

# Conflict of Interest in Business Cooperation of Regional Owned Enterprises (BUMD) Using Regional Capital Participation with Third Parties in the Perspective of Criminal Law

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## ABSTRACT

BUMD is a business entity that all or most of its capital is owned by the region, and was established with the aim of providing benefits for the development of the regional economy in general, organizing public benefits in the form of providing quality goods and / or services for the fulfilment of the livelihood of the community according to conditions, characteristics, and the potential of the area concerned, based on good corporate governance. The process of equity participation is carried out in three steps, namely the planning stage, the implementation stage and the accountability stage. At these three stages in its implementation, the parties to the agreement have the potential to wedderrechtlikj and commit acts against the law that result in losses for BUMD. This study aims to analyse the criminal law aspects of conflicts of interest in business cooperation with Regional Owned Enterprises (BUMD) with third parties that cause losses. This study uses a normative juridical research method, the data used are primary data and secondary data. The results of the analysis are concluded: 1. The existence of conflicts of interest and losses arising from business cooperation using local government capital participation between BUMD and third parties cannot be qualified as criminal acts as long as the decision making and implementation of the cooperation is carried out in accordance with the business judgment rule and good corporate governance (GCG) 2. The relationship between conflicts of interest and the occurrence of losses in cooperation with third parties using regional capital participation funds is a crime if in the cooperation agreement between BUMD and the third party it can be assessed from the planning stage, implementation stage and accountability stage there is an element of error as one of an element in a crime.

**Keywords:** Local Government, BUMD, business cooperation, conflict of interest, criminal law.

## 1. INTRODUCTION

The establishment and implementation of BUMD functions as part of separated regional property rights is regulated in Government Regulation Number 54 of 2017 concerning Regional Owned Enterprises (PP BUMD). PP BUMD is a delegation of several provisions in Law Number 23 of 2014 concerning Regional Government, namely Article 331 paragraph (6), Article 335 paragraph (2), Article 336 paragraph (5), Article 337 paragraph (2), Article 338 paragraph (4), Article 340 paragraph (2), Article 342 paragraph (3) and Article 343 paragraph (2). In its implementation, PP BUMD must not conflict with the 1945 Constitution as the basic norm and also in tandem with several relevant laws and regulations in carrying out its duties and functions, including: the Limited Liability Company Law, the Regional Finance

Act, and the Law on Regional Finance. State Treasury Act. Based on the law, BUMD as a profit-seeking regional company has a policy to protect regional assets. Regional assets, known as regional assets, are regional assets which essentially consist of movable and immovable assets. Regional wealth is one component that plays a role in supporting regional development. So that the regional wealth can be utilized optimally, it is necessary to have a clear regulatory mechanism for the utilization of the regional wealth which is the authority and responsibility of the regional government. [1]

Regional wealth is divided into regional assets owned and regional assets separated. Regional assets that are owned are called Regional Property (BMD), namely all goods purchased or obtained at the expense of the APBD or derived from other legitimate acquisitions (Article 1 of

Law Number 1 of 2004 concerning State Treasury). Regional assets whose management is separated from the APBD are called separated regional assets. One of the reasons for this separated regional wealth is the local government's investment in business entities, both state/regional-owned companies (BUMN/BUMD) and privately-owned companies.

In an effort to strengthen regional revenues originating from separated regional wealth, the role of Government investment through Regional Owned Enterprises (hereinafter abbreviated as BUMD) is highly expected, apart from being a source of PAD, BUMD is also expected to be the main driver of regional economic growth and development (engine of growth).), so that it can cause a large multiplier effect. [2]

BUMD as an agency that receives regional capital through capital participation, the process is carried out in three steps, namely the planning stage, the implementation stage and the accountability stage. From regional investment in the form of separated regional wealth, it is expected to be a source of APBD income. Therefore, ideally BUMD is one source of revenue from a regional government. BUMD is an embodiment of the role of local governments in regional economic development. However, in its development, BUMD has become one of the regional financial problems. Not only fail to become a source of revenue, even BUMD can burden regional finances. The expectation of the ideal role of BUMD is hampered by the current condition of BUMD. There are various problems faced by BUMD, both internal problems related to company management or external problems related to the very high level of competition and changes in the business environment that pose a threat to the survival of the company.[3]

In the 2017 State Audit Board of the Republic of Indonesia's Opinion Report [4], it is explained that there are 6 (six) main problems in the management of BUMDs in the regions, namely:

1. The governance and performance of BUMDs has not been adequate, so that BUMDs have not been able to serve and fulfil their responsibilities to optimally, and have not been able to perform cost efficiency and revenue optimization. For example, PDAM water services have not reached health standards, BPRs have not been able to maximize efforts to provide credit to micro and small businesses (UMK), and mining BUMDs have not been equipped with permits that can support businesses such as Borrow-to-Use Forest Area Permits (IPPKH);
2. Local governments do not describe the role and direction of BUMD development in regional development planning documents, so there are no guidelines for formulating steps for developing and fostering BUMDs
3. Unclear vision and mission of the blood government regarding the objectives of establishing BUMDs, so that BUMDs find it difficult to meet the goals that have been set for example, a BUMD cannot fulfil the purpose of providing goods/services to the local community, while at the same time making a profit from the BUMD's business. On the other hand, if the BUMD continues to suffer losses, the Regional Government does not dare to take the decision to dissolve the BUMD.
4. Recruitment of the Board of Commissioners/Supervisory Board, directors and employees of BUMD that did not go through an open and transparent process, so that many doubted their competence;
5. The response or permit of the Regional Government to business decisions is often slow, so that BUMDs are unable to compete with the private sector which in turn will suffer losses;
6. Lack of local government attention in the aspect of BUMD capital;

From Purwadi's research, several general problems of BUMD were found, namely: [5]

1. High bureaucratic interference;
2. Outdated condition of machinery and equipment;
3. Weak capital capacity;
4. 4. The number of company assets that are not productive (idle capacity), such as land and buildings that cause relatively high overhead;
5. Staff skills in general are still low;
6. Lack of clarity on the legal basis used, not in accordance with current conditions;
7. The marketing system implemented by BUMD is relatively weak;
8. There is competition from private parties that produce similar goods;
9. Lack of functioning of the Supervisory Board;
10. Regional companies generally have a Debt-to-Equity position
11. The burden of having to deposit part of the profit;
12. The loss of BUMD is still maintained;
13. The existence of a BUMD whose establishment is forced, even though it is not economically feasible to establish (not feasible), on the grounds that it involves the need for public services so that the business is inefficient (loss).

These various problems have caused BUMD to have not played much of a role in supporting PAD and the regional economy. Like a company, regional companies can suffer losses. This loss can be caused by poor management of regional companies because they are carried out without paying attention to GCG principles. In addition, losses can also be caused due to the malfunctioning of the planning and internal control system.[6]

In connection with the malfunctioning of the planning and internal control system for implementing the functions of Regional Owned Enterprises in the management of regional assets, this paper focuses on the problem of independence and independence of BUMD's management in order to achieve BUMD's objectives. As an artificial legal subject, the management and management of BUMD is carried out by its organs. In this management, conflicts of interest often occur, resulting in unlawful acts, especially in the use of capital participation from the Regional Government to the Agency for business cooperation between BUMD and third parties which result in losses for BUMD.

The scope of the management of BUMD is subject to civil law, especially the corporate regime, on the other hand as a legal subject BUMD as well as a corporation is a subject of criminal law that can commit criminal acts, it is necessary to have an appropriate legal framework to identify the scope of actions and responsibilities as a corporation and/or its organs.

1. Is a conflict of interest in a BUMD business cooperation with a third party an act against criminal law?
2. How is the relationship between conflicts of interest and the emergence of BUMD losses with unlawful acts committed by the parties in business cooperation between BUMDs and third parties in the perspective of criminal law?

## **2. RESEARCH METHOD**

This article is a normative study using a statute approach and a theoretical approach, namely an approach that is carried out by reviewing all laws and regulations related to legal issues.[7] As a normative legal study, researchers invest in legal materials including primary and secondary legal materials that are adapted to the research theme, namely acts against the participation of capital from the Regional Government to Regional Owned Enterprises (BUMD) in business cooperation with third parties.

## **3. RESULT AND DISCUSSION**

### ***A. Legal Framework for Conflict of Interest in BUMD Business Cooperation with Third Parties***

The existence of Regionally Owned Enterprises (BUMD) as a business institution owned and managed by the regional government has a strategic role in regional economic development. The existence of the BUMD is believed to be able to provide a very large multiplier effect on the economy of the community. with the establishment of BUMD, it will open new jobs, drive

productive economic sectors, and be a stimulant for economic growth in the region. [8]

As one of the regional economic actors, BUMD is expected to be one of the drivers for the regional economy, among others through business activities in order to meet the needs of the community in the form of goods and services. In carrying out its business activities, one of the things that BUMD does is cooperate with third parties. In general, the company's business activities cannot be separated from the relationship and interaction between internal and external parties who establish harmonious, harmonious and sustainable cooperation with each other by not forgetting the ethics and principles of good corporate governance. Regarding business relationships, what often happens and is inevitable is the existence of a Conflict of Interest from one party to another.

Conceptually, the definition of conflict of interest in some literatures is almost the same. For example, the definition of a conflict of interest according to the Corruption Eradication Commission (KPK) is a situation where a state administrator who has power and authority based on laws and regulations has or is suspected of having a personal interest in any use of his authority so that it can affect the quality and performance that should be. [9] Council of Europe (2000), which states "a conflict of interest is a potential that if not managed transparently and accountably will encourage public officials to make decisions that are not based on the public interest". Meanwhile, according to the Organization for Economic Co-operation and Development (OECD), conflicts of interest are: "A conflict of interest involves a conflict between the public duty and the private interest of a public official, in which the official's private-capacity interest could improperly influence the performance of their official duties and responsibilities." [10] Law Number 30 of 2014 concerning Government Administration Article 1 Paragraph 14 defines conflict of interest as a condition of government officials who have personal interests to benefit themselves and/or others in the use of authority so that it can affect the neutrality and quality of decisions and/or actions made and/or done.

Of the three d From the definition above, it can be concluded that there are at least 3 (three) prerequisites for a conflict of interest, namely;

- a. there are actors (government parties or private parties)
- b. there are powers or authorities that are owned, and
- c. there are decisions or actions taken.

Because conflicts of interest must be attached to actors, of course it directly refers to personal competence and integrity. The embodiment of the competence and integrity of an official is always within the framework of "official ethics" both in the private and public domains. On the other hand, there is public ethics which is a

reflection of standards or norms that determine good-bad and right-wrong behavior, actions, and decisions that direct public policy in carrying out public service responsibilities.[11]

The definition of a conflict of interest refers to a situation that has the potential to undermine the impartiality of a person because of the possibility of a clash between the person's self-interest and professional interest or public interest. [12] Duncan Williamson defines a conflict of interest as "a situation in which a person, such as a public officer, employee, or professional, has a private or personal interest in influencing the objectives and performance of the duties of his office or organization". [13] Duncan also mentions that conflict of interest is also closely related to insider dealing. 'a process by which a person uses or encourages another to use, information about a company that is not generally available, for his personal financial gain (other than his proper job performance)." These two definitions can explain to us what is meant by "conflict of interest" there are two reasons why "conflict of interest" is disputed and becomes an unethical act. First, influencing public or office interests for personal financial interests, and secondly influencing decision-making that aims to pass his personal interests.

There are two reasons why conflict of interest is disputed and becomes an unethical act, namely

- a. influencing public or office interests for personal financial gain.
- b. influencing decision-making that aims to pass his personal interests. The definition of a conflict of interest varies but generally refers to a situation where private interests clash with formal duties and responsibilities.[14]

From the above description in terms of avoiding conflicts of interest in BUMD, it can be seen from Article 48 PP N054 of 2017. The article does not explicitly regulate conflicts of interest, what is prohibited is related to concurrent positions. Paragraph (1) states that members of the Supervisory Board or members of the Board of Commissioners are prohibited from holding more than 2 (two) positions as members of the Supervisory Board and/or members of the Board of Commissioners. Violation of the provisions as referred to in paragraph (1) is subject to administrative sanctions in the form of being dismissed at any time from the position as a member of the Supervisory Board and/or member of the commissioner. Furthermore, in Article 49 it is stated that members of the Supervisory Board or members of the Commissioners are prohibited from holding concurrent positions as:

- a. members of the Board of Directors in BUMD, state-owned enterprises, and/or private-owned enterprises;

- b. other officials in accordance with the provisions of the legislation; and/or
- c. other officials who may create a conflict of interest.

Violations of the provisions referred to are subject to administrative sanctions in the form of being dismissed at any time from their positions as members of the Supervisory Board and/or members of the Commissioners. Furthermore, Article 67 also prohibits members of the Board of Directors from holding concurrent positions as:

- a. members of the Board of Directors in other BUMD, state-owned enterprises, and private-owned enterprises;
- b. other positions in accordance with the provisions of the legislation; and/or
- c. other positions that may create a conflict of interest.

The Board of Directors who violates the above provisions will be subject to administrative sanctions in the form of being dismissed at any time from their positions as members of the Board of Directors.

With regard to conflicts of interest in PP 54 of 2017, the forms of actions prohibited in Article 48, Article 49 and Article 67 are related to concurrent positions. The prohibition of concurrent positions in the management of BUMD is intended to avoid conflicts of interest. Violation of the provisions of Article 48, Article 49 and Article 67 of PP No. 54 of 2017 is a maladministration and the sanction given is an administrative sanction in the form of being dismissed at any time from the position as a member of the board of directors.

Conflicts of interest are not criminal acts, but conflicts of interest often give birth to criminal acts, namely corruption. The occurrence of various conflicts of interest that occur between the community and state administrators and BUMN/BUMD often dominate the occurrence of corruption cases. Thus, conflicts of interest can be the beginning or entry point that has the potential to lead to corruption. A number of corruption cases handled by the KPK so far stem from conflicts of interest. He said that the element of conflict of interest is basically closely related to the element of corruption. "Usually corruption involves state officials, because they have personal interests which consequently can affect the performance and responsibilities of state officials. [15]

The spirit of the preparation of PP 54 of 2017 is to establish a transparent, accountable and accountable BUMD based on Good Corporate Governance (GCG). In Indonesia, literally, governance is often translated as "regulation." In the context of GCG, governance is often also called "tata civil service". Furthermore, GCG is defined as a pattern of relationships, systems and

processes used by company organs to provide added value to shareholders on an ongoing basis in the long term, while taking into account the interests of other stakeholders, based on applicable laws and norms. [16]

The term GCG is increasingly popular and has gained a place in the field of corporate law because it is manifested in two beliefs, namely:

1. GCG is one of the keys to a company's success to grow and be profitable in the long term, as well as win global business competition, especially for companies that has been able to develop as well as be open.
2. the world economic crisis, in Asia and Latin America which is believed to have arisen due to the failure to implement GCG. [17]

The application of GCG principles can create a conducive atmosphere for the smooth management of the company's business, including increasing competitiveness. GCG is one of the attractions for investors and creditors to lend funds to companies.

Good corporate governance has positive values to maintain the consistency and professionalism of the company in carrying out various actions towards better performance. This is based on the fact that in GCG there are four principles, namely the principles of fairness, information disclosure, accountability and accountability.[18] In general, several research results show that the implementation of GCG principles in BUMD, including regional companies, has not been optimally implemented. The non-optimal application of GCG principles is due to the low commitment to implementing good corporate governance.

Even though conflicts of interest are not criminal acts, most of the unstable BUMDs are caused by attitudes and management methods that do not apply GCG values properly. Therefore, to keep the company stable, all the strength of the company's resources as a whole and intact must be able to maintain the effectiveness, efficiency and productivity of the company's assets-liability-equity, including cash flow and company profits in the right balance by means of management that complies with the implementation of GCG principles.

### ***B. Relationship of Conflict of Interests in Business Cooperation between Regional Owned Enterprises and Third Parties in the Perspective of Criminal Law***

In discussing the relationship of conflicts of interest in business cooperation between Regional Owned Enterprises and third parties in the perspective of criminal law, we will begin by reviewing the initial footing of the legal actions carried out, namely the business cooperation agreement. which are included in the scope of civil law, especially with regard to whether

the agreement is valid or not. Therefore, the validity of the agreement becomes one of the important points in the discussion. For business people, almost every business transaction will sign a letter of agreement containing a series of agreements between the parties to cooperate.

Agreement is an activity that cannot be separated from modern human life. The agreement is regulated in Article 1313 of the Civil Code (KUHPerdata) which states that: "An agreement is an act whereby one or more people bind themselves to one or more other people." the agreement is:

- a. An act.
- b. Between at least two people.
- c. The act of giving birth engagement between the parties that the promise

According Sudikno, the agreement is a legal relationship that is based on an agreement to give rise to legal consequences. The legal relationship occurs between one legal subject and another legal subject, where one legal subject is entitled to achievements and so are other legal subjects who are obliged to carry out their achievements in accordance with what has been agreed. [19] Subekti defines an agreement as an event where one person promises to another person or where two people promise each other to carry out something. In general, in the Letter of Agreement there are rules regarding the rights and obligations of each party as well as things that may not be done by the parties involved in the agreement.

The terms of an agreement are basic things that must be known and understood properly. An agreement will be binding and valid if the agreement is made legally. In the following, we will discuss the requirements required by law for an agreement to be said to be valid. There are 4 (four) conditions for a valid agreement as regulated in Article 1320 of the Civil Code, namely:

1. The agreement of those who bind themselves (subjective conditions)
2. The ability to make an engagement (subjective conditions)
3. A certain subject matter (objective conditions)
4. A cause that is not prohibited (objective conditions)

Hereinafter described as follows:

#### 1. Agreement

In reaching an agreement or agreement in entering into an agreement, both parties must have freedom of will. This means that the parties in the agreement to reach an agreement are not in a state of pressure that results in a "defect" for the realization of the will.[20] An agreement is the existence of a common will between the

parties who want to make an agreement. Not in a state of facing pressure, it is meant that the parties in reaching an agreement must be free from error (misguidance), coercion and fraud. This is in accordance with Article 1321 of the Civil Code, which reads: "There is no valid agreement if the agreement was given by mistake, or obtained by force or fraud." Without an "agreement" there will be no valid agreement.

## 2. Competent

The person making the agreement must be competent according to law. In principle, every person is capable according to the law, unless by law is not competent. In Article 1330 of the Civil Code, it is stated that people who are considered incompetent to make an agreement, namely people who are not yet mature, those who are placed under guardianship, and women who have husbands. But on the last subject, namely married women, it has been abolished by the Supreme Court Circular No. 3 of 1963, so that now the position of women who are married is elevated to the same level as men and is capable of carrying out legal actions.

## 3. Halal Causes

Article 1335 BW contains "An agreement without a cause, or made based on a false or forbidden cause, has no power." And Article 1337 BW contains "A cause is prohibited, if the cause is prohibited by law or if the cause is contrary to decency or public order."

The meaning of something that is not lawful in the perspective of criminal law, for example, the Board of Directors of BUMD together with a third party is planning an evil conspiracy with the aim of enriching itself and or another corporation as a third party. Through a business cooperation agreement, the actual agreement was made only to facilitate the implementation of its evil intentions.

In the perspective of civil law, the non-fulfillment of this lawful cause makes the agreement null and void. From the perspective of criminal law, the act can be qualified as a criminal act which in the Criminal Code is qualified as a crime, namely conspiracy, embezzlement, fraud, while from the perspective of corruption, the act can be qualified as a criminal act as referred to in Article 2 and Article 3, namely the act of against the law resulting in state losses and Article 15 of Law N0. 31 of 1999 concerning the Crime of Corruption in conjunction with Law no. 20 of 2001 concerning amendments to the Corruption Crime Act. The article stipulates the existence of criminal threats for anyone who conducts experiments, assists, or conspires to commit a criminal act of corruption. The sanctions are also quite heavy, especially when carried out by state officials. The Corruption Law even provides imprisonment and minimum fines for state officials who commit these crimes, both imprisonment and fines.

Thus, if a BUMD business cooperation agreement with a third party has been made, but one of the four elements above is not fulfilled, then the agreement has legal consequences, not only from a civil law perspective, but also from a criminal law perspective. The legal consequences from a civil law perspective are:

- If an agreement does not meet the objective requirements, then the agreement is declared null and void. Cancel by law means that the agreement is considered to have never existed, was never made, there was never an engagement between the parties.
- If an agreement does not meet the subjective requirements, then the agreement is declared null and void. It can be canceled where the agreement is binding on the parties, but one of the parties can file a lawsuit to the court so that the agreement is canceled.

From the point of view of criminal law, it must be based on the principle of legality as a fundamental principle in criminal law in Indonesia, which is regulated in Article 1 Paragraph (1) of the Criminal Code which stipulates that "no action can be punished except by the strength of the statutory criminal rules that already listed." For this reason, it is necessary to examine which conditions in the agreement are contrary to the criminal legislation. To assess the existence of a business cooperation agreement between a BUMD and a third party there is a conflict of interest that has implications for unlawful acts in a criminal context is to assess the causal relationship between mental attitudes (*mensrea*) and actions (*actus reus*) the actions of BUMD organs in a cooperation agreement with other parties. third . If there is a causal relationship between bad intentions (*mens rea*) and actions (*actus reus*) and fulfills the elements in the Articles of criminal legislation, it can be said to be qualified as a criminal act.

## 4. CONCLUSION AND SUGGESTION

The existence of a conflict of interest in a business cooperation agreement with a third party is not a crime. Article 67 of PP No 54 of 2017 is a maladministration and the sanction given is an administrative sanction in the form of being dismissed at any time from his position as a member of the board of directors. Even though conflict of interest is not a crime, conflict of interest gives birth to attitudes and management methods that do not apply GCG values properly, thus making BUMD unstable.

The relationship between conflicts of interest and the emergence of BUMD losses with unlawful acts committed by the parties in business cooperation between BUMDs and third parties in the perspective of criminal law occurs when a BUMD business cooperation agreement with a third party has been made, but one of the four elements of the legal terms of the agreement

(1320 BW) is not fulfilled, then the agreement has legal consequences, namely it is canceled or null and void by law. To assess the existence of a conflict of interest that has implications for unlawful acts in a criminal context is to assess the causal relationship between the mental attitude (*mensrea*) and the action (*actus reus*) of the BUMD organs in the cooperation agreement from the planning stage to the implementation of the agreement with the elements in the articles of legislation.

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