

One-Tier System Juridical Analysis in Single-Member Company in Indonesia

Devi Atikawati¹, Reka Dewantara², Dyah Aju Wisnuwardhani³

^{1,2,3}Master of Notary Study Program, Faculty of Law, Universitas Brawijaya, Indonesia

deviatika@student.ub.ac.id, rainerfhub@gmail.com, diahwisnu20@gmail.com

Abstract

To embody the ease of doing business, the government introduced a new entity, namely a single-member company, by adhering to a one-tier system but not in line with the organs regulated in Law Number 40 of 2007 concerning Limited Liability Companies. The objective of the research is to examine the one-tier system in single-member companies in Indonesia. This research is normative-descriptive juridical research through literature study and aims to analyze the juridical implications of the one-tier system in the organs of single-member companies after the enactment of Law Number 11 of 2020 concerning Job Creation. Based on the results of the study, it is known that there are differences in the terms used in the designation of single-member company organs, and there may be concurrent positions in single-member companies, this has implications for the absence of the checks and balances principle in a company and concurrent positions in a company have the potential to cause a conflict of interest where every management action that contains a conflict of interest is categorized as an act of bad faith. Because such actions are considered as a breach of fiduciary duty and the obligation to obey the laws and regulations.

Keywords

one-tier system; organ; multiple position; single-member company



I. Introduction

After many protests and controversies from the public (CNN, 2020) finally, in 2020, President Joko Widodo enacted Law Number 11 of 2020 concerning Job Creation (hereinafter referred to as the Job Creation Law). This law was formed using the omnibus lawmaking technique (Adriadi et al., 2021; Anggono, 2020; Garner, 2009), namely methods or techniques in the formation of laws and regulations by forming one regulation to amend, revoke, or ratify several regulations at once. One of the amended regulations relates to Limited Liability Companies, which was previously regulated in Law Number 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as UUPT) (Adriadi et al., 2021; Sudja'i & Mardikaningsih, 2021). There are several rules amended by the Job Creation Law, namely Article 1, Article 7, Article 32, Article 153 and there are additional rules, namely Article 153A to Article 153J (Susanto, 2020).

One of the countries that implement this one-tier system is Malaysia, which focuses more on Malaysian family companies, where a person has two roles at the same time in the same company, namely as CEO (director) who is responsible for running the company and also serves as the Board of Commissioners in charge of supervising and evaluating the company's performance. This phenomenon is called CEO duality (Gul et al., 2003). In

carrying out the role, the CEO duality will face a personal conflict of interest (Rashid et al., 2003). According to Finkelstein & D'Aveni (1994) and Moscu (2013), Directors who also serve as the Board of Commissioners often abuse their power for their interests so that it harms the performance of the company and shareholders. The increase in the value of the company's shares, the higher the company value, the higher it will be (Katharina, 2021). In the current economic development, manufacturing companies are required to be able to compete in the industrial world (Afiezan, 2020). The existence of the company can grow and be sustainable and the company gets a positive image from the wider community (Saleh, 2019).

Directors and the Board of Commissioners in the same PT. However, concurrent positions of the Board of Directors and/or Commissioners and/or RUPS in one PT have the potential to cause a conflict of interest within the PT. Regarding this conflict of interest, M. Yahya Harahap stated, in carrying out the management of PT, any action that contains a conflict of interest is categorized as an act of bad faith. This, according to Yahya, is because such action (which has a conflict of interest) violates the obligation of trust and the obligation to obey the laws and regulations (Harahap, 2021).

In the Limited Liability Company Law, there is indeed no prohibition for shareholders to hold concurrent positions both as Directors and as Commissioners of the Company, unless there are other laws and regulations that stipulate otherwise, for example in *lex specialis* laws and regulations, such as Article 26 of the Law No. 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition ("Law No. 5/1999"), Item 3 (e) (7) Bapepam and LK Regulation No. III.A.3 regarding the Director of the Stock Exchange, Item 3 (e) (7) Bapepam and LK Regulation No. III.B.3 regarding the Director of the Clearing Guarantee Institution, and others. In these regulations, it is stated that it is prohibited to hold concurrent positions (Directors or Commissioners) in other companies, not in the same company (Tobing, 2013).

II. Research Methods

This research uses normative legal research. The research approach used in this study, the first is a Statue Approach to analyze the consistency and synchronization between the principles underlying the organs of limited liability companies in Law Number 40 of 2007 concerning Limited Liability Companies and the organs of single-member companies, Law Number 40 of 2007 concerning Limited Liability Companies. 11 of 2020 concerning Job Creation, and the two conceptual approaches to analyzing how the conception of legal regulation regarding organs in single-member companies will be processed systematically and coherently based on research results to avoid the impression of subjectivity (Sunggono, 2015). To solve legal issues in this research, the authors use primary, secondary, and tertiary legal materials. Literature study is used as a research method considering that a study of the legal form of a single-member company can be carried out through searching the concepts and regulations through primary legal materials in the form of laws and regulations, secondary materials in the form of books, journals, news, and official reports as well as tertiary materials in the form of law dictionary and language dictionary.

III. Discussion

3.1 Limited Liability Company represented by Organs

Theoretically, it doesn't seem to be a problem if PT is put forward as a legal subject. This means that at the theoretical level, it can be explained that the stipulation of a PT as a

legal subject means that the PT has the legal capacity (legal standing) to appear before the court if the PT sues and is sued by another party.

However, in practical terms, this is difficult to realize. It is because PT as a legal entity is a legal creation. This means that PT is the bearer of rights and obligations of something abstract.

According to Gunawan Widjaja, PT as a legal entity (artificial person), but PT is not possible to run its activities. For this reason, PT in carrying out daily activities is represented by organs. Organs of directors who carry out daily activities under the supervision of commissioners organ (Widjaja, 2003). A similar opinion was expressed by Hendra Setiawan Boen, PT as a legal entity, therefore it has separate assets from the people who run the company, both the founders, shareholders, directors, and commissioners. PT as a legal entity is considered the same as individuals who can carry out legal actions, and therefore if any legal action committed by the company turns out to contain unlawful acts, then the PT should be held accountable (Setiawan, 2008).

A similar opinion was expressed by Fred B.G Tumbuan, the Board of Directors is an organ that represents the interests of the company as a legal subject. The company is the cause of the existence (*raison d'entre*) of directors because if there is no company, there is also no board of directors. That is also why it is proper to serve the interests of the company (i.e. all shareholders), not the interests of one or several shareholders. Directors are not representatives of shareholders. The Board of Directors is the representative of the Company as "*persona standi in judicio*" or an independent legal subject (Tumbuan, 2007).

From some opinions from experts above, it can be stated here, that the PT is qualified as a legal subject because the PT has fulfilled the characteristics of being called a legal entity. The characteristics are the separation of assets between the PT business entity and the company owner; the existence of a clear PT's objectives; and the existence of an organ or management in PT. The UUPT itself is normatively expressly stated that PT is a legal entity. Thus, one element that is quite important in a PT business entity is the organ. This is also explained in the UUPT, the organs of the company are the General Meeting of Shareholders, Directors, and Commissioners.

The general understanding of the management of the Board of Directors in the context of the Company includes the duties or functions of carrying out administrative powers and the maintenance of the Company's assets. In other words, carrying out the management or handling of the Company's business in the sense of (Woon, 2009) in accordance with the purposes and objectives as well as the activities of the Company within the limits of power or capacity given by law and AD (Ichsan, 1969).

The Board of Directors as the management of the company is the "official" of the company. The position is a member of the Board of Directors or the Board of Directors of the Company (Oliver, 1991). Members of the board of directors or directors are not staff or employees. Therefore, they are not entitled to a preferential payment if the Company is liquidated (Oliver, 1991). The Board of Directors carries out management, including day-to-day management, understanding the implementation of management, including managing and leading daily tasks, namely guiding and developing the activities of the Company towards achieving the goals and objectives set out in the AD. This is confirmed in the explanation of Article 92 paragraph (2) of the Company Law. Management function, assigning the Board of Directors to manage the Company which includes the day-to-day management of the Company. The authority to represent is for and on behalf of the Company. Not on behalf of the Board of Directors, but on behalf of the Company. There is a temporary assumption that the position of commissioner in a PT is merely a compliment. Such opinion, if it is related to the function of the PT organ as regulated in the KUHD (Commercial Code), may be true. It is called so, because the organs of the Commissioner in the KUHD concept are facultative,

meaning they may exist, they may or may not. However, in practice, if ADPT (Articles of Association of the Limited Liability Company) was examined when it was still referring to the KUHD, almost all PTs that were established had commissioners. Meanwhile, in the old UUP (Law Number 1 of 1995 concerning Limited Liability Companies), the Commissioners are implicitly mentioned as one of the organs in PT. Their jobs are not light, namely overseeing the performance of the board of directors.

If it is stated that the organs of the Board of Commissioners are no less important than other organs. This organ is in charge of supervising the tasks carried out by the Board of Directors. The definition of the Board of Commissioners is stated in Article 1 point 6 of the Company Law as follows, the Board of Commissioners is the organ of the company that is in charge of carrying out general and/or special supervision in accordance with the articles of association and providing advice to the Board of Directors.

Concerning the duties carried out by the Board of Commissioners, it is worth paying attention to what Mas Achmad Daniri stated, as one of the organs of the company, the Board of Commissioners must have the responsibility and authority to oversee the actions of the board of directors. Not only that, but the Board of Commissioners also has the right to advise the Board of Directors if needed at any time. The Board of Commissioners is expected to act independently and critically, both to one another and to the Board of Directors. Independent here means that the commissioners are not just a rubber stamp from the Board of Directors but are active in considering (reviewing) and even criticizing (challenging) the strategic policies of the Board of Directors (Daniri, 2005).

The duties that must be carried out by the Board of Commissioners are described in Article 108 of the Company Law, as follows: The Board of Commissioners supervises management policies, the general course of management, both regarding the Company and the Company's business, and provides advice to the Board of Directors. The supervision and advising as referred to in paragraph (1) is carried out for the benefit of the Company and in accordance with the purposes and objectives of the Company.

From the provisions of the article above, it appears that the Board of Commissioners as a supervisory agency in carrying out its duties must refer to the purposes and objectives of the company.

3.2 Founder of a single-member company listed in the Statement of Establishment

Limited Liability Company to obtain legal entity status, the deed of the establishment including the articles of association must be ratified by the Minister of Law and Human Rights of the Republic of Indonesia. With the ratification, registration, and announcement of the deed of establishment of the PT, the Articles of Association of the Limited Liability Company (ADPT) concerned are not only binding on the founders of the company, shareholders, management, but also for the parties who wish to conduct transactions with the PT. if stated in a formal juridical manner, ADPT is a positive law for PT (Sembiring, 2007). It is called so because the purposes and objectives of the PT are described in the ADPT, who are the shareholders of the PT, how much is the capital of the PT, and other matters concerning the PT. According to experts such as Chatamarrusjid Ais and Fred BG Tumbuan, ADPT is the spirit in PT. Therefore, ADPT must be able to reflect on what and how the PT is to be established. This issue is also stated in Article 8 of the UUP (Ais, 2000; Tumbuan, 2007)

- 1) The deed of establishment contains the articles of association and other information relating to the establishment of the Company.
- 2) Other information as referred to in paragraph (1) contains at least:
 - a. The full name, place, and date of birth, occupation, place of residence, and nationality of the individual founder, or the name, domicile, and complete address

- as well as the number and date of the Ministerial Decree concerning the legalization of a legal entity from the founder of the Company;
- b. Full name, place, and date of birth, occupation, place of residence, nationality of the first appointed member of the Board of Directors and Board of Commissioners;
 - c. The name of the shareholder who has subscribed to the shares, details of the number of shares, and the nominal value of the shares that have been issued and paid up.
- 3) In making the deed of establishment, the founder can be represented by another person based on a power of attorney.

The things that must be included in the ADPT are explained in Article 15 of the Company Law as follows:

- 1) The articles of association as referred to in Article 8 paragraph (1) contain at least: the name and domicile of the Company; the purposes and objectives as well as the Company's business activities; the period of establishment of the Company; the amount of authorized capital, issued capital, and paid-up capital; the number of shares, the classification of shares if any, including the number of shares for each classification, the rights attached to each share, and the nominal value of each share; the name of position and number of members of the Board of Directors and Board of Commissioners; determination of the place and procedure for holding the RUPS; procedures for the appointment, replacement, dismissal of members of the Board of Directors and the Board of Commissioners; procedures for using profits and distribution of dividends.
- 2) In addition to the provisions as referred to in paragraph (1), the articles of association may also contain other provisions that are not contrary to this law.
- 3) The articles of association may not contain provisions regarding the receipt of fixed interest on shares; and provisions regarding the provision of personal benefits to founders or other parties.

It can be seen in the description above, that ADPT contains data on the company's organs when it was first established, in terms of the board of directors, board of commissioners, and shareholders. It is different from the deed of establishment of the company, the statement letter for the establishment of a single-member company contains the following: (DITJEN AHU, 2021) Company data containing: Company name; Company email; Company address; Business capital with a maximum of IDR 5 billion; Business activities; Business owner data; Beneficial owner data (can concurrently be a business owner, allowed for Indonesian citizens or foreigners).

If seen from the description above, in the statement of establishment in terms of the company's organs, it consists of business owners and beneficial owners. According to the Minister of Law and Human Rights, Yasonna Laoli, to facilitate business for micro and small businesses, there is a simplification of the organs of single-member companies, namely the business owner or founder in a single-member company automatically acting as a director and concurrently as a board of commissioners, if the founder is concurrently the owner business or beneficial owner, the founder represents all organs in one person. In a one-tier system, the role of the board of commissioners (supervisor) and the role of the board of directors (executive) are combined into one organ/organ. This container is called the board of directors (BOD). This unification makes the roles of supervisors and executives unclear (Retmadi, 2020).

3.3 Concurrent Position by Limited Liability Company Organ

In the existing cases related to concurrent positions, most cases related to concurrent positions in terms of being a director/board of commissioner at the parent company and

subsidiaries, or in different state-owned companies. Such as the case of concurrent positions that occurred between PT. Vayatour that filed a lawsuit to the Business Competition Supervisory Commission (KPPU) with allegations of abuse of dominant position by PT. Garuda Indonesia and its subsidiary PT. Abacus Indonesia as the sole distributor of the abacus system provided by PT. Garuda Indonesia to protect the ARGA (Automated Reservation of Garuda Airways) system, this ARGA is a reservation system for booking domestic Garuda flight tickets (Samawati, 2018). Another case regarding the alleged abuse of concurrent positions also occurred at PT. Indofood Sukses Makmur Tbk, as part of the “Indofood Group” group of companies, where PT. Indofood Sukses Makmur Tbk, as a holding company with 31 subsidiaries, the results of the search found that there were concurrent positions within the Indofood Group involving three people, namely Anthoni Salim, Fransiscus Welirang, and Benny S. Santoso in several subsidiaries of PT. Indofood Sukses Makmur Tbk which has the same type of supporting business. Anthoni Salim as President Director of PT. Indofood Sukses Makmur Tbk also holds the position of President Director of PT. Indosentra Pelangi, besides that, he also holds the position of commissioner of PT. Inti Abadi Kemasindo, PT. Bogasari Sentra Flour Mills, PT. Intisari Flour Mills. Fransiscus Welirang occupied the position of director of PT. Indofood Sukses Makmur Tbk, president director of PT. Inti Abadi Kemasindo, PT. Bogasari Sentra Flour Mills, and PT. Intisari Flour Mills. Benny S. Santoso is the main commissioner of PT. Inti Abadi Kemasindo, PT. Putri Daya Usahatama, PT. Bogasari Sentra Flour Mills, PT. Intisari Flour Mills, besides that, he also serves as a commissioner of PT. Indofood Sukses Makmur Tbk and PT. Indosentra Pelangi (Samawati, 2018; Sugarda, 2015).

In the provisions of the UUPT, there are no rules that explicitly prohibit or allow concurrent positions of the Board of Directors and the Board of Commissioners in the same PT. However, the concurrent positions of the Board of Directors and Commissioners in one PT have the potential to cause a conflict of interest within the PT. Based on Article 92 paragraph (1) of the UUPT, the duties of the Board of Directors are to carry out the management of the Company for the benefit of the Company and in accordance with the purposes and objectives of the Company. The Board of Directors of a PT may consist of 1 or more people (Article 92 paragraph (3) of UUPT). Meanwhile, the duties of the Board of Commissioners are to supervise the management policies, the general course of management, both regarding the Company and the Company's business, and provide advice to the Board of Directors (Article 108 paragraph (1) of UUPT). The Board of Commissioners may consist of 1 (one) person or more (Article 108 paragraph (3) of UUPT).

If look at the two provisions regarding the Board of Directors and the Board of Commissioners, it can be seen that the main task of the Board of Directors is to manage PT, if in a PT the directors concurrently serve as the Board of Commissioners, especially if held by one person, it will result in the emergence of a conflict of interest. This conflict of interest is because the management of PT is feared to be out of control because the authority to carry out supervision and management is held by the same person. In the event of a loss or bankruptcy due to a conflict of interest in the management of a PT, the Board of Directors who is concurrently the Board of Commissioners cannot avoid full personal responsibility, because based on Article 95 paragraph (5) letter c jo. Article 104 paragraph (4) letter c of the UUPT, the Board of Directors who can prove that there is no conflict of interest, either directly or indirectly, over management actions that result in losses, cannot be held responsible for the loss or bankruptcy of PT.

Conflict of interest, namely in carrying out the management of PT, every action that contains a conflict of interest is categorized as an act of bad faith. This, according to Yahya Harahap, is because such an act violates the obligation of trust and the obligation to obey the laws and regulations (Harahap, 2021). Meanwhile, from the side of the Board of

Commissioners who also double as the Board of Directors, full personal responsibility applies if the Board of Commissioners has a personal interest, either directly or indirectly, in the management actions of the Board of Directors that result in losses or bankruptcy (Article 114 paragraph (5) letter b jo. Article 115 paragraph (3) letter c of UUPT). Even though the Board of Directors and the Board of Commissioners each have more than one person, it is still not recommended to have concurrent positions (Hadi, 2012).

3.4 The Juridical Implications for the Occurrence of a One-Tier System in a Single-Member Company

The working relationship between the board of commissioners and the board of directors is a relationship of checks and balances with the ultimate goal of progress and health of the Company. The board of commissioners and directors have a shared commitment to carry out their respective duties to achieve the Company's business continuity in the long term, which is reflected in:

1. The achievement of consistent and sustainable growth of the Company as reflected in the improving margin ratios such as an increase in assets, operating revenues, market share, and equity;
2. Good implementation of internal control and risk management;
3. Achievement of optimal returns for Shareholders (in a single-member PTs called Beneficiary Owners);
4. Protection of the interests of Stakeholders in a reasonable manner;
5. Implementation of a reasonable succession of leadership for the sake of management continuity in all lines of the Company's organization;
6. The consistent implementation of GCG in the Company;
7. Reduce the occurrence of various deviations in business behaviour that can harm the Company's business itself and at the same time provide protection for the Company in facing the challenges of environmental change.

The relationship between the board of directors and the company is not only based on a working relationship, the board of directors also has a fiduciary relationship with the company. The Board of Directors has a fiduciary position in the company (Fisher, 2001; Kusumawardani, 2013). A fiduciary relationship arises because one party does something for the benefit of the other party to the exclusion of his interests. The fiduciary duty of the board of directors contains the following principles: (Ais, 2000)

1. The Board of Directors in carrying out their duties may not do so for personal interests or the interests of third parties, without the approval and or knowledge of the company.
2. The Board of Directors may not take advantage of their position as management to gain profit, either for themselves or for third parties, except with the approval of the company.
3. The Board of Directors may not use or misuse the company's assets

In the provisions of the UUPT, there are no rules that explicitly prohibit or allow concurrent positions of the Board of Directors and the Board of Commissioners in the same PT. However, the concurrent positions of the Board of Directors and Commissioners in one PT have the potential to cause a conflict of interest within the PT (Hadi, 2012).

If there is a concurrent position that results in a conflict of interest, even though members of the board of directors are obliged to avoid it in carrying out the management of the Company. Every management action that contains a conflict of interest is categorized as an act of bad faith. Because such an action breach of fiduciary duty and the obligation to obey the laws and regulations (Woon, 2009).

The scope of obligations of members of the Board of Directors to avoid conflicts of interest in carrying out the management of the Company includes:

- a. The obligation not to use the Company's money and property for personal interests. If this obligation is violated and causes the Company to suffer losses the member of the Board of Directors: Qualified as committing an unlawful act (*onrechtmatigedaad*, unlawful act) based on Article 1365 of the Civil Code; For this action, the member of the Board of Directors concerned is threatened with civil liability and may even be charged with criminal responsibility for embezzling the Company's money under Article 372 of the Civil Code or fraud based on Article 278 of the Civil Code.
- b. Using Company information for personal interests. This act is categorized as a breach of fiduciary duty.
- c. Not using a position for personal gains, such as accepting a bribe, is considered as a breach of fiduciary duty.
- d. Not withholding or taking any part of the company's profits for personal gain. Taking or withholding a portion of the Company's profits for personal gain is categorized as a confidential benefit by the member of the Board of Directors concerned, therefore, the act contains a conflict of interest and is qualified as a breach of fiduciary duty.
- e. Transactions with the Company are prohibited. Members of the Board of Directors are prohibited from conducting transactions between themselves and the Company: In such case, the member of the Board of Directors has violated the obligations that prohibit him from entering into contracts or transactions with the Company which he must take care of himself; The act is categorized as an act of an interested party. This prohibition may not be violated by members of the Board of Directors, either directly or indirectly, including their family members or friends.
- f. Prohibition of competing with the Company.

Members of the board of directors in carrying out their obligations to manage the Company is prohibited from competing with the Company. Violation of this prohibition is categorized as a conflict or conflict of obligations (duty conflict). On the one hand, he must have good intentions and be trusted to manage the Company, while on the other hand, he must compete with the Company. Therefore, such action is categorized as a duty conflict and is qualified as a breach of fiduciary duty and good faith duty.

Thus the breadth of the scope of meaning and aspects of good faith in the management of the Company must be carried out by members of the Board of Directors. The effect of a breach of fiduciary duty is categorized as an "ultra vires" act. However, the agreement or contract made in such a case is not void because of or by law but can be cancelled. Therefore, the Company or any third party involved can demand the cancellation of the agreement accompanied by a claim for compensation experienced or claim the profits taken and detained by the members of the Board of Directors involved (Harahap, 2021).

In a single-member company, a founder can serve as a director who manages the company, a board of commissioners who oversees the company, as well as shareholders or beneficial owners when referring to the statement letter for the establishment of a single-member company. So, if the shareholder or beneficial owner also intervenes in carrying out the company's legal actions so that it involves personal interests and is detrimental to the single-member company, then Article 153J is regulated as follows:

- 1) Shareholders of the Company for Micro and Small Enterprises are not personally responsible for the engagements made on behalf of the Company and are not responsible for the Company's losses above the shares owned.
- 2) The provisions as referred to in paragraph (1) do not apply if b. the shareholder concerned, either directly or indirectly in bad faith, uses the Company for personal gain;

IV. Conclusion

From the discussion that has been described in the previous section, the authors conclude that in a single-member company the founder of the company can have concurrent positions, this is also corroborated by the opinion of Yasonna Laoly that single-member companies adhere to a one-tier system, this also reflected from the content of the statement letter for the establishment of a single-member company that allows for concurrent positions to occur. Regarding this concurrent position, the provisions of the UUPT are not explicitly regulated to prohibit or allow concurrent positions of the Board of Directors and the Board of Commissioners in the same company. However, concurrent positions of the Board of Directors and/or Commissioners and/or shareholders in one company have the potential to cause a conflict of interest within the PT. Regarding this conflict of interest, M. Yahya Harahap in the book of Limited Liability Company Law states, in carrying out the management of the Company, any action that contains a conflict of interest is categorized as an act of bad faith, and if due to personal interest it is detrimental to the company, then it can be qualified as commit an unlawful act (*onrechtmatigedaad*, unlawful act) based on Article 1365 of the Civil Code and for that action, the member of the Board of Directors concerned is threatened with civil liability and may even be charged with criminal responsibility for embezzling the Company's money under Article 372 of the Civil Code or fraud based on Article 278 of the Civil Code. In connection with the conclusions described above, the authors provide recommendations concerning a clear definition of the organs of single-member companies and their responsibilities, if they are subject to the rules of a limited liability company, then can be explained in the limited liability company law regarding the exception of organs in single-member companies.

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