

# CORPORATE CRIME AND STATE-OWNED ENTERPRISES

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## Abstract

*Corporate crime* is a legal issue concerning many countries, including Indonesia, which regulates it in the New Criminal Code Number 1 of 2023. However, corporate crime regulations experience challenges in their application in State-Owned Enterprises. This paper aims to examine how Indonesian law, especially the New Criminal Code, accommodates corporate criminal provisions for state-owned enterprises. Using a juridical normative approach, it analyzes several criminal law instruments related to corporate crime in Indonesia. In conclusion, Criminal Code Number 1 of 2023 has regulated corporate crime and criminal sanctions. However, written law experiences obstacles and dilemmas when imposing corporate criminal sanctions on State-Owned Enterprises because the company's financial status is part of the state financial regime from the perspective of Indonesian law. Imposing fines for violations of State-Owned Enterprises could harm the state that fully or controls most of the company's shares.

*Keywords:* corporate crime, state-owned enterprises, Indonesian law, state finance

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## 1. Introduction

*Corporate criminal liability* is a legal issue that has developed in the modern era. This basic and main argument arises with separating corporate legal entities from human legal subjects for several purposes. Corporations can enter into agreements, sue or be sued in court, and own property in the corporation's name (Fischel & Sykes, 1996, p. 319-350). As an independent and separate legal subject, companies can commit criminal acts detrimental to the state and other parties.

In Indonesia's criminal law history, the old Criminal Code Number 1 of 1946 did not include rules regarding criminal acts committed by corporations. This regulation first appeared in Law Number 31 of 1999 concerning the Eradication of Corruption Crimes. To fill the existing legal vacuum regarding criminal liability committed by Corporations prior to the issuance of the Criminal Code Number 1 of 2023, the Supreme Court of the Republic of Indonesia has issued Supreme Court Regulation Number 13 of 2016 concerning Procedures for Handling Criminal Cases by Corporations as a guideline for law enforcement officials in handling criminal cases committed by Corporations.

The provisions on corporate crime in the Criminal Code Number 1 of 2023 and Anti-Corruption Law do not only target private companies but also state companies. As legal entities that carry out business activities to achieve profits, state companies also have the potential to commit corporate crimes that violate the provisions of laws and regulations in Indonesia.

This paper analyzes the theory of corporate crime from the perspective of Indonesian law and the challenges of its implementation in State-Owned Enterprises. The first part of this paper

explains what and how the corporate crime rules are. The second part presents a study of State-Owned Enterprises in Indonesia. The third part elaborates on the challenges of implementing corporate crime rules in State-Owned Enterprises. Lastly is the conclusion.

## **2. Corporate Crime in Indonesian Legal Perspective**

Before discussing corporate crime, this section begins with the definition of a corporation. Explanation of definitions is crucial in understanding legal aspects, including criminal law related to crimes and violations. Article 146 of the Indonesian Criminal Code states that the meaning of a corporation is “an organized group of people and or wealth, whether it is a legal entity in the form of a limited liability company, foundation, association, cooperative, state-owned enterprise, regionally-owned enterprise, village-owned enterprise, or the equivalent, as well as associations not incorporated as a legal entity or business entity in the form of a firm, limited partnership, or the equivalent.”

The definition of a corporation in the Criminal Code is more detailed than that of the Supreme Court Regulation Number 13 of 2016 in Article 1 point 1, which states that “a corporation is an organized group of people and or wealth, whether it is a legal entity or not a legal entity.” The main difference is that this definition does not mention the types of business entities divided into legal entities and non-legal entities.

In the Black’s Law Dictionary, the definition of a corporation is "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” (Garner, 1999, p. 341).

In understanding theoretically, a corporation has five structural characteristics, including (1) legal personality; (2) limited liability; (3) transferrable shares; (4) centralized management under a board structure; and (5) shared ownership by contributors of equity capital. These five characteristics explain that a corporation is a legal subject or entity that can be equated with human legal subjects. It can transact business with other parties. However, it has separation from the wealth of a person who is the owner or shareholder. It also includes the separation of rights and obligations in responsibility or action (Kraakman & Armour, 2017, p. 5-15).

As a legal entity, a corporation is the subject of a crime (Indonesian Criminal Code, article 45). Criminal acts by corporations are criminal acts committed by management individually or jointly. The administrators in question are divided into two types. The first is management which has an available position in the corporate organizational structure. A second is a person based on a working relationship or other relationship acting for and on behalf of the corporation or acting in the interests of the corporation (Indonesian Criminal Code, article 46). In addition, criminal acts by corporations can be committed by givers of orders, control holders, or beneficial corporate owners outside the corporate structure but can control the corporation (Indonesian Criminal Code, article 47).

In a simple definition, Braithwaite states that corporate crime is "the conduct of corporation or of employees acting on behalf of a corporation, which is proscribed and punishable by law" (Braithwaite, 1984, p. 6). Moreover, corporate crime is not only related to criminal acts in criminal law but also includes administrative and civil violations. Corporations and parties representing them are subject to sanctions following the level of violations proven in court

(Simpson, 2002, p. 6-8).

In determining a corporate crime, the violation or offence is committed by an individual or group that is a legitimate organization member in the context of carrying out organizational tasks. Therefore, the perpetrator commits a crime on behalf of and in the interests of his corporation (van de Bunt, 1994, p. 11-23). The Indonesian Criminal Code stipulates that corporate crime can be held accountable if: (Indonesian Criminal Code, article 48)

- a. included in the scope of business or activity as specified in the articles of association or other provisions applicable to the corporation.
- b. benefits the corporation unlawfully.
- c. accepted as corporate policy.
- d. the corporation does not take the necessary steps to take precautions, prevent a bigger impact and ensure compliance with applicable legal provisions to prevent a crime.
- e. the corporation allows crime to occur.

In the Corruption Crime Act Number 31 of 1999, corporate criminal responsibility is regulated in Article 20 Paragraph (1), which states: "In the event that a criminal act of corruption is committed by or on behalf of a corporation, criminal charges and impositions can be made against the corporation. and/or management". In the case of a corporation bribing state administrators, in addition to the corporation being punished, its management can also be prosecuted and punished based on this provision.

Furthermore, Article 20 Paragraph (2) explains that a corporation is considered to have committed a crime if the crime is committed by people based on work relations or other relationships, acting within the corporate environment alone or together. The phrase "both alone and together" emphasizes that the person doing it can be one standing alone or several people together. The condition is that the perpetrator has a working or other relationship with the corporation.

### **3. Overview of Indonesian State-Owned Enterprises**

Several international organizations define State-Owned Enterprises (SOEs) differently. For example, Asian Development Bank defines SOE as "a legal entity established to undertake commercial activities and owned fully or largely by the sovereign" (ADB, 2018, p. 3). Besides, the Organization for Economic Co-operation and Development (OECD) Guidelines defines SOE as "any corporate entity recognized by national law as an enterprise, and in which the state exercises ownership. It includes joint stock companies, limited liability companies, and partnership limited by shares. Moreover, statutory corporations, with their legal personality established through specific legislation, should be considered as SOEs if their purpose and activities, or parts of their activities, are of a largely economic nature" (OECD, 2015, p. 32).

Another definition introduces SOE by dividing it based on the number of shares owned by the state. European Commission for Economic and Financial Affairs explains that SOE can include the following categories: (EU, 2016, p. 6-7)

- (1). Companies fully owned by public authorities.
- (2). Companies where public authorities have a majority share.
- (3). Companies where public authorities retain a minority share but have special statutory powers.
- (4). Companies where public authorities have a minority share and no special powers.  
These are generally not considered as SOEs however they may be of relevance to

obtain a fuller picture of governments' stake in the economy.

Indonesia, in article 1 point 1-4 of the Law Number 19 of 2003 on SOE, mentions that SOE is an enterprise which equity owned by the state either majority or entirely through direct equity participation deriving from the restricted state assets. Moreover, SOE is divided into three:

- 1) State-Owned Limited Liability Company (*Perusahaan Perseroan*) means a SOE in the form of limited liability company which equity is divided into shares which entirely or at least 51% (fifty one percent) of the shares are owned by the State of the Republic of Indonesia with main objective is to gain profits.
- 2) State-Owned Listed/Registered Company (*Persero*) means a SOE in which equity and number of shareholders has fulfilled specific criteria or *Persero* which has conducted public offering in accordance with the legislation in the sector of capital market.
- 3) Public Corporation (*Perusahaan Umum/Perum*) means a SOE which capital entirely owned by the state and not divided into shares, which objective is for public service in the form of high-quality goods and/or service provision and at the same time to gain profits under the principles of corporate governance.

In establishing a state company, Indonesia has general aims and objectives such as contributing to developing the national economy and increasing state revenues from company business profits. In addition to financial benefits to increase the state treasury, state companies are assigned to organize public benefits by providing high-quality goods and services, especially those related to the main needs of the community. However, state companies are often obligated to pioneer business activities not carried out by private companies and help small and medium business groups (Article 2 of Law Number 19 of 2003).

Indonesia's aims and objectives are similar to those generally experienced by many countries. The OECD notes that many countries own and control SOEs to support their economic and national strategic interests. In addition, SOE provides goods and services that cannot be supplied by the private sector, such as energy, public transportation, defense, and security. More importantly, state ownership of SOEs maintains a "natural" monopoly over some of the nation's major assets (OECD, 2018, p. 23).

Indonesian SOE continues to experience structural reforms and performance improvements in their journey. The Ministry of State-Owned Enterprise, as the state representative in managing SOEs, continues to streamline and improve the portfolio of the number of SOEs through corporate restructuring (holding, mergers, acquisitions). The development focus for restructuring will be carried out starting in 2020, which in the next 5 years will make the number of SOE more efficient, with fewer than 70 SOEs. Under the long-term strategy of the Ministry of SOE, SOE are grouped according to the value chain and business ecosystem to increase business sustainability. In its management, currently, 12 clusters have been formed as follows:

**Table 1.** List of Indonesian State-Owned Enterprises based on the Value Chain and Business Ecosystem

No	Cluster	Company	Main Business
1	Energy, Oil and Gas Industry	PT Perusahaan Listrik Negara (Persero)	Electricity
		PT Pertamina (Persero)	Oil and energy
2	Health Industry	PT Bio Farma (Persero)	Pharmacy and vaccine manufacturer
3	Manufacturing Industry	PT Biro Klasifikasi Indonesia (Persero)	Indonesian-flagged merchant ships.
		PT Len Industri (Persero)	Electronic equipment
4	Mineral and Coal	PT Krakatau Steel	Steel maker

	Industry	(Persero) Tbk	
		PT Indonesia Asahan Alumunium	Aluminum smelting and mining industry
5	Food and Fertilizer Industry	Perum BULOG	Food logistics
		PT Rajawali Nusantara Indonesia (Persero)	Agriculture, animal husbandry, fisheries, trade, and logistics
		PT Pupuk Indonesia (Persero)	Fertilizers and chemicals
6	Plantation and Forestry Industry	PT Perkebunan Nusantara III (Persero)	Plantation commodity products
		Perum Perhutani	Management of state forest resources
7	Insurance Services and Pension Funds	PT Reasuransi Indonesia Utama (Persero)	Reinsurance for general insurance companies and life insurance companies
		PT Asuransi Jiwasraya (Persero)	Insurance
		PT Bahana Pembinaan Usaha Indonesia (Persero)	Financial services for micro, small, and medium enterprises
		PT ASABRI (Persero)	The social insurance company for all soldiers of the Indonesian National Armed Forces, members of the Indonesian National Police, and civil servants at the Ministry of Defense and the Indonesian National Police
		PT TASPEN (Persero)	Insurance companies, retirement savings and pension funds for civil servants
8	Infrastructure Services	Perum Perumnas	Providing decent housing for the lower middle class.
		PT Adhi Karya (Persero) Tbk	Construction, engineering-procurement-construction, property, real estate, infrastructure investment, railway infrastructure and facilities implementation, procurement of goods and hotel services.
		PT Hutama Karya (Persero)	Construction services, development, and toll road service providers
		PT Semen Indonesia (Persero) Tbk	Cement
		PT Wijaya Karya (Persero) Tbk	Building construction
		PT Jasa Marga (Persero) Tbk	Toll road developer and operator
9	Financial Services	PT Bank Negara Indonesia (Persero) Tbk	Banking and other financial services
		PT Bank Rakyat Indonesia (Persero) Tbk	Banking and other financial services with specialization in small-scale and <a href="#">microfinance</a>
		PT Bank Mandiri (Persero) Tbk	Banking and other financial services
		PT Bank Tabungan Negara (Persero) Tbk	Banking and other financial services
10	Logistics Services	Perum Damri	Intercity, airport, tourism, logistics transport, and transport to isolated

			areas and inter-country transport
		PT Kereta Api Indonesia (Persero)	Sole operator of <a href="#">public</a> railways
		PT ASDP Indonesia Ferry (Persero)	Passenger ferry operator
		PT Pelabuhan Indonesia (Persero)	Management and development of ports
		PT Pos Indonesia (Persero)	<a href="#">Postal Service</a>
		PT Pelayaran Nasional Indonesia (Persero)	Cargo and passenger shipping
11	Tourism and Support Services	PT Aviiasi Pariwisata Indonesia (Persero)	Aviation and tourism industry
		Perum Lembaga Penyelenggara Navigasi Penerbangan Indonesia	Air traffic control, air traffic services, aeronautical information, aviation telecommunication, aviation meteorological information, and SAR information
12	Telecommunications and Media Services	PT Telekomunikasi Indonesia (Persero) Tbk	Telecommunications in fixed-line telephony, internet, and data communications
		Perum Produksi Film Negara	Film industry.
		Perum Percetakan Uang Republik Indonesia	Printing rupiah currency and other important state-owned documents and providing digital security services

Source: Summary results from the official website of the Ministry of State-Owned Enterprises of the Republic of Indonesia

#### 4. Law Enforcement of Corporate Crime in State-Owned Enterprises

This paper section analyzes how corporate criminal law enforcement is implemented in SOEs. The discussion focuses on the Indonesian legal framework, stipulating that SOEs finance is state finance. Even though the source of funds for the establishment of SOEs from the State Budget has been separated, the financial status of SOEs remains part of the state financial regime (Hidayatulloh & Erdős, 2023, p. 105-120).

Article 2 point g of the State Finance Law Number 17 of 2003 states that one of the scopes of state finance is state/regional assets that are managed by themselves or by other parties in the form of money, securities, receivables, goods, and other rights can be valued in money, including separated assets in state/regional companies. Based on this rule, government-owned SOE shares are part of state finances.

The financial status of SOEs as part of the state financial regime is strengthened by Law Number 15 of 2004 on the Audit Board of the Republic of Indonesia. Article 3, paragraph (1) of this law regulates that an audit by the Audit Board covers all elements of state finance, not only the State Budget but also SOEs finances. Oversight of SOEs by the Audit Board is the embodiment of the function of state control over state finances managed by state companies, both state companies which the government wholly or mostly owns (Hidayatulloh & Erdős, 2023, p. 152).

The state's financial status in SOEs assets causes a dilemma in enforcing corporate criminal law. A corporation found guilty of a corporate crime will receive fines from the company's assets. If a state company is sanctioned with a fine, it will pay the state itself. These conditions can cause corporate losses, which mean losses to the country's wealth (Kharisma, Putra, & Hidayah, 2021, p. 1039-1064). Moreover, law enforcers have different views on implementing corporate crimes

against state companies. The Corruption Eradication Commission and the Supreme Court support the existence of fines for SOEs who are proven guilty. At the same time, the Police refuse to prosecute SOEs because fines will harm state companies and indirectly harm the state (Rifai, 2019, p. 263).

## 5. Conclusion

Indonesia has adopted rules regarding corporate crimes in the New Criminal Code Number 1 of 2023, which previously had been specifically regulated in the Corruption Crime Act Number 31 of 1999. However, corporate crimes experience legal obstacles when applied to SOEs. The financial status of SOEs, which are part of the state financial regime, causes law enforcement officials to differ in their views on whether SOEs should be given corporate criminal sanctions like private companies. Fine criminal sanctions for corporate crimes applied to SOEs can pose a dilemma because they are detrimental to the state as the company's owner.

Under the new criminal law, a State-Owned Enterprise as a legal entity can be subject to criminal sanctions for criminal offenses or crimes. Criminal sanctions in the form of fines and compensation can be imposed on State-Owned Enterprises. This rule encourages the directors and management of state companies to always comply with the law and prevent company losses that harm state finances. In addition, the Government of Indonesia needs to reconstruct state corporate governance to avoid criminal sanctions against State-Owned Enterprises.

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