

RESPONSIBILITY OF THE BOARD OF DIRECTORS OF STATE-OWNED ENTERPRISES (BUMN) AS MANAGEMENT OF STATE PROPERTY AND AS PROFIT-BASED BUSINESS MANAGEMENT

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ABSTRACT

Directors often face dilemmas in making business decisions in buying and or selling assets, shares, investment, expansion because they have two sides of supervision. If they are always restrained by fear and fear in making decisions, the business movement will definitely be hampered. The approach method used in this research is a sociological juridical approach using secondary data and reinforced by primary data. Secondary data was obtained from laws and regulations and interviews with informants, and questionnaires who had served as Directors in BUMN, while secondary data was obtained from the statute approach and conceptual approach. The data obtained from this study were then analyzed qualitatively to answer the problems in this study. The results of this study indicate that the decision of the Board of Directors in business if it is based on good faith cannot be blamed, either civilly or criminally. However, if the Board of Directors is guilty (schuld) and/or negligent (culpoos), the members of the Board of Directors are fully responsible personally and jointly and severally (Article 97 paragraph (3), (4) and (5) of the Company Law). The Board of Directors personally can also be bankrupt so that it is not only PT that is obliged to pay its obligations, the Board of Directors must also be responsible for paying debts.

Keyword : Responsibility, BUMN, BOD, Management, Profit

INTRODUCTION

Becoming a member of the Board of Directors of a company is the dream of every employee. The highest career ladder for company employees is to become a Board of Directors, not a Commissioner. The Board of Directors is the executive of the company who determines the forward or backward movement of the company. So high is the power, respect and welfare given by the company to the Board of Directors so that it can be said that the position of the Board of Directors is a very honorable position. The high position, power, honor and welfare of the Board of Directors is linear with the responsibility and burden of enormous risk, especially the Directors of SOEs. BUMN companies are not only subject to the general provisions regarding Limited Liability Companies (UU No. 40/2007), but also to the BUMN Law (UU No 19/2003), the State Finance Law (UU No 17/2003), BPK Law (UU No 15/2006) and various implementing regulations. The SOE Directors must be smart and astute in manning the company to achieve its goals without violating the law.

As described in the background above, the problems in this research are: (a) What is the responsibility of the SOE Directors in managing a SOE ; (b) How is the completion of the accountability of the SOE Directors in managing a BUMN, in the event of a criminal act of corruption?

THEORETICAL FRAMEWORK

Responsibility Theory.

Regarding the issue of official accountability, according to Kranenburg and Vegtig, there are two underlying theories, namely:

- 1) the theory of *personalles*, namely the theory which states that losses to third parties are borne by officials who because of their actions have caused losses. In this theory the burden of responsibility is directed at humans as individuals.
- 2) the theory of *fautes de services*, namely the theory which states that losses to third parties are borne by the agency of the official concerned. According to this theory, the responsibility is assigned to the position. In its application, the losses that arise are also adjusted whether the mistakes made are serious mistakes or minor mistakes, where the severity and severity of an error have implications for the responsibility that must be borne (Ridwan, 2006).

In general, the principles of responsibility in law can be distinguished (Shidarta, 2006) as follows:

1. Principle of Responsibility Based on Elements of Error

The principle of responsibility based on an element of fault (fault liability or liability based on fault) is a fairly common principle applicable in criminal and civil law. In the Civil Code, particularly articles 1365, 1366, and 1367, this principle is firmly adhered to. This principle states that a person can only be held legally responsible if there is an element of wrongdoing. Article 1365 of the Civil Code, which is commonly known as the article on unlawful acts, requires the fulfillment of four main elements, namely: (a) the existence of an action; (b) there is an element of error; (c) there is a loss suffered; (d) there is a causal relationship between errors and losses. What is meant by error is an element that is contrary to the law. Understanding the law is not only against the law but also propriety and decency in society.

2. The Presumption Principle To Always Be Responsible.

This principle states that the defendant is always considered responsible (presumption of liability principle), until he can prove that he is innocent.

The word "considered" in the principle of "presumption of liability" is important, because there is a possibility that the defendant frees himself from responsibility, namely in the event that he can prove that he has "taken" all necessary actions to avoid losses (Suherman, 1979).

In this principle, the burden of proof is on the defendant. In this case, the burden of proof is reversed (*omkering van bewijslast*). This is certainly contrary to the legal principle of the presumption of innocence. However, if applied in the case of consumers, this principle will appear quite relevant. If this theory is used, then it is the business actor who is being sued who is obliged to prove the error. The defendant must present evidence that he is innocent. Of course, consumers can not arbitrarily file a lawsuit. The position of the consumer as the plaintiff is always open to being sued back by the business actor, if he fails to show the defendant's fault.

3. The Presumption of Not Always Responsible

This principle is the opposite of the second principle, the principle of the presumption of not always being responsible is only known in a very limited scope of consumer transactions. An example of the application of this principle is the law of carriage. Loss or damage to cabin baggage or hand baggage, which are usually carried and supervised by the passenger

(consumer) is the responsibility of the passenger. In this case the carrier (business actor) cannot be held accountable. The party charged with proving the fault lies with the consumer.

4. Principle of Absolute Responsibility

The principle of absolute responsibility (strict liability) is often identified with the principle of absolute liability. However, there are also experts who distinguish the two terms above.

There is an opinion which states, strict liability is the principle of responsibility that stipulates no fault as a determining factor. However, there are exceptions where it is possible to be released from liability, for example in a force majeure situation. On the other hand, absolute liability is the principle of responsibility without fault and without exception.

According to E. Suherman, strict liability is equated with absolute liability, in this principle there is no possibility to absolve oneself from responsibility, except if the loss is due to the fault of the injured party. Responsibility is absolute.

5. The Principle of Liability With Restrictions

The principle of responsibility with limitations (limitation of liability principle) is very favored by business actors to be included as an exoneration clause in the standard agreement they make. In the film-print washing agreement, for example, if the film to be washed or printed is lost or damaged (including due to an officer's error), the consumer is only limited to compensation of ten times the price of a new roll of film.

This professional responsibility can arise because they (professional service providers) do not fulfill the agreement they have with their clients or as a result of the negligence of the service provider resulting in an unlawful act. Responsibility is a reflection of human behavior. The appearance of human behavior is related to the control of his soul, is part of his intellectual or mental considerations. When a decision has been taken or rejected, it is part of the responsibility and the result of the choice. There is no other reason why it was done or left out. The decision is considered to have been led by his intellectual awareness (Efendi, 1994). Responsibility in the legal sense is a responsibility that is really related to the rights and obligations, not in the sense of responsibility that is associated with a momentary mental turmoil or the consequences are not realized.

In providing services, professionals are responsible to themselves and to the community. Responsible to himself, meaning he works for moral, intellectual and professional integrity as part of his life. In providing services as part of his life. In providing services, a professional always maintains the noble ideals of the profession in accordance with the demands of his conscience, not because it is just a hobby. Being responsible to the community, means the willingness to provide the best possible service without distinguishing between paid services and free services and to produce quality services, which have a positive impact on the community. The services provided are not solely motivated by seeking profit, but also devotion to fellow human beings. Responsible also dare to bear all the risks that arise as a result of his service. Negligence in carrying out the profession has an impact that is harmful or may harm oneself, others and sin against God (Muhammad, 2001).

RESEARCH METHODS.

This research was conducted using a normative juridical research method (Soekanto, et. al. 1994) by conducting a comprehensive study based on laws and regulations as well as empirical juridical research, namely conducting an assessment based on the analysis and observation of the SOE Directors who were on both sides, one On the other hand, it is required to seek maximum profit, but on the other hand, it is bound by various regulations that make it difficult to develop creativity and

improvisation of the Board of Directors in seeking profit. This is different from BUMN before the reform era which received many facilities from the government.

This research is a legal research that uses several approaches to answer the problems studied, namely: 1) the statute approach, 2) the conceptual approach, 3) the comparison approach, and 4) historical and philosophical approaches (historical approach) and (philosophy approach). Data processing is done qualitatively. The written legal materials that have been collected are then systematized according to the problems studied. Furthermore, the legal material is studied and described in accordance with the problem using the relevant theoretical basis. To answer the problem, the legal material that has been systematized is then carried out an assessment so that it can answer correctly the meaning and position and legal implications of the State Policy in the Indonesian constitutional system, between the application of national law, business law and other rules related to State-Owned Enterprises (BUMN). .

DISCUSSION.

The purpose of establishing a state-owned company is not only to pursue profit, but to play a role in overseeing development that is not touched by the government through the state budget and or private budget. Therefore, the position and role of BUMN is very strategic in national development.

Definition of the Board of Directors.

The Board of Directors is a company organ that is given the authority to carry out management for the interests and objectives, is responsible, and represents the company inside and outside the court and in carrying out its duties must comply with the BUMN AD, laws and regulations and are obliged to implement the principles of professionalism, efficiency, transparency, independence, accountability. , accountability and fairness (Article 1 point 9 in conjunction with Article 5 of the BUMN Law). The company's organs other than the Board of Directors are the GMS and the commissioners (Article 1 point 2 in conjunction with Article 1 number 5 of the Company Law). UUPT No 40/2007 adheres to the Continental European system so that it recognizes the organs of the Commissioner. This is different from that adopted in the Common Law system.

In the Common Law system, there are no Commissioners. What is known is only the Board of Directors and the General Meeting of Shareholders. Generally, the Board of Directors is divided into 2 parts consisting of:

- 1) Chief Executive Officer (CEO) who functions and is responsible for carrying out the day-to-day management of the company, and
- 2) Chairman who is a non-executive director (Non executive directors). The general chairman is needed in large companies and public companies who have the skills and act as "watch dogs" for the benefit of minority shareholders.

The purpose and objective of the establishment of BUMN is to contribute to the development of the national economy, to pursue profit, to provide services and goods, to agents of development, as well as to provide guidance and assistance to entrepreneurs from economically weak groups, cooperatives and the community (Article 2 of the BUMN Law). The government assigns SOEs the task of driving the wheels of development in areas that are not yet economically profitable and the private sector is not willing to invest. The burden of tasks and risks borne by SOEs is certainly very heavy because they are no longer facilitated by the government. Meanwhile, the purpose and objective of establishing a private company is stated "The company must have aims and objectives as well as business activities that do not conflict with the provisions of laws and regulations, public order, and/or decency." (Article 2 UUPT). Restrictions on company activities that may not conflict with the

provisions of laws and regulations, public order, and/or decency are also the basis for BUMN work. As a result, SOEs "carry" two provisions of company law (UU PT and UU BUMN).

In addition, BUMN capital comes from separated state assets sourced from the APBN, capitalization of reserves and other sources (Article 4 of the BUMN Law). This provision was adopted from Article 2 letter g (Law No. 17/2003 on State Finance) which states that State Finance includes, "wealth including state assets separated from state/regional companies." Furthermore, in the General Elucidation of the Anti-Corruption Law (UU No 31/1999) it is stated "State finances are all state assets in any form, separated or not separated, including all parts of state assets and all rights and obligations arising from being in the control, management and accountability of BUMN/BUMD, foundations, legal entities, and companies that include state capital, or companies that include third party capital based on agreements with the state"

The SOE Directors are required to seek maximum profit but on the other hand are bound by various regulations that complicate the development of creativity and improvisation of the Directors in seeking profit. This is different from BUMN before the reform era which received many facilities from the government.

This has been disarmed by the issuance of Law No. 5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition. SOEs today must be brave and ready to compete with other private companies but remain within the corridor of goals and objectives. Because BUMN capital comes from separated state assets, the management of BUMN companies cannot be equated with private companies. Supervision of private companies is in the hands of the Commissioners, who in general are the largest shareholders. Commissioners and shareholders (except Independent Commissioners) have almost unlimited authority to determine the direction of the company because they can replace the Board of Directors at any time if it is not in line with the wishes of the Commissioner as a shareholder. SOE Directors must work harder than Directors in privately owned companies if they want to exist and excel. The profile which has been popularized so far as "work in BUMN is good" must be changed to "work in BUMN is dedication, achievement and risk".

This transformation is expected to produce optimal performance (output) through discipline and a good work ethic. The SOE Directors are not only supervised by the Commissioners alone. The Board of Directors is also supervised by the Ministry of State-Owned Enterprises, the BPK, the Technical Inspector General, the National Police, the AGO and the KPK. How heavy the burden of risk and responsibility of the SOE Directors in making company decisions so that they do not have a legal impact. To get Directors who have expertise, integrity, honesty, good leadership, dedication and have a vision for company development, a fit and proper test is carried out. The fit and proper test is carried out transparently and professionally to get a competent personal figure, not determined because of likes and dislikes from officials.

Accountability of Directors in Corruption Crimes in BUMN.

Directors as executives of the company, inevitably have to make decisions for and on behalf of the company. Decision-making in the business sector has different risks from decision-making in other fields. Decision making in the business sector has a very high uncertainty variable. The Board of Directors should be able to map (mapping) things that can hinder the achievement of goals (risk mitigation). Therefore, it takes foresight of intuition and suggestions of related staff. However, sometimes all the initial calculations that have gone through the analysis can become messy due to unexpected things (out of control). In business, there is an adage "high risk high gain" which explains that the higher the business risk, the greater the profit. This means that business people must dare to speculate if they want to be successful quickly and earn big profits.

Of course the risks that have been calculated in business and law. The question arises: Can speculative actions based on the principle of "high risk high gain" be carried out by SOE Directors? If it is guided by the principles of good corporate good governance in Article 5 paragraph (3) of the BUMN Law, it is not allowed. In the principle of good corporate good governance, the term Tariff (Transparency, Accountability, Responsibility, Indenpedency and Fairness) is known.

This means that every decision or legal action of the company that is manned by the Board of Directors is tested against the five "TARIF" principles. If one principle is not accommodated, then the decision of the Board of Directors is not feasible (non-feasible) to be implemented. In business, apart from the "high risk high gain" theory, it is also known as the "low risk high gain" theory. SOE Directors should only be able to play in the realm of low risk high gain to avoid a tedious legal process in the event of a loss to the company. The loss of BUMN can be an entry point for the arrival of internal and external audit teams. The BPK, the Inspectorate of the Technical Department, the Ministry of State-Owned Enterprises, etc. have the investigative authority because the SOE's capital is a separate state asset. The state feels that it has the right to profits and is responsible for the losses of SOEs. The government always takes part in rescuing failed SOEs by adding government capital participation (PMP). The injection of capital from the government becomes "fresh blood" that provides new energy to rise from suspended animation.

There are several decisions of the Board of Directors of SOEs that can be convicted of corruption, among others if:

- a. Enrich oneself or another person or a corporation that can harm state finances against the law (Article 2 of the Anti-Corruption Law);
- b. Benefiting oneself or another person or a corporation, abusing the authority, opportunities or facilities available to him because of his position or position that can harm state finances or the state economy against the law (Article 3 of the Anti-Corruption Law).

An act can be punished if the elements of evil intentions and evil actions are fulfilled. The evil element of intentions and actions is measured using the parameters of the company's legal regulations and AD. If the decision of the Board of Directors has no legal basis and or is contrary to the company's AD, it cannot be tolerated and can be categorized as "evil". The decision of the Board of Directors in business if it is based on good faith cannot be blamed, either civilly or criminally. However, if the Board of Directors is guilty (schuld) and/or negligent (culpoos), the members of the Board of Directors are fully responsible personally and jointly and severally (Article 97 paragraph (3), (4) and (5) of the Company Law). The Board of Directors personally can also be bankrupt so that it is not only PT that is obliged to pay its obligations, the Board of Directors must also be responsible for paying debts.

Members of the Board of Directors cannot be held responsible for losses if they can prove as stipulated in Article 97 paragraph (5) of the Company Law: (a) The loss is not due to fault or negligence; (b) Has carried out management in good faith and prudence for the benefit and in accordance with the aims and objectives of the company; (c) Does not have a conflict of interest that results in losses; (d) d. Has taken action to prevent the occurrence or continuation of losses The Constitutional Court's Decision No. 62/PUUXI/2013 recognizes the existence of a Business Judgment Rule (Rules related to Business Decisions).

Directors often face dilemmas in making business decisions in the purchase and or sale of assets, shares, investment, expansion, etc. If they are always restrained by fear and fear in making decisions, the business movement will definitely be hampered. Whereas the task of management is to seek profit by minimizing risk. Therefore, the Board of Directors cannot be blamed or held accountable if they have made a decision in accordance with good and honest business rules even though there is a business loss as a result of the decision.

CONCLUSION.

- i. The Board of Directors is a company organ that is given the authority to manage for the interests and objectives, is responsible, and represents the company inside and outside the court and in carrying out its duties must comply with the BUMN AD, laws and regulations and are obliged to implement the principles of professionalism, efficiency, transparency, independence, accountability, responsibility and fairness (Article 1 point 9 in conjunction with Article 5 of the BUMN Law). The company's organs other than the Board of Directors are the GMS and the commissioners (Article 1 point 2 in conjunction with Article 1 number 5 of the Company Law). UUPT No 40/2007 adheres to the Continental European system so that it recognizes the organs of the Commissioner. This is different from that adopted in the Common Law system.
- ii. The purpose and objective of the establishment of BUMN is to contribute to the development of the national economy, pursue profit, provide services and goods, development agents, as well as provide guidance and assistance to entrepreneurs from economically weak groups, cooperatives and the community (Article 2 of the BUMN Law). The SOE Directors are required to seek maximum profit but on the other hand are bound by various regulations that complicate the development of creativity and improvisation of the Directors in seeking profit. This is different from BUMN before the reform era which received many facilities from the government.
- iii. Directors as executives of the company, inevitably have to make decisions for and on behalf of the company. Decision-making in the business sector has different risks from decision-making in other fields. Decision making in the business sector has a very high uncertainty variable. The Board of Directors should be able to map (mapping) things that can hinder the achievement of goals (risk mitigation).

BIBLIOGRAPHY

- Abdulkadir Muhamad, Etika Profesi Hukum, Citra Aditya Bakti, Bandung, 2001.
- E. Suherman, Masalah Tanggung Jawab Pada Charter Pesawat Udara Dan Beberapa Masalah Lain Dalam Bidang Penerbangan (Kumpulan Karangan), Cet. II, Alumni, Bandung, 1979.
- Masyhur Efendi, Dimensi / Dinamika Hak Asasi Manusia Dalam Hukum Nasional Dan Internasional, Ghalia Indonesia, Jakarta, 1994.
- Ridwan H.R., Hukum Administrasi Negara, Raja Grafindo Persada, Jakarta, 2006.
- Shidarta, Hukum Perlindungan Konsumen Indonesia, Edisi Revisi, Gramedia Widiasarana Indonesia, Jakarta, 2006.
- Soerjono Soekanto dan Sri Mamudji, (1994), Penelitian Hukum Normatif Suatu Tinjauan Singkat, (Jakarta:Raja Grafindo Persada).
- Undang-undang No 31/1999 Tentang Tipikor
- Undang-undang No 5/1999 Tentang Larangan Praktek Monopoli dan Persaingan Usaha Tidak Sehat
- Undang-undang No. 17/2003 Tentang Keuangan Negara
- Undang-undang No 19/2003 Tentang BUMN
- Undang-undang No 15/2006 Tentang Badan Pengawasan Keuangan.
- Undang-undang No. 40/2007 Tentang Perseroan Terbatas.
- Putusan MK No 62/PUU-XI/2013