

# Responsibility of the Board of Directors (Management) of State- Owned Enterprises Using the Principles of Business Judgement Rule in Criminal Liability

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## ABSTRACT

Enterprises, among others, because BUMN is one of the economic players in the national economy based on economic democracy, and it plays a critical role in the national economy's implementation in order to achieve community welfare. Implementing BUMN's function in the national economy to achieve community welfare, on the other hand, is not ideal. For this reason, the management and supervision must be carried out professionally. In SOE management and supervision, not a few Directors (management) are exposed to exceptional criminal cases due to errors or negligence in implementing the Business Judgment Rule. Moreover, currently, few references or jurisprudence can save BUMN Directors if they are exposed to allegations of corruption, including the condition of laws and regulations from the government that has not explicitly regulated the implementation of the Business Judgment Rule.

**Keywords:** Enterprises, Criminal Liability, Principles, Responsibility.

## 1. INTRODUCTION

BUMN plays a key role in the development of the country and holds a critical position in the Indonesian economy. BUMN serves as an extension of the government's arm in carrying out different commercial operations and as a participant in the national economy's economic activities.

Another purpose of establishing SOEs is to prevent a powerful private company from gaining a market monopoly on goods or services that affect people's livelihoods. If a powerful private company gains a market monopoly on goods or services that affect people's livelihoods, the community will invariably suffer as a result of rising prices of goods or services due to supply and demand economic principles.

SOE management and supervision must be professional and adhere to the principles of Good Corporate Governance, or GCG as it is more often known. Most SOEs in Indonesia still seem inflexible, too procedural, bureaucratic, especially about financial accountability and business operations.

Currently, SOEs are regulated explicitly by Law Number 19 of 2003 concerning State-Owned Enterprises

(BUMN Law) and are regulated by other laws and articles of association. [1]

BUMN is classified into two types, according to the BUMN Law:

1. Persero, or Limited Liability Business, is a BUMN in the form of a limited liability company whose capital is divided into shares, with the Republic of Indonesia owning all or at least 51 percent (fifty-one percent) of its shares. Its primary goal is to make a profit (Article 1 point 2 of the Law Number 19 of 2003 concerning State-Owned Enterprises)
2. A Perum, or Public Company, is a BUMN whose whole capital is held by the government and is not divided into shares, and which aspires to benefit the public by delivering high-quality goods and/or services while also seeking profits based on corporate management standards (Article 1 point 4 of the Law Number 19 of 2003 concerning State-Owned Enterprises).

The aims and objectives of creating BUMN are governed individually in Article 2 paragraphs (1) and (2) of the BUMN Law, which reads as follows:

- (1) The purposes and objectives of the establishment of BUMN are:
  - a) Contribute to the growth of the national economy and, in particular, state income;
  - b) Profit maximization;
  - c) Organizing public benefits in the form of high-quality, sufficient commodities and/or services to meet the requirements of a large number of people;
  - d) Be a pioneer in business activities that the private sector and cooperatives cannot yet carry out;
  - e) Actively give advice and support to entrepreneurs from economically disadvantaged groups, cooperatives, and the general public.

Based on the explanations of these articles, we can see that the purpose of SOEs is not only to seek profit but also to promote the national economy and people's welfare. There are 2 (two) functions that are sometimes contradictory, like two sides of a coin, so that it becomes a dilemma for SOEs' operations, including those that distinguish them from each other. SOEs with private companies who fully pursue profit.

According to the author, the BUMN Business (Persero) is a fake legal corporation controlled in Article 1 point 2 of the BUMN Law, which is not a legal entity but is merely restricted to the conditions for the degree of state share ownership in a limited liability company. The legal entity of a Limited Liability Company is governed by the Limited Liability Company Law No. 40 of 2007. (UU PT). [2]

According to the Limited Liability Company Law, a limited liability company is a legal entity that is a capital partnership formed pursuant to an agreement, conducting business activities with authorized capital that is entirely divided into shares, and meets the requirements set forth in this Law and its implementing regulations.

The company legislation solely controls the management of BUMN from a procedural standpoint for a limited liability corporation. However, for the implementation of its business, it is bound more by the BUMN Law. There will be a dilemma regarding the orientation of the BUMN itself, which should prioritize pursuing profit or prioritizing social interests.

The laws and regulations relating to assets and the management of BUMN themselves have received quite a several requests for material review, and there have also been several decisions of the Constitutional Court related to this matter, for example, the Decision of the Constitutional Court Number 48/PUU-IX/2013 which is a decision of the Constitutional Court. The findings of the investigation of Law No. 17 of 2003 on State Finance (Law No. 17 of 2003), in which the issue is the applicability of Article 2 letters g and I of Law No. 17 of

2003, which reads: "State finances as referred to in Article 1 number 1, include: (g). state assets/regional assets managed by themselves or by other parties in the form of money, securities, receivables, goods, and other rights that can be valued in money, including state finances separated from state/regional companies; (i). other party's assets obtained by using the facilities provided by the government". According to the Petitioner for judicial review, the application of this article is contrary to Article 23 paragraph (1), Article 28 paragraph (1), and Article 28C paragraph (2), but the Constitutional Court has concluded that the petition for judicial review from the Petitioner is wholly rejected. [3].

There is also a request for judicial review of Article 6 paragraph (1), Article 9 paragraph (1), Article 10 paragraph (1) and (3), and Article 11 letter an of Law Number 15 of 2006 creating the Supreme Audit Agency. [4]

Of these articles, the most related to the phrase BUMN/BUMD are:

Article 10 paragraph (1) reads:

"BPK assesses and/or determines the number of state losses caused by unlawful acts, whether intentionally or negligently committed by treasurers, BUMN/BUMD managers, and other institutions or bodies that manage state finances." [4]

Article 10 paragraph (3) reads:

"To guarantee the implementation of compensation payments, BPK has the authority to monitor:... b. Implementation of state/regional compensation to treasurers, managers of BUMN/BUMD, and other institutions or bodies that manage state finances determined by BPK."

According to the petitioner for judicial review of these provisions, they are in violation of the 1945 Constitution's Article 23 paragraph (1), Article 23E paragraph (1), and Article 28D paragraph (1). Concerning this petition, the Constitutional Court's Decision brings reasonable expectations for the implementation of business judgment rules, because in the closing section of their considerations, apart from constitutional difficulties, the justices of the Constitutional Court emphasized that state assets have been changed into BUMN or BUMD business capital, and its administration is governed by business judgment norms. However, the separation of state assets has no effect on BUMN or BUMD's wealth, which is independent of state assets, because, from a transaction standpoint, there is just separation and not a transfer of ownership, thus it stays as state finance. In other words, the supervisory authority remains with the state. The state's form of supervision must change from being based on the paradigm of state wealth management in the administration of government (government judgment rules) to being based on a business paradigm (business judgment rules). [5]

In addition to the problems previously mentioned, it is undeniable that the directors of SOEs also have a high potential for abuse if intensive supervision is not carried out because these directors play a significant role in controlling the company.

Applying BJR to the legal system in nations that follow the civil law legal system appears to be difficult since the Unitary State of the Republic of Indonesia, for example, based its law on laws and regulations as the highest source of law. This factor also causes judges' decisions in Indonesia to be based more on judges' interpretations, which are limited to the theories contained in the Law, so that judges' decisions are not well developed.

In Indonesia, Law Number 40 of 2007 regulating Limited Liability Companies is frequently used as a source of interpretation for BJR. There are 3 (three) essential points that must be met to be categorized as a business decision: business decisions must be taken in good faith, decisions must be taken with responsibility, and the last is decisions taken must be based on the interests of the company. Let us look at the role of SOEs themselves, apart from seeking profit from the business side. They also function as an extension of the state to prosper the community and support government programs in other sectors related to the SOE's main business. To facilitate the discussion regarding this BJR, the researcher's example is PT Pelabuhan Indonesia I, II, III, and IV (Persero), which has its principal business as a port service provider, which is an essential factor in the logistics chain in Indonesia. This BUMN is also related to the lives of many people and dramatically affects logistics costs in Indonesia, which will also significantly affect the selling price of many goods that the community will use.

If viewed from a pure business entity in the form of a Persero whose primary purpose is to seek profit, of course, it will be very contrary to the purpose of forming a company in the form of a Persero, so that it is inevitable that private companies will not want to try or manage similar companies in the sector and region, unless they can apply tariffs that can offset and return their investment. If this happens, the tariffs charged by the private sector will inevitably be high, and they will monopolize as much as possible.

If this happens, the price of goods consumed by many people will soar, and the state's goal to prosper its citizens will undoubtedly be challenging to achieve. This kind of business management problem is experienced by Pelindo 2 but also experienced by state-owned airport providers in the area, including the risk of business losses. This is only a small example of the seriousness of the function and role of BUMN in the form of a Persero. The author believes that there are still many SOEs in Persero in other regions in Indonesia that have the same fate. Only examples related to business, not to mention the investment process, the process of procuring goods and services for business operations, which must have legal

risks because there are so many laws and regulations. - Invitations that must be used as guidelines. If it is associated with corporate responsibility, this risk will inevitably be the SOE Directors' risk. From the description above, the main points of study or discussion in this study are:

1. How did the Business Judgment Rule become a must in the business and management of BUMN in the form of a Persero?
2. What is the form of the model so that it can be used to create a specific, focused, and detailed Business Judgment Rule to eliminate the confusion of SOEs in implementing the Business Judgment Rule?
3. What are the SOE Directors' (Managers) responsibilities in terms of criminal liability for implementing the Business Judgment Rule?

## 2. METHOD

The authors employ normative-empirical legal research approaches to gather data for this study. These research methods combine normative elements supported by the addition of facts that exist in Indonesian SOEs. With the approach method to an existing legal event, the process is still ongoing or not over. Primary Legal Materials, Secondary Legal Materials, and Tertiary Legal Materials are the legal materials used by the author in this study.

## 3. RESULT AND DISCUSSION

In running a business or managing SOEs, Good Corporate Governance (GCG) principles are known. This can convey based on the explanation of Article 4 of the Company Law, which states that:

"The enactment of this Law, the articles of association of the company, and the provisions of other laws and regulations, do not reduce the obligation of each company to comply with the principles of good faith, the principle of propriety, the principle of propriety, and the principles of good corporate governance in running the company." [2]

Furthermore, those relating to GCG are described in Part VI of the BUMN Law's general explanation section, which the writers might summarize as follows:

The Law aims to realize BUMN's long-term development objective and to establish the foundations or principles of excellent corporate governance (GCG). When it comes to managing and overseeing SOEs, these concepts are critical. Experience has shown that the economic downturn in various countries, including Indonesia, is partly because these state-owned companies do not consistently apply the principles of good corporate governance (GCG). [2]

The BUMN Law is designed to create a management and supervision system based on the principles of

efficiency and productivity to improve the performance and value of BUMN and prevent BUMN from exploiting actions outside the principles of good corporate governance (GCG). (1)

In addition to the PT Law and the BUMN Law, the Minister of SOE Regulation number: PER-01/MBU/2011 about the Implementation of Good Corporate Governance (GCG), subsequently abbreviated as Ministerial Regulation BUMN, regulates the necessity to execute GCG. The following is mentioned in Article 2 paragraph (1) of the Minister of SOEs Regulation: [5]

"SOEs are required to implement GCG consistently and sustainably by referring to this Ministerial Regulation while taking into account the applicable provisions and norms as well as the articles of association of SOEs."

Because all acts done as administrators of SOEs are certain to have legal implications, the Board of Directors is required to adopt GCG in the administration of their firm, which is applied in BJR. If we talk about legal consequences, it can be in the form of sanctions in the form of fines of several rupiahs, revocation of permits, and even imprisonment. In addition, legal consequences can also be in the form of civil lawsuits, criminal charges, up to bankruptcy.

According to the terms of Article 97 paragraphs (1), (2), and (3) of Law Number 40 of 2007 respecting Limited Liability Companies, the board of directors (management) has responsibility for this legal risk, up to and including criminal liability. For this reason, the board of directors must understand risk management, including legal risk, because it is an essential part of running a BUMN. As the researcher said at the beginning. Currently, the rules regarding risk management or legal risk are still few and incomplete. The liability for this legal risk in Law Number 40 of 2007 concerning Limited Liability Companies is only to a certain extent. In this journal, the researcher will only discuss the accountability of SOE directors (management). If we categorize this BUMN only as a company (private company) which is associated with the theory of piercing the corporate veil, then the responsibility of the directors is due only to the following matters: [2]

1. Directors do not perform the fiduciary duty to the company;
2. The annual calculation document is incorrect;
3. The Board of Directors is guilty of causing the company to go bankrupt;
4. Inappropriate capital, and
5. The Company operates improperly.

For SOE directors (management) in running the business they lead, there are so many problems that must be resolved other than just the problem of earning profits, especially for SOEs that have Persero status. Even though

its success in managing the business entity has not been matched by written policies from the government in the form of material and non-material, while if the company he leads is losing money or the finances are wrong, he will not only receive insults and social sanctions but starting from civil liability even which is more extreme, namely criminal liability for the policies that have been taken or more appropriate if the researcher uses the term these risks are included in legal risks.

BUMN Directors still have other legal risks that they can experience because if it is related to the status of BUMN that manages state-owned money or, say, separated state assets, it will not be easy to free the directors from state losses if it turns out that the BUMN is managed to suffer losses due to the business risks they run, this means that criminal liability is ready to await the directors, which means that the threat of a criminal act of corruption can easily ensnare BUMN directors.

From the author's explanation above, it is clear why BJR is a must in the business and management of BUMN in the form of a Persero because there are quite several rules that require it, and that is what makes BUMN directors in the form of a Persero it will not be easy to get out of the legal trap if they do not implement BJR.

This BJR must also be implemented to maintain the sustainability of the state-owned company itself, which was created to fulfill and influence many people's lives. If the writer connects it with progressive legal theory, BJR aims to make the Law feel helpful, so creative legal actors are needed to translate the Law in the forum of social interests they must serve. [6]

The second point I'll make is about the model's format, which will be utilized to produce a particular, focused, and thorough Business Judgment Rule that will reduce SOEs' misunderstanding while adopting the Business Judgment Rule.

The author will try to draw the essence of all the BJR rules to be easy to understand and apply. The biggest fear of BUMN directors is the threat of being prosecuted for corruption, which at any time can ensnare him. If we consider the aspects of corruption in general, they are simply connected to BUMN's business and management, not because of bribes or gratuities. The most common ensnare BUMN directors related to the exploitation and management of BUMN are Article 2 paragraph (1) and Article 3 of Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption (UU TPK), which has been updated with Law of the Republic of Indonesia Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption (UU TPK): [7]

- (1) Any individual who unlawfully enriches himself, another person, or a company in a way that harms the state's finances or economy will be sentenced to life in prison or to a minimum of 4 (four) years and a maximum of 20 (twenty) years in jail. twenty) years in prison and a fine of at least Rp. 200,000,000.00



(two hundred million rupiahs) and up to Rp. 1.000.000.000,00 (one billion rupiahs) (one billion rupiah).

Article 3 reads:

"Every person who is intending to benefit himself or another person or a corporation, abuses the authority, opportunities or facilities available to him because of a position or position that can harm the state's finances or the state's economy, is sentenced to life imprisonment or a minimum imprisonment of 1 (one) year and a maximum of 20 (twenty) years and or a fine of at least Rp. 50,000,000.00 (fifty million rupiahs) and a maximum of Rp. 1,000,000,000.00 (one billion rupiah)." [7]

From the two articles, the author tries to explain based on this research that the directors of BUMN Persero can be threatened with criminal acts of corruption if there are at least 2 (two) elements that must be met, namely:

First: The existence of unlawful acts, whether based on authority or not;

Second: the loss of the state or the state economy.

Based on the 2 (two) elements mentioned above, the author believes that the implementation of BJR itself will fulfill the first element if the directors of BUMN Persero do not implement it. For this reason, the author will also provide a brief and detailed explanation that makes it easier to fulfill BJR and is considered to have at least implemented BJR. The elements in the implementation of BJR are broadly divided into 2 (two) elements: the first element, namely: Not contradicting the laws and regulations governing BUMN-Persero; the second element, proper business studies or considerations have been carried out.

From the explanation above, several things can be directly applied by the directors of BUMN Persero so that BJR is considered fulfilled. The first step that can be taken is to conduct a legal review of the investment or business that will be carried out before the investment or business is carried out. This can be done by the legal department of the SOE itself, using a legal consultant or asking a Government Law Office to conduct a legal review of the investment or business plan, which can later become the basis or legal consideration whether the investment or business has met or by statutory regulations that apply and regulates state-owned enterprises or not, so that it can be decided whether the investment or exploitation will be continued or not. This request for review by state-owned enterprises to the Government Law Office (JPN) is itself a benefit facility provided by the state to state-owned enterprises to prevent and minimize legal risks faced by state-owned enterprises.

If, from the legal study alone, violations or inconsistencies with existing laws and regulations have been found, but the investment or business is still being

carried out, there will inevitably be legal risks in the future.

The Attorney General's job is defined in Law No. 16 of 2004 on the Prosecutor's Office of the Republic of Indonesia, which states: [8]

Paragraph 2 of Article 30: The Prosecutor's Office, which has particular powers in the realm of civil and state administration, can act for and on behalf of the state or government both within and outside of the courtroom;

Article 34 (2): The Prosecutor's Office may provide legal considerations to other governments.

Furthermore, it is governed by Presidential Regulation No. 38 of 2010 of the Republic of Indonesia on the Organization and Work Procedure of the Prosecutor's Office of the Republic of Indonesia on [9]

Article 24 (1): In the city and state administrative domains, the Deputy Attorney General for Civil and State Administration has the obligation and power to carry out the responsibilities and authorities of the Prosecutor's Office.

Article 24 (2): The scope of the civil and state administration fields referred to in paragraph 1 includes law enforcement, legal assistance, legal considerations, and other legal actions to the state or government, including state institutions/agencies, central and regional government institutions/agencies, business entities state/regional property in the field of civil and state administration to save, restore wealth/state finances, and uphold the government's authority.

The second step that the directors of state-owned enterprises must take is to conduct a business study or a commercial study. This request for a business study or commercial study can be carried out by a business consultant or commercial consultant who understands and understands the business to be carried out and based on the results of the business study, and a review can be requested the first BPKP.

Articles 2 and 3 of the Presidential Regulation No. 192 of 2014 establishing the Financial and Development Supervisory Agency of the Republic of Indonesia (BPKP). BPKP is responsible for managing government matters, including state/regional finance and national development.

Article 3 letter d of Presidential Regulation of the Republic of Indonesia Number 192 of 2014 concerning the Financial and Development Supervisory Agency (BPKP) carries out the functions: "providing consultancy related to risk management, internal control, and governance of agencies/business entities/other entities and programs/policies strategic government." This is one of the regulations related to BUMN Persero, which functions to protect the BUMN Persero before conducting business or management so that later it can avoid state losses or prevent its business from businesses that can harm the state. The review results can be taken

into consideration to ensure that the investment or ownership can be carried out or not. Suppose there are already problems in business studies or commercial studies, but investment or exploitation is still being forced. In that case, there will inevitably be significant legal risks to be faced in the future. [10]

The author tries to find a simple form of BJR to find the legal regulations. If the legal regulations have been found, the legal regulations are then applied to the legal event. There will undoubtedly be various forms of construction that must be considered. For example, a legal study is appropriate. However, a business study is not feasible, or on the contrary, there is a legal study that is not appropriate, but this business is profitable. If the board of directors considers whether or not all of the components of a criminal act of corruption have been fulfilled, it will be easier for them to make judgments. Including excuses from the business side of the rules are correct. For example, even though this business is detrimental, it is an assignment or a function or role for other social SOEs that the state has assigned.

The next thing that the author will discuss is the responsibilities of the SOE Directors (Managers) in terms of criminal liability for implementing BJR. From the research results and the author's explanation above, we know that the impact of the implementation of BJR is very dominant in criminal liability. Because if BJR is not properly implemented or if BJR principles are broken, it would surely result in legal consequences, including the danger of prosecution under Article 2 or Article 3 of the TPK Law for corruption.

#### 4. CONCLUSION

BJR can also be the basis of the Law that provides the value of justice in policymaking by BUMN Persero. The SOE directors must understand BJR because this will be the basis for the defense of the directors if they encounter legal problems, especially allegations of corruption. BJR is also the foundation for the board of directors' defense, because it underlines that members of the board of directors cannot be held liable for the consequences of a business consideration (BJR) taken by the directors in question [12].

This defense can at least be carried out with the reasons or grounds that have been carried out in the previous discussion, namely that an accountable legal study has been carried out to avoid legal risks that will arise, including a study from the business or commercial side related to the investment or exploitation that will be carried out. From a progressive legal perspective, it can also be considered in court if it turns out that the board of directors is still subject to criminal sanctions because the policy or decision making by him is considered detrimental to the company, provided that the board of directors is legally compliant.

As a result, a progressive legal defense can be used in this instance, because progressive law does not recognize law as an absolute and ultimate institution, but rather as

a tool for serving mankind. Justice, welfare, and care for the people are more significant factors to consider. "Law that is constantly in the process of becoming" is the essence of "law that is always in the process of becoming" (Law as a process, Law in the making). The Law does not exist for the Law's sake, but for the sake of humanity [6].

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#### REFERENCES

- [1] Undang-Undang Nomor 19 Tahun 2003 tentang Badan Usaha Milik Negara.
- [2] Undang-Undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas.
- [3] Undang-undang nomor 17 Tahun 2003 Tentang Keuangan Negara.
- [4] Undang-undang Nomor 15 Tahun 2006 Tentang Badan Pemeriksa Keuangan.
- [5] Peraturan Menteri BUMN nomor: PER-01/MBU/2011 tentang Penerapan Tata Kelola Perusahaan Yang Baik (Good Corporate Governance/GCG).
- [6] Refly Harun, BUMN Dalam Sudut Pandang Tata Negara, Balai Pustaka, Jakarta, 2019.
- [7] Satjipto Rahardjo, Hukum Progresif, Genta Publishing, Yogyakarta, 2009.
- [8] Undang-Undang Republik Indonesia Nomor 20 Tahun 2001 Tentang Perubahan Atas Undang-Undang Nomor 31 Tahun 1999 Tentang Pemberantasan Tindak Pidana Korupsi.
- [9] Undang-Undang Nomor 16 Tahun 2004 tentang Kejaksaan Republik Indonesia.
- [10] Perpres RI Nomor 38 Tahun 2010 tentang Organisasi dan Tata Kerja Kejaksaan Republik Indonesia.
- [11] Peraturan Presiden Republik Indonesia Nomor 192 Tahun 2014 Tentang Badan Pengawasan Keuangan dan Pembangunan (BPKP).
- [12] Business Judgment Rule BUMN, Wawan Zulmawan, Jala Permata Aksara, Jakarta, 2019.