Responsibility of the Board of Directors in Decision Making of the Company Based on the Doctrine of Business Judgement Rule

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Abstract. The business judgment rule doctrine is a reflection of the independence and discretion in making business decisions by the board of directors. This decision-making must be based on good faith and the interests of the company, but this must be proven because it often causes losses to the company. The research method used is normative juridical by examining the business judgment rule doctrine in Law Number 40 of 2007 concerning Limited Liability Companies. Discussion of this doctrine raises that the decision making of the board of directors must be accountable within the legal framework of the company, so that the board of directors, in accordance with the authority they have, cannot be accounted for, even though the business decision causes losses to the company.

Keywords: Business judgment rule doctrine · decision-making · the responsibility of the board of directors

1 Introduction

The development and progress of a company cannot be separated from good management which refers to good corporate governance. Good corporate governance will be realized if the organs of the company act in accordance with their respective functions and duties. The organs of the company are the General Meeting of Shareholders, Directors and Commissioners. Corporate governance is also related to the reconciliation of various different interests of stakeholders, which means that without good corporate governance, it will lead to conflicts of interest that have a negative impact on the company's performance. This means that corporate governance is the foundation for managing the company, including in making business decisions for the company.

Business decision making is an important part of a company. This decision-making is carried out by the board of directors as a form of discretion and also a reflection of the independence of a company, so that based on this doctrine, all decisions of the board of directors for the benefit of the company must be protected by law. The business judgment rule doctrine teaches that the decisions of directors with good intentions must be protected as a reflection of the duties and responsibilities of the directors in running the company.

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Errors and even losses caused by honest decisions of directors based on this doctrine must be protected, even though there are directors who are charged with great responsibility for their business decisions, such as directors of banks, insurance companies, fund management companies such as mutual funds and public companies/public companies.. Legal protection for the board of directors is an important part in the management of the company, but remains within the limits of applicable legal regulations.

On the other hand, the legal protection that should be received by the directors who make decisions for the benefit of the company that causes losses, can still be given the burden of responsibility for their decisions, even though the directors have carried out these obligations in good faith. Article 97 paragraph (2) of the Limited Liability Company Law states that: “PT management must be carried out by every member of the board of directors in good faith and full of responsibility”. The article confirms that every decision made by the board of directors on the basis of good faith will be protected by law, as long as the decision making can be proven that the action does not benefit him, is carried out with full responsibility and has no personal interest in it, and the decision is made carefully. Heart, even though the company suffered a loss. Furthermore, Article 97 paragraph (5) affirms:’

Members of the Board of Directors cannot be accounted for for losses as referred to in paragraph (3) if they can prove:

1. The loss is not due to his fault or negligence;
2. Has carried out management in good faith and prudence for the benefit and in accordance with the purposes and objectives of the Company;
3. Does not have a conflict of interest, either directly or indirectly management actions that result in losses; and
4. Has taken action to prevent the loss from arising or continuing.

Article 97 paragraph (5) is a legal protection for the board of directors in making decisions. Legal protection for making such decisions is based on the business judgment rule doctrine, even though it has harmed the company.

Protection of the board of directors is important because the company’s dependence on the board of directors is very high, apart from being an organ of the company, the progress and development of the company is in the hands of the board of directors. This dependence is based on the doctrine of fiduciary duty, namely the obligation of the manager as a trusted party to act in accordance with the authority it has for the benefit of the company.

The business judgment rule doctrine was originally a doctrine derived from the common law system and is a derivative of corporate law in the United States as an effort to prevent courts in the United States from questioning business decision making by directors [2].

2 Research Method

Research on the Responsibilities of Directors in Making Corporate Decisions based on the Business Judgment Rule Doctrine is a normative legal research based on secondary data, consisting of primary legal materials, secondary legal materials and tertiary legal materials. The method of data collection was carried out by literature study and analyzed qualitatively.

3 Findings and Discussion

1. Good Corporate Governance

The definition of Corporate Governance put forward by the Organization for Economic Cooperation and Development (OECD) is as follows: [2].

Corporate governance is the system by which business corporations are directed and controlled. The corporate governance structure specifies the distribution of the right and responsibilities among different participants in the corporation, such as the board, managers, shareholders and other stakeholders.

This definition shows that the governance of a company is based on the responsibilities and distribution of rights and obligations of the company's role holders, namely the General Meeting of Shareholders, Directors and Commissioners. This distribution of rights and obligations shows the functions and responsibilities of each role holder.

According to the World Bank, Good Corporate Governance is a collection of laws, regulations and rules that must be met that can encourage the performance of company resources to work efficiently, generating sustainable long-term economic value for shareholders and the surrounding community as a whole. [4].

The concept of Good Corporate Governance is not something new for corporate management. Initially the concept of GCG in Indonesia was introduced by the Indonesian government and the International Monetary Fund (IMF) in the context of post-crisis economic recovery. [5] The world's attention to Good Corporate Governance began to increase sharply since Asian countries were hit by the monetary crisis in 1997 and since the collapse of the world's leading giant companies, including Enron Corporation and World Com in the United States, HIH Insurance Company Ltd and One-Tell Pty Ltd. in Australia since Parmalat in Italy in the early 2000s. [6].

In the Decree of the Minister of State / Head of the Agency for Investment and Development of State-Owned Enterprises No. Kep. 23/MPM.PBUMN/2000, dated May 31, 2000, concerning the Development of Good Corporate Governance Practices in Persero Companies, it is stated that what is meant by Good Corporate Governance is the principle of a healthy company and is applied in the management of the company which is carried out solely to protect the interests of the company in order to achieve the goals and objectives of the company. [7].

Good Corporate Governanceis a process and structure used to improve business success and corporate accountability that aims to increase the value of the company in the long term by taking into account the interests of stakeholders and based on laws and regulations, morals and ethical values. From the various definitions above, it can be seen that in Good Corporate Governance there are several important things, namely:

a. Effectiveness comes from Corporate Culture, Ethics, Values, Systems, Business processes, policies and corporate organizational structures that aim to support and encourage company development, more effective and efficient management of resources and risks, corporate accountability to shareholders and other stakeholders.
b. A set of principles, policies and company management systems that are implemented for the realization of efficient, effective and profitable company operations in running the company's organization and business to achieve strategic goals that meet the principles of good business practice and its implementation in accordance with applicable regulations, care for the environment and based on high socio-cultural values.
c. A set of regulations and/or systems that direct the control of the company for the creation of added value for the stakeholders (government, shareholders, company leaders and employees) and for the company itself.

According to the 2004 OECD Principles Study Team, there are two main theories related to Corporate Governance, namely stewardship theory and agency theory. [7].

Stewardship theorybuilt on the philosophical assumption of human nature, namely that humans are essentially trustworthy, able to act responsibly, and have integrity and honesty towards others. In other words, stewardship theory views management as a party who can be trusted to act in the best possible way for the interests of the public and stakeholders. Meanwhile, agency theory developed by Michael Johnson, [9] views that the company's management as "agents" for the shareholders, will act with full awareness for their own interests, not as a wise and wise and fair party to the shareholders.

Contrary to Stewardship theory, agency theory views that management cannot be trusted to act in the best possible way for the interests of the public and stakeholders. With further developments, agency theory received a wider response because it was seen as more reflective of the existing reality. Various thoughts on Corporate Governance have developed by relying on agency theory where management is carried out in full compliance with various applicable rules and regulations.

The aims and objectives of implementing Good Corporate Governance in the company are as follows:

a. Maximizing the value of the company by increasing the principles of openness, accountability, trustworthiness, responsibility, and fairness so that the company has strong competitiveness, both nationally and internationally.
b. Encouraging professional, transparent and efficient company management, as well as empowering functions and increasing independence.
c. Encouraging company management in making decisions and carrying out actions based on high moral values and compliance with applicable laws and regulations, as well as awareness of the existence of corporate social responsibility towards stakeholders and environmental sustainability around the company.
d. Increase the company's contribution to the national economy
e. Increase investment value and company wealth

2. Responsibilities of the Board of Directors Based on the Business Judgment Rule

The business judgment rule doctrine is a doctrine that was originally known in Anglo Saxon countries that adhere to the Common Law system, as a doctrine that teaches that the company's directors cannot be held responsible for making decisions that are detrimental to the company, if the decision is based on good faith, prudence and the aim is for the benefit of the company. The Board of Directors obtains protection without having to be based on justification by the shareholders and also through court decisions. DThe Business Judgment Rule has been accommodated in the Limited Liability Company Law concerning the duties and responsibilities of the board of directors. Article 92, states that:

a. The Board of Directors carries out the management of the company for the benefit of the company and in accordance with the aims and objectives of the company;
b. The Board of Directors is authorized to carry out the management as referred to in paragraph (1) in accordance with the policies deemed appropriate, within the limits specified in this law and/or the articles of association.

Article 97, states that:

a. The Board of Directors is responsible for the management of the company as referred to in Article 92 paragraph (1);
b. The management as referred to in paragraph (1) must be carried out by each member of the board of directors in good faith and full of responsibility;
c. Each member of the board of directors is personally responsible for the loss of the company if the person concerned is guilty or negligent in carrying out his duties in accordance with the provisions as referred to in paragraph (2);
d. In the event that the board of directors consists of 2 (two) or more members of the board of directors, the responsibilities as referred to in paragraph (3) apply jointly and severally to each member of the board of directors;
e. Members of the board of directors cannot be held responsible for losses as referred to in paragraph (3) if they can prove:

   1) The loss is not due to his fault or negligence;
   2) Has carried out management in good faith and prudence for the benefit and in accordance with the aims and objectives of the company;
   3) Does not have a conflict of interest, either directly or indirectly, over management actions that result in losses; and
   4) Have taken action to prevent the occurrence or continuation of the loss;

f. On behalf of the company, shareholders who represent at least 1/10 (one tenth) of the total shares with voting rights may file a lawsuit through a district court against a member of the board of directors who due to his/her mistake or negligence caused a loss to the company

The Board of Directors as the manager of the company is responsible for all company decisions in accordance with the aims and objectives of the company. Based on article 92 paragraph (2), the board of directors can take steps that are deemed appropriate for the interests of the company, do not conflict with the law and are in accordance with the company's articles of association. This is a manifestation of the responsibilities and obligations of the board of directors as an organ of the company and as a form of the company's dependence on the board of directors as fiduciary duties. The form of fiduciary duty is that the board of directors carries out their authority as a trusted party to act in the interests of the company.

Other obligations attached to the board of directors are: [10].

a. Obliged to carry out management for a reasonable purpose (duty to act for a proper purpose), which is based on good faith to carry out the power or function of the management authority for a reasonable purpose;
b. Obedience to comply with applicable laws and regulations (statutory duty),
c. Duty of loyalty, namely a loyal and loyal attitude to the company is realized by professional and responsible action;
d. Obligation to avoid conflicts of interest, especially conflicts of personal interest, both in the use of money, wealth, information, personal gain, and other legal actions.

Based on the duties and responsibilities of the board of directors, these steps must be accounted for, so that if the decision taken turns out to be detrimental to the company, the board of directors is not burdened with responsibility. On the other hand, according to Munir Fuady,[10] that the board of directors can be accounted for personally and not protected by law according to the business judgment rule doctrine are:

a. Actions that are contrary to the principle of fiduciary duty, including conflicts of interest;
b. Actions taken are not in accordance with the precautionary principle;
c. Contrary to the principle of good faith;
d. Incompetent;
e. Violate laws and regulations;
f. Lack of information in making decisions;
g. Hasty attitude and without prior investigation and unreasonable consideration rational.

Thus, the board of directors has great duties and responsibilities in managing the company. Proof that the board of directors made a mistake must fulfill the elements stipulated in Article 97 of the Limited Liability Company Law and the company's articles of association. Directors who have carried out their obligations with a professional attitude, good faith, full of prudence and do not violate the applicable laws and regulations as well as the company's articles of association, the losses incurred due to the decisions of the board of directors cannot be borne by the board of directors. However, now, in some countries, it is permissible for the Company to compensate members of the Board of Directors in some cases. For example in the United States in Sect. 5 of The Model Act. In this provision, the Company has the authority (is authorized) to reimburse the

costs of losses suffered by members of the Board of Directors, when he faces legal proceedings. However, it does not require to replace the costs incurred by the member of the Board of Directors. The reimbursement of costs does not question whether the member of the Board of Directors is guilty of what is being demanded or charged to him. The benchmark is that the act or deed is carried out in "good faith", and it is believed that the action taken is "reasonable" and in the best interests of the Company (reasonable for the best interest of the corporation) [12].

4 Conclusion

The Board of Directors as an organ of the company has an important role, because it is responsible for the progress of a company. The Board of Directors is not only responsible managerially but also legally responsible, and represents the interests of the company both inside and outside the court. In carrying out their duties and obligations, the steps taken may be detrimental to the company and can be held accountable, unless the board of directors can prove otherwise.

The business judgment rule doctrine is a doctrine that teaches that directors can obtain legal protection, are not responsible for making decisions that are detrimental to the company, by defending by proving that the steps taken in making decisions are right, even though they are detrimental to the company. The evidences include the existence of good faith, being professional, having no personal interest / conflict of interest and not violating the law and the company's articles of association.

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