



State rights to state owned enterprise assets placed in state-owned subsidiaries linked to corruption crimes

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Abstract

This research aims to analyze the state's rights to state-owned enterprise assets placed in state-owned subsidiaries in relation to criminal acts of corruption. This is due to the dualism of the state's position in state-owned subsidiaries. This research is normative legal research with statutory, conceptual and case approaches. The results of this research are the legal relationship between BUMN and BUMN subsidiaries, namely that subsidiaries are considered independent legal subjects, however, BUMN has significant control through majority share ownership and special rights in making important decisions. In addition, the State, through the Minister of BUMN, has significant rights over BUMN assets in subsidiary capital participation, both in the form of supervision, monitoring and strategic decision making. The principles of separation of legal entities and limited liability still apply, where the actions and legal obligations of the subsidiary are not the responsibility of the parent company. However, BUMN's strategic control over its subsidiaries remains strong through special privileges regulated in government regulations and the company's articles of association. These state rights over state-owned subsidiaries provide additional controls that ensure state interests remain protected.

Keywords: State-owned subsidiary, state-owned enterprise, state rights

Introduction

The Law on the Eradication of Corruption Crimes specifically regulates its own procedural law regarding law enforcement for perpetrators of criminal acts of corruption, generally differentiated from the handling of other special crimes. This is because corruption is an extra ordinary crime that must take priority over other criminal acts. The reasons why Corruption Crimes qualify as extraordinary crimes can be seen in the general overview of Law of the Republic of Indonesia Number 30 of 2002 concerning the Commission for the Eradication of Corruption Crimes as Amended by: Government Regulation in Lieu of Law Number 1 of 2015 which was ratified by Law of the Republic of Indonesia Number 10 of 2015 and Law of the Republic of Indonesia Number 19 of 2019: "The uncontrolled increase in criminal acts of corruption will bring disaster not only to national economic life but also to the life of the nation and state in general. Widespread and systematic criminal acts of corruption are also violations of the social and economic rights of the community, and because of this, criminal acts of corruption can no longer be classified as ordinary crimes but have become extraordinary crimes. Likewise, efforts to eradicate it can no longer be carried out normally, but require extraordinary methods."

In handling this act of corruption, there are still many legal problems. One of them is related to dualism. Problems related to the interpretation of "state losses" and "state financial losses" are often debated when related to losses from State-Owned Enterprises (BUMN). Based on Article 1 number 1 of Law Number 19 of 2003 concerning State-Owned Enterprises, the BUMN Law), a State-Owned Enterprise or BUMN is a business entity whose capital is wholly or largely owned by the state through direct participation originating from separated state assets. . From the definition in Article 1 point 1 of the BUMN Law which states that BUMN capital comes from state assets which are separated if linked to the classification of state finances in

Article 2 letter g of the Law State Finances (in casu: State assets/regional assets managed by themselves or by other parties in the form... including assets separated from state companies/regional companies), means that when there is a loss to a BUMN, it can be said that there is also a loss to state finances. This means, when there is a loss to a BUMN, it can qualify as a criminal act of corruption.

The existence of dualism related to state losses to state-owned enterprises that qualify as state losses or not also has juridical consequences, related to the existence of new legal problems, namely legal ambiguity (obscurity of law) regarding the position of losses of state-owned subsidiaries whether they qualify as criminal acts of corruption or not. As in Article 1 number 5 of the Regulation of the Minister of State-Owned Enterprises of the Republic of Indonesia Number PER-3/MBU/03/2023 concerning Organs and Human Resources of State-Owned Enterprises (PERMEN BUMN 3/2023) which regulates: "BUMN Subsidiaries hereinafter referred to as A Subsidiary is a limited liability company whose shares are more than 50% (fifty percent) owned by a BUMN or a limited liability company that is directly controlled by a BUMN.", then it can be understood that a BUMN Subsidiary is a limited liability company where the majority of its shares are owned by a BUMN or private company. Limited controlled by BUMN.

From the definition in BUMN Ministerial Decree 3/2023, it can be understood that the source of wealth of BUMN subsidiaries still comes from BUMN which incidentally, in condition sine qua non, remains state finance (in casu: wealth that is separated from state companies/regional companies), so that losses that occur to BUMN subsidiaries also include state losses and constitute a criminal act of corruption, if they fulfill the other elements in Articles 2 and 3 of the Corruption Law. However, if it is related to the legal position of a BUMN subsidiary which is a separate legal entity with the BUMN and based on its nature which is

a "subsidiary", it means that its responsibility is only to the BUMN, not to the state, then the child's losses should be State-owned company, not a loss to the state.

As the legal adage goes: "*verdictum quasi dictum veritatis; ut iudicium quasi juris dictum*" (free translation: "A decision, as it should be, explains the truth, in the same way that a decision explains the law or rights") which has a depth of meaning, that law enforcement can be seen from the judge's decision,

So it is related to the dualism regarding the losses of BUMN subsidiaries as state losses or not, which can be seen from the existence of 2 (two) different decisions, namely the Central Jakarta District Court Decision Number 14/ Pid.Sus /TPK/2020/PN Jkt.Pst and the Court Decision Agung Number 121K/ Pid.Sus /2020. In the Central Jakarta District Court Decision Number 14/ Pid.Sus /TPK/2020/PN Jkt.Pst , PT. Infomedia Nusantara, a subsidiary of PT. Indonesian Telecommunication / PT. Telkom), qualified as a state loss and the Defendant was convicted of committing a criminal act of corruption, while in the Supreme Court Decision Number 121K/ Pid.Sus /2020, the Defendant was found not guilty of committing a criminal act of corruption with one of the arguments, that PHE's finances as a subsidiary of BUMN were not including state finances as well as losses. Therefore, it will be analyzed in relation to the State's Rights to State-Owned Enterprise Assets Placed in State-Owned Subsidiaries Associated with Corruption Crimes.

Literature review

Looking at the historical background, the presence of BUMN actually existed before Indonesia became independent. Since the time of the Dutch East Indies government, state enterprises such as Spoorswagen (SS), Gemeenschapelijke Mijnbouw Maatschappij Biliton (GMB), this company operates in the tin mining sector on Belitung Island, Pegadaian Company, PLN, PTT, and so on. After the independence era, the Indonesian government took over all these public utilities as state companies with government status, for example the Railway Bureau, PTT Bureau, Pegadaian Bureau, and so on.

In essence, the existence of BUMN itself is a legacy or legacy of the history of the Dutch East Indies government through the nationalization program and after that BUMN functioned as an "agent of development".¹³ Apart from continuing BUMN as a legacy of the Dutch East Indies government, the Indonesian government established BUMN based on the provisions of Article 33 paragraph (2) The 1945 NRI Constitution. In this article it is stated that "Branches of production which are important for the state and affect the livelihoods of many people are controlled by the state". On this basis, the government formed business entities that play a strategic role in national economic development. As time progresses, the role of BUMN itself becomes increasingly important when private businesses and cooperatives which are expected to work together with BUMN are not optimal or do not play a meaningful role.

Various laws and regulations provide definitions of State-Owned Enterprises. The BUMN Law states that State-Owned Enterprises, hereinafter referred to as BUMN, are business entities whose capital is wholly or largely owned by the state through direct participation originating from separated state assets. Meanwhile, in the Decree of the Minister of Finance of the Republic of Indonesia No. 740/KMK 00/1989, what is meant by BUMN is a business

entity whose entire capital is owned by the state (Article 1 paragraph (2) a of the BUMN Law), or a business entity whose shares are not entirely owned by the state. But its status is equal to that of BUMN (Article 1 paragraph (2) b of the BUMN Law):

1. BUMN which is a joint venture between the Government with local Government.
2. BUMN which is a joint venture between the government and other BUMN.
3. BUMN which are joint venture entities with national/foreign private companies where the state has a majority stake of at least more than 50% Regarding subsidiaries of BUMN, this is in Article 1 point 5 of the Regulation of the Minister of State-Owned Enterprises of the Republic of Indonesia Number PER-3/MBU/03/2023 concerning Organs and Human Resources of State-Owned Enterprises (PERMEN BUMN 3/2023) which regulates: "BUMN Subsidiaries, hereinafter referred to as Subsidiaries, are limited liability companies whose shares are more than 50% (fifty percent) owned by BUMN or limited liability companies that are controlled directly by BUMN." Article 3 of PERMEN BUMN 3/2023 regulates the material mandatory requirements for Directors of BUMN subsidiaries:
 - a. skill;
 - b. integrity;
 - c. leadership;
 - d. experience;
 - e. Honest;
 - f. good attitude; And
 - g. High dedication to advancing and developing the company.

In Article 4 of PERMEN BUMN 3/2023, the formal requirements for Directors of BUMN subsidiaries are regulated:

- a. natural person;
- b. able to carry out legal actions;
- c. never been declared bankrupt within 5 (five) years prior to appointment;
- d. never been a member of the Board of Directors or member of the Board of Commissioners/Supervisory Board who was found guilty of causing a BUMN, Subsidiary and/or other business entity to be declared bankrupt within 5 (five) years prior to appointment; And
- e. Has never been convicted of committing a criminal act that is detrimental to the finances of the State, BUMN, Subsidiaries, other business entities and/or related to the financial sector within 5 (five) years prior to appointment.

Apart from that, in Article 6 of PERMEN BUMN 3/2023, other requirements are regulated by the Directors of BUMN subsidiaries:

- a. Not an administrator of a political party, legislative candidate, and/or legislative member in the People's Representative Council, Regional Representative Council, Provincial Regional People's Representative Council, and Regency/Municipal Regional People's Representative Council;

- b. not a candidate for head/deputy regional head and/or head/deputy regional head, including acting head/deputy regional head;
- c. not served as a member of the Board of Directors of the relevant BUMN or Subsidiary for 2 (two) periods;
- d. not currently serving as an official in a ministry/institution, member of the Board of Commissioners/Supervisory Board in another BUMN, member of the Board of Directors in another BUMN, member of the Board of Directors in a Subsidiary and/or other business entity;
- e. not currently occupying a position which is prohibited by law from being held concurrently with the position of member of the Board of Directors;
- f. have dedication and provide full time to carry out their duties, as stated in a statement letter from the person concerned;
- g. physically and mentally healthy, that is, not currently suffering from an illness that could hinder the performance of their duties as a member of the Board of Directors, as proven by a health certificate from the hospital; And
- h. Have a Taxpayer Identification Number (NPWP) and have carried out the obligation to pay taxes for the last 2 (two) years.

Research methodology

This research is a type of normative research. In this research, law is conceptualized as what is written in legislation (law in book) or law which is conceptualized as rules or norms which are a benchmark for society's behavior towards what is considered appropriate. However, in fact, law can also be conceptualized as what is in action (law in action). The law in the book is a law that should work as expected, both are different, meaning that the law in the book is often different from the law in people's lives.

The approaches in this research are statute approach, conceptual approach, and case approach. The legal materials used are primary and secondary legal materials.

The technique for collecting legal materials used in this thesis research is Normative Law research or literature with library studies of legal materials, both primary legal materials, secondary legal materials, tertiary legal materials and non-legal entities. Searching for legal materials can be done by reading, listening, Viewing or by searching for legal materials via the internet. In fact, the law is then analyzed to find answers to existing legal issues.

Discussion

A BUMN subsidiary based on Article 1 point 5 of the BUMN PERMEN is a limited liability company with the majority of its shares owned by the BUMN or a limited liability company controlled by the BUMN. Considering its status as a limited liability company, its arrangements are subject to Law no. 40 of 2007 concerning Limited Liability Companies (UU PT). Normatively, the PT Law does not provide strict regulations regarding group companies (holdings) consisting of holding companies and subsidiaries, although in several articles it does mention the terms "subsidiary" and "parent company" but PT did not provide further explanation regarding these two terms.

In the context of the legal position of BUMN subsidiaries, it follows the same principles as the position of subsidiaries as

in the PT Law, considering that there are no specific regulations governing group companies. Following the principles contained in the PT Law, a BUMN subsidiary as a limited liability company is an independent legal entity that stands apart from its BUMN parent company. The legal implications of the separate entity status of BUMN subsidiaries for BUMN, namely that subsidiaries have their own legal obligations. All legal actions, contracts or agreements made by subsidiaries are the legal responsibility of the subsidiary, not the parent BUMN. This goes back to the provisions of Article 3 paragraph (1) of the PT Law which emphasizes that shareholders are not personally responsible for agreements made on behalf of the company and are not responsible for the company's losses in excess of the shares they own.

Based on the description above, the characteristics of ordinary subsidiaries and BUMN subsidiaries are basically the same, but there are special characteristics, namely the existence of special privileges as stated in the Government Regulation of the Republic of Indonesia Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Company as Amended by: Republic of Indonesia Government Regulation Number 72 of 2016.

The regulatory framework for group companies (holdings) in Indonesia still uses the provisions in the PT Law, emphasizing the concept of a single company in explaining the relationship between parent companies and subsidiaries. So the PT Law considers that both BUMN and BUMN subsidiaries are independent legal subjects, the relationship between the two can be seen from the share ownership of BUMN in BUMN subsidiaries, namely that BUMN controls more than 50% (fifty percent) of the shares of its subsidiaries. This connection in the PT Law is explained through Article 3 paragraph (1), namely that the legal entity of a limited liability company (separate legal entity) is the dividing line between shareholders and the company itself, and limited liability applies which protects shareholders from the company's responsibilities, which exceeds the value of shares in the company. Thus, the relationship between BUMN as shareholders and BUMN subsidiaries as companies is strictly defined based on the PT Law.

After explaining the legal relationship between BUMN subsidiaries and BUMN, the next thing that will be analyzed is related to state rights in these BUMN subsidiaries. In Article 2A paragraph (2) of Government Regulation of the Republic of Indonesia Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies as Amended by: Government Regulation of the Republic of Indonesia Number 72 of 2016 is regulated:

In the event that state assets in the form of state-owned shares in BUMN as intended in Article 2 paragraph (2) letter d are used as state capital participation in other BUMN so that the majority of the shares are owned by other BUMN, then the BUMN becomes a subsidiary of the BUMN with the provisions that the state is obliged to own shares with privileges regulated in the articles of association.

From the provisions above, it can be understood that there are 2 (two) classifications of state rights towards BUMN subsidiaries:

1. General rights as shareholders

These rights are related to the rights of shareholders in the PT Law. For example, the right to receive dividends, as in Article 71 of the Company Law, the right to obtain information relating to the Company from the Directors and/or Board of Commissioners, as in Article 75 paragraph (2) of the Company Law, the right to carry out inspections on the company, as in Article 138 of the Company Law, etc.

2. Privilege

In the Explanation to Article 2A paragraph (2) of Government Regulation of the Republic of Indonesia Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies as Amended by: Government Regulation of the Republic of Indonesia Number 72 of 2016, it is explained:

What is meant by "privileges regulated in the articles of association" include, among other things, the right to approve:

- a. appointment of members of the Board of Directors and members of the Commissioners;
- b. changes to the articles of association;
- c. changes in share ownership structure;
- d. Merger, consolidation, separation and dissolution, as well as takeover of the company by another company.

Regarding the transformation of state rights into state shares/capital in BUMN subsidiaries, this is also confirmed in Article 2A paragraph (3) of Government Regulation of the Republic of Indonesia Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies as Amended by: Government Regulation of the Republic of Indonesia Number 72 of 2016. In the Elucidation of Article 2A paragraph (3) of Government Regulation of the Republic of Indonesia Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies as Amended by: Regulation Government of the Republic of Indonesia Number 72 of 2016.

After being converted into state capital participation in a BUMN or Limited Liability Company, the state assets are transformed into shares/capital of the relevant BUMN or Limited Liability Company which are owned by the state, so that the status of state assets changes from undivided state assets to capital/shares which are separated state assets. Thus, even though the state's wealth is transformed into BUMN or Limited Liability Company wealth as a result of this transformation, it still has a relationship with the state because of the state's status as a shareholder/capital owner.

From this explanation, it can be understood that the status of state assets has changed from unseparated state assets to capital/shares which are separated state assets.

In relation to the state's rights to BUMN subsidiaries, corruption is also regulated, because previously there was ambiguity regarding the position of losses to these BUMN subsidiaries, the Supreme Court in Circular Letter Number 10 of 2020 concerning the Implementation of the Formulation of the Results of the 2020 Supreme Court Chamber Plenary Meeting as a Guide to the Implementation of Duties For the Court (SEMA 10/2020) letter A Criminal Chamber Formulation Number 4 explains: "Losses arising

from BUMN/BUMD subsidiaries whose capital does not come from the APBN/APBD or are not capital participation from BUMN/BUMD and do not receive/use State facilities , does not include state financial losses." From this arrangement, it can be understood that losses to BUMN subsidiaries do not include state losses if:

- a. The capital does not come from:
 - i. APBN / APBD or;
 - ii. not capital participation from BUMN/BUMD

- b. do not receive/use State facilities

From SEMA 10/2020 letter A Criminal Chamber Formulation Number 4, can be understood a *contra rio* , if the capital comes from the APBN / APBD or; capital participation from BUMN/BUMD and receiving/using state facilities, then the loss of the BUMN subsidiary is a state loss.

Conclusion

The legal relationship between BUMN and BUMN subsidiaries, namely subsidiaries, is considered an independent legal subject, however, BUMN nevertheless has significant control through majority share ownership and special rights in making important decisions. In addition, the State, through the Minister of BUMN, has significant rights over BUMN assets in subsidiary capital participation, both in the form of supervision, monitoring and strategic decision making. The principles of separation of legal entities and limited liability still apply, where the actions and legal obligations of the subsidiary are not the responsibility of the parent company. However, BUMN's strategic control over its subsidiaries remains strong through special privileges regulated in government regulations and the company's articles of association. These state rights over state-owned subsidiaries provide additional controls that ensure state interests remain protected. Apart from that, directly, the state's rights to BUMN subsidiaries can be qualified into 2 (two): 1) Rights as shareholders in general; and 2) Privileges.

Regarding the example of the application of state rights law in a subsidiary of a BUMN, so that it can be qualified as a criminal act of corruption, is Decision No. 121 K/ Pid.Sus /2020 dated March 9 2020 decided Ir. Galaila Karen Kardinah in her capacity as President Director of PT Pertamina (Persero) is not guilty of the charges which stated that she had committed a criminal act of corruption because she approved the investment of PT Pertamina Hulu Energi which is a subsidiary of PT Pertamina (Persero) in the form of a participating Interest (PI) of 10% in the Australian BMF Block without going through an adequate due diligence process and risk analysis and the act of signing a sale purchase agreement without approval from legal and the Board of Commissioners. The panel of judges was of the opinion that Ir. Galaila Karen Kardinah is not included as a criminal offense.

Suggestions

To strengthen and clarify the legal and operational relationships between BUMN and subsidiaries, it is recommended that BUMN clarify and strengthen control and responsibilities through clear and comprehensive internal policies. This policy must include mechanisms for monitoring, reporting and evaluating subsidiary performance on a regular basis. In addition, BUMN must

ensure that the decision-making process in subsidiaries is carried out transparently and accountably, including in the preparation of annual reports, independent financial audits, and active involvement in GMS.

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