



Legal Standing of Parent and Subsidiary Companies of Indonesian Subsidiary State-Owned Enterprises

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Abstract. The formation of State-Owned Enterprise Holding (BUMN) is a strategic plan to organize the BUMN's management structure and its subsidiaries, aiming to optimize BUMN performance and create a more competitive business environment in Indonesia. However, as this holdingization increases, legal consequences arise for BUMN's parent and subsidiary companies, especially concerning applying the principles of the Business Judgment Rule, which concerns legal protection for each company's directors. Therefore, further research needs to be done to discuss this issue. This research examines the problems: First, the legal standing of BUMN's parent and subsidiary companies in Indonesia. Second, the application of the principles of the Business Judgment Rule (BJR) to BUMN subsidiaries' directors in Indonesia. The method used in this research is normative juridical, using a positive legal approach and a conceptual approach using qualitative data types. The results of this research conclude that: First, the legal standing of a BUMN that has become a subsidiary in a holding company is no longer a BUMN because the shares of a BUMN subsidiary no longer come directly from the state but rather originate from its parent company. Second, there are several differences between the application of the principles of the Business Judgment Rule in the scope of BUMN subsidiaries and its parent company. As there is still a conflict of opinion related to BUMN subsidiaries' status, it is hoped that there will be a uniform view on the legal standing of BUMN subsidiaries, which could also affect the application of BJR within the company.

Keywords: BUMN, Business Judgment Rule, Board of Directors, Holding Company.

1. Introduction

In the context of the national economy, State-Owned Enterprises, also well-known as Badan Usaha Milik Negara (BUMN), is a concrete embodiment of Article 33 of the 1945 Constitution of the Republic of Indonesia (UUD RI 1945) and a form of development of business entities in Indonesia. BUMN is a business entity whose capital is wholly or primarily owned by the state through direct participation from separated state assets.[1] Since the formation of the Ministry of BUMN at the beginning of the reformation era in Indonesia, the management of BUMN has become the responsibility of the Ministry of BUMN, where the ministry is tasked with representing the government as the capital owner or shareholder of BUMN. In general, BUMN can be divided into 2 (two), namely Public Companies (Perum) and

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Limited Liability Companies (Persero). Especially for Persero, legal principles apply like a Limited Liability Company or *Perseroan Terbatas (PT)* and become subject to Law Number 19 of 2003 concerning State-Owned Enterprises (UU BUMN) and Law Number 40 of 2007 concerning Limited Liability Companies (UUPT).

The formation of BUMN Persero aims to carry out government policies in serving citizens and, simultaneously, to pursue profits considering the various challenges in the business world, which are increasingly developing each day.[2] Currently, to anticipate possible losses and increase diversification in the business fields it is managing, BUMN Persero then forms its subsidiary companies. In this case, BUMN Persero acts as the holding or parent company. Meanwhile, BUMN Persero and BUMN subsidiaries have something in common: they are both Limited Liability Companies. They are subject to Limited Liability Companies' legal principles as regulated in Law Number 40 of 2007. In other words, as legal entities, BUMN Persero and BUMN subsidiaries cannot act alone, so the role of the company's organs as a driving force is necessary. The company's organs include the General Meeting of Shareholders, Board of Commissioners, and Directors.

To maintain order in management and responsibility for every action, BUMN Persero and BUMN subsidiaries, through their directors, can apply and comply with certain legal principles or doctrines like a Limited Liability Company (PT). Legal doctrine, in this case, is helpful as a basis for controlling the behavior of company organs when carrying out their responsibilities. There are several types of legal doctrine as contained in Law Number 40 of 2007.

This study provides a pioneering exploration into how legal standing of parent and subsidiary companies in BUMN can be effectively transplanted into the state-owned enterprise landscape, which has a dual mandate of serving both public and government interests. This shift in focus not only highlights the innovative nature of our research but also its potential to contribute significantly to the evolving discourse on corporate governance in emerging markets like Indonesia.

Moreover, the novelty of our study extends beyond its mere application of the legal standing of parent and subsidiary companies to Indonesian BUMN; it also delves into the complex interplay between corporate law and public policy. This intersection has not been extensively studied in the context of Indonesian BUMN, making our research highly original. The governance of state-owned enterprises often necessitates a delicate balance between public policy objectives, government interests, and commercial viability.[3] By examining how the legal standing of parent and subsidiary companies in BUMN can be a valuable tool in navigating this intricate terrain, our study not only advances the theoretical understanding of corporate governance but also provides practical insights for policymakers, boards of directors, and legal practitioners operating in the Indonesian context. In summary, our research on the legal standing of parent and subsidiary companies in Indonesian subsidiary state-owned enterprises introduces a novel perspective that contributes significantly to the fields of corporate law, governance, and public policy.

2. Problems

Based on the matters previously explained, several problems will be discussed, which can be formulated as follows: What is the legal standing of parent and subsidiary companies in BUMN?

3. Method

The research uses a juridical-normative research method by taking a positive legal approach to laws and regulations and a conceptual approach using qualitative data types. The data source used is secondary data,[4] which combines primary, secondary, and tertiary legal materials to obtain information related to this research. The primary legal materials that will be utilized in this research include Law Number 19 of 2003 concerning State-Owned Enterprises, Law Number 40 of 2007 concerning Limited Liability Companies, and other related regulations such as BUMN State Ministerial Regulation Number PER-04/MBU/06/2020 concerning Amendments to the Regulation of the Minister of State for State-Owned Enterprises Number: PER-03/MBU/2012 concerning Appointment Guidelines Members of the Board of Directors and Members of the Board of Commissioners of BUMN Subsidiaries and Government Regulation Number 72 of 2016 concerning Amendments to Government Regulation Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies. Then, the secondary legal materials that are used include any textbooks that discuss legal issues, especially those relating to BUMN and limited liability companies, law journals, and other related articles. The tertiary legal materials utilized in this research include but are not limited to the law dictionary. The results of this research will then be analyzed using interpretation and presented in the form of narrative text.[5]

4. Discussion

4.1 Legal Standing of Parent and Subsidiary Companies in BUMN

Based on the provisions of Article 1 point 1 of Law Number 19 of 2003 concerning State-Owned Enterprises (BUMN Law), it is stated that "*State-Owned Enterprises, from now on referred to as BUMN, are business entities whose capital is wholly or largely owned by the state through direct participation originating from separated state assets.*" As a company whose position is owned by the State, BUMN has the aims and objectives of its establishment, including:

- a. Contribute to the development of the country's economy in general and provide income to the country in particular;
- b. Earning a profit;

- c. Carry out the function of providing public benefits such as producing goods and/or services of good quality and sufficient to fulfill the livelihood needs of the wider community;
- d. As a pioneer in implementing several economic activities that cooperatives, MSMEs, or the private sector cannot carry out;
- e. Play a full role in assisting and supporting business actors from weak economies, communities, and cooperatives.

Apart from that, in its position as a state company, BUMN is also bound by government provisions in the field of public law. This is because BUMN capital is and originates from separated state assets. According to Article 9 of the BUMN Law, BUMN consists of 2 (two) forms, namely Persero and Perum. A limited liability company or Persero is a state-owned company with the form of a PT whose assets are divided into shares, all or at least 51% of whose shares belong to the state of the Republic of Indonesia, which aims to make a profit. A public company or Perum is a BUMN whose entire capital or assets belong to the state of the Republic of Indonesia and are not divided into shares whose aim is to provide public benefits.

Based on the statements above, a State-Owned Enterprise is a company whose shares are mostly or entirely owned by the State through direct participation to fulfill the livelihood needs of many people while making a profit. BUMN can be divided into BUMN in the form of Persero and Perum. However, the state as a shareholder and the State-Owned Enterprise are separate entities. A separate entity means a separate business entity that, based on entity theory (aggregate theory), considers the company different from its shareholders and/or owners.[6] This principle protects company owners and/or shareholders for all specific company actions and activities in companies in the form of limited liability companies.

Separation of entities in limited liability companies creates the principle of limited liability of shareholders. The separation of the limited liability company entity is regulated in Article 3 Paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies, which states that the company's shareholders are not personally responsible for agreements made in the name of the company and are not liable for the company's losses over the shares they own. In other words, there is a separation of assets from the personal assets of the founder/management or what is known as separate patrimony.[7] If you use the separate entity theory and examine the definition of BUMN based on statutory regulations, then the BUMN's capital comes from the State Government. However, the assets are the assets of BUMN because BUMN and the State Government are separate entities.

Furthermore, as discussed in the introductory section above, the Government, in this case, the Ministry of BUMN, is focusing on building a holding company in the form of a cluster consisting of companies (subsidiary companies) in accordance with a common core—business of each BUMN. The formation of this BUMN Holding (parent company) was inspired by the success of holdings in other countries, such as in the Southeast Asia region, Temasek from Singapore, and Khazanah Nasional from Malaysia.[8] In line with this, BUMN Holding is the government's effort to face today's increasingly competitive business challenges, increasing the creation of

company market value (market value creation), strengthening synergy and the strategic role of BUMN in supporting various government programs to achieve national goals, carrying out business efficiency while pursuing maximum profits.[9]

Based on existing theories in corporate law, there are 2 (two) types of Holding Companies when viewed from the aspect of the business activities of the parent company, consisting of:[10]

- a. Investment Holding Company: In this type, the parent company only places shares or capital in its subsidiaries without carrying out any supporting or operational activities. As a consequence, the parent company only gets dividends or profit sharing from its subsidiaries;
- b. Operating Holding Company: In this type, the parent company not only owns shares in the subsidiary but also carries out business activities and exercises control over the subsidiary. At the implementation level, the parent company's business activities often serve as a guideline in determining the type of business activity permits the subsidiary must carry out.

The Ministry of BUMN uses two types of holding companies based on corporate law theory in carrying existing BUMNs. However, the current greater tendency is to use the operating holding company type.[11] Apart from that, the kind of holding company that is applied is also based on clusters depending on each company's characteristics and core businesses. However, many are still run by type. In this regard, the Ministry of BUMN has so far established several BUMN holdings in strategic sector clusters, including: [12]

- a. The formation of the BUMN Semen holding company was based on the Letter of the Minister of Finance of the Republic of Indonesia Number S-326/MK.016/1995, dated 5 June 1995, which appointed PT Semen Indonesia Persero Tbk. (Formerly known as PT Semen Gresik Persero Tbk) the holding company oversees several state-owned companies, including PT Semen Padang, PT Semen Tonasa, and Thang Long Cement;
- b. The formation of the BUMN Pupuk holding company was based on Government Regulation Number 38 of 1998, which appointed PT Pupuk Indonesia Persero (formerly known as PT Pupuk Sriwidjaja Persero) to be the holding company that oversees several BUMNs which are subsidiaries, including PT Petrokimia Gresik, PT Pupuk Kujang. PT Pupuk Kalimantan Timur, PT Rekayasa Industri, PT Pupuk Iskandar Muda, and PT Mega Eltra;
- c. The formation of the BUMN Perkebunan holding company was based on Government Regulation Number 72 of 2014, which appointed PT Perkebunan Nusantara III Persero to be the holding company that oversees the BUMN PT Perkebunan Nusantara I - XIV, which is a subsidiary;
- d. The BUMN Forestry holding was formed through Government Regulation Number 73 of 2014, which appointed Perum Perhutani as the holding company overseeing BUMN PT Inhutani I – PT Inhutani V, a subsidiary;

- e. The formation of a mining BUMN holding based on PP Number 72 of 2016 by selecting PT Indonesia Asahan Aluminium (Persero) (Inalum) as the holding company which will later become the parent of three mining BUMNs, including PT Timah (Persero) Tbk, PT Aneka Tambang (Persero) Tbk (Antam) and PT Bukit Asam (Persero) Tbk (PTBA). Persero status in the three BUMNs has been lost after the Extraordinary General Meeting of Shareholders (EGMS);
- f. The formation of the BUMN Oil and Gas holding was based on the same basis as the formation of the BUMN Mining holding, namely PP Number 72 of 2016 and after the signing of the deed of transfer of state-owned series B shares amounting to 56.96% in PT Perusahaan Gas Negara (Persero) to Pertamina by the Minister of BUMN Rini Soemarno, The government appointed PT Pertamina (Persero) as the holding company and PT Perusahaan Gas Negara as a subsidiary and the status of PT Perusahaan Gas Negara was lost;
- g. Establishment of a BUMN Pharmaceutical holding based on PP Number 76 of 2019 by appointing PT Bio Farma (Persero) as the holding company that oversees the BUMN PT Kimia Farma and PT Indonesia Farma, which are subsidiaries.

The several BUMN holdings that have been formed demonstrate that the Ministry of BUMN has experience developing holdings with various strategy models—starting from the hands-on management model where the involvement of the parent company management is very high. This can be seen from the cases of Pupuk Sriwijaya Holding and Semen Gresik. Then, it slowly transforms towards the Synergy Creation model, where the parent company no longer intervenes too much in the strategic and operational affairs of the subsidiary because the subsidiary is considered accountable for reporting and other matters.[13] This is currently being implemented, as is the case in the context of Pupuk Indonesia and Semen Indonesia.

In Indonesia, there has not been a legal definition of a Holding Company. In the regulations that have been in force in Indonesia, Parent Companies and Subsidiaries have been regulated in Law Number 1 of 1995 concerning Limited Liability Companies. In the Elucidation to Article 29, what is meant by "subsidiary" is a company that has a special relationship with another company that occurs because:

- a. The parent company owns 50% (fifty percent) of the shares;
- b. The parent company controls more than 50% (fifty percent) of the votes at the GMS;
- c. The parent company has influence and control in appointing and dismissing the Board of Directors and Commissioners of subsidiary companies.

Black's Law Dictionary defines the meaning of a Holding Company as: "A company that usually confines its activities to owning stock in, and supervising the management of, other companies. A holding company usually owns a controlling interest in the companies whose stocks it holds. For a corporation to gain tax consolidation benefits, including tax-free dividends and the ability to share operating

losses, the holding company must own 80% or more of the corporation's voting stock".[14]

Munir Fuady believes Holding companies can be called holding companies, parent companies, or controlling companies. Related to that, a holding company is a company that aims to own one or more shares in another company and/or regulate one or more of these other companies. As M. Yahya Harahap put forward, to get the benefit principle from limited liability or accountability limited, a company can form a "Subsidiary Company" or "Parent Company" business. Therefore, based on the rules of separation and distinction known as separate entities, the assets of the Parent Company and Subsidiary Companies are "isolated" from potential losses that may occur by one of them.

When viewed based on the BUMN Law, the definition of a BUMN Subsidiary needs to be explained in this regulation. The provisions governing the definition of a BUMN Subsidiary are contained in the Regulation of the Minister of State for State-Owned Enterprises Number PER-04/MBU/06/2020 concerning Amendments to the Regulation of the Minister of State for State-Owned Enterprises Number: PER-03/MBU/2012 concerning Appointment Guidelines Members of the Board of Directors and Members of the Board of Commissioners of BUMN Subsidiaries (Permeneg BUMN 4/2020) that what is meant by BUMN Subsidiary is a limited liability company with the majority of its shares owned by BUMN or a limited liability company controlled by BUMN.

Not only that, but also based on the explanation above, the emergence of legal implications for the holding companies is inevitable, mainly related to the status or legal position of each company, both for the company that is the parent company and the company that is subsidiary. This also applies to state-owned companies that hold holdings. By holding, there may be a change in the status or legal standing of these state-owned companies, especially those that are subsidiaries. Will its status or legal position remain as a state-owned company, or will it no longer be classified as a state-owned company? In point of fact, both BUMN holding companies and subsidiaries are classified as legal subjects. As legal subjects, both BUMN parent companies and subsidiaries have rights and obligations. Rights and obligations in law are part of what is called legal standing. Legal standing is a concept where every legal subject or object can exist within the scope of legal acts. Legal subjects or objects can carry out all actions and authority according to their status by having a position. Specifically, the legal standing in the context of a company refers to the legal status that a company has in carrying out its business activities.

In principle, the parent and subsidiary companies hold the juridical status as separate legal entities, which is like stretching the dividing line between the parent and subsidiary companies. When a BUMN as a parent company forms a BUMN subsidiary, the capital participation comes from the parent company's assets, not the parent company's shareholders, originating from the State Government. This has an impact on differences in liability between parent and subsidiary companies. Accountability refers to whom the Company is accountable for all its business activities. Next, the legal relationship between the parent company and the subsidiary is the relationship between the shareholders and the company. In this case, the

participation of the parent company means taking responsibility for the losses of the subsidiary if there is domination of the parent company, which results in unlawful acts or default, and there is proven loss from a third party. The parent company's responsibility to its subsidiaries can be personal, joint, and certain levels of responsibility.

Furthermore, look at the context of understanding BUMN as a legal entity based on the definition of BUMN according to the BUMN Law, where the State owns some or all of its shares. In that case, the legal position of BUMN, a subsidiary of the holding company, is not included as a BUMN, whether BUMN in the form of a Persero or Perum. Because the shares of BUMN, which have become subsidiaries, no longer come from the State because what is referred to as BUMN based on Article 1 Paragraph 1 of the BUMN Law is a business entity whose capital is wholly or primarily owned by the state through direct participation originating from separated state assets. If we look at the definition of BUMN, it is emphasized that BUMN has wealth that comes from divided state assets. Here, what is meant by separated state assets is state assets sourced from the APBN or other legitimate acquisitions and included in the form of state capital participation in BUMN, which is managed according to corporate principles. Meanwhile, a BUMN subsidiary company is established, and the capital participation comes from BUMN, the parent company. In that case, the capital does not come from the State but from the BUMN, the parent company, as a legal entity with separate assets from the shareholders.

The BUMN Law in Article 1 defines BUMN as a business entity whose capital is wholly or partially owned by the state through direct participation from separated state assets. In contrast, article 2A paragraphs (3) and (4) Government Regulation Number 72 of 2016 states that assets in BUMN that are transferred to subsidiaries in the form of capital participation are transformed or changed into shares/capital and become the assets of the BUMN or Limited Liability Company. Thus, the wealth or assets of a BUMN subsidiary are BUMN wealth or assets that have been separated and become independent assets of the BUMN subsidiary. It is crucial to keep in mind that the formation of BUMN Holding is not the same as privatization because privatization aims, among other things, to expand public ownership or release BUMN shares to the broader community. However, in holding, majority share ownership is still in the hands of the state through the BUMN Holding, and the BUMN Holding only transfers shares to its subsidiaries.[19]

The legal standing of BUMN, a subsidiary of a holding company, has also been confirmed in the definition contained in the Minister of State for BUMN Regulation No. PER-03/MBU/2012 of 2012 concerning Guidelines for the Appointment of Members of the Board of Directors and Members of the Board of Commissioners of Subsidiaries of State-Owned Enterprises. Article 1 point 2 of the Minister of State Regulation on BUMN explains what a BUMN Subsidiary means: a Limited Liability Company whose shares are owned mainly by BUMN or a limited liability company controlled by BUMN. From this definition, BUMNs, which have become subsidiaries, are only referred to as limited liability companies and are no longer categorized as State-Owned Enterprises (BUMN).

In addition, the juridical standing of BUMN subsidiary is also seen from the authority of the Minister of BUMN in appointing members of the Board of Commissioners and Board of Directors of BUMN subsidiaries. According to Article 14 paragraph (1) of the BUMN Law, the Minister, in this case, the Minister of State for BUMN, acts as the GMS if the state owns all of the Persero's shares and acts as a shareholder in the Persero and limited liability company if not all of the shares are owned by the State. If the Minister acts as the GMS, then by referring to Article 15 in conjunction with Article 27 of BUMN, the Minister has the authority to appoint and dismiss Directors and appoint and dismiss Commissioners. However, this authority is not found in Government Regulation Number 44 of 2005 in conjunction with Government Regulation Number 72 of 2016. Even in Article 2 paragraph (2) of BUMN State Ministerial Regulation Number 3 of 2012, it is stated: "*Appointment of members of the Board of Directors and members of the Board of Commissioners of Subsidiaries carried out by the relevant GMS of the Subsidiary through a nomination process based on the guidelines set out in this Ministerial Regulation.*" These regulations clearly state that the appointment of members of the Board of Directors and members of the Board of Commissioners of BUMN Subsidiaries is not carried out by the Minister of BUMN but rather by the GMS of Subsidiaries. This clearly shows that BUMN subsidiaries' legal status differs from its BUMN parent company.

However, there are still differences in understanding between the two leading judicial authorities in Indonesia regarding the position of BUMN subsidiaries. As stated in Constitutional Court Decision Number 01/PHPUPRES/XVII/2019, the status or position of a BUMN subsidiary is separate or not the same as its parent company (BUMN). This is because BUMN subsidiaries are partners who collaborate with BUMN.[15] This decision is relevant to the description stated above. On the other hand, in Supreme Court Decision Number 21 P/HUM/2017, the Panel of Judges considered that the form of BUMN had not changed to an ordinary limited liability company, but rather BUMN remained a subsidiary of BUMN. This is also in line with the provisions of Government Regulation Number 72 of 2016 concerning Amendments to Government Regulation Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies. Through this provision, the government wants to convey that BUMN subsidiaries in the holding structure remain controlled by the state as indicated by the special privileges owned by the state. BUMN subsidiaries are still treated the same as BUMN. The same treatment is like getting an obligation from the government to carry out public services and/or getting special state and/or government policies. It is believed that a BUMN subsidiary is just like an extension of the parent company so that the wealth of the BUMN subsidiary also becomes part of the BUMN's wealth. Because the assets of the BUMN Holding are part of the state's assets, the assets of the BUMN subsidiaries should also be part of the state's assets directly. So, even though the state's direct state shares are only a minority in the state-owned subsidiary, the state has a share classification called series A Dwiwarna shares. Ownership of the Dwiwarna A series share classification allows the state to control strategic matters and decisions in BUMN subsidiaries.[16]

The lack of uniformity of views regarding the legal position of subsidiaries has undoubtedly given rise to a lot of conflict of opinion among academics and legal

practitioners. However, in this regard, the author tends to believe that BUMN capital comes from separate state assets because BUMN invests capital in shares in its subsidiaries, not the state that invests money directly in BUMN subsidiaries. Everything cannot be put together under the pretext of a flow of capital participation as proof of unified ownership. In this case, capital participation is only a form of control from the parent to the subsidiary. That said, the legal position of a BUMN subsidiary is no longer a BUMN. Still, it is only a limited liability company, which is subject to the provisions of the Indonesian Company Law.

5. Conclusion

The formation of State-Owned Enterprises (BUMN) Holding in Indonesia brings legal and operational challenges, especially concerning the juridical status. By the analysis of the secondary data with the limitation only in the context of normative research, the study concluded that a common thread can be drawn that the status or legal standing of BUMN, which has become a subsidiary in a holding company, is no longer a BUMN because the shares of BUMN, which have become subsidiaries, no longer come directly from the state but come from the BUMN which is the parent company. However, in practice, there is still a dualism of opinion regarding the legal standing of BUMN subsidiaries, especially with the share classification, which allows the state to maintain control over subsidiaries and gives special rights to subsidiaries like BUMN so that BUMN subsidiaries are equated by the government with BUMN parent company. It is evident that there is a pressing need to address the ambiguity surrounding the legal standing of state-owned enterprise (BUMN) subsidiaries within the context of a holding company structure. As highlighted, the transformation of BUMNs into subsidiaries under a holding company structure has blurred the traditional delineation between BUMNs and private entities. This shift in ownership dynamics necessitates a comprehensive review of the legal framework governing BUMN subsidiaries. To resolve the dualism of opinion and establish clarity on the legal status of BUMN subsidiaries, further research is essential. Scholars and legal experts should collaborate to delve deeper into the intricacies of share classification, examining its implications on state control and the distinct rights granted to BUMN subsidiaries

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