



# *Criminal Liability of Beneficial Owners in Corporate Crime*

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**Abstract**— This research examines the legal issues relating to holding Beneficial Owners (BOs) liable for corporate wrongdoing. This research aims to examine the regulations regarding the involvement of Beneficial Owners in Indonesian law and evaluate their criminal liability for violations of corporate law. The research method includes literature review, case analysis, and reference to relevant regulations. The research findings show that the position of beneficial owners in limited liability companies is not clearly regulated in national laws and regulations such as the Limited Liability Company Law and the Capital Market Law. However, the issuance of Presidential Regulation No. 13/2008 has provided a definition and standard for beneficial owners, which specifically refers to individuals who hold ultimate power and have full control over the company. Regarding the criminal liability of beneficial owners, the main consideration is the role of the beneficial owner. If beneficial owners plan or authorize corporate abuses to hide the proceeds of criminal activity, they may face criminal liability under applicable laws and regulations.

**Keywords**—Criminal Liability; Beneficial Owner; Corporate.

## I. INTRODUCTION

Corporation operating in a globalized economy can significantly influence a country's economic growth, either positively or negatively. Historically, a Limited Liability Company was referred to as Naamloze Vennootschap by the Dutch. The term "Limited Liability Company" originates from the combination of the words "company" and "limited." Here, "company" denotes the capital of a limited liability company, which is comprised of shares. Shares, conversely, represent a claim to the company's assets or its profits. The term "limited" underscores the shareholders' liability, confined to the nominal value of their shares. The impact of a corporation's presence hinges on its operations. If conducted ethically, a corporation can wield a positive influence, but without good faith, it can engage in unfair business practices, monopolistic behavior, misinformation, tax manipulation, exploitation of natural resources, environmental degradation, and criminal activities such as money laundering and terrorism financing.[1]

Frequently, criminal offenses involve the actions of corporations, where the crimes occur within the scope of the company's operations and are intended to benefit the corporation. Criminal liability arises when harm is caused due to these actions. Corporate criminal liability, similarly, stems from unlawful acts committed by a corporation resulting in harm to others. This concept has garnered attention from legal experts on both national and international levels. Despite the significant contribution of corporations to economic growth and national development, they are often involved in various criminal activities that harm the state and society. It is not uncommon for corporations to be utilized as a means to conceal assets acquired through criminal acts, avoiding legal repercussions.

A corporation is a distinct legal entity with its own identity, separate from that of its shareholders, directors, and other organs. In Indonesia, one common form of corporation is the Limited Liability Company, established

through an agreement and functioning as a capital partnership divided into shares. To set up a company, a physical location, company name, capital structure, business objectives, and composition of the board of directors, commissioners, and shareholders are required. Additionally, the enactment of Presidential Regulation No. 13/2008, a new term emerged, namely the Beneficial Owner.

Regarding the Beneficial Owner, several expert opinions can be found that explain this concept. Vogel states that the Beneficial Owner is an individual or group that has the right or power to determine the utilization of capital or wealth owned for others or determine the utilization of the results or profits from the capital or wealth. Herman LJ said that a beneficial Owner is an owner who is not only legally registered as the owner but also has the right or authority to make decisions about things that will be done on objects that are in his control. Meanwhile, Olivier, Libin, Weeghel, and Toit state that the concept of Beneficial Owner is a provision that needs to exist in consideration for the provision of facilities for reducing tax rates on royalty income, dividends, and interest on a tax subject under certain conditions.[2]

Full control of the company triggers crimes or actions that can harm the state, so determining the beneficial owner is very useful in preventing or dealing with these problems. *"Anonymity enables many illegal activities to take place hidden from law enforcement authorities, such as tax evasion, corruption, money laundering, and financing terrorism"*[3] However, the process of determining who is the actual beneficial owner or Ultimate Beneficiary Owner is very difficult to do. Some factors make it difficult to indicate the beneficial owner, one of which is the existence of a nominee, which in practice can be interpreted as using the name of an individual or a citizen who acts as if he is one of the limited liability companies in a company or a shareholder of a company in Indonesia. The OECD states that the beneficial owner is the party that receives the final benefit or the actual beneficiary. For example, in the field of taxation, it is necessary to assess who is the real beneficial owner, meaning that in a corporation shareholders or members are referred to as owners, but in a corporation or partner where the need is held by the corporation or partner. Inadequate regulations and disclosure applications regarding beneficial owner information, lack of information, and difficulty accessing information, so that it has an impact on the accuracy or guaranteed truth of the beneficial owner can be utilized by certain parties who want to commit crimes. Related to this matter which the author describes above, it is necessary to conduct a deeper study related to the criminal liability of the beneficial owner in corporate crime.[4]

In addition, it is worth noting the case involving the destruction of the Sei Hulu Lanjai and Tanjung Kasam Protected Forests by PT Prima Makmur Batam (PMB) highlights the limitations in enforcing laws against environmental crimes, particularly in holding the main actors or beneficial owners accountable. While the company's managing director and commissioner have been subjected to prison sentences and fines, there are still challenges in reaching those most responsible.

In this particular case, the panel of judges at the Batam District Court imposed a 7-year prison sentence and a fine of Rp 1 billion on the director of PT PMB. Similarly, the commissioner of PT PMB received a 5-year and 6-month prison sentence and a fine of Rp 1 billion. However, it is important to note that these legal repercussions only apply to company executives directly involved in the day-to-day operations.

It's crucial to note that in this scenario, there's no evidence that law enforcement has been able to identify or hold accountable the beneficial owner who likely played a significant role in the strategic decisions leading to environmental harm. Without addressing the beneficial owner, the deterrent effect of law enforcement against environmental crimes is greatly diminished. Unpunished beneficial owners can potentially continue similar practices through other companies or via alternative means, thereby limiting efforts to prevent environmental damage. To effectively address this issue, it is essential to implement stronger regulations and more comprehensive law enforcement mechanisms. This should involve mandating companies to disclose information about beneficial owners, as well as enhancing collaboration between law enforcement agencies at both national and international levels. Related to this matter which the author describes above, it is necessary to conduct a deeper study related to the criminal liability of the beneficial owner in corporate crime.

## II. LITERATURE REVIEW

### A. Criminal Liability

When determining and identifying a person committing a criminal offense, it is necessary to hold him/her criminally responsible. This is because the criminal act (*actus reus/criminal act*) alone is not sufficient to declare a person guilty. Criminal responsibility is imposed on a person due to specific actions they have taken and their knowledge of the consequences of their actions.

Following the principle of "*actus non facit reum nisi means sit rea*," criminal responsibility involves the *actus reus* (criminal offense) followed by the *means rea* (criminal responsibility) and encompasses elements such as guilt in the broad sense of both intent and negligence, the ability to be responsible, and the absence of excuses. Criminal responsibility is closely related to guilt in criminal law and the ability to be responsible. The ability to be

responsible can be said to be the state of mind of a normal and healthy person. According to Moeljatno, for the existence of the ability to be held accountable, a person must be :

1. Able to distinguish between good and bad actions; lawful and unlawful.
2. The ability to determine his/her will according to the realization of the good and bad of the act.

Based on this explanation, the first is an intellectual factor, which can distinguish between actions that are allowed and actions that are prohibited in criminal law. The second is a feeling or volitional factor, namely the ability to adjust their behavior with awareness of what is allowed and what is prohibited in criminal law.

Criminal responsibility is an important element in criminal cases because the perpetrators of criminal acts must be able to take responsibility for their actions. Article 44 of the Criminal Code regulates the reasons for the elimination of punishment, namely the inability to be responsible. This means that perpetrators of criminal acts who are unable to take responsibility for their actions cannot be convicted. Then in criminal law, the principle of "Keine Strafe ohne Schuld" is also known, which means that there is no punishment without fault. Although this principle is an unwritten principle, many countries use this principle, such as England, America, and Indonesia.

Fault is a certain mental state of the criminal and the relationship between the mental state (the criminal) and his actions in such a way. Fault is always in harmony with the mental state, the act, and the consequences of the act. According to Andi Hamzah, mistakes in a broad sense include :

1. Intentionally (*Dolus*)
2. Negligence (*Culpa*)
3. Accountable

Criminal responsibility and guilt in criminal law are essential in the imposition of punishment, both have a very close relationship in terms of punishment because based on the principles described above no one can be convicted without fulfilling these two elements, namely the existence of guilt and his actions can be accounted for.

#### B. *Beneficial Owner*

The concept of beneficial owners does not have a strong legal basis in Indonesia. However, in 2018, the President issued Presidential Regulation No. 13/2018 to address this issue. This regulation mainly focuses on recognizing beneficial owners to prevent and eliminate Money Laundering Crime (TPPU) and Terrorism Financing. According to Article 1, Paragraph (2) of this Presidential Regulation, a beneficial owner is an individual who has the authority to control a corporation by appointing or dismissing directors, commissioners, administrators, supervisors, or corporate trustees, as well as receiving direct or indirect benefits from the corporation.

Article 1 point 2 defines a beneficial owner as: "an individual who can appoint or dismiss directors, board of commissioners, administrators, supervisors, or supervisors in the Corporation, can control the Corporation, is entitled to and/or receives benefits from the Corporation either directly or indirectly, is the actual owner of the funds or shares of the Corporation and/or fulfills the criteria as referred to in this Presidential Regulation". The Presidential Regulation in question narrows down the definition of a corporation to specifically include limited liability companies, foundations, associations, cooperatives, limited liability partnerships, firm partnerships, and other similar forms of corporate entities.

Presidential Regulation No. 13/2018 details the categorisation of beneficial owners. Firstly, those with a direct stake in the company, named in the articles of association, who own more than 25% of the shares, voting rights, or profits, and possess the authority to hire, to replace, or dismiss board members and commissioners. Secondly, there are individuals with indirect beneficial ownership through relationships or affiliations, who may not meet the share ownership, voting rights, profit, or authority criteria in the company. These individuals exert influence or control through unlisted relationships or affiliations in the company's articles of association.

Law No. 40 of 2007 on Limited Liability Companies (referred to as UUPT), does not explicitly address the role of beneficial owners in Limited Liability Companies. The regulations pertaining to beneficial owners are specifically highlighted in Presidential Regulation No. 13/2018. According to this regulation, there are three key parameters that define the beneficial owner: Firstly, ultimate power, where the direct beneficiaries of the company are not limited to the individuals officially listed in the company's records, as the listed names may not necessarily correspond to the true owners or direct beneficiaries. Secondly, economic benefits, where the direct beneficiaries not only include shareholders, but also individuals who have access to the company's financial cash flow. Lastly, control, where the direct beneficiaries are not limited solely to shareholders, but also possess the authority to control the company.[5]

In the Indonesian UUPT the definition of ownership is stated in Article 7. According to this article, a company is established by 2 or more people through a notarial deed in the Indonesian language. Each founder is obligated to own shares when the company is established. Although UUPT does not explicitly regulate nominee shareholding agreements in the establishment of a PT, Article 1338 BW serves as the legal basis. UUPT states in Article 48 that company shares are issued in the name of the owner, but it does not prohibit the use of nominee shareholders. Therefore, when nominee shareholders are used in a PT, the legal owner of the shares is the party whose name is lent or the nominee party. However, according to Law Number 25 of 2007 on Capital Investment, both domestic and foreign investors are not allowed to make agreements or statements stating that the ownership of shares in a

limited liability company is on behalf of another person. Any such agreement or statement is considered null and void, as stipulated in Article 33.

### C. *Corporate Crime*

In Dutch criminal law, the term *strafbaarfeit*, and sometimes the term *delictum* borrowed from Latin, are used to refer to a criminal offense. This abstract term encompasses concrete events in criminal law. While *strafbaarfeit* denotes a punishable event, *delictum* refers to an act for which the perpetrator is liable to punishment. In Indonesian criminal law, the term for criminal offense mirrors that of the Netherlands, owing to the derivation of the Indonesian Criminal Code from the Dutch *Wetboek Van Strafrecht*. In the Netherlands, the term *feit* is employed as it encompasses not only actions (*handelen*) but also negligence (*nalaten*). A *strafbaarfeit* is an act that contravenes the law and is subject to punishment, involving an element of fault and committed by a responsible individual.

In England and America, there is a principle that reads "An act does not make a person guilty unless his mind is guilty" In Latin, this principle reads "actus non facit reum nisi mens sit rea" which when translated into Indonesian this principle reads "an act cannot make a person guilty unless his mind is guilty". Guilty where the intent and purpose are innocent". The most essential element in this principle is the *actus reus*/criminal act element. *Actus reus*/criminal act can be harmonized with *strafbaarfeit* in the Dutch Criminal Code, where *actus reus* includes elements relating to unlawful acts.

Corporation, as a business entity, is gaining recognition among the people of Indonesia. Previously, people were more accustomed to terms like *Naamloze Vennootschaap (NV)* or Limited Liability Company. The legal provisions regarding NV changed, leading to the adoption of the name Limited Liability Company based on Law Number 1 of 1995 and subsequently amended by UUPT. The term "Corporation" has gained popularity, signifying their significant influence on the lives of Indonesians and the global community. While corporations make substantial positive contributions to industrial development, there is also a need to address the potential negative impacts they have on people's lives. The Supreme Court of the Republic of Indonesia, in Regulation Number 13 of 2016, defines a "Corporation" as a group of people and/or wealth, whether it is a legal entity or not, organized in a specific way.

The term "corporation" has its etymological roots in the Latin word "corporation," and is related to the Dutch "corporate" and German "corporation." The word "corporate" originates from the Latin word "corpus" (Indonesian: *badan*), which refers to the act of creating or embodying something. Therefore, "corporation" denotes the outcome of the process of embodying an entity, in essence, a body given personhood through human effort, as opposed to a naturally occurring human body.

In legal terminology, various legal experts have defined the term "corporation." For instance, according to Subekti and Tjitrosudibyo, "corporate" or "corporation" refers to an individual regarded as a legal entity. Meanwhile, Yan Pramadya Puspa explains that a "corporation" denotes an individual recognized as a legal entity; a corporation or company is an association or organization that, by law, is regarded similar to a human being (*persona*) as a rights and obligations holder, possessing the capacity to initiate legal proceedings or be subject to legal action. Examples of legal entities include limited liability companies, NV (name *Vennootschap*), foundations (*Stichting*), and even the state.

In addition, as per the provisions of Law No. 31 of 1999 on the Eradication of Corruption, a corporation is considered a legal entity subject to criminal law. Article 20, paragraph 2 of the law states that "A corporation is held accountable for the crime of corruption if the illegal act is carried out by individuals through employment or other relationships, whether independently or collectively within the corporation." Furthermore, as stated in Law No. 20 of 2001, a corporation is defined as an organized assembly of individuals and/or assets, regardless of its legal status.

In general, corporate crime provides various types of losses in the realm of the life of the nation and state, specifically, it has made losses in various sectors, including:[6]

#### 1. Economic losses

Many cases show that losses from corporate criminal acts cause very large-scale economic losses when compared to losses caused by ordinary crimes. Specifically in corruption cases, corruption involving corporations generally has a greater amount than human legal subjects.

#### 2. Losses in Health and Life Safety

Quoting Gilbert Geis, Kristian explained that every year, corporations are responsible for cases that cause thousands of deaths and disabilities that occur around the world. Crimes committed by corporations also result in the risk of death and disability. These crimes can be caused both by products produced by corporations and in the production process, so that the wider community becomes victims, especially consumers and laborers who work for the corporation.

#### 3. Social and moral losses

In addition to economic, health, and life losses, losses that also arise as a result of corporate crime are losses in the social and moral fields. A corporate crime also causes damage to public trust in business behavior. Quoting

The President's Commission on Law Enforcement and Administration of Justice, Kristian stated that corporate crime is the most important crime of concern not only because of its enormous losses but also the damaging effects on moral measures of American business behavior. Business crime (corporations) undermines public confidence in the business system because such crimes are integrated into the structure of legitimate business.

### III. METHODS

In this study, the author employs a normative legal research method that involves organizing legal materials to aid in analysis and interpretation. Primary legal materials used include laws and regulations, while secondary legal materials encompass books, journals, and legal articles, as well as tertiary legal materials. The analysis follows a qualitative approach, incorporating statutory, case, and conceptual approaches to provide thorough interpretations and conclusions that address the research problem.

### IV. RESULT AND DISCUSSION

#### A. *Beneficial Owner Regulations in Indonesian Law*

In today's landscape of economic crime, the perpetration of financial wrongdoing frequently hinges on the manipulation of legal entities. Money laundering is a prime example of this practice, as criminals often exploit cash-based business structures and other legitimate channels to obscure the origins of illicit funds. This subterfuge commonly involves the utilization of entities such as limited liability companies, foundations, and firms. Limited liability companies, referred to as companies hereinafter, are a popular choice for criminals seeking to obfuscate their identities and illicit gains. The intricate web of shareholding within these companies, often orchestrated by white-collar criminals, complicates the process of tracing and identifying perpetrators.

Share ownership within these companies extends beyond direct shareholders to encompass true nominees. These nominees are individuals specifically designated to act on behalf of the appointing party—referred to as the beneficiary—in executing specific legal duties. Nominees can assume various roles, such as property or land owners, directors, proxies, shareholders, and more, in the performance of legal actions.

The lack of regulation of beneficial owners in UUPT concerning Limited Liability Companies gives rise to a different reality in which the ownership of shares is not transparent. As a result, beneficial owners' presence becomes challenging to track due to their concealed position within the company's intricate ownership framework, making them legally untraceable. This opacity presents potential obstacles, particularly in identifying accountability for addressing money laundering offenses committed by beneficial owners. Therefore, the disclosure of beneficial owners within a company becomes crucial, especially as the current practice equates the definition of the company's representative with that of the beneficial owner, despite the practical differences between the two.

In accordance with Presidential Regulation No. 13/2018, the concept of beneficial owner is a person or entity that owns capital or shares of the company and has the authority to hire or suspend the company's management, board of directors, board of commissioners, or supervisors. In addition, they also have the power to influence the company and have rights over, or benefit from, the company either directly or indirectly. This regulation applies to various types of business entities including limited liability companies, foundations, associations, limited liability partnerships, and other forms of business entities. The stipulation of rules regarding beneficial owners in this Perpres has several interests, namely protecting companies and beneficial owners who are in good faith, providing legal clarity regarding criminal liability, and increasing the effectiveness of asset recovery efforts.[7]

When comparing the concept of beneficial owner contained in Presidential Regulation No.13/2018 and the Financial Action Task Force on Money Laundering and Terrorism (hereinafter referred to as FATF) Recommendations, there are two similarities, namely both regulate beneficial owners as individuals, not entities. Beneficial owner refers to an individual or individual who has a great ability to direct the company (ultimate owns or controls) and refers to an individual who effectively controls the overall decision (ultimate effective control) of another entity or over the enactment of a particular law.

The background of FATF regulating the beneficial owner is a form of breakthrough to eradicate money laundering cases in drug transactions at that time. The international standard in FATF in 2012 number 24 states :

*"Transparency and beneficial ownership of legal persons. Countries should take measures to prevent the misuse of legal persons for money laundering or terrorist financing. Countries should ensure that there is adequate, accurate, and timely information on the beneficial ownership and control of legal persons that can be obtained or accessed in a timely fashion by competent authorities. In particular, countries that have legal persons that can issue bearer shares or bearer share warrants, or which allow nominee shareholders or nominee directors, should take effective measures to ensure that they are not misused for money laundering or terrorist financing. Countries*

*should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22”*

Meanwhile, the Organization for Economic Cooperation and Development (hereinafter abbreviated as OECD) states that the beneficial owner is the party who receives the final benefit or the actual beneficiary. For example, in the field of taxation, it is necessary to assess who is the real beneficial owner, meaning that in a corporation, shareholders or members are referred to as owners, but in a corporation or partner where the need is held by the corporation or partner. FATF states guidelines, procedures, and standards on how countries provide limitations and implement regulations on beneficial owners. Inadequate regulation and application of disclosure regarding beneficial owner information, lack of information, and difficulty accessing information, so that it has an impact on the accuracy or guaranteed truth of the beneficial owner can be utilized by certain parties who want to commit crimes, especially TPPU and terrorism financing.

#### *B. Beneficial Owner's Liability in Corporate Crime*

A corporation, as an entity or legal subject, plays a crucial role in advancing economic growth and national development. However, there are instances where corporations engage in criminal activities, also known as corporate crime, leading to significant losses for the state and society. It is not unusual for corporations to be utilized as a means to conceal assets acquired through criminal activities, evading accountability within the criminal justice system.

The urgency to make corporations a subject of criminal law and the ratio to impose criminal responsibility on corporations has become a discussion by various criminal law academics, not only nationally but also internationally. One of them is if the profit obtained by the company and the loss/harm suffered by the community can reach such a large point. Thus, it will not be possible to balance if the corporation is only subject to civil sanctions.

However, it is not uncommon that the main perpetrator of corporate crime is not from the board of directors and commissioners, but the main perpetrator is a beneficial owner. In determining the criminal liability of the Beneficial Owner, it is necessary to see whether based on material truth there is an act that violates the criminal provisions stipulated in the law by looking at the existing facts. Material truth itself can be defined as truth based on evidence that is valid according to the law and the judge's belief. Material truth can also be interpreted as true or actual truth, where the judge of a criminal case is seeking material truth, the event must be proven.

Beneficial Owner itself can basically be interpreted as ownership that is not only limited to being legally registered as the owner but also has the right to decide what to do with the controlled object. The Beneficial Owner can refer to a person who controls the entity. From this understanding, it can be seen that the Beneficial Owner itself is not always the person in the company's organizational structure even though Presidential Regulation No. 13/2018 itself requires the Corporation's obligation to determine the Beneficial Owner.

In corporations formed to commit a crime or be a means of carrying out a crime, it is often difficult to detect who the Beneficial Owners are. This is because, in some corporations that were originally intended as a means to carry out crimes, the perpetrator or main controller of the crime generally tries to disguise his name or identity to make it difficult to trace the flow of funds from the crime. There are many techniques used by corporations in committing crimes, one of which is the crime of money laundering with the technique of using a puppet company (shell company) is a technique which is often used to disguise or hide the proceeds of crime. That this technique is carried out by establishing a formal company based on applicable legal rules. In practice, the company is not used in conducting business activities but only to conduct fictitious transactions or store assets of the founder or other people. In addition, the technique also aims to obscure the identity of the people who control the funds. So often the names of the Beneficial Owners are also not listed in the corporate structure.

Based on the description above, the author sees that in requesting criminal liability from a beneficial owner, the role of the beneficial owner must first be considered, if the beneficial owner acts as the main perpetrator who persuades or orders the implementation of a corporate crime to disguise and hide the proceeds of crime, then the beneficial owner can be held criminally responsible by the provisions of the legislation.

## V. CONCLUSION

The national legal framework currently lacks specific regulations governing the status of beneficial owners, encompassing the Limited Liability Company Law and the Capital Market Law. Nonetheless, Presidential Regulation No. 13/2018 has introduced guidelines concerning the identification of beneficial owners of corporations. According to this regulation, a beneficial owner is defined as an individual who is the primary beneficiary or the highest-ranking holder of power and exercises complete control over the company. This definition underscores the accountability and authority that beneficial owners possess.

When determining the criminal responsibility of beneficial owners, it is essential to thoroughly assess the roles and obligations of the individuals involved. If beneficial owners are found to have functioned as the principal instigator instructing or commanding the commission of corporate crimes to conceal and disguise the proceeds of



crime, they may be held criminally accountable under the provisions of the law. This highlights the importance of comprehending the specific actions and powers of beneficial owners in instances of corporate misconduct.

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