



SECONDARY CRIMINAL LIABILITY IN THE CUSTOMS FIELD: AN EFFORT OF HANDLING OF E-COMMERCE CHALLENGES IN INDONESIA *

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Article	Abstract
<p>Keywords: secondary liability, customs law, e-commerce, criminal law</p> <p>History of Article Received: Maret 20, 2024; Reviewed: April 15, 2024; Accepted: April 21, 2024; Published: December 31, 2023;</p> <p>DOI: 10.56282/jtlp.v2i1.491</p>	<p>The complexities of cross-border e-commerce transactions have created its own challenges for customs authorities. The complexities relating to the traffic of goods entering or leaving a country's territory as well as violations in terms of import duties and export duties will give rise to liability. Based on doctrinal legal research using agency theory, which is useful in solving problems due to conflicting desires or goals and asymmetry of information between principals and agents, then 2 (two) main conclusions are obtained. First, secondary liability in the customs sector currently tends to be limited to administrative liability, which only reaches the Freight and Portage Services Company (PPJK), Designated Postal Operators, and Courier Service Companies (PJT). Second, the justification of secondary criminal liability in the field of customs in handling the challenges of e-commerce in Indonesia must be done through the expansion of participant-based and/or relationship-based meanings that are able to reach PPJK, Postal Operator, PJT, and Platform. It is suggested that there is the formulation of secondary criminal liability. Elements needed to make a claim for secondary criminal liability, as well as relevant standards relating to secondary criminal liability and primary criminal liability.</p>

A. Introduction

The development of the digital economy that has spurred electronic commerce (e-commerce) transactions has made it a prima donna for many countries, especially to enhance economic growth, productivity, and competitiveness in international trade.

* This article is a private scientific study of the researcher and does not reflect the institution's opinion/policy.

The success of e-commerce has been proven by several global technopreneurs, such as eBay, which has successfully conducted auctions around the world, Alibaba.com which has succeeded in providing goods and services to millions of people and companies, and Amazon.com which has succeeded in selling retail books and millions of other items.¹

However, e-commerce which is currently rife through cross-border borders needs to have its own challenges for fiscal authorities, especially customs authorities in Indonesia, the Directorate General of Customs and Excise (DGCE or DJBC). The challenges faced by DJBC with regard to customs authority in Indonesia, that is all matters relating to the obligations of all activities related to the traffic of goods entering or leaving the territory of the Republic of Indonesia and collection of import duties and export duties as formulated in Article 1 number (1) Law Number 17 of 2006 regarding the Amendment of Law Number 10 of 1995 regarding Customs (Customs Law), which must be prepared to face increased economic and market integration used by certain parties to carry out base erosion profit shifting (BEPS)² through micro/macroeconomic complexity, organizing, and administering e-commerce.³

Of course, what is the duty and responsibility of DJBC may not be openly accepted by certain parties who have been comfortable doing trading activities across borders via the internet, who can easily find out, compare and shop for goods and/or certain services that he wants with as much as possible avoiding import duties, exit fees, and/or other customs levies. This can lead to smuggling to avoid taxes and customs which have been considered as a factor in increasing the price of goods/services, as several studies have revealed. Viboonthanakul's study revealed that e-commerce and trade on the internet cause a new problem of smuggling and government may well have lost revenue from all commodities, such as cigarettes, household equipment, textiles, clothing, footwear and leather goods, books and stationery, and also motor cars.⁴ Then, Selinsek's study states that smuggling (which is usually the basic form of moving goods across national borders by avoiding customs and excise officers' supervision, and or using certain company facilities, certain groups, or through coercion with certain threats) is one form of tax evasion because customs payments are a type of indirect tax, so it is increasingly emphasized that smuggling is one of the violations that always damages the customs system in a country.⁵

The problem of smuggling, which makes a country lose revenue from import duties and/or exit charges for cross-border e-commerce transactions, which has occurred so far can be seen from the complexity of the transactions and the involvement of different parties whose interests are actively interacting with each other. The complexity of cross-border e-commerce transactions can involve at least 3

¹ Efraim Turban et al., *Electronic Commerce 2018: A Managerial and Social Networks Perspective* (Cham: Springer International Publishing AG, 2018).

² OECD, *Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project* (Paris: Organisation for Economic Co-operation and Development, 2015), www.oecd.org/tax/beps-explanatory-statement-2015.pdf.

³ Ana R. del Aguila et al., "Digital Economy and Management in Spain," *Internet Research: Electronic Networking Applications and Policy* 13, no. 1 (2003): 6–16.

⁴ Sittiphol Viboonthanakul, "Smuggling via E-Commerce: Effect on Tax Revenue," *Journal of International Trade Law and Policy* 8, no. 3 (2009): 272.

⁵ Liljana Selinsek, "The Penalisation of Tax Violations and Criminal Tax Offences in Slovenian Law," *Journal of Money Laundering Control* 8, no. 2 (2004): 176.

(three) countries, where the illustration can be illustrated by a buyer X who is in country A ordering goods to sellers in country C by using a cyber shop or platform that can be on country A or country B or country C, and then the goods will be sent through the warehouse which could be in country A or country B or country C.⁶ Whereas the parties that actively interact with each other consist of at least 3 (three) parties, that is buyers/sellers who are targets of digital economic applications, government (including customs authorities), and providers of digital economic services (platforms).

Considering the complexity of cross-border e-commerce transactions has created its own challenges for DJBC, violations in customs will create liabilities⁷ for violators and parties who are legally involved in them, and very wide customs functions (such as inspection and classification of goods, trade appraisal in the context of implementing customs obligations, as well as other functions that are intended to counteract and anticipate things that could endanger/harm Indonesian territory),⁸ the application of secondary criminal liability in customs law is very important and urgent to be implemented in Indonesia, as Dinwoodie said core secondary liability (or derivative liability) as the defendant's liability for damages caused by a complicated picture caused by primary wrongdoer wrongdoing.⁹ This can be exemplified, the internet service provider (ISP) who can be held responsible when legal violations occur due to primary wrongdoers are often anonymous, do not have sufficient financial capacity, or are outside the jurisdiction.¹⁰ Thus, this paper tries to answer 2 (two) main problems, that is how to regulate secondary criminal liability in the field of customs in Indonesia, and how to arrange ideal secondary criminal liability in the customs field in handling the challenges of e-commerce in Indonesia.

B. Legal Doctrine and Agency Theory in Secondary Criminal Liability in the Customs Field

Given that the aim of this study is to construct the applicable customs laws and regulations in terms of addressing e-commerce challenges in Indonesia¹¹ through an ideal legal concept of secondary criminal liability in the customs field, this research adequate to use doctrinal method, as this method departs from the law as what in the books which contains requirements¹² in answering existing problems through a priori thinking on the strength of legal certainty, guarantee of justice, and public benefit of

⁶ Jae Kyu Lee and Yeoul Hwangbo, "Cyberconsumption Taxes and Electronic Collection Systems: A Canonical Consumer-Delivered Sales Tax," *International Journal of Electronic Commerce* 4, no. 2 (1999): 64, <https://doi.org/1080/10864415.1999.11518365>.

⁷ Bryan A. Gardner, "Black's Law Dictionary" (West Publishing Co., Minnesota, 2009). As Black's Law Dictionary defines liability as "the quality or state being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment", p 997.

⁸ Henry D.P. Sinaga and Benny R.P. Sinaga, *Rekonstruksi Model-Model Pertanggungjawaban Di Bidang Perpajakan Dan Kepabeanan* (Yogyakarta: PT. Kanisius, 2018).

⁹ G. B. Dinwoodie, "A Comparative Analysis of the Secondary Analysis of the Secondary Liability of Online Service Providers," in *Liability of Internet Service Providers*, ed. G. B. Dinwoodie (Cham-Switzerland: Springer International, 2017), 9–11.

¹⁰ Dinwoodie.

¹¹ Risanto and Arief Hakim P. Lubis, "Novum and Unrevealed Data in Tax Disputes in Indonesia: A Legal Certainty Perspective," *Journal of Tax Law and Policy* 1, no. 2 (2022): 19, <https://doi.org/https://doi.org/10.56282/jtlp.v1i2.95>.

¹² Dumaria Simanjuntak, *Rancang Bangun Hukum Pengawasan Desa Di Indonesia* (Jakarta: PT. Scientia Integritas Utama, 2022).

ideal binding law.¹³ The legal doctrine also sufficient to use agency theory as a knife of analysis to address the e-commerce challenges that must be faced by DJBC.

Doctrinal methods still occupies a central position in writing conducted by legal professionals. This method cannot be separated from the legal doctrine, the constituent components in the form of normative components and other related moral and substantive considerations, resulting incoherence in many aspects of law (such as aspects of using traditional methods, aspects of systematization, aspects of overarching principles of law, aspects of unity in time, and legal validity aspects).¹⁴ The hallmark of doctrinal law on a priori way of thinking by relying on the strength of values and teachings is very adequate in this study which seeks to address the e-commerce challenges that must be faced by DJBC considering that smuggling is a violation, which in this case involves the obligations of all activities related to the traffic of goods entering or leaving the territory of a country as well as violations in terms of import duties and export duties, will lead to liability. The concept of liability in law is closely related to the concept of liability to everyone who is deemed legally competent for a particular act which when a violation of the law occurs can have consequences for the offender directly and for any person who is legally related to any violation.¹⁵

Agency theory is¹⁶ appropriate to be used to test the external or internal factors of a particular community (business)¹⁷ to solve 2 (two) main problems that always arise between principals¹⁸ and the agent¹⁹, that is conflicting desires/goals and the occurrence of information asymmetry.²⁰ The development of agency theory has reached positivist agency theory and principal-agent research which emphasizes the need for analysis of contractual relationships between principals and agents.²¹ The focus of positivist agency studies lies on two propositions, that is how to do things effectively in limiting the opportunism of agents through outcome-based contracts and information systems. While the principal agent's focus lies in his study of establishing behavior-based contracts versus outcome-based contracts in establishing the optimal contract that occurs between the principal and the agent. Thus, the existence of this theory will be contractually binding between the customs authorities and their apparatus through performance achievements that must be met and with related

¹³ Anis W. Hermawan, "Voluntary Disclosure Program in Taxation and Its Certificates: A Philosophical Perspective," *Journal of Tax Law and Policy* 1, no. 2 (2022): 63–70, <https://doi.org/https://doi.org/10.56282/jtlp.v1i2>.

¹⁴ Aleksander Peczenik, "Can Philosophy Help Legal Doctrine?," *Ratio Juris* 17, no. 1 (2004): 106–17.

¹⁵ Henry Dianto Pardamean Sinaga, "PENGATURAN PERTANGGUNGJAWABAN MUTLAK WAJIB PAJAK DI INDONESIA DALAM PERSPEKTIF KEADILAN DAN KEMANFAATAN UMUM," *Jurnal Hukum & Pembangunan* 49, no. 3 (November 5, 2019): 535, <https://doi.org/10.21143/jhp.vol49.no3.2186>.

¹⁶ Gardner, "Black's Law Dictionary."

¹⁷ M.B. Adams, "Agency Theory and the Internal Auditor," *Managerial Auditing Journal* 9, no. 8 (1994): 8–12.

¹⁸ Gardner, "Black's Law Dictionary." Based on the definition on Black's Law Dictionary that describes principal as one who authorizes another to act on his or her behalf as an agent, p. 1312.

¹⁹ Gardner. Based on the definition on Black's Law Dictionary that describes agent as one who is authorized to act for or in place of another, p. 72.

²⁰ Kathleen M. Eisenhardt, "Agency Theory: An Assessment and Review," *The Academy of Management Review* 14, no. 1 (1989): 57–74.

²¹ Eisenhardt. *Ibid.*, pp. 57, 59.

parties related to the implementation of customs laws,²² such as exporters and importers.

C. Regulation of secondary criminal liability in the field of customs in Indonesia

Secondary liability or accessory liability or indirect liability or derivative liability is widely developed in countries with common law systems, such as the United States and the United Kingdom. In the Black's Law Dictionary there is no definition of secondary liability, but rather the definition of derivative liability as "*liability for a wrong that a person other than the one wronged has a right to redress*".²³ This responsibility arises because of the difficulty in determining primary liability so that a clearer mapping of the substance is carried out through conventional forms of secondary liability or joint tortfeasor liability,²⁴ which is exemplified by the accountability of accountants for errors or failures in detecting fraudulent clients, the responsibility of the employer for losses or damage caused by employees outside the scope of work,²⁵ and the bank's responsibility for funds out of a customer's account due to fraud/check fraud/fraud current account.²⁶

According to Dinwoodie, secondary liability consists of participant-based liability and relationship-based liability. The involvement of secondary actors in participant-based liability occurs through "causing" or "contributing to" or "facilitating" the occurrence of harmful acts committed by primary wrongdoers. Contributory infringement in US copyright law is one example of this type of responsibility, as the formula reads "one who, with knowledge of the infringing activity, induces, causes, or materially contributes ... may be held liable as a contributory infringer". Whereas the involvement of secondary actors in relationship-based liability arises in terms of the benefits they receive from violations that harm certain parties and their relationship is very close to the primary wrongdoer. Often the law treats primary wrongdoers and secondary actors as one and the same because the relationship is very close, so secondary actors should act as intermediaries who are able to prevent acts that violate the primary wrongdoer.²⁷

The justification of secondary liability derived from primary liability was stated more comprehensively by Herring and Konarski and Targosz. Herring argued that the occurrence of a violation of the law due to the actions of two or more parties that gave birth to the principle of responsibility of principals and accessories should be deepened by the legal regime by minimizing the difference between principals and accessories through neglect in terms of the level of participation in a crime. The acting capacity of the perpetrators is considered irrelevant because someone acts as an accessory or joint principal that is considered to be no longer material since the

²² Anis W. Hermawan, "Tax Audit in Indonesia: An Agency Theory Perspective," *Journal of Accounting Issues* 1, no. 2 (2022), p. 37.

²³ Gardner, "Black's Law Dictionary." *Op.cit.*, p. 997.

²⁴ Dinwoodie, "A Comparative Analysis of the Secondary Analysis of the Secondary Liability of Online Service Providers," pp. 8, 10.

²⁵ Giuseppe Dari Mattiacci and Francesco Parisi, "The Cost of Delegated Control: Vicarious Liability, Secondary Liability and Mandatory Insurance," *International Review of Law and Economics* 23, no. 4 (2004): 454.

²⁶ Richard A. Mann and Barry S. Roberts, *Business Law and the Regulation of Business* (Ohio: South-Western Cengage Learning, 2011).

²⁷ Dinwoodie, "A Comparative Analysis of the Secondary Analysis of the Secondary Liability of Online Service Providers." *Op.cit.*, hlm. 9.

accessory or secondary actor can be held responsible as a second party for crimes greater than those committed by the primary party. In addition, in substance the law, secondary actors cannot be punished in crimes that are categorized as probation and cannot be applied strict liability, because based on the principle of "derivative liability" the perpetrator can be considered secondary responsibility as long as the primary/primary violation has been committed.²⁸ Then Konarski and Targosz explained that secondary liability is usually associated with direct violations. It is most likely done by users who utilize a service provided to them because only direct users can use the service provider services (which are intermediary rights holders provided by the state) as a means of violating. Accountability for secondary violations will also follow responsibility for primary violations relating to certain requirements, such as mistakes, which are always defined in certain regulations or laws.²⁹

Secondary liability in the provision of customs administration in Indonesia is currently still governed by the regulation of the Minister of Finance (PMK) (not in the realm of law). Article 2 paragraph (2), paragraph (3), and paragraph (4) PMK No. 182/PMK.04/2016 which formulates that Designated Postal Operators and Courier Service Companies (*Perusahaan Jasa Titipan/PJT*) that have obtained approval from the Customs Authority are responsible for paying import duties, excise duties, and/or taxes in the framework of imports related to the import of Shipment Goods, but the recipient of the goods remains responsible for the payment obligations of import duty, excise and/or tax in the context of import in the case of customs notification of the shipment of goods in the form of a Special Goods Import Notification (*Pemberitahuan Impor Barang Khusus/PIBK*) or Notification of Imported Goods (*Pemberitahuan Impor Barang/PIB*) despite the inaccuracy or incompatibility of filling documents This is due to an error or negligence of the sender of goods, and there is no criminal provision in the event of a violation of responsibility (there is the only sanction of revocation of approval to perform customs services to the Designated Post Operator and *PJT*).

There are indeed rules regarding the imposition of administrative sanctions and criminal sanctions related to secondary liability in the Customs Law arrangement. The administrative sanctions in Article 31 of the Customs Law which states that the Freight and Portage Service Company (*Perusahaan Pengangkutan dan Jasa Kepelabuhan/PPJK*) which is authorized by the importer is responsible for the import duty owed in case the importer is not found, and in Article 45 paragraph (4) of the Customs Law which applies a fine as much as 100% of the import duty that should be paid to the bonded hoarding businessman who cannot take responsibility for the goods that should be in that place. Then, the case of criminal sanctions in Article 107 of the Customs Law which emphasizes the imposition of criminal sanctions against PPJK who carry out acts threatened with criminal sanctions based on the Customs Law in the handling of Customs Notifications or powers received from importers or

²⁸ Jonathan Herring, *Criminal Law* (New York: Palgrave Macmillan, 2011).

²⁹ Xawery Konarski and Tomasz Targosz, "Secondary Liability of Internet Service Providers in Poland," in *Secondary Liability of Internet Service Providers*, ed. Graeme B. Dinwoodie (Cham: Springer International Publishing Switzerland, 2017), 79.

exporters. However, the PPJK definition³⁰ and Entrepreneurs are bonded landfills³¹ it is not yet sufficient to apply secondary liability in criminal customs of e-commerce activities. It refers to e-commerce of goods and/or services in Customs Areas can be done through a marketplace platform, or a platform other than a marketplace that can be online retail, classified ads, daily deals, or social media.³² So that PPJK and Entrepreneurs of bonded storage places cannot always become parties who have sufficient readiness and ability to carry out the obligation to pay customs, excise, and/or taxes considering that they are not parties involved in e-commerce transactions that have technical measures and legal protocol for that.³³

D. Ideal secondary criminal liability in the field of customs in handling the challenges of e-commerce in Indonesia

Secondary liability in the field of customs crimes is needed because it is irrelevant to the conditions and situations of e-commerce violations to only apply liabilities based on faults that always require proof of 4 (four) interrelated components. First, the enactment of the self-assessment system³⁴ in exercising rights and fulfilling customs obligations brings consequences in the form of examining customs compliance.³⁵ Of course, this examination carried out by DJBC will raise legal liability in the event of a violation of customs law, both administratively and

³⁰ Indonesia, “Regulation of the Minister of Finance Number 65/PMK.04/2007 on June 20, 2007, Concerning Entrepreneurs in Customs Services” (2007). As Article 1 number (3) defines Entrepreneurs in Customs Services as a business entity that carries out activities of fulfilling customs obligations for and on the power of importers or exporters.

³¹ Indonesia, “Law Number 17 of 2006 Regarding the Amendment of Law Number 10 of 1995 Regarding Customs” (1995). As Article 1 number (2) defines customs area as the territory of the Republic of Indonesia which includes land, water, and air space above it, as well as certain places in the Exclusive Economic Zone and continental shelf in which Customs Law applies.

³² Indonesia, “Regulation of the Minister of Finance Number 210/PMK.010/2018 Regarding Tax Treatment of Trade Transactions through the Electronic System” (2018). Article 3 paragraph (1). Although this regulation has not yet been enacted as of April 1, 2019, because it has been withdrawn by the Press Release of the Ministry of Finance of the Republic of Indonesia Number: 12 / KLI / 2019 on March 29, 2019, but e-commerce through marketplace platforms or platforms other than marketplace is common in the world business. Furthermore, Article 3 paragraph (2) of this PMK describes the e-commerce method for goods and/or services, as follows:

1. Marketplace Platform Providers provide e-commerce services for goods and/or services;
2. Traders or Service Providers use Platform facilities provided by Marketplace Platform Providers to conduct e-commerce;
3. Buyers of goods or service recipients make purchases of goods and/or services through Marketplace Platform Providers; and
4. Payment for trade in goods and services through e-commerce by the buyer to the Trader or Service Provider is made through the Marketplace Platform Provider.

³³ Elvrida N. Sinaga et al., “Reconstruction of E-Commerce Law in Addressing the Challenges of E-Commerce in Indonesia: A Fairness Perspective,” *Ayer Journal* 27, no. 2 (2020): 114–15.

³⁴ Dino Sulistomo, “Undivided Inheritance as a Unit in Lieu of the Beneficiaries: A Tax Fairness Perspective,” *Scientia Business Law Review* 1, no. 1 (2022): 16, <https://doi.org/https://doi.org/10.56282/sblr.v1i1.49>. As the self-assessment system meaning is the tax collection system that requires taxpayers themselves to register, fill out a Notification Letter correctly, thoroughly, and clearly and sign and submit it to the tax authority, and pay or deposit the taxes owed themselves.

³⁵ Yuli T. Hidayat and Henry D. P. Sinaga, “Certainty and Simplicity in Broadening the Scope of Tax Audit in Indonesia,” *Journal of Tax Law and Policy* 1, no. 1 (2022): 11–23, <https://doi.org/https://doi.org/10.56282/jtlp.v1i1.60>.

criminally.³⁶ Second, *actus reus, mens rea*, and without a recognized legal defense.³⁷ Three, the ability secondary liability in covering a very broad risk, such as against PPJK (as in Article 29 paragraph (2) the Customs Law allows importers or exporters to authorize customs notification to PPJK). Four, e-commerce activities for cross-border goods and/or services can conducted through a marketplace platform or a platform other than a marketplace, so PPJK and the platform are required to further enhance its prudential standards in knowing and recognizing the occurrence of cross-border transactions. Important matters related to secondary liability have been stated by Barazza by emphasizing that although some countries apply a theoretical approach to secondary liability differently, there are three key elements that are the same in the focus of justice, that is: “*the nature of the services or goods used by the primary infringer, the knowledge and intent of the third party, and the duty of care imposed upon it*”.³⁸

Usually, the elements of the nature of services or goods are valued earlier in court decisions because they greatly affect the other two elements. The idea refers to three different cases, that is: “*as goods and services can either be unsuited to infringing use, suited to both infringing and non-infringing use or aimed exclusively at infringement*”.³⁹ Interaction of knowledge and intentions of intermediary parties are intertwined from the availability of goods and or services that are apparently used for violations and non-violations. The case overview is exemplified by a decision relating to the responsibility of generic drug manufacturers for trademark infringement committed by pharmacists, that is Inwood Laboratories Inc. and others v Ives Laboratories Inc. The Supreme Court verdict in the case shows that the behavior of “producers or distributors who deliberately encourage others to violate trademarks” refers to intentions, while the behavior “continues to supply their products to someone with knowledge or known reasons involved in trademark infringement” refer to knowledge.⁴⁰ This shows that the interaction between intention and knowledge cannot be separated, that is, the intention to persuade the occurrence of violations shows constructive knowledge of further violations, while the intention to create violations originating from the choice to continue to supply products used for violations will occur after the perpetrators obtain actual knowledge about the use of trademarks that violate the law. Interaction between intentions and inseparable knowledge is also reflected in the court decision in the United States in the case of Global-Tech Appliances Inc. v SEB SA which emphasizes that not only knowledge about patents that are infringed must be actual, but the intention to encourage, assist or violate violations must be assessed thoroughly because the two aspects are interrelated. On the contrary, in Germany and the United Kingdom, the court focuses

³⁶ Denny Irawan, “Sampling Audit of the Tax Audit in Indonesia: A Legal Certainty Perspective,” *Scientium Law Review* 1, no. 2 (2022): 13–21, <https://doi.org/https://doi.org/10.56282/slr.v1i2.148>.

³⁷ Gerry Ferguson, “Criminal Liability and Criminal Defenses,” in *International Encyclopedia of the Social & Behavioral Sciences Vol. 19*, ed. James D. Wright (Massachusetts: Elsevier Ltd, 2015), 219.

³⁸ Stefano Barazza, “Secondary Liability for IP Infringement: Converging Patterns and Approaches in Comparative Case Law,” *Journal of Intellectual Property Law & Practice* 7, no. 12 (2012): 883.

³⁹ Barazza.

⁴⁰ Barazza. *Ibid.*, pp. 884-885. As Supreme Court affirmed that “*if a manufacturer or distributor intentionally induces another to infringe a trade mark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trade mark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit*”.

on assessing whether a third party or intermediary party knows or has reasons to know about the intentions of violating the main offender.⁴¹

Furthermore, the element of duty of care imposed on third parties or intermediary parties can be used as a fulcrum of secondary responsibility in a chain of events leading to violations, which elements can determine the balance between the competing interests of the parties. The idea refers to all actions that must be taken by intermediary parties in ensuring that their actions do not exceed the maximum degree of indifference to the rights of other parties, which is tolerated by jurisdiction. The duty of care is mainly related to the ability of intermediary parties to predict the possibility or knowledge of infringing use.⁴² The importance of enforcing the duty of care lies in efforts that require intermediary parties to take important steps to prevent violations that may be (or) are known. It is indeed possible that there are two fundamental problems in the implementation of the duty of care. First, evaluation of alleged violations cannot be fully transferred to the service provider, because of the limited financial burden resulting from these obligations and it is difficult to assess unclear violations. Second, the possibility of improper evaluation which can actually lead to a breach of contract between intermediary parties and customers. One solution according to Barazza is the hope for regulators to provide appropriate guidance regarding the steps needed to carry out the duty of care and carry it out uniformly, bearing in mind the responsibility of third parties or intermediary parties lies in constructive knowledge and inferred intentions than in the assessment of their material contribution to the violation.⁴³

E-commerce matters are defined by the Organization for Economic Co-operation and Development (OECD) as the sale and purchase of goods or services carried out through a computer network based on methods specifically designed for the purpose of receiving or placing orders,⁴⁴ in which there are many related parties, that is the buyer/seller who are the target of digital economic applications, the platform, and the regulators of each sovereign country (which includes the buyer, seller, and platform which may be different -different countries), so it is very susceptible to legal violations committed by primary wrongdoers, especially those related to anonymous, gaps in jurisdiction, any goods or services that are not recognized as purchases by buyers in the destination country.

Legal violations (in this case customs law in Indonesia) committed by the primary wrongdoer in the case of cross-border transactions require the direct role of PPJK, Postal Operators, PJTs, and Platforms. Indeed, all duties related to these transactions, efforts to counteract and anticipate the entry of things that can endanger/harm Indonesian territory from outside the customs area are the duty and responsibility of DJBC, however, it is necessary to regulate the e-commerce that are on target, fair, efficient, and able to encourage the growth of the economic ecosystem through input from all stakeholders,⁴⁵ through secondary liability arrangements that supposed to reach criminal liability. The urgency of this arrangement is reinforced by

⁴¹ Barazza. *Ibid.*, p. 885.

⁴² Barazza. *Ibid.*, p. 887.

⁴³ Barazza. *Ibid.*, p. 889.

⁴⁴ OECD, *Addressing the Tax Challenges of the Digital Economy, Action 1-2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project* (Paris: OECD Publishing, 2015).

⁴⁵ Indonesia, "Siaran Pers Kementerian Keuangan Republik Indonesia Nomor: 12/KLI/2019 Tanggal 29 Maret 2019," n.d.

the fact that liability based on faults has not been able to touch direct beneficiaries in the event of violations of customs laws in e-commerce transactions. Then, so that an offense meets the qualifications as a secondary/derivative criminal liability, it is necessary to have a deep understanding of the fulfillment of the existence of three complementary elements, namely the initial planning element, the factual element, and the mental element. That is, the requirements of secondary mental elements/derivative criminal liability will be difficult to understand without understanding the factual elements, as well as the factual elements which will be difficult to understand if they do not understand the reason for the initial planning, which is based on objectives, actual expressions which are requirements of mental elements.⁴⁶ Initial planning will range from what was originally categorized as non-participation to full, active, and dominant participation in the occurrence of a violation committed by primary wrongdoer.⁴⁷ The object of this initial planning can be identified with the nature of the services or goods, as Barazza has stated its form in three different cases, in the form of goods and services which may not be suitable for the use of violations, goods, and services suitable for the use of violations and non-violations, or goods and services intended specifically for infringement.

The factual element is important in secondary liability because in general the modern structure applies the basic principles of broad external objectives of criminal liability, and is designed to answer the four main questions of the delinquent event: "what?" which discusses the essence of the violation and refers to the substantive facts of the event (what happened), the three main components consisting of behavior, circumstances, and results, "who?" related to the identity of the competent offender legally, "where?" relating to the determination of the location of violations within the territorial jurisdiction of a country's sovereignty, and "when?" which examines aspects of the time of violation.⁴⁸ One unique example of a factual element in secondary liability is that behavior not acting on violations of law through third party means or intermediary parties is a unique form of behavior and must be criminally accounted for.⁴⁹

While the mental elements in secondary liability, according to Hallevy, must fulfill the following three main things, that is mens rea, negligence, and strict liability. In the case of a violation, the mens rea aspect must consist of the volitive aspect, i.e. aspects related to the results, including layers of indifference and rashness, and supported by cognitive concepts, which consist of awareness of behavior and circumstances ("*in result offenses it contains an additional element: awareness of the possibility of the occurrence of the results*").⁵⁰

The significance of this liability's expansion is related to the objectives prohibited by law in obtaining benefits by using the tools and/or services of other parties, where everything that is prohibited by law on secondary responsibility always considers motive (*mens rea*) or mistakes.⁵¹ One of the *mens rea* implementation on secondary criminal liability is seen in one of the considerations of the opinion of The

⁴⁶ Gabriel Hallevy, *The Matrix of Derivative Criminal Liability* (Heidelberg: Springer-Verlag Berlin Heidelberg, 2012).

⁴⁷ Gabriel Hallevy. *Ibid.*, p. 141.

⁴⁸ Gabriel Hallevy. *Ibid.*, pp. 155-156.

⁴⁹ Gabriel Hallevy. *Ibid.*, pp. 267-268.

⁵⁰ Gabriel Hallevy. *Ibid.*, p. 215.

⁵¹ Sverker K. Högberg, "The Search for Intent-Based Doctrines of Secondary Liability in Copyright," *Columbia Law Review* 106, no. 4 (2006): 911-12.

Malaysian Federal Court which has emphasized that corporate *mens rea* is not just "criminal intention" or "wicked mind", but has included "connoting fault" or "blameworthiness of conduct".⁵²

Negligence is the last ranking of the four main elements of error, that is intention, knowledge, rashness, and negligence. Some literature has explained about negligence. The Singapore Penal Code defines negligence as a failure to take precautionary and prudent measures.⁵³ Cane argues that negligence is a type of error that is formed by three elements, that is a duty to take care, a breach of that duty, and damage caused by that breach of duty. Then, Greene emphasizes negligence on duty violations, that is duty of care which must refer to three things, that is foreseeability, proximity, as well as fairness, justice, and reasonableness.⁵⁴

Furthermore, the application of the duty of care in secondary criminal liability is important to adopt Turner's advice, that is to consider several factors, in the form of allocation of losses, practicality, professionalism, constitutionality, the beneficial effects of the imposition of obligations for future behavior, and morality. Loss allocation is a consideration in the form of things that cannot be avoided because of the tendency to impose obligations on those who are able and justified to bear the loss. Practical considerations are considered as effective policies in the future that are able to ward off the avoidance of accountability. Professional protection is based on concerns about the rise of restrictions on professionalism. Constitutional considerations relate to the thinking of law enforcers who think they must comply with applicable laws and regulations. The beneficial effect of imposing an obligation on future behavior is related to the assumption that through the implementation of the duty of care can become a legal problem for those who fail to carry out their obligations properly. And then, according to Turner, moral considerations are reflected in the community who are more willing to accept the "good Samaritan law", which is better to try to recover the losses that may occur even if there are some treatments not in accordance with applicable regulations, rather than through a law enforcement system.⁵⁵

Then, the mental element in secondary liability that must meet strict liability is related to its provisions which must be based on the order of the law, so that the *mens rea* does not need to be proven and sufficient to prove the *actus reus* because there have been consequences in the form of losses to the victim which has been done by the primary wrongdoer through the means of the intermediary party.⁵⁶ In this case, it can be said that secondary liability is not another form of strict liability considering secondary responsibility is derived from primary liability.⁵⁷

⁵² Stanley Yeo, Neil Morgan, and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (Singapore: LexisNexis, 2012). As the complete citation is: "An essential ingredient of all offences under the Penal Code is *mens rea*; although, in the context of culpable, rashness or negligence, *mens rea* should not be understood as synonymous with 'criminal intention' or 'wicked mind'. Rather, it should be construed as connoting fault or blameworthiness of conduct."

⁵³ Yeo, Morgan, and Cheong. *Ibid.*, p. 44.

⁵⁴ Brendan Greene, *Optimize Tort Law*, (Oxon & New York: Routledge, 2017).

⁵⁵ Chris Turner, *Unlocking Tort* (London & New York: Routledge, 2014).

⁵⁶ Sinaga and Sinaga, *Rekonstruksi Model-Model Pertanggungjawaban Di Bidang Perpajakan Dan Kepabeanan*. *Op.cit.* p. 363.

⁵⁷ Agus Suharsono and Henry Dianto Pardamean Sinaga, "Rekonstruksi Ketentuan Pidana Perpajakan Agar Penegakan Hukum Pidana Perpajakan Di Indonesia Efektif," in *Kajian Akademis Direktorat Penegakan Hukum DJP* (Jakarta, 2019).

Another thing related to moral considerations which increasingly confirms that the legal regime has a justification for being fair in the case of the application of secondary criminal liability in the scope of e-commerce is the existence of mutual restrictions of legal certainty, justice, and benefits in terms of law enforcement providing a deterrent effect, recovering and balancing state losses arising from violations, and the accuracy and firmness of the customs and excise apparatus in proving and implementing regulations that have been violated.⁵⁸ The essence of understanding secondary justice liability in the scope of e-commerce is expressed through fairness, which is trying to put everything desired in its place and "what people are due",⁵⁹ which ideas include "*liberty, equality, and reward for services contributing to the common good*".⁶⁰ The formulation of justice as fairness at the same time shows the limits of legal practice based on position and position, the determination of the existence of power and responsibility, as well as the determination of rights and obligations⁶¹ each party involved in an agency relationship whose habitat thrives in the form of business relationships. Thus, by attaching fairness will strengthen the legal regime to recover state losses from violations of primary wrongdoers through several considerations of customs secondary liability arrangements. Including, the consideration of propriety of PPJK, Post Operator, PJT, and Platform to bear monetary sanctions based on understanding of participant-based and/or relationship-based, consideration of limited financial and non-financial capabilities of primary wrongdoers in recovering state losses along with sanctions other monetary conditions, accountability consideration through the realization of realized fairness against three parties who are interrelated in accountability (namely to the state as a victim who bears losses to state revenues from the tax and customs sector, against perpetrators of violations, and to direct and indirect beneficiaries),⁶² and consideration of and the feasibility of PPJK, Post Operator, PJT, and Platform as the "surest", "authorized" party or as "policy breaker"⁶³ in the event that a cross-border transaction occurs.

The importance of secondary liability regulation in the provisions of customs crime in Indonesia refers to cross-border transactions involving many parties, namely buyers, sellers, platforms, and regulators, which are of course vulnerable to legal violations committed by primary wrongdoers through the use of means from intermediary parties. The absence of secondary liability in the provisions of customs crime will lead to the potential in the form of rampant violations of customs liability that are not based on mistakes, which can refer to violations of customs purposes (for customs acceptance and the purpose of preventing and anticipating things that can endanger/harm Indonesian territory), potential failure in preventing attempts to use certain facilities for violations of customs law, or deliberately ignoring any acts that

⁵⁸ Denny Irawan, "On One Continued Act in Tax Crime in Indonesia," *Scientia Business Law Review* 1, no. 2 (2022): 38, <https://doi.org/https://doi.org/10.56282/sblr.v1i2.120>.

⁵⁹ David Schmidt, *Elements of Justice* (Cambridge: Cambridge University Press, 2006).

⁶⁰ John Rawls, "Justice as Fairness," *The Philosophical Review* 2 (1958): 166.

⁶¹ Rawls. *Ibid.*, p. 164.

⁶² Benny P Rikardo Sinaga et al., "Justice Reconceptation in Establishing Responsive Tax Law in Indonesia: A Rawlsian Perspective," *Ayer* 27, no. 3 (2020): 171–89, <http://ayerjournal.com/index.php/ayer/article/view/134>.

⁶³ Sinaga and Sinaga, *Rekonstruksi Model-Model Pertanggungjawaban Di Bidang Perpajakan Dan Kepabeanan*. *Op.cit.*, pp. 172-173.

violate customs law. Within the framework of the reform of the Customs Law in the future, it is necessary to formulate secondary criminal liability.

E. Conclusion

Two main conclusions are produced. First, the arrangement of secondary liability in the customs sector in Indonesia still tends to be limited to administrative accountability that only reaches PPJK, Designated Post Operators, and PJT. Indeed, there are rules regarding the imposition of criminal sanctions related to secondary liability in Article 107 of the Customs Law, but the definition of PPJK and Entrepreneurs where bonded landfills are inadequate for secondary criminal liability to be applied in e-commerce activities, transactions tend to be done through marketplace platforms or platforms other than marketplaces. In fact, the main violations that are often committed by primary wrongdoers in e-commerce transactions are matters relating to anonymous, gaps in jurisdiction, any goods or services that are not recognized by buyers in the destination country. Second, ideal secondary criminal liability arrangements in the field of customs in dealing with the challenges of e-commerce in Indonesia must be done through an expansion of participant-based meaning (the imposition of criminal liability is based on "causing" or "contributing to" or "facilitating" the occurrence of violations committed by the primary wrongdoer) and/or relationship-based (the imposition of criminal liability based on the benefits it receives from the violations committed by the primary wrongdoer that harm certain parties and is based on a very close relationship with the primary wrongdoer) each Participant-based liability or relationship-based liability is focused on the nature of the services or goods used by the primary wrongdoer, the knowledge and intent of the PPJK, the Postal Operator, PJT, and Platform, and the duty of care is imposed upon it. Considering that the ideal of secondary criminal liability is based on notification of specific things to a party regarding the impact of a violation of a purpose, and failure to prevent the use of the violation, or intentionally ignoring the existence of the violating act, then within the framework of customs law renewal on the future is suggested:

- a. Secondary criminal liability in the customs sector must be based on *mala prohibita*, which indicates a failure to fulfill its customs obligations. Provisions must also be made, such as the platform that is considered "not violating" in certain cases.
- b. The matter of formulation of secondary criminal liability must make adjustments to the criminal provisions that are in force or are still in draft form, such as the Draft Criminal Code, the Draft Criminal Procedure Code, the Supreme Court Regulation No. 13 of 2016 concerning Procedures for Handling Acts Criminal by the Corporation, and Draft Law on General Provisions and Tax Procedures so that there are no overlapping criminal provisions that cause legal uncertainty.
- c. Make *know your customer* (KYC) rules that are strict to the Platform, Designated Post Operators and PJTs, bearing in mind that they can or buyers who are reasonably expected to be the primary wrongdoers of the Customs Law that uses its discretion against the seller in force.

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