



RESPONSIBILITY OF THE BOARD OF DIRECTORS ON IMPLEMENTATION OF COMPANY WHEN CONFLICT WITH COMMISSIONERS

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ABSTRACT- Limited Liability Company hereinafter referred to as Company is a legal entity which is a capital partnership. It is established based on an agreement to conduct a business activities with authorized capital. This is entirely divided into shares or individual legal entities which all meet the criteria for Micro and meet the requirements set out in The Law on Limited Liability Companies and its implementing regulations (Law Number 11 of 2020 regarding Job Creation) which changes several definitions of Limited Liability Companies as regulated in Law Number 40 of 2007 (hereinafter referred to as UUPT). The research method used in this writing is a normative legal research method which analyzes the problem through an approach to legislation, theory and applicable principles. Talking about the applicable provisions in the important organs of the Limited Liability Company. The Limited Liability Company Organ itself is a Group of Organs consisting of the General Meeting of Shareholders (hereinafter referred to as GMS), the Board of Directors, and the Board of Commissioners. Among the three organs of a limited liability company, the directors have full authority over the company. Based on the provisions of Article 1 paragraph (5) of the Company Law, "The Board of Directors is an organ of the Company which is authorized and fully responsible for the management of the Company for the benefit of the Company in accordance with the aims and objectives of the Company and represents the Company both inside and outside the court in accordance with the provisions of the articles of association". Besides that, in a company, the board of directors is the party who has the most important role, both in managing the company, managing it, and advancing it. The Board of Directors is appointed by the GMS, as referred to in Article 94 paragraph (1) of the Company Law, that; "Members of the Board of Directors are appointed by the GMS." And further paragraph (3) members of the Board of Directors are appointed for a certain period of time and may be reappointed.

Keywords: Limited company, Fiduciary Duty, Responsibilities of the Board of Directors

I. INTRODUCTION

The existence of the issue of Civil Law and Public Law and how to determine their boundaries is indeed a matter of debate in disputes in Dutch literature. The conflict between Civil Law and Public Law is very sharp. That Public Law undermines Civil Law but Civil Law cannot be ruled out. The civil law system is a form of fundamental legal structure that has been adopted into Indonesian law in the dynamics of regulatory regulations which are based on the reality of the relationship between humans and the environment in Indonesia. One of the implementations is found in the establishment of a PT which uses the Agreement Principle of the Civil Code where the Limited Liability Company, hereinafter referred to as a Legal Entity, occurs as a result of an act of business agreement between the parties which is set forth in an agreement (as stated in Article 1313 of the Civil Code). The definition of an agreement is an act by which one or more persons bind themselves to one or more other persons. Which in this corridor synergizes with Article 7 paragraph (1) of the Company Law, which regulates The company can be said as a legal entity must meet the following requirements:

The existence of separate assets (rights) with specific purposes separate from personal assets between members or allies of shareholders and the legal entity concerned. By duty, there is a separation of assets between the assets of the body or company.

There is an interest in the objectives of the legal entity concerned: Some people become organs of the legal entity in carrying out its business activities. The form of business of a Limited Liability Company has a characteristic called limited liability (Hayes, 2021). These characteristics make the shareholders, directors and board of commissioners of the Company, in principle, free from responsibility for losses suffered by the Company. This is an embodiment of the separation principle owned by the Company because in the eyes of the law, a Company is seen as a separate legal entity from its shareholders, directors and board of commissioners. A limited liability company has its own assets that are separate from the assets of its shareholders. The Company may also have legal engagements which are separate from the engagements made by shareholders, directors, and the board of commissioners. Thus, the Company's actions only bind the Company itself as a legal entity and in general the shareholders, directors and board of commissioners cannot be held accountable. However, this principle is not absolute and not without exception. Law Number 40 of 2007 concerning Limited Liability Companies has stipulated that in certain circumstances the shareholders, directors and commissioners in carrying out their responsibilities to promote the company, but if there is a conflict of interest, they can be held still accountable for the losses suffered by the Company and including the directors and commissioners.

II. RESEARCH METHODS

In this legal research, the legal research used refers to normative law research. As (Soekanto, 2007) opinion, legal research is a scientific activity based on certain methods, systematics and thoughts, which has the aim of studying one or several general symptoms of certain laws by analyzing, conducting in-depth examinations of the legal facts and then seeking a solution to the problems.

III. RESULT AND DISCUSSION

Responsibilities of Directors and Commissioners

First of all, it is necessary to understand the duties and responsibilities of the board of directors and the board of commissioners as regulated in the provisions of the Company Law. The Board of Directors to represent the Company is unlimited and unconditional, except as stipulated in the Company Law, articles of association and the decision of the shareholders' meeting both inside and outside the court in accordance with the provisions of the company's articles of association (Article 1 point 5 of the Company Law). Meanwhile, the Board of Commissioners is tasked with conducting general and/or specific supervision in accordance with the articles of association and providing advice to the board of directors (Article 1 point 6 of the Company Law).

Furthermore, the board of directors is obliged to carry out the management/interests of the Company and in accordance with the aims and objectives of the Company (article 92 paragraph (1) of the Company Law). The Board of Directors is also required to carry out management in accordance with policies which are deemed appropriate with the limits specified in the Company Law and/or the articles of association (Article 92 paragraph (2) of the Company Law). Each member of the board of directors is also required to carry out management in good faith and full responsibility (Article 97 paragraph (2) of the Company Law). On the other hand, each member of the board of commissioners is required to carry out the task of supervising and providing advice to the board of directors in good faith, prudence, and responsibility. The benefit of a limited liability company (article 114 paragraph (2) of the Company Law) and in its development the implementation of the authority of the board of directors must be based on good corporate governance.

Responsibilities which must be held by each Board of Directors and Board of Commissioners in the Company;

Responsibilities of the Board of Directors

According to Article 97 paragraph (2) of the Company Law, each member of the Board of Directors is personally responsible for the loss of the Company if the person concerned is guilty or negligent in carrying out his duties. Applies jointly and severally to each member of the Board of Directors. Based on Article 97 paragraph (3) of the Company Law, members of the Board of Directors cannot be held responsible for the losses referred to above, if they can prove.

Responsibilities of the Board of Commissioners

The board of directors is the central of the internal control mechanisms to monitor managers (Fama, 1980). The Board of Commissioners is responsible for the supervision of the Company as referred to in Article 108 paragraph (1) of the Company Law, namely in terms of supervising management policies, the general course of management, both regarding the Company and the Company's business, and providing advice to the Board of Directors. Each member of the Board of Commissioners must act in good faith, be careful, and be responsible in carrying out their supervisory duties and providing advice to the Board of Directors for the benefit of the Company and in accordance with the purposes and objectives of the Company. Then, each member of the Board of Commissioners is personally responsible for the loss of the Company, if the person concerned is guilty or negligent in carrying out his duties. If the Board of Commissioners consists of 2 (two) members of the Board of Commissioners or more, then the responsibilities as referred to above apply jointly and severally to each member of the Board of Commissioners (Article 114 paragraph (3) of the Company Law).

The theory of fiduciary duty is an obligation stipulated by law for someone who takes advantage of someone else, where one person's personal interests are taken care of by another person, which is only a temporary superior-subordinate relationship. In managing a company, the members of the board of directors and commissioners as one of the vital organs in the company are fiduciaries who must behave like trust holders. Then, the person who has this obligation must carry it out based on the highest standard of duty as stated by law. While this fiduciary is someone who holds the role of a representative (trustee) or a role that is equated with something that acts as a representative, in this case the role is based on trust and confidence which in this role includes scrupulous, good faith, and candor. This fiduciary includes relationships such as, administrator or manager, supervisor, representative or guardian, and protector. It is including a lawyer who has a fiduciary relationship with his client.

Although the Board of Directors and the Board of Commissioners have different duties, both the Board of Commissioners and the Board of Directors are basically subject to the Fiduciary Duty principle. The mainstay legal dictionary for legal practitioners, namely the Black's Law Dictionary, formulates two definitions of fiduciary duty; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as duty that one partner owes to another). Then, a duty of utmost good

faith, trust, confidence, and candor owed by a fiduciary (such as lawyer or corporate officer) to the beneficiary (such as lawyer's client or stakeholder).

According to (Harahap, 2011), fiduciary duty means trusted which means that each of the members of the board of directors and board of commissioners in all time is trusted and in all time perform its duty in honesty. The two formulations of the definition of fiduciary duty according to the Black's Law Dictionary contain several important principles which were later adopted by the Law on PT. These principles include; honesty, loyalty, good faith, trust, and transparency. The values contained in the fiduciary duty principle are actually the key to realizing a harmonious relationship between the directors and commissioners. If a harmonious relationship has been realized, then the company's objectives as stated in the articles of association should also be easily achieved. On the other hand, if the directors and commissioners neglect or even violate the fiduciary duty principle, the company will be in trouble and the company may lose money also eventually be declared bankrupt. It is because the Company's Commissioners and Directors are fiduciaries, both of them must behave like trust holders. This is where the commissioners and directors have a fiduciary position in managing the company and the relationship mechanism must be fair.

In the context of directors, it is very important to control the behavior of directors who have great positions and power in managing the company, including setting standards of conduct to protect parties who will be harmed if a director behaves in an inappropriate manner or behaves inappropriately. In order to impose liability on the directors or management of the corporation, it must be proven that there has been a violation of the powers and obligations they have. The management of the corporation in this case must be proven to have violated the good faith entrusted to him in running the corporation or company as stipulated in the principle of fiduciary duty.

Fiduciary Duties Violation and Consequences

According to (Pinakunary, 2021), the consequences that can be accepted by each member of the board of directors and board of commissioners in connection with the violation of fiduciary duties is that each of them can be held personally responsible for the Company's losses caused by the violation. Article 97 paragraph (3) of the Company Law confirms this for the board of directors; Each member of the Board of Directors is personally responsible for the loss of the Company if the person concerned is guilty or negligent in carrying out his duties in accordance with the provisions as referred to in paragraph (2).

As for the board of commissioners, this is confirmed in the provisions of article 114 paragraph (3) and each member of the Board of Commissioners is personally responsible for the loss of the Company if the person concerned is guilty or negligent in carrying out his duties as referred to in paragraph (2). The actions of the Board of Directors and the Board of Commissioners which may cause them to be personally responsible for the losses suffered by the Company. The Company Law itself specifically regulates actions or circumstances that cause the directors or board of commissioners to be held personally responsible.

Errors in financial statements

The Board of Directors has the obligation to submit annual financial reports (article 66 paragraph (1) of the Company Law). Furthermore, for these obligations, the board of directors and the board of commissioners also have responsibility for the truth and accuracy of the contents of the financial statements. In addition to each of the directors and the board of commissioners being required to sign the financial statements. In the event that the financial statements provided are found to be untrue and/or misleading, members of the Board of Directors, and members of the Board of Commissioners are jointly also severally responsible for the injured party (Article 69 paragraph (3) of the Company Law). So, if a third party suffers a loss due to an error in the financial statements, the members of the board of directors and the board of commissioners can be held jointly and severally responsible.

Not reporting the shares their family owns in the company or other companies

Article 101 paragraph (1) of the Company Law regulates the obligation of members of the Board of Directors to report to the Company regarding the shares owned by the member of the Board of Directors concerned and/or his family in the Company and other companies to be further recorded in a special register. If the member of the Board of Directors does not carry out this obligation and causes a loss to the Company. Then, the member of the Board of Directors is personally responsible for the loss of the Company (Article 101 paragraph 2 UUPT).

Reasons for defense available to members of the Board of Directors and Board of Commissioners

Basically the violation will affect all members of the board of directors and board of commissioners. Regarding violations of the fiduciary duties of the board of directors, article 97 paragraph (4) of the Company Law stipulates that if the board of directors consists of two or more people. Then all members of the board of directors will be jointly and severally responsible. The same also applies to violations of the fiduciary duties of the board of commissioners as stipulated on article 114 paragraph (4) UUPT. The question now is if there are members of the board of directors and or board of commissioners who have carried out their duties properly and honestly in accordance with the provisions of the Company Law and the articles of association. Can they defend themselves so that they are not responsible for violations that were not caused by other members of the board of directors or commissioners?

Reasons for Defense of Members of the Board of Directors and Board of Commissioners in the event of a violation of fiduciary duties.

The Company Law answers this by providing requirements for members of the board of directors and board of commissioners to be able to defend themselves in the event of a violation of fiduciary duties committed by a member of the board of directors and board of commissioners (Kesowo, 1996). Article 97 paragraph (5) of the Company Law regulates the following; members of the board of directors cannot be accounted for losses as regulated in paragraph (3) and members of the Board of Commissioners cannot be held responsible for the losses as referred to in paragraph (3).

Implementation of GCP Principles as a Progress for the Company and its Structure

According to the Index through the (Booz & Amilton, 1982) study compared to countries such as Japan, Malaysia, and Thailand are the lowest as well as the level of legal and judicial efficiency. Furthermore, according to the forum for Corporate Governance in Indonesia, it is a set of regulations which regulate the relationship between shareholders, managers, creditors, government employees, and other stakeholders inside also outside the company. The role of Good Corporate Governance in the Company often makes companies that have fallen to become slowly rising. Meanwhile, according to expert opinion (Syakhroza, 2002) has defined Corporate Governance as a system used by the "Board" to direct and control also supervise (directing, controlling, and supervising) the management of organizational resources efficiently, effectively, and efficiently, economical, and productive-E3P with the principles of transparent, accountable, responsible, independent, and fairness-Tariff in order to achieve the organization's goals. So, it can be concluded from several that corporate governance is a system, process and set of regulations built to direct and control the company so as to create a good, fair and transparent relationship between various parties who are related and have interests (stakeholders) in the company. As for some of the advantages obtained in the implementation of the company's Good Corporate Governance minimize, agency costs, namely costs incurred as a result of delegation of authority to management; Companies can minimize the Cost of Capital, namely the cost of capital that must be borne when the company applies for loans to creditors; With the existence of GCG the decision-making process will take place better so that it will produce optimal decisions; Good Corporate Governance will enable it to be avoided or at least be able to minimize abuse of authority; The value of the company in the eyes of investors will increase as a

result of increasing their trust in the management of the company in which they invest (Teoh & Wong, 1993); For shareholders, increased performance has a supporting factor in order to increase share value and generate dividends.

The various benefits and benefits that are felt to be given by the implementation of good corporate governance as mentioned above, it is natural that all stakeholders, especially business actors in Indonesia, realize how important this concept is for the recovery of business conditions and at the same time the recovery of our national economic condition. Therefore, it is necessary to make improvements through understanding the actors in the corporate sector, in order to avoid problems in terms of company structure.

IV. CONCLUSION

As the responsibilities of the organs of the company, both the Board of Directors and the Board of Commissioners have been regulated and included in the Company Law No. 40 of 2007, as according to Article 108 paragraph (2) of the Company Law. It is stated that the Board of Commissioners has the duty and authority to supervise the management policy system. Its operations in general, both regarding the Company and the Company's business, and providing advice to the Board of Directors. As for the Board of Directors itself. It is regulated in Article 97 paragraph (2) of the Company Law that the full responsibility is personally for the Company's losses if the person concerned is guilty or negligent in carrying out his duties. The principle of limited liability of the Company applies to provide protection for shareholders, directors, and board of commissioners. However, under certain conditions, this principle may become invalid if each party in the position or position of the parties has violated their obligations within reasonable limits so that they can be used for compensation to the Company or third parties. The Obligations and Authorities of the Limited Liability Company's organs are not only limited to the fiduciary duty principle, but also need a deep understanding as the company's principles that we know so far. It is namely the principle of Good Corporate Governance are very helpful in supporting business activities to reduce legal problems which occur in the scope of the company. The benefits which are felt are tangible. One of which is the creation of formal and material support but with the corridors of the company environment, so that maximum benefits can be felt and the achievement of prosperity itself. The responsibilities of the Board of Directors as the Company's Organs are described descriptively, one of which is the Fiduciary duty principle which has the meaning of trust. Technically it means that a person who holds fast to his duties and obligations does not only have rights and authority in order to achieve the interests of others whose interests are entrusted to him. Understanding the true meaning of the word trust in running a company is a key to achieving a healthy company and guiding the company towards a conducive and aspired direction.

REFERENCES

- Booz, A., & Amilton. (1982). *New product management for the 1980's*. Booz, Allen & Hamilton, Inc.
- Fama, E. F. (1980). Agency Problems and The Theory of The Firm. *The Journal of Political Economy*, 88(2), 288–307.
- Harahap, M. Y. (2011). *Hukum Perseroan Terbatas*. Sinar Grafika.
- Hayes, A. (2021). *Limited Liability*. Investopedia.
- Kesowo, B. (1996). Beberapa Prinsip Dalam Undang-Undang Perseroan Terbatas. *Newsletter of Center of Law Study*, 7(24).
- Pinakurny, F. J. (2021). *Liabilities of the Board of Directors and the Board of Commissioners of a Limited Liability Company*. Fredrik J Pinakurny Law Offices.
- Soekanto, S. (2007). *Pengantar Penelitian Hukum*. Universitas Indonesia.
- Syakhroza, A. (2002). Mekanisme Pengendalian Internal dalam Melakukan Assessment terhadap Pelaksanaan Good Corporate Governance. *Jurnal Usahawan*, XXXI(08), 41–52.
- Teoh, S. H., & Wong, T. J. (1993). Perceived Auditor Quality and The Earnings Response Coefficient. *The Accounting Review*, 346–366.