
RESEARCH ARTICLE

Reformulation of the Function of the Board of Directors as an Organ of Persero Company in the Framework of Legal Development

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ABSTRACT

This article discusses the urgency of reformulation of the function of the Board of Directors as an organ of persero company in carrying out the company's business activities to obtain profits that are further deposited to the state as non-tax state revenues. This research is normative research. The results of this study show that the transfer and guarantee actions carried out by Directors against persero's assets are one form of legally valid management as long as it is in accordance with the laws and regulations, its basic budget and the interests of persero. In order to achieve legal certainty, it is necessary to reformulate the function of the Board of Directors of Persero in the laws and regulations into the function of management, ownership and representing persero both in and in court as long as it is in accordance with the laws and/or articles of association of Persero.

KEYWORDS

State-Owned Enterprises, Persero, Directors, Management, Ownership, Development Law, *Economic Analysis of Law*

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1. Introduction

1.1 Background

Pancasila as a source of law provides a philosophical view that the nature of law for the Unitary State of the Republic of Indonesia is a law that is godly, humane, upholds the unity of Indonesia that is people-based and social justice. The Constitution of the Republic of Indonesia in 1945 (hereinafter referred to as the 1945 Constitution) and Law No. 17 of 2007 on the National Long-Term Development Plan (RPJPN) of 2005-2025 (hereinafter referred to as Law No. 17/2007) are one of the crystallization of Pancasila values that are used as guidelines in the preparation of the national legal system (Erwin, 2019).

In the political perspective of law, it can be understood that the desired legal development in Law No. 17/2007 is the preparation, making and changing of national legal products that support the realization of sustainable economic growth, regulating economic problems both fiscally, monetarily, problems in the business world and the industrial world and creating justice, certainty and legal expediency in the running of the country's economy and people's lives based on Pancasila. and the 1945 Constitution (Manan, 2008).

One of the functions of the government as an executive institution that runs the wheels of government as mandated by article 33 of the 1945 Constitution is to organize an economy based on the principles of togetherness, equitable efficiency in order to provide the greatest welfare for the people, progress and national economic unity. State-Owned Enterprises (hereinafter referred to as SOEs) as an extension of the government is expected to make a positive contribution in order to provide public services for the community while still pursuing maximum profits as one of the sources of non-tax state revenue (hereinafter referred to as PNBP). The company (hereinafter abbreviated as Persero) as one form of SOE is a limited liability company (hereinafter referred to as PT) owned by the state with stake ownership of at least 51% owned to pursue the maximum profit as stipulated in Law No. 19 of 2003

concerning State-Owned Enterprises (hereinafter referred to as Law No. 19/2003) and Law No. 40 of 2007 on Limited Liability Companies (hereinafter referred to as Law No. 40/2007).

In carrying out his business activities, persero as a legal subject in the form of a legal entity that can conduct legal relations, have wealth, can be prosecuted and sue before the court on behalf of himself requires an organ that serves as a trusted administrator acting using its authority only for the benefit of the company solely based on *fiduciary duties*. with the company he manages. The Board of Directors is the only organ in the company that carries out the function of persero management that is fully responsible for the management for the interests and purposes of the company and represents the company both inside and outside the court based on the laws and/or basic budget as mandated by article 1 number 9 of Law No. 19/2003 jo. Article 1 number 5 of Law No. 40/2007. From these provisions, it can be concluded that the directors in the company have a management function (management) and a representative function (representation). But in practice, the community has different interpretations both as business actors and people appointed as directors of Persero and legal experts in interpreting the management function by persero directors (Ridho, 1986).

One of the rulings that tried to interpret the management actions by the directors of Persero is in decision number 34 / Pid.Sus-TPK / 2019 / PT. DKI on behalf of the defendant Ir. Galaila Karen Kardinah aka Karen Agustiawan as the former president director of PT Pertamina (Persero). In the ruling, the panel of judges based on his consideration that the management actions carried out by the directors of Persero, among others, conducting investment activities on behalf of the company and strategic business decision-making must be carried out in good faith and full responsibility based on the Regulation of the Minister of SOEs Number PER-01 / MBU / 2011 dated August 1, 2011 (hereinafter referred to as Permen BUMN No. PER-01 / MBU / 2011) jo. Regulation of the Minister of SOEs Number PER-09 / MBU / 2012 dated July 6, 2012. 2012 (hereinafter referred to as Permen BUMN No. PER-09/MBU/2012).

Another envoy who tried to interpret the act of ownership of persero assets as one of the management actions by the directors of Persero is in the case of investment losses made by the directors of PT Pertamina (Persero) in the decision number 3849K / Pid.Sus / 2019 on behalf of defendant Ferederick ST Siahaan as the former finance director of PT Pertamina (Persero). In its consideration, the panel of judges argued that the actions of the directors of PT Pertamina (Persero), which placed investment funds on the acquisition of *participating interests* of BMG-Australia worth 10%, was one of the authorities of the directors in performing management functions because the transaction uses funds of PT Pertamina (Persero) with asset value that does not exceed 50% of the company's total net assets.

What attracts the attention of the author is whether the act of ownership of persero property is part of the authority of the board of directors in managing persero? This needs to be analyzed further considering that in carrying out persero business operations, there are always transactions involving persero wealth, such as the use of persero cash in the investment activities of a business to obtain profits, as the author described earlier. Given the breadth of the meaning of management is also a further question of whether a legal reformulation is needed to the regulation of the management function of the board of directors in carrying out Persero's business activities in order to achieve certainty and legal development in accordance with the 1945 Constitution and Pancasila as a source of law? With these legal issues, the author is interested in raising the theme of research in this journal entitled "**Reformulation of The Regulation of The Function of the Board of Directors as an Organ of Persero Company in the Framework of Legal Development**" with the following problem formulation: 1) Is the transfer or underwriting of persero's assets in order to obtain loans made by the board of directors can be categorized as management actions? How is the reformulation of the law regulating the function of the board of directors as an organ of persero in the framework of legal development?

2. Method of Research

This research is a normative juridical study focused on reviewing the application of rules or norms in positive law. The approaches used in this study are *the statute approach* (Effendi & Ibrahim, 2018) the case *approach* and the conceptual approach to secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials (Sari et al., 2021). The analytical methods used in this study are legal reasoning and legal interpretation methods (Marzuki, 2008). Conclusions in this study use deductive methods to conclude things that are general to special things (Nasution, 2016).

3. Discussion

A. The Inclusion of Capital Into Persero and The Receipt of Dividends to the State as Shareholders Is Part of State Finance

With reference to the provisions of article 1, number 1 of Law No. 17 of 2003 on State Finance (hereinafter referred to as Law No. 17/2003), Djafar Saidi and Merdekawati Djafar divide the object of state finance into 4 (four), namely all state rights that can be assessed with money, all state obligations that can be assessed with money, money owned by the state and goods owned by the state. One form of state action in advancing the general welfare as mandated by paragraph 4 of the 1945 Constitution is to establish a state-owned enterprise in the form of persero that aims to obtain profits as state revenue instead of taxes and perform public services to the community (Saidi & Djafar, 2021).

As specified in article 2 letter g of Law No. 17/2003, the participation of capital in persero separated from state wealth includes one (one) object of state finance. In this case, what needs to be criticized is what is the scope of state finance in state-owned enterprises in the form of persero? On the legal issue, the author argues that part of the property that is part of state finance is the participation of capital in the establishment of persero as money or state property and the distribution of dividends to the state as shareholders sourced from the balance of profits that have been booked that have obtained the approval of the General Meeting of Shareholders (hereinafter referred to as gms) as rights or money that can be owned by the state as non-tax state revenues and can be in the form of goods made by persero business given to the state.

Based on the provisions of article 4 of Law No. 19/2003, state capital participation in state-owned enterprises must be based on government regulations that can be sourced from the state budget, reserve capitalization, and other sources. Considering that state-owned enterprises in the form of persero are also subject to the provisions of the laws and regulations in the field of limited liability companies as mandated by Article 11 of Law No. 19/2003, the deposit of capital can be made both in the form of money and other forms that can be assessed with money with capital provisions in other forms must be assessed fairly both based on market value and assessment / taksasi conducted by the assessor who will be converted into shares as regulated. in article 1 number 7 of Law No. 25 of 2007 on Investment (hereinafter referred to as Law No. 25/2007) jo. Article 35 of Law No. 40/2007.

Yahya Harahap divides dividends into 2 forms: final dividend and interim dividend. A final dividend is defined as the division of the company's profits to its shareholders that have been decided and determined in one particular financial year, while the interim dividend is a temporary dividend declared and paid before the company's financial year ends. Based on the provisions of article 15 paragraph (1) letter i of Law No. 40/2007, it is determined that the distribution of dividends is determined in the articles of association with the provision of positive persero profit balance. If the provisions of the author's article are interpreted with systematic and grammatical interpretation, it can be concluded that there are 2 ways of distributing dividends in the following ways (Harahap, 2009):

1. Based on the decision of the GMS with reference as stipulated in article 15 paragraph (1) letter i jo. Article 71 paragraph (2) of Law No. 40/2007;
2. Based on the decision of the board of directors who have obtained approval from the board of commissioners with reference to article 15 paragraph (1) letter i jo. Article 71 paragraph (2) jo. Article 72 paragraph (4) of Law No. 40/2007.

So based on the above description, the author argues that the property of persero companies in addition to persero capital deposited by the state and profits that have been determined as dividends distributed are not necessarily stated property because by referring to the opinion of Otto Von Gierke and article 1 number 2 of Law No. 19/2003 jo. Article 1 number 1 of Law No. 40/2007 that persero as a legal entity is a legal subject has the right to and legal obligations that can perform legal acts such as making alliances in accordance with their purposes and objectives and obtaining the right to materiality.

B. Legal Concept of Management Functions by Persero Board of Directors as An Organ of Persero Company

The regulation of the function of the persero board of directors has generally regulated in the provisions of article 1 number 9 jo. Article 5 of Law No.19/2003 determines that the directors of Persero are the authorized and responsible persero organs to perform management functions for the benefit of achieving the purposes and objectives of persero and representative functions both representing persero inside and outside the court. The definition of management carried out by the directors of Persero can be found in the provisions of article 1 number 12 of Government Regulation No. 45 of 2005 on the Establishment, Management, Supervision and Dissolution of State-Owned Enterprises (hereinafter referred to as PP No. 45/2005) which explains that management is an activity carried out by directors in an effort to achieve the company's intentions and objectives. After observing the provision can be obtained a legal issue; what is the extent and how is the form of management functions carried out by the board of directors? This becomes important to be criticized considering that Law No. 19/2003 jo. PP No. 45/2005 does not regulate in detail the management actions carried out by the directors of Persero, which only states that the management function by the directors of Persero refers to the principles of limited liability companies as stipulated by Law No. 40/2007.

Regarding the management function by the board of directors, Rudhi Prasetya understands the management function of the board of directors is spelt out as follows (Prasetya, 2014):

1. Management in a narrow sense, namely the board of directors carrying out the company's operational management actions(*beheeren*);
2. Management in the broadest sense, namely the board of directors carrying out management actions(*beheeren*)and ownership actions (*beschikking*)both in the form of transfer and guaranteeing the property of persero to third parties.

Another opinion on the management function by the board of directors can be found in the *ratio decidendi* of the panel of judges in decision number 3849K / Pid.Sus / 2019 which states that the act of ownership by the directors of Persero is one of its authorities as an organ of the company that carries out the management function as long as it is in accordance with the provisions of its basic

budget and does not exceed 50% of the company's net assets based on the company's financial year as stipulated in its basic budget.

Based on the provisions of article 92 paragraph (1) of Law No. 40/2007 and its explanation that uses the word "among others", it can be interpreted that the scope of management actions by the board of directors is not only limited to the management of the company's daily business activities but also includes other actions such as ownership actions on the company's assets as long as it aims to maintain the interests and objectives of the company while being guided by the company's laws and regulations basic budget. So if the provisions of article 5 of Law No. 19/2003 jo. Article 1 number 12 PP No. 45/2005 jo. Article 92 jo. 97 jo article 102 of Law No. 40/2007 is interpreted with systematic and grammatical interpretation, it can be concluded that the management function of persero directors also includes ownership actions both transfer and guarantee persero assets to third parties with cumulative conditions as follows:

1. In accordance with applicable laws and regulations, especially Law No. 19/2003, Law No. 40/2007, PP No. 45/2005;
2. In accordance with the purpose and purpose of the Company;
3. In accordance with its authority and the conditions specified in the articles of association;
4. Do not exceed 50% of the company's net worth based on 1 (one) financial year or a longer period as stipulated in the articles of association. If it exceeds the limit of 50%, it is mandatory based on the approval of the GMS.

If the act of ownership does not meet the above elements can cause 2 legal implications. The first legal implication is if the act of ownership carried out by the directors of persero is an *ultra vires* action, namely the company's organ actions including directors carried out outside the company's intentions and objectives. The second legal implication is that if the actions of the board of directors are still within the corridor of the company's intentions and objectives but exceed the authority given in the company's articles of association, then the actions of the directors can be categorized as lack of authority actions which means the actions of directors on behalf of the company outside the limits of its authority in the laws and articles of association. Actions that do not meet these elements have legal implications for the directors of Persero can be held accountable personally or responsibly as specified in article 97 of Law No. 40/2007 jo. article 27 paragraph (2) pp No. 45/2005 (Sjawie, 2017).

C. Reformulation of Legal Regulation of Management Functions by the Board of Directors as An Organ of Persero in the Framework of Legal Development

As mandated by RPJPN 2005-2025 that in the framework of the development of the Republic of Indonesia requires the construction of a national legal system either by forming a newly legal product or changing a legal product or known as legal reformulation. Legal reformulation can be interpreted as an act or attempt to make changes to the law as a norm governing the behaviour of a society that aims to change the behaviour of its people and create justice, expediency and legal certainty in the future (Harun, 2016).

According to Richard A. Posner, the theory of *economic analysis of law* is an economic analysis of the law to create laws that regulate human activities in determining and exercising their choices to maximize their prosperity and happiness by not harming others publicly and privately. According to Fajar Sugiarto, there are several theories in economic analysis of *law* as a benchmark in analyzing a legal product with an economic approach, including the *gap-filling* theory that assesses the benchmark of the efficiency of legal products determined from substances that are not multi-interpretation, explicit regulation of a legal problem, easy to understand and applied by both law users and law enforcement officials (Holman, 2004; Posner, 1982).

If the author analyzes the provisions of article 5 of Law No. 19/2003 or the provisions of Law No. 40/2007 regarding the function of management by directors as *law in the book* and verdict number 34 / Pid.Sus-TPK / 2019 / PT. DKI and decision number 3849K / Pid.Sus / 2019 and as *law in action*, of course, how widely the meaning of "management" in the legislation can be seen. In its application, especially in the activities of judges *rechtsvinding* by being literate between legal norms and legal facts revealed in the trial, the understanding of judges in interpreting management functions is very diverse, which causes no legal certainty. The breadth of the meaning of management provides an opening for judges to interpret the meaning of management differently, either interpreted *kasuistis* or interpreted only to the extent of legal norms.

Based on the *gap-filling* theory, a legal product must have a concrete, explicit substance so that there is no multi-interpretation. By referring to the theory of *economic analysis of law* that prioritizes the principle of effective, efficient and explicit legal substance, the author argues that the management arrangement can be arranged a reformulation of functions into the following:

1. Management function, namely the function of directors to run managerial both operational and strategic business policy-making of persero companies in good faith and full of responsibility. Such actions include determining the work plan of persero, compiling the financial statements of persero, recording the list of persero shareholders and taking business policies that are considered appropriate based on best business practices and applicable laws and regulations;

2. The function of ownership, where the board of directors as an organ of Persero is authorized to carry out the transfer and guarantee of persero assets to third parties in carrying out business transactions as long as they are in accordance with the purpose and purpose of persero's business activities with limits stipulated in the laws and/or articles of association. This becomes legally logical considering that Persero as a legal entity has its own property that does not necessarily become state property considering the state property against persero in the form of cashed-up capital and receipt of dividend distribution that has been decided;
3. Representative function, namely the board of directors, serves to represent persero both inside and outside the court.

4. Conclusion

Based on the systematic and grammatical interpretation results of the provisions of article 5 of Law No.19/2003, jo. Article 1 number 12 PP No. 45/2005 jo. Article 92 jo. Article 97 of Law No. 40/2007, the act of ownership either diverts or guarantees persero assets is one form of management of the company's company by the board of directors as long as it is for the benefit of persero and is carried out in accordance with the provisions of the laws and/or articles of association of Persero.

In order to achieve nuanced legal development to ensure legal certainty and effective, efficient and equitable economic activities as mandated by RPJPN 2005-2025 in the field of legal development, legal reformulation is needed to regulate the function of directors as managers of so-called persero into a management function, ownership function both diverts and guarantees persero assets as long as it is in accordance with the purpose and purpose of persero within the same limits. It is determined by the laws and/or basic budget and representative functions representing persero both inside and outside the court.

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