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The Role of Independent Commissioners in Realizing The Principles of Good Corporate Governance

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ABSTRACT

The existence of independent commissioners is intended to create a more objective, independent climate, as well as to maintain fairness and provide a balance between the interests of majority shareholders and the protection of the interests of minority shareholders, even other interests. Independent Commissioners are needed by companies in Indonesia, especially for public companies. With the existence of independent commissioners, all interested parties benefit greatly, especially through the establishment of conditions in accordance with the principles of Good Corporate Governance, where independent commissioners can provide opinions with a higher level of independence and accountability.

Keywords: Investment, Independent Commissioner, Good Corporate Governance.

INTRODUCTION

Rapid economic development accompanied by technological and industrial advances has produced a variety of diverse types of goods and/or services, so that consumers are ultimately faced with various types of choices. Each country then competes to make rapid innovations to increase competitiveness, especially in the field of investment.

Any investment will make a major contribution to the economic growth of a country, because investment will encourage the development of economic activity as a whole. In this regard, investment must be part of the implementation of the national economy and be placed as an effort to increase sustainable economic development, increase national technological capacity and capability, encourage populist economic development, and realize the welfare of the community in a competitive economic system.

The government has made a legal umbrella regulation in the field of investment including Law No. 1 of 1967 jo. Law No. 11 of 1970 on Foreign Investment, Law No. 6 of 1968 Jo. Law No. 12 of 1970 on Domestic Investment, Law No. 25 of 2007 on Investment and later amended by Law No. 1 of 2020 on Job Creation.

In investing, investors will conduct a feasibility study on the prospects of the business to be carried out, including those studied are the provisions of laws and regulations relating to the investment, it will be a problem for investors if the losses experienced are not due to mismanagement of the company, but there is no legal protection, both for the capital invested and the goods to be produced. Investors need legal certainty in running a business, meaning that investors need a measure that becomes a guide in carrying out their investment activities. This measure is called a rule made by a party that has the authority to do so, because legal certainty is one of the necessities for the arrival of foreign capital to a country.

Corporate Governance became very important, with the monetary crisis in 1998, which hit countries in Southeast Asia, especially Indonesia. In addition, the recent global economic crisis has hit almost all over the world, including superpowers such as America. The downturn in the business sector is felt more due to the lack of effective management of the company by management, which is supported by the weak supervisory mechanism carried out by the board of commissioners. Good Corporate Governance (GCG) is a very long process, which requires commitment, cooperation and support from various elements in society. Although there is currently a new limited liability company law, Law No.40 of 2007, there are still many regulations related to the creation of Good Corporate Governance, which have not yet been amended, such as the Capital Market Law.

The spirit of reform in Indonesia provides a significant impetus for the improvement of business order and management of companies that are professional, healthy and responsible. The prolonged crisis that hit Indonesia, the demands of global competition, and the need for capital also contributed significantly to Good Corporate Governance reform in Indonesia. Good Corporate Governance reform that has been started since 2000 is not an easy job, considering that it is a long process and requires commitment, cooperation and support from various elements of society.[1] Nationally, efforts have been made by Non-Governmental Organizations (NGOs), especially the Forum for Corporate Governance in Indonesia (FCGI) and the Indonesian Society of Independent Commissioners (ISICOM), which have been actively conducting seminars and publications to socialize GCG to the Indonesian business world. The collaboration between the two NGOs and the NCCG has resulted in two independent commissioner guidelines and an audit committee guideline launched in Jakarta in 2004.

The guidelines for implementing Good Corporate Governance have existed since 2001 and were revised in 2006. These guidelines do not have binding legal force, but are a reference for the business world in implementing Good Corporate Governance. The guidelines are a reference to the steps that need to be taken to create a check and balance situation, uphold transparency and accountability and realize social responsibility for the survival of the company.

In the business world, every business actor in carrying out his activities needs a container, where the business activities are organized by the implementers. The container can be created in various forms according to the needs. A limited liability company is one of the containers for conducting business activities, which limits the responsibility of the owner of the capital, as much as the number of shares owned.

In this kind of company, the separation between the owner of the capital and the head of the company can be seen clearly. The functions of each party cannot be combined, the owner is the party that provides capital and the manager is the party that utilizes capital to carry out the company's economic activities.

The role of each can shift according to the size, nature of the activity and applicable regulations. Similarly, the behavior of each can be mutually unsupportive of the company's interests. However, the interests of the owner are not the same as the interests of the company. There is a concept that says that the duty of the board of commissioners is to pay attention to the interests of shareholders as owners of the company.[4]: Subsequent developments according to Article 108/2 paragraph 1 of the Company Law No. 40 of 2007, the board of commissioners supervises and provides advice for the benefit of the company. This is in line with the provisions of Article 92/1, UUPT which states that the board of directors runs the company for the benefit of the company and in accordance with the aims and objectives of the company.

The board of commissioners is a translation of the raad van commissarisen as stipulated in the Code of Commerce (KUHD), which actually does not differ much from the laws in the Netherlands. However, changes in Dutch law caused the function of the *raad van commissarisen* to change as well, but with the enactment of Law No. 40 of 2007, the function of the board of commissioners has been adjusted to that of the Netherlands, namely that the board of commissioners works for the benefit of the company in accordance with the aims and objectives of the company (article 108/2 UUPT).

Based on the description above, an interesting problem to study is how the role of independent commissioners in maintaining a balance of interests between majority and minority shareholders.

RESEARCH METHOD

This research is conducted with a descriptive juridical approach in which the author uses written data in the form of legal sources, books, and expert opinions and other materials then described by the author in this work.

DISCUSSION

A. Company Organs

The company is an entity that in each of its activities aims to obtain profit or profit which then the profit or profit is used to finance all forms of costs and operations and to advance the Company. In order to achieve the objectives of the company and is a requirement of the establishment of a company, there are 3 (three) organs in the Company that play an important role in formulating various kinds of Company strategies and policy directions which are then used as guidelines for the progress and sustainability of the Company established. These organs are regulated in Law Number 40 of 2007 concerning Limited Liability Companies, namely the General Meeting of Shareholders (GMS), the Board of Directors, and the Board of Commissioners.

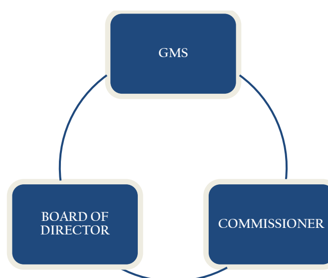

Chart 1. Company Organs

a) General Meeting of Shareholders (GMS)

General Meeting of Shareholders (GMS) in Article 1 paragraph 4 of the Limited Liability Company (PT) Law, GMS provides an understanding related to the Company's organs that have authority that is not given to the Board of Directors or the Board of Commissioners within the limits specified in this Law and/or the articles of association.

The GMS is held at least once a year as long as the Limited Liability Company (PT) is still established and no later than 6 months after the closing of the Company's financial year.

b) Board of Directors

The Board of Directors is an organ of the Company that is fully responsible for the management for the interests and purposes of the Company and owns the Company, both inside and outside the court in accordance with the provisions of the Articles of Association (Article 1 paragraph 5 of the Limited Liability Company Law). The Board of Directors has the authority to run the Company as well as possible, but its authority to run the Company is limited by the Law and or the Articles of Association of the Limited Liability Company.

c) Comissioner

Based on Article 1 Paragraph 6 of the Limited Liability Company Law, the Commissioner is an organ of the Company whose duty is to supervise in general and specifically in accordance with the Articles of Association in running the Company.

B. Independent Commissioner

The definition of an Independent Commissioner is a member of the board of commissioners who is not affiliated with the board of directors, other members of the board of commissioners and controlling shareholders, and is free from business or other relationships that may affect his/her ability to act independently or act solely in the interests of the Company. This is the same as what is mentioned in the Explanation of Article 120 paragraph (2) of Law Number 40 of 2007 concerning Limited Liability Companies which states that the Independent Commissioner in the Code of good corporate governance is "Commissioner from outside".

Independent status focuses on the responsibility to protect shareholders, especially from fraudulent practices. Law No. 40/2007 on Limited Liability Companies has stipulated that the company's articles of association can state to place at least one independent commissioner and one delegate commissioner. It is intended that independent commissioners can act as referees. In addition, independent commissioners can avoid conflicts of interest between majority and minority shareholders.

According to Article 120 paragraph (1) which reads:

"The Company's articles of association may provide for the existence of 1 (one) or more Independent Commissioners and 1 (one) Representative Commissioner."

Whereas in Article 1 point 2 of the Financial Services Authority Regulation Number 55/POJK.04/2015 of 2015 concerning the Establishment and Implementation Guidelines for the Audit Committee ("POJK 55/2015"), it is stipulated that an Independent Commissioner is a member of the Board of Commissioners who comes from outside the Issuer or Public Company and fulfills the requirements as referred to in this Financial Services Authority Regulation.

The article above states that the existence of an Independent Commissioner depends on the Company's Articles of Association. If the company's articles of association stipulate that there is an Independent Commissioner in the Board of Commissioners, then the existence of the Independent Commissioner becomes an obligation.

C. Commissioners and Good Corporate Governance

Today, the board of commissioners is a supervisory body solely for the benefit of the company; it no longer acts on behalf of the shareholders, but must defend the interests of the company against everyone, including the shareholders. This view was born out of developments in the late sixties in the business world, which increased attention to the interests of society. The company's function is no longer only to see the interests of shareholders and leaders, but to turn to demands for the interests of the community which are considered as parties that must be prioritized. Shareholders, even as owners, do not need special treatment. As owners, their rights can be transferred to anyone. The Company as a legal entity is no different from an individual and is considered a member of the community, therefore its existence is not for the benefit of certain groups. On the other hand, the company is considered to be something that benefits society, and therefore must be safeguarded through devices that are impartial and do not represent shareholders.

Legal entities as independent legal subjects that are equated before the law with private individuals, although they can be the bearer of rights and obligations, regardless of the person who founded or is a member of the legal entity, are not one hundred percent the same as private individuals or individuals. Legal entities are only equated with private individuals, in the field of property law and the law of obligations.

Law No. 40/2007 on Limited Liability Companies (UUPT) requires the institution of commissioners as one of the organs of the company, even companies whose business activities are related to raising public funds, companies that issue debt recognition letters to the public or

public companies must have at least two commissioners (Article 108/2 of Limited Liability Company Law).

Based on the Limited Liability Company Law, the management system consists of two levels, each of which performs management and supervisory functions. In certain cases, commissioners can perform the management function of the company. As a regular organization, the company has organs consisting of the General Meeting of Shareholders (GMS), Board of Directors and Commissioners (Article 1 point 2 of Limited Liability Company Law). The regularity of the organization can be known through the company law, the company's articles of association, the company's bylaws, and the decisions of the general meeting of shareholders.

The position of commissioner is not an easy position without risk, because the UUPT sets quite strict requirements for someone who wants to occupy the position of commissioner. They must have fiduciary duties towards the company regarding their share ownership in the company. By submitting a share ownership report, a conflict of interest that is detrimental to the company can be prevented (Guidelines on Independent Commissioners: 2008).

In order to supervise and enforce the implementation of fiduciary duties by the Board of Directors or Commissioners, the Company Law stipulates that shareholder representing at least 1/10 of the total number of shares with valid voting rights may file a lawsuit against directors or commissioners who, due to their fault or negligence, cause losses to the company (Article 97/6 and article 114/6 of the Limited Liability Company Law).

The board of commissioners is a corporate organ tasked with conducting general and/or special supervision in accordance with the articles of association and providing advice to the board of directors (Article 1-point 6 and Article 108 paragraphs 1 and 2 of the Limited Liability Company Law) In relation to the responsibilities of the board of commissioners, it can be said that the relationship of trust and fiduciary duties of members of the board of directors mutatis mutandis applies to members of the board of commissioners.

As a result of the commissioners being a panel, a commissioner cannot act individually. Article 110 of the Limited Liability Company Law outlines the requirements to become a member of the board of commissioners must be capable of taking legal action, in addition there are other requirements, namely that in the last 5 (five) years before his appointment he has never been declared bankrupt or become a director or commissioner who was found guilty of causing

a company to be declared bankrupt or was convicted of a criminal offense that is detrimental to state finances and or related to the financial sector.

Good Corporate Governance (GCG) is a free translation of good corporate governance. Since Indonesia was mired in the economic crisis, Good Corporate Governance has become part of the revamping of corporate management. Every issuer, board of directors and commissioners are sincerely willing to change and make the movement of their business, has reflected this principle.

Good Corporate Governance (GCG), namely transparency, accountability, responsiveness, independence, and fairness, is needed to achieve sustainability by taking into account stakeholders.

1. Transparency

The purpose of transparency is for companies to provide material and relevant information in a way that is easy for stakeholders to access and understand. Companies should take the initiative to disclose not only matters required by law, but also matters important for decision-making by shareholders, creditors and other stakeholders. It is necessary to establish various standardized procedural systems to be adhered to in making important decisions related to this principle of transparency, including, among others, the appointment of commissioners, directors, remuneration of commissioners and directors, performance of commissioners and directors, relationships with external parties, transactions with third parties, and appointment of auditors.

In the early stages, the Board of Directors and Board of Commissioners need to ensure that external auditors, internal auditors and audit committees have access to information owned by the company, provided that the confidentiality of company information is maintained. The Board of Directors and Board of Commissioners need to provide corporate governance reports to the government or internal supervisory bodies (Bank Indonesia, Capital Market Supervisory Agency, the office of the Minister of State-owned Enterprises). Companies also need to convey to the public the extent to which they have complied with applicable laws and regulations (accounting procedures, taxation, etc.).

2. Accountability

The company must be able to account for its performance transparently. For the company must be managed properly, measurable and in accordance with the interests

of the company while still taking into account the interests of shareholders and other stakeholders. Accountability is a necessary prerequisite for achieving sustainable performance.

3. Independency

This principle is used to launch the implementation of Good Corporate Governance, the company must be managed independently so that each organ of the company does not dominate each other and cannot be intervened by other parties.

4. Fairness (fairness and equality)

In conducting its activities, the Company must always consider the interests of shareholders and other stakeholders based on the principles of fairness and equality.

Equitable treatment of shareholders, reflecting fairness, shareholders who own shares with the same classification, must be treated equally towards the company. Equitable treatment of shareholders or equal treatment of shareholders, especially minority shareholders and foreign shareholders.

D. Independent Commissioner in the perspective of Good Corporate Governance (GCG)

The implementation of Good Corporate Governance (GCG) in companies is one of the government mandates that must be carried out by the Company, especially in companies that have gone public. With the implementation of Good Corporate Governance (GCG is expected to increase business success and corporate accountability in order to realize shareholder value in the long term while taking into account the interests of other stakeholders. According to Susiana and Arleen Herawaty, the elements contained in the measurement of the Corporate Governance mechanism are:

1) Percentage of shares owned by the Institution
2) Percentage of shares owned by management
3) The existence of an audit committee in the company
4) The existence of independent commissioners in the company.

E. Independent Commissioner Requirements

Article 6 of POJK 55/2015 mandates that Independent Commissioners must fulfill the requirements as stipulated in the Financial Services Authority Regulation Number

33/POJK.04/2014 regarding the Board of Directors and Board of Commissioners of Issuers or Public Companies ("POJK 33/2014"), including:

a. In the event that the Board of Commissioners consists of 2 (two) members of the Board of Commissioners, 1 (one) of them shall be an Independent Commissioner.
b. In the event that the Board of Commissioners consists of more than 2 (two) members of the Board of Commissioners, the number of Independent Commissioners shall be at least 30% (thirty percent) of the total number of members of the Board of Commissioners.

In addition to fulfilling the above provisions, Independent Commissioners must fulfill the requirements as described in Article 4 of the Financial Services Authority Regulation 33/2014 applicable mutatis mutandis to Members of the Board of Commissioners, as follows:
To become an Independent Commissioner, you must fulfill the following requirements:

a. have good morals, character and integrity;
b. capable of performing legal acts;
c. in the 5 (five) years prior to appointment and during office:
    1. has never been declared bankrupt;
    2. never been a member of the Board of Directors and/or a member of the Board of Commissioners who was found guilty of causing a company to be declared bankrupt;
    3. never been convicted of a criminal offense that is detrimental to state finances and/or related to the financial sector; and
    4. never been a member of the Board of Directors and/or a member of the Board of Commissioners during his/her tenure:
        a) has not held an annual General Meeting of Shareholders (GMS);
        b) his/her accountability as a member of the Board of Directors and/or a member of the Board of Commissioners has not been accepted by the General Meeting of Shareholders or has not provided accountability as a member of the Board of Directors and/or a member of the Board of Commissioners to the General Meeting of Shareholders; and
        c) has caused a company that obtained a license, approval, or registration from the Financial Services Authority to not fulfill the obligation to submit annual reports and/or financial reports to the Financial Services Authority.
d. have a commitment to comply with laws and regulations; and

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e. have knowledge and/or expertise in the field required by the Issuer or Public Company.

Not only that, the requirements to become an Independent Commissioner are also further elaborated in article 21 paragraph (2) of Financial Services Authority Regulation 33/2014, which is as follows:

a. is not a person who works or has the authority and responsibility to plan, lead, control, or supervise the activities of the Issuer or Public Company within the last 6 (six) months, except for reappointment as Independent Commissioner of the Issuer or Public Company in the following period;
b. does not own shares either directly or indirectly in the Issuer or Public Company;
c. have no affiliation with the Issuer or Public Company, members of the Board of Commissioners, members of the Board of Directors, or major shareholders of the Issuer or Public Company; and
d. not have a business relation, either directly or indirectly, related to the business activities of the Issuer or Public Company.

F. Independent Commissioner Appointment Scheme

Chart 2. Independent Commissioner Appointment Scheme

If the Company has not yet regulated the Independent Commissioner, the Company is required to amend the Articles of Association first for the basis of the appointment of the Independent Commissioner.

CONCLUSSION

That when referring to the laws and regulations, Independent Commissioners are mandated and recommended in companies as an effort to implement the principles of Good Corporate Governance (GCG), this is because Independent Commissioners are outsiders who are not affiliated with company organs where the hope is that Independent Commissioners can provide neutral views and attitudes to every Company policy in order to avoid fraudulent practices.

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REFERENCES

I Gusti Rai Widjaya, *Penanaman Modal, Pedoman Prosedur Mendirikan dan Menjalankan Perusahaan dalam rangka PMA dan PMDN*, Pradnya Paramitha, Jakarta, 2003

John Downer, Jordan Elliot Goodman, *Keuangan dan Investasi,* Elex Me- dia Komputindo, Jakarta, 1994ku

Kansil, C.S.T. *Pokok-Pokok Pengetahuan Hukum Dagang Indonesia*, Aksara Baru, Jakarta, 1980

Kartini Mulyadi, *Aspek-Aspek Hukum Emisi Obligasi Pemerintah Pusat, Pemerintah Daerah, BUMN dan Perusahaan Swasta,* Aksara Baru, Jakarta, 1990.

Moenaf Regar, *Dewan Komisaris Peranannya Sebagai Organ Perseroan,*
Jakarta, Bumi Aksara, 2000.

Munir Fuady, *Pasar Modal Moderen (Suatu Tinjauan Hukum),* Citra Aditya Bakti, Bandung, 1996

_____, *Doktrin-Doktrin Modern Dalam Corporate Law: Eksistensinya dalam Hukum Indonesia*, Citra Aditya Bakti, Bandung, 2002

Pedoman umum Good Corporate Governance ,2006

Ruchiyat Kosasih, *Diskusi Panel Pusat Pengkajian Hukum tentang Pasar Modal,* Newsletter No. 23/ VI/ 1995

Rudhy Prasetia, *Kedudukan Mandiri Perseroan Terbatas,* Citra Aditya Bakti, Jakarta, 1995

_____, *Upaya Mencegah Penyalahgunaan Badan Hukum,* Makalah dalam Temu Karya Hukum Perusahaan dan Arbitrase, Jakarta, 1991

Setiawan, *Aspek Hukum Pemilikan Saham: Penyalahgunaan Badan Hukum dan Penyitaan Saham,* dalam Majalah Varia Peradilan No. 52 Tahun V, Januari 1990

Soekanto Winahyo," Sebuah Pengantar tentang Pertanggungjawaban Hukum Direksi BUMN: Kasus Tempo", *Newsletter* No. 18/ IX/ 1994, Pusat Pengkajian Hukum, Jakarta, 1994