

Responsibility of the Board of Directors for Violations of Good Corporate Governance Principles

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ABSTRACT

Taking into account the provisions of the Articles of the Limited Liability Company Law, it can be stated that there are no provisions governing the application of the GCG principles, because it only stipulates that the company is obliged to comply with all good things in a corporation, but it is not regulated regarding the forms of GCG. itself, the procedures for implementing GCG, what are the responsibilities of a Board of Directors if the principle is violated and what are the sanctions that must be given to those who violate it. So that there is a norm in the regulation of obligations in the management of PT, this norm can certainly cause legal uncertainty. Normative legal research method or normative juridical. Management responsibilities if there is a violation of GCG principles in the management of PT can be in the form of: Civil and criminal liability.

Keywords: Director, Management of Limited Company, Good Corporate Governance

1. INTRODUCTION

Good Corporate Governance (GCG) has become an important topic of discussion for business people around the world following pressure from institutional investors, NGOs (non-governmental organizations), and the mass media for companies to implement GCG. Several important events have prompted the growing attention to Corporate Governance (CG) in several countries in Europe and Asia. CG has developed since human civilization has known corporations. In other words, GCG in practice is not something new, but recent developments have pushed the centralization of GCG issues significantly, including:

- a. The Triumph of the Corporation
- b. Global Company
- c. Global Investors
- d. The Demand for Capital
- e. Development of the Code (The Triumph of The Code)
- f. Organization for Economic Cooperation and Development (OECD) (Corporate Governance Principles)

These OECD principles have been accepted globally as a general basis for GCG that addresses different interests, practices and cultures. The principles put forward by the OECD can be well implemented as practical guidelines to assist the Board of Commissioners and the Board of Directors (corporate board), so that companies can operate efficiently, and compete effectively to attract investors.

Looking at the various developments in GCG reform in various countries that have been discussed above, there are things that lead to GCG practices, including the necessity of establishing an Audit Committee and Independent Commissioner. At the same time, the proportional empowerment of the functions of the Board of Directors and the re-emphasis of the importance of the independence of the Board of Directors has received wide attention. The principles of GCG in Indonesia, since the prolonged economic crisis, demands for global competition, and the need for capital have required the Indonesian government to mobilize capital by launching various strategic initiatives, including restructuring of the banking sector, privatization program for State-Owned Enterprises (BUMN), and GCG reform.

In the context of economic recovery, the Indonesian government and the International Monetary Fund (IMF) introduced and introduced the concept of GCG as sound corporate governance. GCG by definition is a system that regulates and controls the company to create added value for all stakeholders. In short, there are several main components needed in this GCG concept, namely fairness, transparency, accountability, and responsibility. These four components are important because the consistent application of GCG principles has been proven to improve the quality of financial reports.

With regard to GCG reform, the government essentially hopes that by implementing GCG, investors' positive perceptions of Indonesian companies will strengthen. In other words, GCG is an important criterion for investors in making investment decisions. The national policy for

GCG reform is the result of joint discussions between the Government and various international donor institutions such as the IMF, World Bank, and the Asian Development Bank (ADB).

GCG is defined as a matter related to effective decision making that originates from corporate culture, ethics, value systems, business processes, policies and organizational structures, which aim to encourage:

- a. Growth in company performance.
- b. More efficient and effective management of resources and risks.
- c. Corporate accountability to shareholders and other stakeholders

In general, the institutions in CG include internal or external to the company. External institutions include: the government, the capital market where the company's shares are registered, and the courts that recognize legal remedies for violations of governance rules. Internal institutions are mechanisms within the company that determine how the company is run. These external and internal institutions are interconnected with each other since internal mechanisms are widely regulated and determined by external institutions.

In a PT, there are important organs, namely: the General Meeting of Shareholders (GMS), the Board of Commissioners and the Board of Directors. The GMS is a corporate organ whose position is as the organ that holds the highest power in the company as stipulated in Article 1 point 4 of Law Number 40 of 2007 concerning Limited Liability Companies (UUPT) which states: to the board of directors or the board of commissioners within the limits specified in this law and/or the articles of association". The Board of Commissioners is the company's organ in charge of carrying out general or special supervision in accordance with the articles of association and providing advice to the Board of Directors. Provisions concerning the board of commissioners are regulated in Article 1 paragraph (6) of the Company Law, Articles 108 to 121 of the Company Law.

As one of the main pillars in the company, without the Board of Directors a PT will not be able to carry out its activities, it can be seen that the company is considered as a legal subject, where the company cannot do anything without the help of members of the Board of Directors as individuals who act representing a Limited Liability Company (PT). The demand for the implementation of GCG is also one of the issues to attract foreign investors to enter a country's capital market. So that the better a country implements the principles contained in GCG, it is an indication of good treatment of investors.

GCG is definitively a system that regulates the control of the company to create added value for all stakeholders. The concept of GCG in Indonesia can be interpreted as the concept of good corporate management.

An effective CG system must be able to provide adequate incentives for Commissioners and Directors to achieve company goals for the benefit of the company and its shareholders. This system must also be able to facilitate effective supervision, thereby encouraging companies to use existing company resources more efficiently:

- a. Maximizing the value of the company and the value of the company for shareholders by increasing the principles of transparency, accountability, trustworthiness, responsibility, and fairness so that the company has strong competitiveness.
- b. Encouraging the management of the company in a professional, transparent and efficient manner; and
- c. Encouraging shareholders, members of the board of commissioners and members of the Board of Directors in making decisions and carrying out actions based on high moral values and compliance with laws and regulations as well as being responsible to other interested parties.

Without the Board of Directors and Commissioners, PT cannot carry out its function as an institution or entity that conducts business activities to seek economic benefits. The Board of Directors, the appointment is based on the consideration of shareholders so that the company can be managed professionally with the end result of large profits obtained by the company, to run PT. In its implementation, the Board of Directors needs to be given the task and authority.

Duties and Authorities are 2 (two) things that cannot be separated. The Board of Directors has a duty in running the company and to carry out these duties he needs authority. The Board of Directors in carrying out their duties and authorities must pay attention to good corporate governance or GCG principles. This principle is of course very closely related to the good faith element of the board of directors. With the good faith element of the board of directors in managing the company, it reflects the existence of the company to be able to live sustainably and provide benefits to the company's stakeholders.

In the Company Law, it is determined that the management of the company is carried out by the Board of Directors appointed by the GMS (Article 79 paragraph (1) and Article 80 of the Company Law). A Company may be managed by a Director, but a Company is required to have at least 2 (two) members of the Board of Directors in the case stipulated in Article 92 Paragraph (1); Paragraph (2); Paragraph (3); Paragraph (4); Paragraph (5); Paragraph (6); Article 97 Paragraph (1); Paragraph (2); Paragraph (3).

By taking into account the provisions of the Articles of the Company Law, it can be stated that there are no provisions governing the application of these GCG principles, because it only stipulates that the company is obliged to comply with all good principles in a corporation. the form of the GCG principle itself, the

procedures for implementing GCG, what are the responsibilities of a Board of Directors if the principle is violated and what sanctions must be given to those who violate it. So that there is a norm vacuum in regulating the obligations of the Board of Directors in managing PT, this norm vacuum can certainly cause legal uncertainty.

The author feels that this phenomenon is important to study, considering that the organs of the company, especially the Board of Directors and all stakeholders, are able to understand well the forms of principles, procedures for implementation and their responsibilities in implementing these principles into the management system of company management based on elements of good faith. Given the importance of the role of the Board of Directors in managing a company, it is necessary to know what the duties, rights and authorities of the Board of Directors are.

The research method used by the researcher is a normative legal or normative juridical research method. The theories that will be used in this paper are: Responsibility Theory and Legal Assurance Theory.

2. PROBLEM

Based on the description of the background above, the authors are interested in further analyzing this matter with the title of writing, namely: Responsibility of the Board of Directors for Violations of the Principles of Good Corporate Governance in the Management of a Limited Company. Based on the above background, the following problems are formulated: What are the responsibilities of the board of directors in managing the Limited Liability Company? What is the responsibility of the board of directors for violations of GCG principles in the management of a Limited Liability Company?

3. DISCUSSION

The Board of Directors can be sued personally to the District Court if the company suffers a loss caused by its mistakes and negligence. Likewise, in the event that the loss occurs due to the fault or negligence of the board of directors and the company's assets are not sufficient to cover the loss due to the bankruptcy, each member of the board of directors is jointly and severally responsible for the loss. In the event of a loss to the company, the board of directors is not a priori personally responsible for the company, but on the contrary that the board of directors must be free from responsibility for the loss of a limited liability company, the responsibility of the board of directors whose company suffers a loss, in principle is the same as the responsibility of the board of directors whose company no loss.

PT losses, either directly or indirectly, will cause legal consequences for the management, especially for the company's directors. There are many issues regarding the legal consequences arising from the decision regarding the loss of a limited liability company, one of which is regarding the extent of liability for the loss of a limited liability company, in this case the legal entity will not assume responsibility, because as a company organ in this case the directors will be responsible. answer personally. The criteria for the responsibility of the board of directors are as follows: The liability arises if the company goes through a bankruptcy procedure; There must be an error or omission; The responsibility is residual, meaning that the responsibility arises if later it turns out that the company's assets taken are not enough; The responsibility is jointly and severally means that even if only one creditor is at fault, other directors are considered to be responsible; Presumption of guilt with reversed proof.

In general, it can be concluded that the responsibilities of the board of directors include the following:

a. Responsibilities of Directors at Limited Company

The Board of Directors is fully responsible for managing the company for the interests and objectives of the company and representing the company both inside and outside the court. So in addition to being fully responsible for the management, the board of directors also acts on behalf of the company (*persona standi in judicio*).

In carrying out their duties for the interests and business of the company, each member of the board of directors must be in good faith and full of responsibility. However, if this is not the case, then each member of the board of directors is fully responsible personally, if the person concerned is guilty or negligent in carrying out his duties as charged and required to him.

b. Responsibilities of the Board of Directors to the Company and Shareholders.

The duties and responsibilities of the board of directors to the company and the shareholders of the company begin from the time the company obtains the status of a legal entity as regulated in Article 7 paragraph (4) of the Company Law which states that the company obtains the status of a legal entity on the date of issuance of a ministerial decree regarding the legalization of a company legal entity

c. Joint Responsibilities Among Members of the Board of Directors of the Company.

According to the legal system in Indonesia, as well as the law in most countries that adhere to the civil law system, the relationship between directors and companies is contractual. This means that even though there is no specific contract between the company and its directors, by law it is considered (fictional) that there is a contract giving the power of attorney. Therefore, the relationship between the

directors and the company is not the relationship between the trustee and the beneficiary as in the Anglo Saxons.

As a juridical consequence, the board of directors as the power holder may not act in excess of the powers granted to him. How far the power is given to him, can be seen in the articles of association of the company concerned. If the board of directors acts beyond the authority given to him, the board of directors is also personally responsible. If the company concerned then goes bankrupt, the burden of responsibility is not sufficiently accommodated by the company's assets (bankrupt assets), then the directors will also be jointly and severally responsible.

d. Responsibilities of Directors to Third Parties.

The duties and obligations of the company's directors to third parties are manifested in the obligation of the board of directors to disclose to third parties for any company activities that are considered to affect the company's assets. A third party is another party who is not part of the agreement.

The company's directors are required to submit the results of the company's annual calculations to be examined by a public accountant before the annual calculation is approved by the Annual GMS and immediately after being ratified by the meeting, announced for the benefit of third parties. Especially for a public limited company, the company's directors are also required to announce every purpose and plan for holding a GMS. The above provisions do not rule out the possibility of requests for data and or information regarding the company by interested third parties, based on the agreement between the parties. In the cases mentioned above, the Board of Directors is obliged to provide such data and or information in a clear, firm, true and accurate manner.

The principles of GCG which are indirectly or abstractly contained in the articles in the Company Law, both in terms of the duties, authorities and obligations of the directors in the company's responsibility. The Board of Directors who in this case is personally and fully responsible for the management of the company entirely as a result of all decisions taken with or without prioritizing good faith, an act either intentionally or unintentionally that causes harm to all parties involved in it, either outside and inside the company (stakeholders).

The Board of Directors can be held accountable even though in this case there is a doctrine that protects the Board of Directors as an organ of the company from all their actions, such as the business judgment rule doctrine. If the board of directors is proven to have committed an act prohibited both in the applicable regulations and the articles of association. Then the board of directors may be subject to sanctions in

accordance with the category of acts violated, both in matters relating to acts prohibited in civil, criminal, administrative, and other regulations.

The responsibility of the board of directors in the event of a violation of GCG principles in the management of PT can be in the form of:

a. Civil liability: the principle of civil liability can be in the form of personal responsibility and joint responsibility. In addition to civil liability in question are:

1) Responsibility with elements of error (intentional and negligence) as stated in Article 1365 of the Civil Code, namely: "Every act that violates the law, which brings harm to another person, obliges the person who because of his mistake published the loss, compensates for the loss". Responsibility with elements of error, especially negligence as contained in Article 1366 of the Civil Code, namely: "Everyone is responsible not only for losses caused by his actions, but also for losses caused by negligence or carelessness".

2) Absolute responsibility (without error) as contained in Article 1367 of the Civil Code.

Criminal responsibility emphasizes that there is an elaboration of responsibility from the beginning to be civil in nature, but also includes criminal responsibility from the side of the person in charge, which party is considered most responsible for unlawful acts committed or related to corporate business activities, or attributed as the burden of the corporation as a legal entity whose existence has been recognized as a natural human being (naturlijk persoon).

The criminal liability for someone who serves as a member of the board of directors is regulated, among others, in Article 59 of the Criminal Code, Article 398 of the Criminal Code and Article 399 of the Criminal Code. In relation to this criminal liability, the granting of release and discharge (aquit et de charge) by the GMS for the management and supervision responsibilities carried out by the board of directors and the board of commissioners, when the annual report is approved by the GMS, does not mean that there has been a criminal discharge of responsibility. because it is not the authority of the GMS. In addition, the granting of acquit et de charge only means that the GMS has granted waiver of responsibility to the board of directors and the board of commissioners for matters reflected in the annual report.

4. CONCLUSION

GCG is a system, process and set of regulations that regulate the relationship between various interested parties (stakeholders), especially in the narrow sense of

the relationship between shareholders, the board of commissioners and the board of directors in order to achieve the company's goals, so that GCG is nothing but a good regulatory system for the functions of the company. , duties, rights, obligations, supervision and relationships of each and among the directors, commissioners, shareholders, employees, creditors, investors and other stakeholders in a company. In summary, the main principles of CG that need to be considered for the implementation of GCG practices are: fairness, transparency, accountability and responsibility. These basic principles are non-binding and provide guidelines for countries to improve corporate governance in their countries. The implementation of GCG in Indonesia is expected to provide added value for shareholders and other stakeholders. Since Indonesia was mired in an economic crisis, GCG has become a part of improving the management of corporations or companies. Based on the explanation regarding the elaboration of GCG principles above, further explanation will be given regarding the responsibility of the board of directors for violations of GCG principles, which in practice are implicit in the regulation of GCG principles in the Company Law.

The responsibility of the board of directors in the event of a violation of GCG principles in the management of PT can be in the form of: Civil liability: the principle of civil liability can be in the form of personal responsibility and joint responsibility. As for other than civil liability, these are: Liability with elements of error (intentional and negligence) as stated in Article 1365 of the Civil Code and absolute responsibility (without errors) as contained in Article 1367 of the Civil Code. Criminal responsibility emphasizes that there is an elaboration of responsibility from the beginning to be civil only, but also includes criminal responsibility from the side of the person in charge, which party is considered most responsible for unlawful acts committed or related to corporate business activities, or attributable to the burden of the corporation. as a legal entity whose existence has been recognized as a natural human being (naturlijk persoon). The criminal liability for someone who serves as a member of the board of directors is regulated, among others, in Article 59 of the Criminal Code, Article 398 of the Criminal Code and Article 399 of the Criminal Code.

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