The legal protection weakness of the directors board from the risk of losses due to business decisions

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ABSTRACT

Business is a risk. There is no guarantee the business is run By the board of Directors will always bring profit. One day profit, no profit, and another time can lose. When business decisions are taken by the board of Directors losses especially in significant amounts can be ascertained will happen nervousness on the board of Directors of the Company. State-Owned Enterprises established for business purposes in the full operation of risk. Law No. 19 of 2003 concerning State-Owned Enterprises does not regulate the protection of the Board of Directors of the Company, meanwhile, Law No. 40 of 2007 on Limited Liability Companies regulation of the protection of the Board of Directors of its implementation gives rise to multi-interpretation. Business decisions made by the Board of Directors of the Company in accordance with the principles of Business Judgement Rule are a business risk, should get legal protection. The purpose of this research is to find out the weaknesses of this legal protection. This research includes normative legal research with a statutory approach with The analysis technique in this research is investigation strategy. The results show that there is no legal certainty regarding business decisions taken by Directors who experience losses in business transactions so that the Government / DPR must amend the BUMN Law by adding articles on legal protection of the Directors of Persero.

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Introduction

The government in conducting economic activities is carried out through state companies. A State Company is a business entity whose entire or capital is owned by the Central Government. State Companies are intended to be carried out through a Business Entity named State Owned Enterprises (SOEs). State-Owned Enterprises in the SOE Law are defined as a business entity whose entire or most of its capital is owned by the state through direct participation derived from the wealth of separated countries, namely state assets derived from the State Budget (APBN) to be used as state capital investment in Persero and/or Perum and other limited liability companies. State-Owned Enterprises include Public Companies (Perum) and the Company or better known as Persero.

The Company hereinafter referred to as Persero is a state-owned limited liability company whose capital is divided into shares that are all or at least 51% (fifty-one percent) of its shares owned by the Republic of Indonesia whose main goal is to pursue profit. State-Owned Enterprises of the Company as a State Company is one of the economic actors has an important role in moving the national business.

State-Owned Enterprises of the Company (BUMN) as a State Company is one of the economic actors has an important role in moving the national business. Judging from the capital structure of the government taking from the State Budget included in the State-Owned Enterprises Persero's next management is the state wealth separated from the state budget and will be the capital of the Company. Provisions on state activities in economic activities are stipulated in Law No. 19 of 2003 on State-Owned Enterprises. It is clearly stated that State-Owned Enterprises, hereinafter referred to as SOEs, are business entities whose entire or most of their capital is owned by the state through direct participation derived from the wealth of separated countries.

SOEs, especially Persero as businesses in general, in the pursuit of profits potentially suffer losses in their business activities (Ridwa, et al., 2018). In the Company each transaction is recorded during one accounting period conducted by the management (directors)

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and reported in a company profit and loss statement. So how is the legal protection for the Directors of PERSERO SOEs that cause financial losses of persero even though its actions are based on good faith. This becomes a dilemma for the Board of Directors of PERSERO SOEs considering the legal umbrella with regard to the separate state financial provisions occurring disharmony.

The disharmony of the rules is between Law No. 20 of 2001 on the Eradication of Corruption Crimes (PTPK), Law No. 40 of 2007 on Limited Liability Companies (PT Law), Law No. 19 on State-Owned Enterprises (SOEs), and Law No. 17 of 2003 on State Finance. As a result, often law enforcement officials do not understand the concept of legal entities, such as Limited Liability Companies or Companies and also do not understand correctly the juridical consequences of capital investment by the state in the form of separated state wealth and state-owned enterprises so that the actions of the authorities in order to eradicate corruption in state-owned enterprises turned out to be contrary to legislation (PT Law and SOE Law) that became the basis of the existence and activities of the company (Khairandy, 2009).

State-Owned Enterprises established for business purposes in the full operation of risk. Business is a risk sometimes profit sometimes also suffer losses. The Board of Directors when making business decisions is certainly based on professional business decisions, conducted carefully in accordance with the standard rules in the Company it manages. Risks are always in business and when experiencing losses in business transactions against directors who have performed standard procedurals in the company and applicable regulations it is a business risk, but in practice it is not like a theoretical study. Directors who bring losses to the companies it manages, especially those with great value, will have problems with law enforcement officers representing the government asking the Board of Directors to take responsibility for business decisions made in the realm of public law. On the other hand, the existing legal umbrella, namely the law on SOEs and the law on Limited Liability Companies does not regulate adequate legal protection so that this creates diversity for the Board of Directors of the Company in managing its responsibilities in the Company. This problem that the author examined is the weak legal protection of the Board of Directors of Persero in business transactions that suffered losses.

Normative Juridical Research

This type of research is normative juridical research, which is a legal research conducted by studying and interpreting theoretical matters related to the principles, conceptions, doctrines and legal norms related to the regulation of the Company's SOEs as a business entity. The purpose of this research is to find out what stakeholders should do. Legal research is an activity of know-how in law, not just know-about. As a know-how activity, legal research is carried out to solve the legal issues faced (Marzuki, 2019). The research approach used is the statutory approach. The legal material from this research using secondary data and legal materials related to statutory regulations, scientific books and journals. The technique of searching secondary legal materials is done by studying literature which is a way to gather information by looking at and examining library materials (literature, previous research results, scientific magazines, scientific bulletins, scientific journals, Web Ministries or institutions) and internet searching (Raharjo, 2008). The analysis technique in this research is investigation strategy (Amirudin & Asikin, 2016), by using the deduction method which is to explain a general thing then draw it to a more specific conclusion.

Implications

Law No. 19 of 2003 concerning State-Owned Enterprises (SOE Law) at all in its tor body or its explanation is not found provisions of legal protection for the Board of Directors of the Company against business risks from the companies it manages. Whereas the purpose and purpose of the establishment of SOEs in the form of the Company is to pursue finance. The Company is a business entity whose operational motion is led by the Board of Directors conducting business transactions that are full of risk. Article 1 number 2 of the SOE Law explains:

The Company, hereinafter referred to as Persero, is a state-owned limited liability company whose capital is divided into shares that are all or at least 51% (fifty-one percent) owned by the Republic of Indonesia whose main goal is to pursue profit.

Furthermore Article 2 determines that the purpose and purpose of the establishment of SOEs are:

- i. *contribute to the development of the national economy in general and state revenues in particular;*
- ii. *pursue profits;*
- iii. *to conduct general benefits in the form of provision of goods and/or services of high quality and adequate for the fulfillment of people's lives;*
- iv. *to pioneer business activities that have not been implemented by the private sector and cooperatives;*
- v. *actively provide guidance and assistance to entrepreneurs of weak economic groups, cooperatives and communities.*

Government Regulation No. 41 of 2003 concerning The Delegation of The Position, Duties and Authority of the Minister of Finance in The Company (Persero), Public Company (Perum), and Perusahaan Jawatan (Perjan) to the Minister of State-Owned Enterprises, as a follow-up to the establishment of the State Ministry of State-Owned Enterprises in the Gotong Royong Cabinet the material also does not regulate at all the legal protection of the Board of Directors of the Company. In Government Regulation No. 45 of 2005 concerning the Establishment, Management, Supervision and Dissolution of State-Owned Enterprises also does not regulate the legal protection of the Board of Directors of the Company. Further provisions concerning the Company are Government Regulation No.

72 of 2016 concerning Amendment to Government Regulation No. 44 of 2005 concerning Procedures for Inclusion and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies with absolutely no provisions governing the legal protection of the Board of Directors of the Company against business risks.

Business is a risk. There is no guarantee that a business run by the Board of Directors will always bring profits. One day profit, no profit, and another time can lose. While business decisions taken by the Board of Directors suffer losses especially in significant amounts, it is certain that there will be anxiety in the Board of Directors of the Company. In the mind of the Board of Directors imagined will face a legal process with law enforcement officers who are long, winding, tiring and draining extraordinary resources not only for law enforcement officers but also the Directors of the Company as well as their families.

This condition is not fair especially for the Board of Directors who in their business decisions have carried out an action management process that is good faith, no personal interests, business decisions taken in accordance with the applicable rules in case of loss must be protected. This loss is a business risk. The SOE Law further determines in article 1 number 2 that Persero is a Limited Liability Company, this means that the next provision of Persero is subject to Law No. 40 of 2006 on Limited Liability Companies (PT Law).

- i. The legal protection of the Board of Directors shall be stipulated in articles 97 paragraphs (1), (2), (3), (4) and (5) stating as follows:
- ii. The Board of Directors shall be responsible for the management of the Company as referred to in Article 92 paragraph (1).
- iii. The management as referred to in paragraph (1) shall be carried out by each member of the BOD in good faith and with full responsibility.
- iv. Each member of the BOD shall be personally responsible for the Company's losses if the company is guilty or fails to perform its duties in accordance with the provisions as referred to in paragraph (2).
- v. In the case that the Board of Directors consists of 2 (two) members of the BOD or more, the responsibilities as referred to in paragraph (3) shall be valid on a joint basis for each member of the BOD.
- vi. Members of the BOD cannot be held accountable for losses as referred to in paragraph (3) if they can prove:
 - a. the loss is not due to his/her faults or omissions;
 - b. has carried out management in good faith and prudence for the benefit and in accordance with the purposes and objectives of the Company;
 - c. not have a conflict of interest, whether directly or indirectly, in the management actions that result in the loss; and
 - d. has taken action to prevent the occurrence or recurrence of such damages.

The Board of Directors (in this case including the Persero Board of Directors) shall be stipulated in article 97 paragraph (5). The author argues that legal protection for the Board of Directors in its implementation raises multiple interpretations both by law enforcement officials and the Board of Directors, especially while the Business Decisions of the Board of Directors in its business decision-making suffer significant losses will be criminally litigated in the form of corruption crimes as stipulated in the Corruption Crimes Act (Tipikor) is considered to be a financial crisis of the state this is because persero's capital is a state wealth separated from the state budget that is included in persero so that it is part of the state financial scope. In the implementation regulation of SOE Law or PT Law, no further regulation of article 97 of PT Law is found.

Different interpretation among the stake holders, the absence of further explanation / arrangement in the rules of implementation of article 97 paragraph (5) of the PT Law in its implementation raises the diversity of the Persero Board of Directors in managing the company that is responsible for the fear of being criminalized due to business decisions made by the Persero Board of Directors if it suffers losses in business transactions.

Legal protection includes preventive legal protection that is protection provided by the government with the aim to prevent before the occurrence of violations. This is contained in the legislation with the intention to prevent an offence and provide signs or restrictions in performing sutu obligations, while repressive legal protection is the final protection in the form of sanctions such as fines, imprisonment, and additional penalties given if there has been a dispute or an offence has been committed (Putra, 2018).

The Board of Directors is an organ of the company in charge and fully responsible for carrying out the management of the company. In other words, the board of directors is the personification of the company itself. The position of the board of directors in the company is as an executive, where the actions are limited by the company's articles of association. That is, despite having full authority in terms of the management of the company, the steps of the board of directors must remain within the limits determined by the law and the company's articles of association (Purba, 2011). There is no authority without accountability. The adagium adequately describes the position of the board of directors of a company as it is like two sides of a currency. One side of the board of directors is given the authority or power to manage, manage and run the company's business wheels.

The Board of Directors on the other hand is held accountable for all the actions of the company as the results of the board of directors' decision making. The consequences of accountability for the management and management of a corporation, its directors or directors are often one foot in the threat of imprisonment as the responsibility of wrongdoing that results in the loss of the company categorized

as corruption due to state financial losses. Unabashed, the directors of Persero SOEs that result in financial losses of the State are threatened with severe criminal sanctions in the form of imprisonment for 20 (twenty) years or even life imprisonment (vide Article 2 paragraph (1) jo 3 law No. 31/1999 as amended into Law No. 20/2001 on corruption crimes).

The threat is certainly not without reason or legal basis, given the breadth of the financial scope of the State as stipulated in the provision of Article 2 letter g of Law No. 17/2003 on State Finance which stipulates that state/regional wealth is self-managed or by other parties in the form of money, securities, receivables, goods, and other rights that can be assessed with money, including wealth separated in state companies / regional companies.

Persero's state-owned capital is a separate state wealth taken from the state capital investment derived from the State Budget (vide Article 4 paragraph (1) and (2) Law No. 19/2003 on SOEs). Therefore, for the protection of the state's financial losses, law enforcement officials always apply sanctions and criminal threats to the losses of Persero SOEs due to business decision-making conducted by the board of directors.

Lewis D Solomon (1994) on Board of Directors accountability

He states:

Fiduciary duty is perhaps the most important concept in the Anglo American law of corporation. The word "fiduciary" comes from the latin fides, meaning faith or confidence, and was originally used in the common law to describe the nature of the duties imposed on a trustee. Perhaps because many of the earliest corporations cases involved chart table corporations, courts began to analogize the duties of a director in managing corporate property to the duties of a trustee in managing trust property.

The original analogy between a trustee and those who control a corporation was a close one. But as corporations began to play a role of increasing importance in an increasingly complex commercial world, the basic notion survives that officers, directors and controlling shareholders owe some sort of enforceable duty to the corporation, and through the corporation, to the shareholders. The term "fiduciary duty" however has no fixed meaning, its parameters are continually evolving.

Business is a risk. There is no guarantee that a business run by the Board of Directors will always bring profits. One day profit, no profit, and another time can lose. While business decisions taken by the Board of Directors suffer losses especially in significant amounts, it is certain that there will be anxiety in the Board of Directors of Persero. Persero SOEs established for business purposes in the full operation of risk. Business decisions made by the Board of Directors of Persero in accordance with the principles of the Business Judgement Rule are a business risk, should get legal protection.

Conclusion

The Board of Directors in moving the business processes of Persero whose responsibilities do not get adequate legal protection in the SOE Law or in the PT Law. In the SOE Law there is absolutely no article that provides legal protection. BUMN Persero is a Limited Liability Company so that further provisions of Persero's operational motion are subject to the UUPT. The legal protection of the Board of Directors contained in UUT article 97 paragraph (5) is inadequate and multi-interpretation. The Law of State-Owned Enterprises (SOE Law) does not regulate the categorization of matters relating to the actions or actions of a Board of Directors that has caused harm to the persero is a criminal act of corruption or not. Soe Law is more regulating to the form of accountability of a Board of Directors that causes losses to persero whose reference uupt. Against this SOE in addition to the provisions of the SOE Law, there is also a provision of the Limited Liability Company Law (UU-PT). Related to the form of accountability of the Board of Directors who have made losses to SOEs, the prevailing provisions are those that have been regulated in the PT Law as described in Article 97. As is known, business entities in the form of Limited Liability Companies such as Persero SOEs have separate wealth characteristics, there is a firm separation between the management of the Company and the power of the owners of wealth (separate legal entities). Capital divided into shares. With this separate legal entity, Persero can take legal action within the scope of private law (privatrechthandeling) or do business (bisniszakelijk).

Consequences due to lack of legal protection cause diversity for the Board of Directors of Persero. The author argues that there is no legal certainty regarding business decisions made by the Board of Directors who suffered losses in their business transactions even though it has been done in a good way, there is no personal interest, and in accordance with the laws and regulations. The vagueness of the rule of law can bring consequences of interests that are not uncommon even often affect the perspective / point of view that leads to the establishment of his interpretation.

The Government /DPR amends the SOE Law by adding an article on the legal protection of the Persero Board of Directors in carrying out its duties cannot be prosecuted criminally or civilly if it has implemented the principles of business judgement rule (BJR) in business transactions suffered losses carried out by itikat both in accordance with the laws and regulations and has no interest in the decision and, has a rational basis to believe that the decisions taken are the best for the company solely because of business risks.

The Government /DPR proposes to reformulate the provisions of legal protection in the SOE Law by stating in one of its articles that the Persero Board of Directors cannot be prosecuted criminally or civilly in the management of companies whose responsibilities

suffer losses in their business transactions if in such business decisions have been first taken based on the principles of the Business Judgement Rule (BJR) solely for the purposes and objectives of Persero.

Further provisions on the Business Judgement Rule (BJR) on the legal protection of the Board of Directors of Persero shall be further regulated in the Ministerial Regulation.

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