

Compliance & Commercial Matters: Introducing a Compliance System for Business Entities under the New Criminal Code

Indonesia's House of Representatives and government earlier this year enacted a new Criminal Code that was decades in the making. Law No. 1 of 2023 on the Criminal Code ("**New KUHP**") introduces substantial changes to the criminal law framework, including provisions that specifically affect companies.

In response, Makarim & Taira S. held a seminar on 30 May 2023 with the theme of "Corporate Criminal Liability in the New Indonesian Criminal Code". Featuring speakers including academics, government officials and practitioners, the seminar focused on critical aspects of the new Criminal Code, its potential impact on companies, and best practices to ensure compliance and risk management. We summarize below the important issues highlighted during the seminar.

Corporate Criminal Liability Under the New Criminal Code

One of the key aspects that business entities need to be mindful of in the New KUHP is corporate criminal liability. There are now explicit provisions that refine the old rules outlined in Supreme Court Regulation No. 13 of 2016 on Guidelines for Case Management of Crimes Committed by Companies.

Under Article 45 of the New KUHP, companies can now be charged with criminal offenses. This applies to both legal entities and non-legal entities such as Limited Liability Companies,

Foundations, Cooperatives, State-Owned Enterprises, Regional-Owned Enterprises, Firms, Limited Partnerships, and their equivalents.

Furthermore, the New KUHP provides a definition of corporate crime in Article 46, which encompasses criminal offenses committed by either:

1. **Members of the management team** holding functional positions within the corporate structure; or
2. **Individuals** who, by virtue of employment or another connection, act for and on behalf of or in the interest of the company.

According to the elucidation of Article 46 of the New KUHP¹, this definition may apply to both **directors and commissioners** of a company. Furthermore, the term "individuals" includes those engaged under temporary contracts, and the New KUHP also extends to controllers and beneficial owners of companies.

Scope of Corporate Criminal Liability

Article 48 of the New KUHP outlines the following conditions under which a company can be held liable for criminal offenses:

1. The criminal offense **falls within the scope of the business or activities** specified in the company's Articles of Association or other applicable provisions.
2. The offense results in unlawful benefits for the company.
3. The offense is accepted as part of the **company's policy**.
4. The company has **failed to take necessary measures to prevent** the offense, **mitigate** its impact, and **ensure compliance** with relevant legislation to avoid committing a criminal offense.
5. The company has allowed a criminal offense to occur.

In light of these conditions, companies are expected to **establish appropriate measures to prevent and mitigate criminal offenses, while ensuring compliance with the relevant laws and regulations**. Furthermore, corporations must adopt policies that prohibit engaging in activities that could be categorized as criminal offenses.

Sanctions

Failure to comply with the New KUHP may lead to both principal and additional sanctions. Below are the sanctions that can be imposed on companies under Articles 79, 120 and 121 of the New KUHP.

Principal sanctions:

1. A fine of at least IDR200,000,000 (Category IV)
2. For criminal offenses punishable by imprisonment of less than 7 years, a maximum fine of IDR2,000,000,000 (Category VI)
3. For criminal offenses punishable by imprisonment of 7 to 15 years, a maximum fine of IDR5,000,000,000 (Category VII)
4. For criminal offenses punishable by the death penalty, life imprisonment or imprisonment for up to 20 years, a maximum fine of IDR50,000,000,000 (Category VII).

Possible Additional Sanctions:

1. The payment of compensation.
2. The remedying of the consequences of the criminal offense.
3. Compliance with the obligations that have been neglected.
4. Compliance with customary obligations.
5. The financing of job training.
6. The forfeiture of goods or profits obtained from the crime.
7. The publication of the court ruling.
8. The revocation of a certain license.
9. A permanent prohibition against engaging in certain activities.
10. The closure of all or part of the place of business and the activities of the company.
11. The suspension of all or some of the company's business activities.
12. The dissolution of the company.

Measures and Compliance Strategies for Business Entities

Given the expectations set by the New KUHP for business entities and internal stakeholders to ensure compliance with its provisions, it is advisable for businesses to consider implementing the following programs going forward:

1. **Implement a robust compliance and policy program**

Companies should establish **a thorough compliance program** that includes internal controls, policies, and processes to prevent and detect illegal activities. This program should address anti-corruption, fraud prevention, data protection, and other pertinent legal obligations, **particularly those pertaining to the company's commercial activities.**

2. **Conduct regular risk assessments**

Regular identification and assessment of potential risks

associated with a company's operations and business activities are vitally important. These risk assessments may include evaluating internal operations and providing training, either by internal or external trainers. By understanding the risks, companies can implement targeted preventive measures.

In Indonesia, it is common for companies to engage external experts such as lawyers, consultants, or compliance professionals to provide advice and training on legal requirements, best practices, and effective compliance programs, as well as procedures tailored to their specific needs.

3. **Monitoring and auditing**

Regular internal audits and reviews should be conducted to assess the effectiveness of compliance measures. Establishing a whistleblower program can be an effective way to ensure compliance. While the need for a whistleblower program depends on factors such as the company's size and number of employees, it is advisable for companies to at least encourage employees to report any suspected misconduct or criminal offenses (e.g., under the Company Regulations). Companies must also ensure the safety and confidentiality of employees who report such offences.

By implementing these measures, a company can demonstrate its commitment to preventing criminal offenses, mitigating risks, and ensuring compliance with the applicable laws and regulations. Implementing robust programs and policies not only helps prevent offenses but also provides a defense against criminal sanctions if any offenses do occur.

Conclusion

The New KUHP has introduced refined provisions regarding corporate criminal liability, necessitating careful assessment by companies. It is essential for companies to review the relevant articles pertaining to preventative measures against criminal offenses. By implementing programs that mitigate the risks, ensure compliance, and strengthen corporate policies and procedures related to their business activities, companies can minimize suspicions of committing criminal offenses and avoid the potential criminal sanctions.

[1] The elucidation of Article 46 of the New KUHP states, "The term 'functional position' refers to a person who has the authority to represent, make decisions on behalf of, and enforce

