

An Analysis of the Application of the Principle of Due Diligence in Corporate Criminal Liability in Indonesia

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Abstract

The objective of this study is to analyze the legal status of the due diligence principle in determining corporate mens rea and to examine its application in the Indonesian criminal justice system. This study employs a normative legal research method using a legislative, conceptual, and case-based approach through the analysis of sectoral regulations and court decisions. The results of the study indicate that the principle of due diligence does not yet have an explicit legal standing in Indonesian positive law, although it is implicitly recognized in several sectoral regulations as a ground for exculpation or mitigation of liability. Its application by law enforcement officials is severely limited due to the absence of a normative framework, low technical capacity, and a judicial system oriented toward individual accountability. The conclusions of this study recommend legislative reform through implementing regulations of the Criminal Code, the development of technical guidelines for due diligence assessments, and the strengthening of institutional capacity among law enforcement officials.

Keywords: *Due Diligence, Corporate Criminal Liability, Mens Rea, Law Enforcement, Corporate Crime.*



A. INTRODUCTION

Indonesia's corporate criminal liability framework continues to encounter a significant challenge in establishing corporate mens rea due to the absence of clear and comprehensive provisions within existing positive law. The current Criminal Code (Wetboek van Strafrecht), which remains applicable until 2025, is historically grounded in the doctrine of **societas delinquere non potest**, under which corporations are not formally recognized as criminal law subjects. Although the New Criminal Code (Law No. 1 of 2023), scheduled to come into force on January 2, 2026, formally acknowledges corporations as entities capable of bearing criminal responsibility under Articles 47 and 48, the legislation still provides limited guidance concerning the formulation and assessment of corporate intent within criminal proceedings, these provisions do not explicitly address the role of the due diligence principle as an element that may negate or mitigate corporate culpability (Ms et al., 2024).

The absence of explicit regulations regarding due diligence standards in determining corporate mens rea has led to multiple interpretations in law enforcement practice, which in turn creates legal uncertainty for both corporations and law enforcement officials. Article 4 paragraph (2) of Supreme Court Regulation No. 13 of 2016 on Procedures for Handling Criminal Cases Involving Corporations (PERMA

13/2016) implicitly suggests that a corporation may incur criminal liability where it neglects to undertake appropriate preventive actions aimed at avoiding unlawful conduct, but it does not provide clear parameters regarding the required due diligence standards or how these affect the construction of corporate culpability (Bueno & Bright, 2020).

Cases such as environmental pollution caused by plantation and mining companies resulting in forest fires and river contamination workplace accidents stemming from inadequate safety standards, and money laundering cases involving corporate entities demonstrate that corporate crime has a massive impact on the public interest. However, in law enforcement practice, authorities tend to focus criminal charges on executives or individuals acting for and on behalf of the corporation, while the corporation's liability as a legal entity is often overlooked or difficult to prove. The main difficulty lies in proving whether the corporation has exercised adequate due diligence or, conversely, fostered an organizational culture conducive to the commission of crimes (corporate culture) (Safira et al., 2025).

In criminal law theory, the principle of *actus non facit reum nisi mens sit rea* (there is no crime without fault) requires the element of fault as the foundation of criminal liability. The concept of *mens rea* that has developed in conventional criminal law requires the presence of intent (*dolus*) or negligence (*culpa*), which are psychological conditions of the perpetrator. However, the application of this concept to corporations which are legal fictions lacking psychological conditions creates a fundamental theoretical and practical gap. Doctrines of corporate liability such as vicarious liability, the identification theory, and the aggregation theory have been developed to bridge this gap; however, in the practice of the Indonesian judiciary, there has been no consistency in adopting these doctrines. The principle of due diligence, which theoretically can function as a defense or as a mitigating factor in a strict liability system, does not have a clear position within the structure of criminal liability in Indonesia (Prasetyo & Lasmadi, 2024).

From a regulatory perspective, a number of sectoral statutes, particularly Law No. 32 of 2009 on Environmental Protection and Management, have implicitly recognized the relevance of the due diligence principle in determining corporate accountability, recognize due diligence as a defense under the strict liability regime (Article 88). On the other hand, Law No. 31 of 1999 as amended by Law No. 20 of 2001 on the Eradication of Corruption does not explicitly regulate due diligence in corporate liability, although in practice the existence of an internal control system is often a consideration for judges in assessing corporate fault.

Several court rulings demonstrate inconsistencies in the application of the due diligence concept and the proof of corporate liability. In the Supreme Court's ruling regarding PT Kallista Alam (Forest Pollution and Fire Case), the court considered the existence of the corporation's fire prevention system as a mitigating factor; however, it did not explicitly use the term "due diligence" and did not provide clear parameters regarding the standard of care that the corporation should have met. Conversely, in criminal corruption cases involving PT Garuda Indonesia (Judgment No. 88

PK/Pid.Sus/2020) and PT Conch North Sumatra Cement (Judgment No. 16/Pid.Sus-TPK/2016/PN.Mdn), the panel of judges adopted the identification theory by stating that the directors' fault constitutes the corporation's fault, without conducting a thorough analysis of whether the corporation had an adequate compliance system or, conversely, had created an organizational structure that facilitated the occurrence of corruption. This phenomenon indicates that although regulations have opened the door to corporate liability, their implementation in practice remains highly limited and far from optimal (Micheler, 2023).

This research is particularly urgent given the normative gap regarding the role of the due diligence principle within the framework of corporate criminal liability and the discrepancy between normative regulations and law enforcement practices. First, from a normative perspective, the absence of explicit provisions regarding due diligence standards in the New Criminal Code and its implementing regulations creates legal uncertainty for corporations acting in good faith to prevent crimes through compliance programs. Second, from a practical perspective, law enforcement officials face difficulties in determining the criteria and methods of proving due diligence, resulting in low rates of prosecution and criminal punishment of corporations despite clear indications of their involvement.

Third, there is inconsistency among various sectoral regulations regarding the role of due diligence, where some laws recognize it as a defense while others do not address it at all. Fourth, there are no technical guidelines for law enforcement officials to assess corporations and determine whether their preventive efforts meet the standard of reasonable care. A significant research gap is the absence of a comprehensive study analyzing the role of the due diligence principle in the context of proving corporate mens rea under Indonesian criminal law, as well as how law enforcement officials should apply this principle in the concrete handling of corporate criminal cases.

Wibisana and Marbun analyze the effectiveness of corporate criminal liability within Indonesia's anti-corruption regime through their article "Corporate Criminal Liability in Indonesia's Anti-Corruption Law: Does It Work Properly?" The study evaluates the vicarious liability model using a law and economics approach, concluding that while theoretically efficient, its implementation requires improvements to both substantive and procedural regulations. However, this article does not explore the role of due diligence as a determining factor in proving corporate mens rea. Alhakim and Soponyono examine corporate criminal liability policies in the article "Corporate Criminal Liability Policies in the Fight Against Corruption." This study identifies regulatory weaknesses regarding when a corporation can be held criminally liable and issues related to sanctions, and recommends legislative reforms. However, the principle of due diligence is not the subject of substantive analysis in this study (Wibisana & Marbun, 2018).

This study differs fundamentally by positioning due diligence as the central object of study in the context of proving corporate mens rea, rather than merely as a secondary variable. The methodological distinction lies in the integration of normative

analysis with an evaluation of law enforcement practices across the three stages of the criminal justice system, resulting in a comprehensive mapping of the gap between norms and practices. This study also integrates comparative analysis with jurisdictions that have adopted the due diligence defense to identify adaptable legal frameworks. The theoretical contribution lies in the development of a conceptual framework regarding the role of due diligence within the structure of criminal liability in Indonesia, while the practical contribution consists of recommendations for assessment guidelines for law enforcement officials guidelines that are currently unavailable.

This study aims to analyze and construct the legal status of the due diligence principle within the framework of proving corporate criminal intent (*mens rea*) under Indonesian positive law, including identifying normative gaps and inconsistencies in regulations across various statutes, to examine and evaluate the practice of applying the due diligence principle by law enforcement officials (police, prosecutors, and courts) in handling corporate criminal cases, including identifying normative, capacity, and systemic obstacles that.

B. METHOD

This study employs a doctrinal legal research method to analyze the role of the due diligence principle within the corporate *mens rea* framework and its application in the Indonesian criminal justice system. This method was chosen because the research questions require legal interpretation and construction of positive law norms, as well as the identification of normative gaps.

The research approaches used include: first, the statutory approach to analyze the research initially adopted a statutory approach to assess the legal framework governing corporate criminal liability, particularly the New Criminal Code (Law No. 1 of 2023), PERMA No. 13 of 2016, and various sectoral regulations, including anti-corruption, anti-money laundering, and environmental legislation. Furthermore, a conceptual approach was applied to examine the theoretical dimensions of *mens rea*, due diligence, and corporate liability doctrines within criminal law discourse.; third, a case approach to examine court rulings regarding corporate criminal liability; fourth, a comparative approach to identify best practices from the jurisdictions of the UK, Australia, and the Netherlands

The study relied on three categories of legal materials, namely primary legal sources comprising legislation and court judgments, secondary legal sources consisting of academic literature, textbooks, and research reports, and tertiary legal sources in the form of legal dictionaries and encyclopedias. The analysis of the research materials employed a qualitative approach, utilizing a hermeneutic approach for the interpretation of legal norms, content analysis to identify patterns in court rulings, and comparative analysis to compare legal systems. The analysis was conducted using a deductive-inductive method to produce a coherent and applicable legal framework (Ibrahim, 2020).

C. RESULTS AND DISCUSSION

The role of the due diligence principle in determining corporate mens rea cannot be separated from the fundamental discourse on how to attribute the element of fault (schuld) to a corporate entity, which is a legal fiction. The classical doctrine of criminal law crystallized the legal maxim “*actus non facit reum nisi mens sit rea*” reflects the fundamental doctrine that the imposition of criminal liability requires not only the commission of an unlawful act but also the existence of a guilty mind, manifested through either intentional conduct (dolus) or negligence (culpa). This premise works effectively for natural legal subjects who possess a will (wil) and the psychological capacity to understand the consequences of their actions. When this concept is applied to corporations which, philosophically speaking, lack a soul (anima), consciousness, or independent will a fundamental legal paradox arises: how to attribute fault to an entity that is inherently incapable of thought or volition (Lie et al., 2020).

This paradox has given rise to various theoretical constructs aimed at bridging the gap between traditional mens rea doctrine and the reality of corporations as subjects of criminal law. The theory of vicarious liability adopts a pragmatic approach by attributing the fault of directors or employees to the corporation based on an agency relationship, arguing that acts committed within the scope of employment and for the benefit of the corporation can be attributed to the corporation. The identification theory takes a more restrictive stance by attributing liability only to individuals who serve as the “directing mind and will” of the corporation that is, senior officials with authority over strategic policy. Meanwhile, the aggregation theory, or corporate culture theory, develops the concept that corporate liability can be identified through the accumulation of organizational attitudes, policies, and practices that create a climate conducive to the commission of crimes (Arseno, 2024).

An analysis of Indonesian positive law reveals that the legal framework for corporate mens rea suffers from a significant normative gap, particularly regarding the role of the due diligence principle. Although Article 47 of the New Criminal Code (Law No. 1 of 2023) acknowledges corporations as criminal law subjects, Article 48 paragraph (1) continues to adopt a derivative and anthropomorphic model of liability. Under this provision, corporate criminal responsibility arises only where an offense is committed by a person acting for and on behalf of the corporation or for its benefit within the context of an employment or comparable legal relationship. This construction essentially adopts a vicarious liability model that makes individual fault the basis for corporate fault, without providing room for an analysis of whether the corporation, as an organization, has taken adequate preventive measures (Wangania et al., 2024).

Supreme Court Regulation No. 13 of 2016 (PERMA 13/2016) provides an implicit indication of the relevance of due diligence in Article 4(2), which states that a corporation may be held liable if “the corporation fails to take the necessary steps to prevent, mitigate further harm, and ensure compliance with applicable legal provisions to avoid the commission of a criminal offense.” This formulation contains

an element of organizational negligence, which, in theory, should be negated through proof of due diligence. However, PERMA 13/2016 does not provide further elaboration regarding the required due diligence standards, the assessment parameters, the mechanism for proving it, and most crucially how the presence or absence of due diligence affects the construction of the corporation's mens rea (Jubaidi & Khoirunnisa, 2025).

The inconsistencies in the regulations become even more apparent when comparing various sectoral laws. Law No. 32 of 2009 on Environmental Protection and Management, in Article 88, adopts a strict liability regime while recognizing due diligence as a defense: "Any person whose actions, efforts, and/or activities involving hazardous substances, generates and/or manages hazardous waste, and/or poses a serious threat to the environment, bears absolute liability for any resulting damage without the need to prove fault." However, this article provides an exception if it can be proven that the environmental pollution and/or damage occurred due to force majeure or because preventive measures were taken. This construction positions due diligence as an element capable of negating liability under a strict liability regime, even though it does not explicitly use the term "due diligence" (Rusyana & Saputera, 2024).

By contrast, the Anti-Corruption Law, namely Law No. 31 of 1999 as amended by Law No. 20 of 2001, contains no explicit formulation concerning due diligence as a basis for assessing corporate liability. Article 20 paragraph (1) only provides that criminal charges and penalties may be directed against a corporation and/or its directors when a corruption offense is perpetrated by or on behalf of the corporation. This formulation is alternative-cumulative but does not provide distinct criteria regarding when a corporation may be exempted from liability for having exercised due diligence. Judicial practice indicates that judges occasionally consider the existence of an internal control system as a mitigating factor; however, this is done on a case-by-case basis without a consistent normative framework (Hendriawan, 2022).

Based on normative and comparative analysis, the role of the due diligence principle in determining corporate mens rea can be framed in three alternative positions, each with different legal implications. First, due diligence as the negation of the element of fault (absence of fault). In this construction, due diligence is understood as the antithesis of corporate negligence. If the corporation has taken preventive measures that meet the standard of reasonable care, then the element of culpa is not satisfied and fault (schuld) as an essential element of criminal liability is not proven. The legal consequence is that the corporation must be acquitted (vrijspraak) because it has not been proven to have committed a criminal offense. This construction is relevant for criminal offenses requiring proof of fault (culpability-based offenses), where the prosecutor must prove that the corporation was organizationally negligent (Escueta, 2025).

Second, due diligence as a defense. Under this framework, even if a criminal act occurs and can be attributed to the corporation, the existence of a robust compliance system demonstrates that the corporation acted in good faith and should

not be held criminally liable. This framework operates within the context of the corporate culture defense, where the corporation can demonstrate that the crime occurred contrary to the organizational culture established through effective compliance programs. The legal consequence is a dismissal of all legal charges (ontslag van alle rechtsvervolging) because, although the act occurred, the corporation cannot be held liable (verwijtbaarheid) (Choudhury, 2023).

Third, due diligence as a mitigating factor. This approach treats due diligence not as an element that eliminates liability, but as a factor to be considered in sentencing. Corporations may still be held criminally liable, but with lighter penalties because they have demonstrated preventive measures. This approach is most frequently adopted in Indonesian judicial practice, where judges consider the existence of a compliance system as a mitigating factor in imposing criminal penalties (Korka-Knuts, 2024).

Of these three approaches, the one most consistent with the principle of *nullum crimen sine culpa* is the first namely, due diligence as the negation of the element of fault. This is because if a corporation has taken adequate preventive measures in accordance with an objective standard of care, it cannot logically be said that the corporation was negligent or at fault. However, this construction requires clear regulations regarding due diligence standards, the burden of proof, and assessment methods, which are currently absent in Indonesian positive law. This gap leads to legal uncertainty and hinders the effective enforcement of laws against corporate crimes.

The application of the due diligence principle by law enforcement officials in handling criminal offenses involving corporations still faces a number of significant obstacles. Due diligence, as a principle of care in conducting thorough and systematic investigations, should serve as the foundation for establishing corporate liability. However, in practice, the implementation of this principle has not been optimal in Indonesia (Sari, 2023).

First, the limited capacity of law enforcement officials poses a major obstacle. Police and prosecutors often lack the technical expertise needed to analyze the complexities of corporate structures and the mechanisms of criminal liability for legal entities. Investigations are often limited to pursuing individual perpetrators without delving into the systemic involvement of the corporation itself. As a result, due diligence becomes superficial and fails to capture the true nature of corporate crime (Supriyanto, 2020).

Second, slow and unstructured investigative processes hinder the effective implementation of due diligence. A lack of coordination among law enforcement agencies such as the police, the prosecutor's office, and specialized investigative agencies results in an incomplete collection of evidence. Reviews of corporate documents, financial transactions, and organizational structures are often not conducted thoroughly in accordance with international due diligence standards (Negara, 2022).

Third, threats from corporations and limited resources discourage officials from conducting thorough due diligence. Large corporations often have strong legal teams and are able to obstruct investigations through various procedural means (Ismaidar, 2025).

The necessary solutions include enhancing human resource capacity through specialized training in corporate investigations, establishing a dedicated unit to handle corporate crimes, and increasing budget allocations. Additionally, there is a need for harmonization with international standards in the application of due diligence, as well as a clarification of the role and functions of corporations within Indonesia's criminal liability system. Thus, the application of the due diligence principle can truly become an effective instrument in combating corporate crime.

D. CONCLUSION

This study demonstrates that the principle of due diligence plays a crucial role in determining the presence or absence of corporate mens rea; however, to date, it has not been explicitly regulated in Indonesian positive law. Neither the New Criminal Code, PERMA 13/2016, nor various sectoral laws provide clear standards, parameters, or mechanisms for assessing due diligence. This normative gap leads to legal uncertainty and confusion in determining whether a corporation has made adequate preventive efforts or has instead demonstrated organizational negligence. Consequently, the system of corporate criminal liability still relies on the attribution of individual fault (the vicarious liability model) and has not evolved toward an analysis of fault based on organizational structure and culture.

In practice, law enforcement agencies have not consistently applied the due diligence principle due to the absence of technical guidelines, limited institutional capacity, and a judicial system that remains individual-centric. Court rulings reveal a disconnect between legal norms and practice, where due diligence is sometimes considered a mitigating factor but has never been positioned as an element capable of negating corporate liability. Therefore, this study recommends legislative reform through explicit regulations on due diligence, the development of technical guidelines for assessing corporate compliance, and the strengthening of law enforcement capacity. Such reforms are essential to ensure a more effective, fair, and principled system of corporate criminal liability that aligns with the principle of *nullum crimen sine culpa*.

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