universally applied on the basis of fraudulent acts carried out to rake in personal profit and by implementing civil forfeiture or civil recovery, the proceeds of crimes committed by shareholders are likely to be returned.

Keywords:

Corporations, Shareholders, Acts Against The Law

Introduction

Corporate crime arises in line with economic and technological progress. Crime can be identified by the emergence of losses that result in the birth of criminal liability. Corporate liability is still being debated because according to the Indonesian criminal law, the subject of criminal law is only an individual in the sense of a natural biological connotation (naturlijk person). Since the piercing the corporate veil doctrine is known, in certain cases it is possible

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to eliminate the directors' responsibility in a limited liability company. Limited liability by shareholders is not absolute. This doctrine began to develop in the current modern legal system, in line with the need for justice for parties in good faith and third parties who have legal relations with limited liability companies.

The court will waive the legal status of the limited liability company and impose liability on the organs of the limited liability company by ignoring the principle of limited liability that is usually held by them. Immunity that is commonly owned by shareholders, directors, and commissioners that is limited liability is opened and broken into unlimited liability to personal wealth in the event of irregularities or mistakes in managing the company.

Limited Liability Company is a capital alliance body, also in the form of a legal entity, the company is a legal subject that has rights and obligations. In essence, a Limited Liability Company has two sides, firstly as a legal entity, and secondly also as a place for the realization of cooperation between shareholders or capital owners. This can be seen in the general provisions of Law Number 40 of 2007 concerning Limited Liability Companies. Corporations are often referred to as legal entities or rechtsperson with the intention to explain, that the body has a legal identity that has wealth and rights and obligations that are separate from its members. In general, corporate terminology has the following characteristics (Susanto, 1995):
a. Is a legal subject that has a special legal position.
b. Has an unlimited life span.
c. Obtain power from the State to carry out certain business activities.
d. Owned by shareholders.
e. Shareholders' liability for corporate losses is usually limited to the shares they own.

The notion of a corporation as a legal entity can also be found in the Black’s Law Dictionary, which states that:“An entity (usually a business) having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely, a group or succession of persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that is constitution gives it” (Campbell, 1999).

In the Indonesian legal system the principle of independence of a legal entity from a Limited Liability Company is recognized strictly by Law No. 40/2007 through the provisions of Article 3 paragraph (1) which formulates: The company's shareholders are not personally responsible for the agreements made on behalf of the company and is not responsible for the company's losses exceeding the value of the shares it has taken. Explanation of the provisions of the article above then enforces that the provisions concerning the separation of legal responsibility between the company and the shareholders personally further emphasize the characteristics of a limited company in which shareholders are limitedly liable, i.e. only responsible for the value of the shares taken and do not include the shareholders' personal property. In general, the principle of limited liability mentioned above, can provide benefits for the smooth running of business activities as described, bearing in mind the company is an economic institution established by the owner for profit. Companies in the form of Limited Liability Companies also contribute greatly to economic growth and development which will lead to improvements in living standards.

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Limited Company with the principle of limited liability, as an economic organization has greater ability to develop itself in economic activities, as revealed by Sri Redjeki Hartono (2000), because:

a. Limited Liability Company has the ability to raise more funds compared to other forms of business without disrupting its existence.
b. Limited Liability Company has the ability to develop itself without affecting its existence.
c. Activities in a Limited Liability Company can be designed to carry out long-term anticipation for large-scale businesses both locally, nationally and internationally.
d. Limited Liability Company is able to do cooperation between companies while maintaining its identity, including anyone as its supporters (meaning shareholders).

There are several liabilities so that the related company can maintain its supporters or shareholders. There are three top liability goals for the shareholders. First, limited liability aims to protect shareholders from greater losses beyond what they have invested. Second, transfer the risk of potential business failures to the company's creditors. Third, to encourage investment and facilitate the accumulation of capital of the company.

According to Ridwan Khairandy (2009), in the common law system, there are 4 (four) basic theories for determining the *piercing the corporate veil*, namely fraud, alter ego or re-instrumentally, corporate entity, and agency. In fraud theory, the court will impose unlimited liability when shareholders use corporate entity to commit fraud, mislead creditors when conducting business transactions with the company, divert funds out of the company fraudulently, or otherwise commit fraudulent actions within the corporate entity.

The doctrine of *piercing the corporate veil* which means that in certain cases the limited liability of shareholders does not apply, as specified in article 3 paragraph (2), is a measure that makes the position of shareholders not protected by the doctrine of separate legal personality of a company. Based on the doctrine of *piercing the corporate veil*, shareholders are responsible up to personal property. So this opens up the boundaries of legal entities with the shareholders. Thus, based on the doctrine of *piercing the corporate veil* there is the possibility of shareholders in certain matters, taking responsibility to his personal property for actions taken by and in the name of the company.

The application of the doctrine of *piercing the corporate veil* has the aim of achieving justice, especially when the company has certain legal relationships. Usually the doctrine of *piercing the corporate veil* appears and is applied whenever there is a loss or a lawsuit from a third party against the company.

The basic criteria for universality in order to legally pierce the corporate veil are as follows:

a. A fraud occurred
b. An injustice occurred
c. Oppression occurs
d. Does not meet the legal element (illegality)
e. Excessive shareholder dominance
f. The company is the alter ego of the majority shareholder.

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Identification of the Problem
Based on the background described, two problems can be found as follows;
a. How does corporate law in Indonesia regulate shareholder liability?
b. What should be the criminal liability of corporate shareholder?
c. How to return the proceeds of crime committed by corporate shareholder?

Research Method

Research Specifications
The method used in this research is Normative Jurisprudence research, research specifications are descriptive analytical and using qualitative juridical analysis. Normative juridical approach focuses on studying the application of norms in positive law and to identify legal concepts and principles used in enforcement criminal acts of corruption, especially deviations committed by shareholders of a corporation. Normative legal research is library research (Soekanto & Mamuji, 2012). Researchers examine the interpretation of the law, legal construction, legal philosophy and legal comparison, also used inductive logic and deductive logic. Inductive Logic is to draw conclusions from real cases into general conclusions and deductive logic is used to draw conclusions from general matters into individual cases (Rodes, Jr., & Pospesel, 1997).

Legal analysis is intended as a process of investigation and study of jurisprudence (juristic of science), the object of legal science research includes positive law (*ius constitutum*), which has been in force and research on law that is expected to apply in the future (*ius constituendum*). Therefore, conducting research and discussion of the substance of the matter of irregularities by directors and shareholders in a company is to use the normative legal research method with the approach used is the statutory approach, the conceptual approach (analytical and conceptual approach), legal case approach and comparative approach.

Data Collection Technique
Legal Material Collection Techniques in this study were collected through library research (generally legal documents). Literature research aims to obtain legal materials obtained through literature, writing and seminar papers. Then also based on the opinions of several legal experts, especially in the field of criminal law and criminal procedure law and others. The technique used in the form of literature study is conducted to find legal principles and principles, in this case what is meant is legal materials, including concepts, and doctrines that are deemed to be able to add clarity to the problem and the direction of the relevant discussion in this research. . Literature studies were carried out in several libraries such as the Supreme Court Library and the Law Faculty Library, Jayabaya University

Analysis

Arrangement of Liabilities of Corporate Shareholders in Indonesia
A limited liability company is different from a partnership that is not a legal entity and is not separate from the partners who are members of the partnership. A company is a different legal entity and is separate from the shareholders of the limited liability company (Usman, 2004). As a legal entity separate from its shareholders, the company in carrying out its legal functions is not acting as the power of its shareholders but acting for and on its own behalf. The shareholders are not parties to the agreements made by the limited liability company with other

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parties; therefore the shareholders have no right to force other parties to carry out their obligations specified in the agreement. As a consequence, a third party cannot claim or sue a limited liability company for legal obligations from the company's shareholders, on the contrary, it also has no right to claim any third party for obligations that must be paid to the company shareholders.

Characteristics of a Limited Liability Company

A limited liability company as a corporation is a legal entity that has several substantive characteristics inherent in itself (Khairandy, 2009), namely:

Limited Liability

The limitation of the liability of shareholders of a Limited Liability Company is explained in article 3 paragraph (1) of the Limited Liability Company Law, which basically the founders or shareholders or members of a corporation are not personally responsible for corporate losses or debts, this limit seems to be influenced by the Commercial Code Article 40 paragraph 2 (Prasetya, 1995).

Perpetual Succession

Philip Lipton and Abe Herzberg said the perpetual succession aspect caused the company to never experience a lack of capacity in legal action, shareholders or directors and commissioners of the company could change, but that would not affect the legal personality of the Limited Liability Company.

Has Own Wealth

The shareholders, when they founded the company, had separated part of their wealth to be deposited into the company. The company's founders' paid-in capital is the company's initial wealth. Limited Liability Companies as Legal Entities as well as legal subjects can be prosecuted and sued before the court. The responsibilities that can be requested to shareholders for the elimination of limited liability are explained in article 3 paragraph (2) of the Limited Liability Company Law as follows:

a. The requirements of the Company as a Legal Entity have not been fulfilled.
b. Shareholders, both directly and indirectly, make the company as a tool for their own interests, so that the company loses money.

Criminal Liability That Should Be Given by Corporate Shareholders

Fiduciary Duty Principle

Commissioners and directors of companies must behave as trustworthy holders. The principle of Fiduciary Duty is an obligation established by law for someone who uses someone else, the personal interests of someone who are managed by another person, which is only a temporary relationship between subordinates and superiors. People who have these obligations must carry out according to the highest standard of obligation in accordance with what is stated by law. Fiduciary is someone who holds a role as a trustee or a role that is equated with something that acts as a representative, in this case the role is based on trust and confidence in this role including scrupulous, good faith, and candor. This fiduciary includes relationships such as, management or manager, supervisor, representative or guardian, guardian included in a lawyer who has a fiduciary relationship with his client (Campbell, 1990). In understanding the fiduciary relationship in the common law system, it is recognized that people who have a

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natural fiduciary possess the potential to abuse their authority, therefore the fiduciary must be based on high standards (Scott, 1989).

In common law fraud has been constructed more broadly in lawsuits against people who are fiduciary compared to lawsuits against individuals. Because in a relationship of trust and confidentiality, fiduciary, it is required to apply higher standards of behavior and can be held accountable based on the doctrine of constructive fraud for violations of fiduciary duty. In the context of commissioners, it is very important to control the behavior of directors who have a large position and power in managing the company. This includes determining standards of conduct to protect parties who will be harmed if the directors behave in accordance with their authority or behave dishonestly (Dine, 1998). In common law countries have clear standards to determine whether a director can be held accountable for the actions he takes, that is based on the standard of duty of loyalty and duty of care in the responsibility of directors of a limited liability company based on a theory of interrelated meaning the latter theory is a reaction or improvement from the previous theory.

The Principle of Duty of Care and the principle of Duty of Loyalty

The obligations of directors to the company are as a whole, not to shareholders either individually or as a group (Dine, 2001), in accordance with the position of directors as trustees in the company. This position requires a director not to act recklessly in performing his duties (Duty of Care) (Keenan & Biscare, 1999). In addition, in his duties a director may not take advantage for himself over the company (Duty of Loyalty) (Seligman, 1995). Violation of the two principles in relation to fiduciary duty can cause directors to be held personally liable for acts committed both to shareholders and to other parties (Lipton & Herzberg, 1992). With regard to directors, it also applies to the board of commissioners, according to article 1 paragraph (2) of the Limited Liability Company Law it is determined that the Board of Commissioners supervises management policies, the course of management, both regarding the company and the business of the company, and advises the Directors, furthermore the article 114 paragraph (1) of the Limited Liability Company Law states that the Board of Commissioners is responsible for the supervision of the company as referred to in article 108(1), relating to the responsibilities stipulated in article 114 paragraph (3) of the Limited Liability Company Law which specifies that each member of the Board of Commissioners is personally responsible for the company's loss if the person concerned is guilty or negligent in carrying out his duties.

The Judgment Rule Business Principle

This principle reveals that, in the establishment of a Limited Liability Company, the company becomes separated from the person who founded it or runs it, subsequently the company has rights and obligations that are closely related to its activities not to those who own or run it. One of the benchmarks for deciding that a loss is not caused by an inappropriate business decision (Business judgment) so that it can avoid violating the principle of duty of care, is having enough information about the problem to be decided and making sure the information is true, has no interest in the decision and decides with in good faith and have a rational basis to believe that the decision taken is the best for the company (Vaght, 1998). In reality the Court is more likely to see whether the duty of care has been fulfilled, even though the decision is viewed from a business perspective (Priest et al., 1995). The Limited Liability Company Law No. 40 of 2007 in Indonesia has clearly adopted the principle of business judgment rule, it is important to know or determine whether a director can be held accountable or not. The company is a risk taker that aims to seek profits, directors as corporate organs in making

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business decisions are often speculative that tend to suffer losses, this is where the need for standards regarding accountability to be able to see whether business decisions to be taken are in accordance with procedures for the benefit of the company or the business decisions are taken for personal gain.

Members of the board of commissioners cannot be held liable for losses suffered by the Company as written in Article 114 Paragraph (5) and paragraph (3), if they can prove that they:

a. Have supervised in good faith and prudence for the interests of the Company and in accordance with the purposes and objectives of the Company.
b. Do not have a personal interest either directly or indirectly for the management actions of directors that result in loss.
c. Have given advice to directors to prevent such losses from arising or continuing.

The above provision is a business judgment rule principle commonly found in common law countries, while the differences are as follows:

First, in general, the principle of business judgment rule only applies to business decisions, while in the Law on Limited Liability Companies this principle applies to the management of the company which is a broader aspect compared to business decisions.

Second, there is no clear definition of mistakes and omissions, so it will be difficult to prove that there are no elements of error and neglect in business or management decisions without clear parameters of what can be categorized as mistakes and omissions. In an increasingly competitive business climate, it is not uncommon for directors to have to make speculative decisions to be able to compete with their competitors, and if later the decision results in losses, how can the directors be considered wrong or negligent? In contrast to the common law country, what is generally done is a reasonable standard. The court will see the decision taken by the directors by seeing what will be done by someone else who has the same position and conditions and if the other person tends to take the same decision then the decision can be said to be a reasonable business decision. This is done so that directors can take innovative decisions. Without this courage, it is feared that economic development can be hampered, especially during globalization, where directors are faced with competitors from various countries.

Third, the measure of good faith and prudence in the Corporate Law is unclear, so the directors must be careful in managing and making business decisions in order to receive protection from the Limited Liability Company Law.

Fourth, in article 155 of the Limited Liability Company Law also regulates the provisions that the Board of Directors responsibility does not reduce errors and negligence regulated by the Criminal Law, meaning that even though according to the provisions of the Law the Board of Directors is exempted from its responsibilities, it does not rule out that the directors can still be sued with other statutory provisions. This provision can obscure the application of the principle of the Business Judgment rule which was intended to provide a safe harbor to the directors, but on the other hand does not automatically protect the directors from their responsibilities against the exposure of other Criminal Laws.

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Returns of Proceeds of Crimes Committed by Corporate Shareholders (Stolen Asset Recovery)

Application of Mutual Legal Assistance (MLA) in Stolen Asset Recovery

One legal effort that can be applied in the StAR Initiative is Mutual Legal Assistance (MLA), an effort to recover assets that have been stolen by corruptors in Indonesia because MLA is a request for assistance in criminal matters relating to investigations, prosecution, and examination in a court of law in accordance with the provisions of the legislation required. This MLA is a very useful legal instrument because many of the stolen assets are stored abroad which often have a legal or political system that is very different from Indonesia.

As we know, the MLA regime in Indonesia has been around since 1999, where Indonesia has ratified bilateral agreements with law enforcement officials in Australia. The integration of MLA into national regulations was then carried out by the Indonesian government through Law No. 1 of 2006 concerning Mutual Legal Assistance in Criminal Matters (MLA Law) after signing and ratifying the United Nations Convention against Corruption (UNCAC). In addition, Indonesia has also made bilateral treaty on MLA with several other countries such as China, the United States and Korea as well as being a signatory to Treaty on Mutual Legal Assistance in Criminal Matters made by ASEAN Countries.

The MLA Law aims to provide a legal basis for the Government of Indonesia to request and/or provide mutual assistance in criminal matters. The MLA Law also aims to be a guideline in making mutual assistance agreements in criminal matters with foreign countries. With the existence of the MLA Law, the Indonesian government can request assistance from other countries to facilitate the legal proceedings of corruptors, such as requesting evidence, taking over assets and carrying out court decisions in that country. The MLA Law also regulates the sharing of proceeds from assets taken over with the assisting State. The distribution is done to cover the costs arising from the process carried out in the framework of such assistance.

There are bilateral or multilateral agreements that have been signed but still have not been ratified, such as bilateral agreement with Korea or multilateral agreement at the ASEAN level. Without this ratification, Indonesia cannot request assistance from ASEAN countries. In addition, it is also important to consider the cost sharing aspect of the process of takeover of assets of the corruptors. At present Indonesia does not yet have a clear guideline regarding aspects of financing or revenue sharing, especially not all countries have the same provisions. Therefore, it is necessary to establish regulations that regulate this matter and prepare human resources to negotiate with countries that are asked to help, so that Indonesia can get the most out of the cooperation.

Application of Civil Forfeiture (Action in Rem)

Civil forfeiture or civil recovery is used if criminal proceedings followed by confiscation cannot be carried out, which can be caused by five things, namely: the asset owner has died, the end of the criminal process because the defendant is free, criminal prosecution occurs and is successful but the asset takeover was unsuccessful, it was said that it was not within jurisdiction, the name of the owner of the asset was unknown, there was not enough evidence to initiate a criminal suit.

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In general, the civil forfeiture regime can be more effective in taking over assets stolen by corruptors compared to the criminal regime. This is because the civil forfeiture regime has advantages that facilitate the takeover of assets in the process of proof in court. This is because civil forfeiture uses a civil law regime that uses substantiation standards that are lower than the standards used by the criminal legal process. In addition, in the implementation of civil forfeiture, it uses an inverse proof system where the government has sufficient initial evidence that the assets to be taken over are the result, related to or used for crime. For example, the government simply calculates how much income the corrupter has and compares it with the assets he has, if the asset exceeds the amount of the corrupter's income, then the duty of the corrupter is to prove that the asset he got through legal channels.

This is what causes civil forfeiture to be a very good alternative if the criminal route is not successful. Even in practice, it was found that the civil forfeiture procedure was considered more effective in recovering stolen assets, although this procedure was not immune from weaknesses such as slow and high costs. Civil forfeiture applications carried out in each country are different. Civil forfeiture was initially implemented on a domestic scale, namely filing a civil suit to confiscate or take over assets resulting from domestic crime. If assets resulting from crime are outside the region, some countries that use civil forfeiture domestically apply it extra territoriality. For example, the UK, in the Proceeds of Crimes Act 2002, it was stated that the civil forfeiture model adopted by the UK applies to all property or assets regardless of location.

Conclusions

From the results of the study as described in the previous chapters, the following conclusions can be made:

Criminal law in Indonesia has not been maximally or not sufficiently covered crimes committed by corporations, especially corporations in the form of limited liability companies. Nevertheless, there is a way out to overcome the problem of inadequate law governing crimes committed by corporations, namely through the provisions of Article 3 paragraph (1) of Law No. 40 of 2007 concerning Limited Liability Companies. In the provisions of Article 3 paragraph (1), provisions concerning the liability of shareholders who have committed acts against the law have been determined, but the liability that can be requested from shareholders does not exceed the shares paid up in the limited company.

In fact, the amount of loss incurred due to illegal acts committed by the shareholders may not be proportional to the value of the shares that are paid up. The position of such criminal law can be compared to be applied from various legal systems that are practiced in various countries in the world, including Indonesia. That is, it can be understood that the law relating to criminal liability of shareholders in a corporation that can be elaborated by orienting towards determining criminal liability using the vicarious liability theory/*piercing the corporate veil* approach or identification theory/ directing mind theory. With the doctrine of *piercing the corporate veil*, the immunity that is commonly owned by shareholders, namely limited liability, is opened and intruded into unlimited personal wealth if there is an act against the law.

The form of criminal liability of corporate shareholders can also be based on the doctrine of *piercing the corporate veil*, which in the doctrine has developed a theory of fraud law, alter ego theory and vicarious liability theory. Thus, based on these theories shareholders can be

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held accountable for corporate criminal liability. Because the position of shareholders based on the understanding of the theories shows that the actions of shareholders cannot be separated from criminalized corporate actions or the principle of the separation of the company's legal entity.

It can also be added that the criminal liability of corporate shareholders is strengthened by the application of the Jorfeinure civil regime which is intended to return the proceeds of crime (stolen asset recovery) in practice with the term "in rem" actions or claims against assets that are indeed the result of criminal acts. Related to the evidence system adheres to the civil evidentiary system here, a reverse proof system based on *follow the money* is also applied, which is a distinction from civil forfeiture where the evidence system adheres to the criminal proof system that was once applied by the Attorney General of the Republic of Indonesia.

Suggestions

For the progress of legal development relating to the criminal liability of corporate shareholders in the future, the following matters should be considered:

It is absolutely necessary to regulate the criminal liability of corporate shareholders who are criminalized in the upcoming Criminal Law with thoughts based on the categories of fraud and alter ego of shareholders in accordance with the doctrine of *piercing the corporate veil*.

It is necessary to accommodate the criminal liability of criminalized corporate shareholders as variations develop in the tradition of the common law system, which in general the application of the criminal liability law of shareholders has succeeded in implementing its prosecution by basing its claims in accordance with the doctrine of *piercing the corporate veil.*

It is necessary to implement a civil forfeiture regime in returning assets originating from shareholder crime. Mutual legal assistance is again an important factor. Mutual legal assistance is needed not only to assist asset recovery through criminal lawsuits, but also through civil lawsuits. Indonesia can mimic the steps taken by other countries by establishing an independent institution that specifically handles asset recovery (asset recovery agencies). With the establishment of these institutions, the asset recovery process can become more directed and organized.

It is necessary to establish an independent institution that specifically handles asset recovery as carried out by other countries and expand the scope of Indonesia's jurisdiction as did by New Zealand and Fiji.

The use of the nominee concept is very necessary for time and cost efficiency. Therefore, Indonesia should adopt the approach taken by Australia with the use of the nominee concept followed by a strong anti-openness regime. Supervisory institutions such as Bapepam should be authorized to ask shareholders suspected of being nominees to disclose information about who are the beneficial owners of the shares they hold. In addition, it is also necessary to consider the obligation to register nominee shares for companies or individuals acting as nominees in all publicly or privately owned companies.

It is necessary to strengthen the substance of legal education, whereby law faculties develop syllabus or curriculum related to criminal responsibility of criminalized corporate shareholders

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by including courses on the civil forfeiture regime in criminal proceedings. This is to complement the criminal law courses in the discussion of the criminal forfeiture regime, which certainly expects law school students to understand the follow-money as desired by the anti-money laundering regime.

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