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CRIMINAL LIABILITY OF INDONESIA'S STATE-OWNED ENTERPRISE DIRECTORS FOR ACTS THAT CAUSE STATE FINANCIAL LOSSES

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ABSTRACT

Background: Directors of state-owned enterprises can be prosecuted because of suspicions of their actions which cause state finances loss.
Aim: The objectives of this research is to find out the responsibilities of directors which cause state finances loss.
Method: This research used normative juridical methods.
Findings: The research found that the directors of state-owned enterprises were assumed as state officers. State-owned company assets were interpreted as state assets, as well as state loss was interpreted as state finance loss. In administrative law, when directors of state-owned enterprises do an action that causes state financial loss, they are obliged to return the loss, but in criminal law, returning the loss will not eliminate the penalty of the criminal.

KEYWORDS

criminal liability; directors of state-owned enterprise; state financial loss

INTRODUCTION

The 1945 Constitution of the Republic of Indonesia Article 4 paragraph (1) gives the President the authority to exercise government power to achieve the goals of the state, namely the welfare of the people. This provision is further detailed in Article 33 which forms the basis for implementing constitutional duties for all components of the nation, including Indonesia's *Badan Usaha Milik Negara* (BUMN)/State-Owned Enterprises (SOE).

Many people think that state-owned companies are extraordinary economic forces and drivers. For example, in Singapore and Malaysia, SOEs contribute greatly to economic activity. In Indonesia, SOEs are included in many diverse sectors or business fields, from banking, energy, food, infrastructure, transportation sectors, both sea, and air. A total of 118 SOEs in 2015 with total assets of IDR 5,395 trillion can certainly make a greater contribution to economic growth in the following year if they can synergize in managing the business fields of each SOE (Juliani, 2016). BUMN assets are also estimated to be larger through the asset revaluation process (Kompas, 2016). SOEs continue to work on many projects. As an illustration, the total value of BUMN projects with a period of 1-3 years by the end of 2015 reached Rp 795.9 trillion. Realization until the end of 2015 amounted to Rp 248.5 trillion. In 2016, it is projected that there are 62 strategic projects carried out by SOEs, with a value of approximately IDR 347.2 trillion (Juliani, 2016).

The management of SOEs cannot be separated from the role of the board of directors, because the board of directors is the SOEs' organ responsible for the management of SOEs for the interests and objectives of the SOEs, and represents SOEs both inside and outside the court. The directors' persistence in leading SOEs by prioritizing the principles of professionalism, profitability, efficiency, and innovation will have a positive impact on the SOEs themselves in carrying out their functions as public service providers and development agents. This can be seen, among other things, in Ignasius Jonan when he led the Indonesian Railways Company (*PT Kereta Api Indonesia (Persero)*). On the other hand, SOE directors can also be sued in

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court because they are suspected/accused of having taken actions that harm state finances as a result of their actions in managing/managing the SOEs they lead. The last case is the case of RJ Lino. Richard Joost Lino (RJ Lino) is the president director of the Indonesian Port Corporation II (*PT Pelindo II (Persero)*) who was officially dismissed from his position by the shareholders on December 23, 2015, after the KPK named Lino a suspect in the alleged corruption case in the procurement of quay container cranes (QCC) in 2010.

In connection with the importance of the board of directors in managing the SOEs they lead and the responsibilities and risks they carry in managing state assets, research will be conducted by examining the issues: "Criminal Liability of Indonesia's State-Owned Enterprise Directors for Acts That Cause State Financial Losses".

Directors as Actors and Managers of SOEs

Based on Article 1 point 5 of Law Number 40 of 2007 concerning Limited Liability Companies (UUPT), the Board of Directors is a company organ that is authorized and fully responsible for the management of the company for the benefit of the company, following the aims and objectives of the company and represents the company, both inside and outside the company. or outside the court following the provisions of the articles of association. It is reaffirmed in Article 92 paragraphs (1) and (2) that the Board of Directors carries out management of the Company for the benefit of the company and in accordance with the aims and objectives of the company and the Board of Directors are authorized to carry out management in accordance with policies deemed appropriate, within the limits specified in the law. this law and/or the articles of association.

In Article 5 of Law Number 19 of 2003 concerning State-Owned Enterprises (BUMN Law), it is stated that: 1) The management of BUMN is carried out by the Board of Directors; 2) The Board of Directors is fully responsible for the management of the BUMN for the interests and objectives of the BUMN and represents the BUMN, both inside and outside the court; and 3) In carrying out their duties, members of the Board of Directors must comply with the articles of association of SOEs and laws and regulations and must implement the principles of professionalism, efficiency, transparency, independence, accountability, responsibility, and fairness.

There are duties and responsibilities of the Board of Directors, namely carrying out the management of the Company. The management of the company is carried out by the Board of Directors in accordance with its policies in good faith and responsibility but must remain within the limits determined by the law and the company's articles of association. The management of the company is the responsibility of the Board of Directors itself, therefore the Board of Directors is also responsible for the company's losses caused by errors or negligence in the duties of the Board of Directors Ministry of State-Owned Enterprises, 2007). Members of the Board of Directors also personally bear the loss, namely in the case of the Board of Directors of 2 or more persons whose responsibilities apply jointly and severally. The members of the Board of Directors can be released from the responsibility for state losses if they can prove that the loss was not due to error or negligence, and has carried out management carefully and in good faith, has no conflict of interest, and has taken precautions (Pratama, 2015). In Article 7 of the BUMN Law and reaffirmed in Article 23 of the Decree of the Minister of BUMN

Number: PER-01/MBU/2011 dated August 1, 2011, concerning the Implementation of Good Corporate Governance, that members of the board of directors are prohibited from taking personal advantage either directly or indirectly from BUMN activities other than legitimate income.

Terminology of State Finances and State Financial Losses according to Indonesian Law

Terminology of State Finance

State-Owned Enterprises, hereinafter referred to as SOEs in Article 1 number 1 of the BUMN Law, are business entities whose entire or most of the capital is owned by the state through direct investment originating from separate state assets. In Article 1 point 10 of the BUMN Law, it is emphasized that the separated state assets are state assets originating from the State Revenue and Expenditure Budget (APBN) to be used as state capital participation in *Persero* and/or *Perum* and other limited companies.

Based on the formulation that BUMN capital comes from separated state assets, it raises the opinion of some parties who state that SOE's wealth is not part of the state's wealth. One of them is Professor of the Faculty of Law, University of Indonesia Erman Radjaguguk who stated that the wealth of SOEs does not become state assets, the article "separated state wealth" in SOEs is only in the form of shares or in other words the state only has shares in state-owned companies (FNH, 2012).

However, if you look at the terminology of state finances in Article 1 point 1 of Law Number 17 of 2003 concerning State Finance, it is stated that state finances are all state rights and obligations that can be valued in money, as well as everything in the form of money or money. in the form of goods that can be used as state property in connection with the implementation of these rights and obligations. Then it is emphasized in Article 2 letter g of the State Finance Law, state finances include state assets/ regional assets managed by themselves or by other parties in the form of money, securities, receivables, goods, and other rights that can be valued in money, including assets. separated on state/regional companies. Based on the formulation of Article 2 letter g, it means that state finances include state assets including assets separated from state companies/regional companies.

Referring to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption as amended by Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption, it is also regulated regarding the terminology of state finances. The General Elucidation of the Anti-Corruption Law states that 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:

1) Being in the control, management, and accountability of state agency officials, both at the central and regional levels;
2) Being in the control, management, and accountability of State-Owned Enterprises/Regional-Owned Enterprises, foundations, legal entities, and companies that include state capital, or companies that include third-party capital based on agreements with the state.

Terminology of State Financial Losses

The terminology of state financial losses is contained in Article 1 number 22 of Law Number 1 of 2004 concerning the State Treasury, which states that state/regional losses are a shortage of money, securities, and goods, which are real and definite in amount as a result of unlawful acts either intentionally or negligently. This formulation is also regulated in Article 1 point 15 of Law Number 15 of 2006 concerning the Indonesian Audit Board (*Badan Pemeriksa Keuangan*).

Regarding state financial losses, the Indonesian Audit Board (BPK) uses 4 (four) criteria for state financial losses (Adami, 2018), namely:

1) Reduced state assets and or increased state obligations that deviate from the provisions of the applicable laws and regulations. Meanwhile, state wealth is a consequence of the existence of profitable income receipts and expenditures that are a burden on state finances (income minus state expenditures).
2) Not receiving part or all of the income that benefits state finances, which deviates from the provisions of the applicable laws and regulations.
3) Part or all of the expenditure that is a burden on state finances is greater or should not be a burden on state finances, which deviates from the provisions of the applicable laws and regulations.
4) Any increase in state obligations resulting from commitments that deviate from the provisions of the applicable laws and regulations.

In the General Elucidation of the State Treasury Law number 6 concerning Settlement of State Financial Losses, it is emphasized that any state/regional losses caused by unlawful acts or negligence of a person must be replaced by the guilty party. With the settlement of these losses, the country/region can be recovered from the losses that have occurred (Juliani, 2016).

METHOD

The research method that the author uses in compiling this paper is normative juridical research as the author has alluded to above. Normative Juridical Research Method is a legal research library conducted by examining library materials or secondary data (Sunggono, 2003). The author uses the Deductive Thinking Method, which is a way of thinking that is used when concluding from something that is general and has been proven true and then the conclusion is intended for something specific (Sedarmayanti & Hidayat, 2002).

Because of the things that the author has described above, thus the object analyzed by qualitative research is a research method that refers to the legal norms and provisions contained in the Legislation (Soekanto & Mahmudhi, 2003).

RESULT AND DISCUSSION

Accountability of SOE Directors for Acts That Cause State Financial Loss

According to the explanation of Article 2 point 7 of Law Number 28 of 1999 concerning State Organizers that are Clean and Free from Corruption, Collusion and Nepotism, in point 1 it is emphasized that the Directors, Commissioners, and other structural officials in BUMN and BUMD are state administrators. This is because they are included in the group of officials who have strategic functions in relation concerning the administration of the state in accordance with the provisions of the applicable laws and regulations. The SOE officials are responsible

for bringing SOEs as agents of development by using the Business Judgment Rules (BJR) paradigm and the principles of Good Corporate Governance (GCG) (Soekanto & Mahmudhi, 2003).

Implementation of Good Corporate Governance (GCG) Principles

Based on Article 1 point 1 of the Decree of the Minister of BUMN Number: PER-01/MBU/2011 dated August 1, 2011, concerning the Implementation of Good Corporate Governance in BUMN as amended by the Decree of the Minister of State for BUMN Number: PER-09/MBU /2012, Good Corporate Governance, hereinafter referred to as GCG, are the principles that underlie a process and mechanism for managing a company based on laws and regulations and corporate ethics. Through the Ministerial Decree, it is emphasized in Article 2 paragraph (1), that SOEs are required to implement GCG consistently and sustainably by referring to this Ministerial Regulation while still taking into account the applicable provisions, norms, and articles of association of SOEs.

The required GCG principles include (Minister of State-Owned Enterprises, 2011):

1) Transparency, that transparency in the decision-making process and openness in disclosing material and relevant information about the company;
2) Accountability, namely clarity of function, implementation and liability organs so that the management company to run effectively;
3) Responsibility, the suitability in the management of the company against the laws and principles of healthy corporate;
4) Independency, which is a state where a professionally managed company with no conflict of interest and influence/pressure from any party that does not comply with the legislation and the principles of healthy corporate;
5) Fairness, namely justice and equality in fulfilling the rights of Stakeholders Arising under the agreement and the legislation in force.

Regarding the principles of GCG, it is also regulated in Article 5 paragraph (3) of the BUMN Law, and in its explanation, it is said that the Board of Directors as an organ of BUMN assigned to manage is subject to all regulations that apply to BUMN and still adhere to the application of GCG principles.

There is a goal in the application of GCG principles to BUMN in Article 4 of the Decree of the Minister of BUMN Number: PER-01/MBU/2011 dated August 1, 2011, concerning the Implementation of Good Corporate Governance in BUMN, namely to:

1) Optimizing the value of BUMN so that companies have strong competitiveness, both nationally and internationally, so that they can maintain their existence and live sustainably to achieve the aims and objectives of BUMN;
2) Encouraging the management of SOEs in a professional, efficient, and effective manner, as well as empowering functions and increasing the independence of Persero Organs / Perum Organs;
3) Encouraging Persero Organs/ Perum Organs in making decisions and carrying out actions based on high moral values and compliance with laws and regulations, as well as awareness of BUMN's social responsibility towards Stakeholders and environmental sustainability around BUMN;

4) Increase the contribution of SOEs in the national economy;
5) Improving a conducive climate for the development of the national investment.

Application of the Principles of Business Judgment Rule (BJR)

In the perspective of modern corporate law, there is a doctrine called the Business Judgment Rule. According to Black Law Dictionary, a business judgment rule is defined as a presumption that in making a business decision not involving direct self-interest or self-dealing, corporate directors act in the honest belief that their actions are in the corporation's best interest (Garner, 2010). The doctrine teaches that the Board of Directors of a company is not responsible for losses arising from an act of decision making if the action is based on good faith and prudence. The Board of Directors gets protection without the need to obtain justification from the shareholders or the court for the decisions they make in the context of managing the Company. The business judgment rule doctrine encourages the Board of Directors to be more daring to take risks than to be too careful so that the company cannot run optimally. This principle reflects the assumption that court judges cannot make better assurances in the business field than Directors, because judges generally do not have new business skills to study problems after the facts have occurred (Makawimbang, 2014).

In the BJR Principles, it is necessary to ensure that every decision of the Board of Directors/Commissioners is not taken with evil intentions and actions. That way, it will be clear which decision is a business risk and not a criminal act. In the end, even if the Board of Directors/Commissioners are involved in criminal matters, they can easily prove that the elements of men's rea and actus reus are not fulfilled (Rajagukguk, 2006a).

The implementation of the business judgment rule doctrine in the civil law system does not highlight certain standards. However, it is based more on the power of attorney agreements between the parties. Following the principle of fiduciary duty, a director as the beneficiary of the company may not act beyond the limits of his authority, as stipulated in the company's articles of association. If a director takes action outside and or following the limits of his authority that have been given to him, he will personally be legally responsible, not the company as the power of attorney.

In the positive law level, such as the Limited Liability Company Law, it is not found explicitly and related to the business judgment rule doctrine. However, if examined carefully, the business judgment rule doctrine has been accommodated in the provisions of Article 92 and Article 97 of the Indonesian Limited Liability Company Law.

The substance of Article 97 paragraph (5) of the Limited Liability Company Law, states that a member of the board of directors cannot be held responsible for the loss of a company if they can prove that: (a) the loss was not due to their fault or negligence, (b) has managed in good faith and prudence in the interest and in accordance with the aims and objectives of the company, (c) has no direct or indirect conflict of interest over management actions that result in losses, and (d) has taken action to prevent the occurrence or continuation of such losses.

In addition to protecting to the Board of Directors of the Company, it seems that the provisions of Article 115 paragraph (5) of the Limited Liability Company Law have also accommodated the business judgment rule doctrine against Members of the Board of Commissioners when a company goes bankrupt. The principle of 'good faith' stated in Article

97 paragraph (2) of the Limited Liability Company Law contains the 'soul' and 'spirit' of the business judgment rule doctrine. Directors cannot be blamed for their decisions as long as the decisions do not contain elements of personal interest, are decided based on information they believe, under appropriate circumstances and rationally, and are the best decisions for the company.

There are at least three parameters, which determine whether a business decision avoids violating the duty of care principles. *First*, have information about the problem to be decided and believe that the information is correct and can be accounted for. *Second*, decide in good faith and have no interest in that decision. *Third*, have a rational basis for believing that the decisions they take are the best for the company (Constitutional Court Decision, 2019).

The accountability of a Board of Directors can be seen from the conformity in the management of the company to the laws and regulations and sound corporate principles. Based on this, if the Board of Directors in managing SOEs results in financial losses of SOEs due to unlawful acts, whether intentionally or negligently, it can be interpreted as harming state finances as long as they meet the formulation of the provisions of the laws and regulations that govern them (Juliani, 2016).

Criminal Sanctions for SOE Directors whose actions result in State Financial Losses

Based on the explanation of Article 2 point 7 of Law Number 28 of 1999 concerning State Organizers that are Clean and Free from Corruption, Collusion, and Nepotism, it is emphasized that the Directors, Commissioners, and other structural officials in BUMN and BUMD are state administrators. They have a strategic function in the administration of the state and are responsible for guiding SOEs as agents of development with the principles of good corporate governance. The accountability of the Board of Directors can be seen in compliance with the laws and regulations and the principles of a healthy corporation. If a loss occurs, whether intentionally or negligently against the law, it can be interpreted as a state financial loss as long as it fulfills the formulation of the elements of the laws and regulations that govern it.

State Administrative Law stipulates that harming state finances can be said to be the same as state losses, as regulated in:

1) Article 35 paragraph (1) and paragraph (4) of Law Number 17 of 2003 concerning State Finance;
2) Article 1 number 22 and Article 59 to Article 67 of Law Number 1 of 2004 concerning the State Treasury;
3) Article 20 paragraphs (4), (5), and (6) of Law Number 30 of 2014 concerning Government Administration; and
4) Article 67 paragraph (2) of Law Number 1 of 2004 concerning the State Treasury.

Based on Article 20 paragraphs (2) and (6) of Law Number 30 of 2014 concerning Government Administration, officials who make administrative errors and cause state financial losses due to an element of abuse of authority must return the losses. Referring to the Regulation of the Supreme Court Number 4 of 2015 concerning Guidelines for Proceeding in the Assessment of Elements of Abuse of Authority, the Administrative Court has the authority to assess before the criminal process.

According to Article 64 paragraph (1) of Law Number 1 of 2004 concerning the State Treasury, the actions of the Board of Directors of SOEs that result in state financial losses may

be subject to administrative and/or criminal sanctions. Furthermore, in paragraph (2), it is emphasized that the criminal decision does not release the relevant Board of Directors from claims for compensation (Juliani, 2016).

The basis for the lawsuit against the Board of Directors who committed an act, made an error or omission resulting in a loss to the Company is Article 1365 Indonesian Civil Code (*Burgerlijk Wetboek* (BW)) or better known as a lawsuit for unlawful acts (*Onrechtmatige daad*). In addition, in the provisions of Article 1366 BW, it is determined that every person is responsible not only for losses caused by his actions but also those caused by negligence or carelessness. In this case, the Board of Directors of BUMN Persero as the fiduciary duty holder of the shareholders of the Company is fully responsible for the management and management for the interests and objectives of the Company and to carry out the duties and obligations assigned to him in good faith, in accordance with the provisions outlined in the articles of association. and applicable laws and regulations.

Article 155 of the Indonesian Company Law (UUPT) stipulates that: "The provisions regarding the responsibilities of the Board of Directors and/or the Board of Commissioners for their errors and omissions as regulated in this Law do not reduce the provisions stipulated in the Law on Criminal Law". This provision contains the principle that civil liability (*Civielrechtelijke aansprakelijkheid*) does not eliminate or reduce criminal liability for errors and omissions committed by the Board of Directors and/or the Board of Commissioners if it is proven that the error or omission contains elements of a criminal act.

Based on the provisions of Article 155 of the Limited Liability Company Law, the Board of Directors and/or the Board of Commissioners can be prosecuted simultaneously, both civilly and criminally. For example, if a member of the Board of Directors or a member of the Board of Commissioners embezzles money or assets of the Company, both civil and criminal liability are attached to the act. Civil liability can be sued based on Article 1365 BW as a violation of the law which causes the Company to suffer losses due to the embezzlement act. The criminal responsibility can be prosecuted based on Article 372 of the Indonesian Penal Code (KUHP), namely intentionally taking or unlawfully possessing an item that wholly or partly belongs to the Company which is in his hands to be managed (Harahap, 2009).

Juridically, both criminal acts and unlawful acts are both wrong and each constitutes a deviation or violation of the law (Commission) and of legal obligations (Omission). In the Indonesian legal system, an act is a criminal offense only if an existing criminal provision determines that the act is a criminal offense. This relates to the principle of legality adopted in Indonesian criminal law as stipulated in Article 1 paragraph (1) of the Indonesian Penal Code.

Thus, state financial losses in the provisions of the Anti-Corruption Law cannot be applied to state financial inclusion in State-Owned Enterprises. This is because SOEs are the legal entity that is not wholly-owned by the state. Because there are private equity investments whose legal arrangements and regulations are subject to the provisions of the Company Law and the BUMN Law, so that state financial losses in BUMN that are carried out by the Board of Directors as a result of their policies cannot be imposed as acts of corruption as regulated in Article 2 paragraph (1) and Article 3 of the Anti-Corruption Law, except if someone intentionally embezzles the shares of a State-Owned Enterprise against the law that he keeps because of his position or allows the shares to be taken or embezzled by another person or assists in carrying out the act (Rajagukguk, 2006b).

Legal remedies that can be taken by the state against the Board of Directors whose actions cause losses to the Company should not necessarily be carried out based on criminal acts of corruption, but must meet the elements as described above cumulatively, not only emphasizing the elements of state financial losses or the economy. only country. In addition, the relevant Board of Directors may be criminally prosecuted, for example on charges of embezzlement, falsification of financial data or reports, and criminal acts in the banking sector (Ginting, 2007).

CONCLUSION

BUMN/Indonesian SOEs in the form of a Limited Liability Company is a Legal Entity, so as a Legal Entity. In BUMN inherent characteristics possessed by legal entities, namely: having an organized organization, having assets that are separate from the founders or shareholders; can perform acts and enter into legal relations themselves; and has certain objectives specified in the articles of association and does not conflict with the laws and regulations. Therefore, in accordance with the characteristics of a Legal Entity that separates the assets of a Legal Entity from the assets of its shareholders or management, this also applies to BUMN. Thus, the legal status of ownership of assets or assets of BUMN which is sourced from separated state assets does not include state assets or finances as referred to in the State Finance Law.

The BUMN Law stipulates that the Board of Directors is the organ that is fully responsible for the management of BUMN and represents BUMN both inside and outside the court. In the management of a Company, profits or losses may arise for the Company. However, losses that occur in a BUMN Persero cannot be considered as state financial losses, because in the management of the Company there are always business risks that can bring losses to the Company. Therefore, losses arising from a business transaction carried out by BUMN Persero do not automatically become state losses which lead to criminal acts of corruption, where what can be referred to as state losses is if the act that causes losses to the Company is carried out against the law, namely the non-execution of fiduciary duty by the Board of Directors which causes the Board of Directors not to be entitled to legal protection in accordance with the principle of business judgment rule . The Board of Directors of the Company can be held liable both civilly and criminally if he acts outside his authority (*ultra vires*) and or does not perform his duties and obligations on the basis of good faith, prudence and in the best interest of the Company.

Based on the conclusions as described above, it is hereby recommended several suggestions, namely that it is necessary to make changes and synchronization of laws and regulations on the definition of state finances and state losses, which until now are still contradictory and overlapping between one law and the other. other statutory provisions. This needs to be done to provide legal certainty (*Rechtszekerheid*) for SOE management so that they do not hesitate in making business decisions and are more willing to take risks to support the development and progress of the Company in achieving its goals; and that. The application of the principles of good corporate governance must be prioritized in the management of SOEs to improve company performance and maintain public trust and to achieve company goals and objectives in ways with integrity. It is hoped that there will no longer be deviations made by the SOE management and the management in carrying out their duties and responsibilities following the articles of association and laws and regulations.

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