

Re-Appointment of Directors and Commissioners in the Same Position in a Limited Liability Company

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Abstract

A limited liability company (PT) or Naamloze Vennootschap (NV) is a legal entity to run a business that has capital, with the organs of the company being the General Meeting of Shareholders (GMS), Directors, and Commissioners. Based on the explanation of Law Number 40 of 2007, the appointment of the Board of Directors is the authority of the GMS. The Board of Directors has the authority to represent the company both inside and outside of the court. Likewise, the Board of Commissioners is also the authority of the GMS. The Board of Directors has the authority to supervise the company which is carried out by the Board of Directors. Directors and Commissioners are appointed for a certain term of office in accordance with the Articles of Association and/or the decision of the GMS. If their term of office has expired, the Directors and Commissioners can be reappointed. The GMS can, however, decide at any time to get rid of the Board of Directors and Commissioners.

Keywords: Directors, Commissioners, Limited Liability Companies, General Meeting of Shareholders.

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INTRODUCTION

Basically, everyone's needs cannot be fulfilled alone without the help of others. As stated by Aristotle, humans are destined to live in society and interact with each other, a thing that distinguishes humans from other creatures. Everyone must have relationships with other people to fulfill all their needs, including binding themselves to the agreement. An agreement is a legal act in which the parties are mutually committed to carrying out something while the agreement itself is a source of engagement. In addition to that, it is also regulated in law. The provisions of Article 1233 of the Civil Code state that "Every agreement is emergent because the law makes the agreement valid." A contract is legal if it meets the requirements of Section 1320 of the Civil Code, which are: (1) Consensus on those who bind themselves; (2) The ability to make an engagement; (3) A specific matter; and (4) A permissible cause.

Legal subjects are those who have rights and responsibilities under the law. In daily life, the subjects of law in the Indonesian legal system, which is based on the Dutch legal system, are persons and legal entities (companies, organizations, and institutions).

Furthermore, in this article, we will explore the legal issue of legal entities, specifically limited liability companies. "Limited Liability Company" has two syllables: "company" and "limited." A Capital Company refers to the holdings or shares that comprise the capital of a Limited Liability Company. The term "limited" refers to the shareholders' responsibilities, which are limited to the nominal value of the shares they own.

A limited liability company, or Naamloze Vennootschap (NV), is a legal entity to run a business that has a capital consisting of shares, the owner of which has as many shares as the shares it owns. Because the capital consists of shares that can be traded, changes in company ownership can be made without the need to dissolve the company. The Limited Liability Company itself is a business organization that has an official legal entity from the Minister of Law and Human Rights of the Republic of Indonesia, wherein in the company there are at least two shareholders. According to Chidir Ali (2014), in a limited liability company, shareholders are not obliged to lead the company because they can appoint someone other than the shareholders to be the head of the company.

Directors, as well as commissioners, are appointed directly by the shareholders through the GMS, based on Article 94 Paragraph (1) of Law No. 40 of 2007, which reads, "Members of the Board of Directors are appointed by the GMS." For the Board of Commissioners, it is regulated in Article 111 Paragraph (1) of Law No. 40 of 2007, which reads, "Members of the Board of Commissioners are appointed by the GMS." Based on how Article 94 Paragraph 1 and Article 111 Paragraph 1 are explained, the GMS has the power to choose the Board of Directors and Commissioners. This power cannot be given to any other part of the company.

Furthermore, there is a period of time for the positions of directors and commissioners. Although not explicitly stipulated in Law No. 40 of 2007 concerning Limited Liability Companies, in the explanation of Article 94 Paragraph (3) of Law No. 40 of 2007, it is explained that "The requirement for the appointment of members of the Board of Directors for a "certain period of time" means that members of the Board of Directors whose term of office has expired do not automatically continue their original positions, except by reappointment based on the decision of the GMS. For example, for a period of 3 (three) years or 5 (five) years from the date of appointment, since the expiration of that period, the former member of the Board of Directors concerned is no longer entitled to act for and on behalf of the Company, except after being reappointed by the GMS." Elucidation of Article 94 Paragraph (3) of Law No. 40 of 2007 above emphasizes that in the event that the term of office of a member of the Board of Directors has ended, the member of the Board of Directors whose term of office has ended by itself should no longer have the right to continue his position as a member of the Board of Directors or no longer have the right to act for and on behalf of the company. To be able to continue his position as a member of the Board of Directors and act for and on behalf of the company, the member of the Board of Directors must first be reappointed based on the decision of the GMS (Rudhi Prasetya, 2004).

However, it is undeniable that most entrepreneurs, in terms of establishing a limited liability company, only look at the economic factors by turning a blind eye to the legal side, so many entrepreneurs lack knowledge of the actions and consequences from the legal side. In this regard, this paper focuses on the obligation of the GMS to reappoint the positions of the Board of Directors and the Board of Commissioners. The research questions are:

What is the reappointment of the Board of Directors and/or Commissioners if it refers to the company's articles of association and Law Number 40 of 2007 concerning Limited Liability Companies? What are the procedures for extending the terms of office of

directors and commissioners and the risks if they do not carry out the extension process?

DISCUSSION

Re-appointment of directors and/or commissioners

The definition of the Board of Directors is regulated in Article 1 Number 5 of Law No. 40 of 2007 concerning Limited Liability Companies, while the duties and responsibilities of the Board of Directors are regulated in Article 92 Paragraph (5) of the Limited Liability Company Law, where the duties and responsibilities are to carry out the management of the Company. Although the management is carried out by the Board of Directors in accordance with its own policies, it must remain within the limits determined by law and its articles of association. In carrying out the management of the company, the Board of Directors may give written authorization to the company's employees, or to other people, to take certain legal actions on behalf of the company. As the management of the company, the Board of Directors can represent the company both inside and outside the court. The Board of Directors has unlimited and unconditional authority as long as it does not conflict with the law and the articles of association, as well as the resolutions of the GMS. As the management of the company, the Board of Directors can represent the company both inside and outside the court. The Board of Directors has unlimited and unconditional authority, as long as it does not conflict with the law and the articles of association as well as the resolutions of the GMS.

In the event that there is more than one member of the Board of Directors, each member of the Board of Directors is authorized to represent the company, unless otherwise specified in the articles of association. In such circumstances, those who are entitled to represent the company are:

- Other members of the Board of Directors who do not have a conflict of interest with the Company. The Board of Commissioners in the event that all members of the Board of Directors have a conflict of interest with the Company.
- Other parties appointed by the GMS in the event that all members of the Board of Directors or Board of Commissioners have a conflict of interest with the Company.

The Board of Directors has the obligation to:

- Make a list of shareholders, special lists, minutes of the GMS, and minutes of meetings of the Board of Directors.
- Prepare the annual report as referred to in Article 66 and the company's financial documents as referred to in the law concerning corporate documents.
- Keep all of the company's lists, minutes, and financial records, as mentioned in letters A and B and other company documents.

Members of the Board of Directors are also required to report to the company regarding the shares owned by the member of the Board of Directors concerned and/or his family in the company and other companies to be further recorded in a special register. Members of the Board of Directors who do not carry out this obligations and cause losses to the Company, are personally responsible for the Company's losses. Members of the Board of Directors are not authorized to represent the Company if there is a case in court between the Company and the member of the Board of Directors concerned or if the member of the Board of Directors concerned has a conflict of interest with the Company. The requirement to become a member of the Board of Directors is that an individual who is capable of carrying out legal actions, unless within five years prior to his appointment he has: (a) been declared bankrupt; (b) been a member of the Board of Directors or a member of the Board of Commissioners found guilty of causing a company to be declared bankrupt; (c) been sentenced for committing a crime that is detrimental to state finances and/or related to the financial sector.

The provisions of the above requirements do not reduce the possibility of the technical agency authorized to stipulate additional requirements based on the laws and regulations. The fulfillment of these requirements is evidenced by a letter kept by the company. Members of the Board of Directors are appointed by the GMS. For the first time, the appointment of members of the Board of Directors is carried out by the founder in the Deed of Establishment. Members of the Board of Directors are appointed for a certain period of time and may be reappointed. In this regard, the articles of association regulate the appointment, replacement, and dismissal of members of the Board of Directors and may also regulate the procedures for the nomination of members of the Board of Directors. Furthermore, the Board of Commissioners comes from a German legal concept which is similar to the law of continental European countries, which in Dutch is called Raad van Commissarissen, although there is no equivalent in the concept of common law. In English, it is often referred to as the Board of Commissioners, or the Board of Commissioners, or the Board of Supervisory Directors.

The existence of the Board of Commissioners has a strategic position. This can be seen from the functions and positions regulated in the provisions of Article 108 of the Company Law, where the Board of Commissioners supervises management policies and the general course of management, both regarding the company and the company's business, as well as provides advice to the Board of Directors. This supervision and advice are carried out for the benefit of the company and in accordance with its purposes and objectives of the Company. The Board of Commissioners consists of one or more members. The

Board of Commissioners, which consists of more than one member, is an assembly, and each member of the Board of Commissioners cannot act alone but only based on the decision of the Board of Commissioners. Companies that collect and/or manage public funds, companies that issue debt acknowledgments to the public, or companies that do business with the public must have at least two members of the Board of Commissioners.

In addition to the commissioners, companies that carry out business activities based on sharia principles are required to have a Sharia Supervisory Board consisting of one or more sharia experts, who are appointed by the GMS on the recommendation of the Indonesian Ulema Council. The Sharia Supervisory Board is tasked with providing advice and suggestions to the Board of Directors as well as supervising the company's activities in accordance with sharia principles. Here's more about what the Board of Commissioners does to control things and give advice:

- The Board of Commissioners is in charge of overseeing the policies of the Board of Directors in running the company and providing advice to the Board of Directors.
- The Board of Commissioners must in good faith and with full responsibility carry out their duties in the interests of the company's business.
- The Board of Commissioners is required to report to the company regarding the ownership of shares and/or their families in the said company and/or other companies. Likewise, any changes in share ownership must also be reported. Reports regarding this matter are recorded in a special register, which is one source of information regarding the size of the ownership and interests of the management of the company concerned and/or other companies, so that conflicts of interest that may arise can be minimized as much as possible.

Based on the foregoing, the Board of Commissioners basically has two basic functions, namely a supervisory function and an advisory function. Supervision functions in the form of financial audits, organizational audits, and personnel audits. A financial audit is an audit of the cash flow and financial health of a company, which must be monitored and monitored properly because it shows the condition of the assets and the profit and loss position of the company. An organizational audit is a supervisory audit of the organizational structure, line leadership relationships, and the shape and size of the organizational structure that is tailored to the needs of the company. The Board of Commissioners is responsible for the supervision of the company. Each member of the Board of Commissioners must act in good faith, be careful, and be responsible in carrying out their supervisory duties and providing advice to the Board of Directors for the benefit of the company and in accordance with the aims and objectives of the company. Each member of the

Board of Commissioners is personally responsible for the loss of the company if the person concerned is guilty or negligent in carrying out his duties. In the event that the Board of Commissioners consists of two or more members, the liability for losses applies jointly and severally to each member of the Board of Commissioners. Members of the Board of Commissioners can't be blamed for losses, though, if they can show:

- They have carried out supervision in good faith and prudence for the benefit of the company and in accordance with the aims and objectives of the company.
- They do not have a personal interest, either directly or indirectly, in the actions of the management of the Board of Directors that result in losses.
- They have provided advice to the Board of Directors to prevent the occurrence or continuation of such losses.

Members of the Board of Commissioners can also be sued by the shareholders on behalf of the company who represent at least 1/10 of the total shares with voting rights due to the fault or negligence of the board of commissioners, causing losses to the company in the District Court. First of all, people who can do legal work can be appointed to the Board of Commissioners, unless they have done one of the following in the 5 years before their appointment: being declared bankrupt; becoming a member of the Board of Directors or a member of the Board of Commissioners who is found guilty of causing a company to be declared bankrupt; and being sentenced for a crime affecting state finances and/or the financial sector.

The provisions of the requirements above do not reduce the possibility of the technical agency authorized to stipulate additional requirements based on the laws and regulations. The fulfillment of these requirements must be proven by a letter kept by the company. In terms of appointment, members of the Board of Commissioners are appointed by the GMS. The appointment of members of the Board of Commissioners for the first time is carried out by the founder in the deed of establishment. Members of the Board of Commissioners are appointed for a certain period of time and may be reappointed. The articles of association of the company regulate the procedures for the appointment, replacement, and dismissal of members of the Board of Commissioners and may also regulate the nomination of members of the Board of Commissioners. The GMS does not determine when the appointment, replacement, and dismissal of members of the Board of Commissioners will take effect. Appointments, replacements, and dismissals take effect as of the closing of the GMS. In Law no. 40 of 2007 concerning Limited Liability Companies, the provisions concerning the arrangement of the Board of Commissioners have many similarities with the Board of Directors, among others, regarding the requirements

to become a member of the Board of Commissioners, and the appointment and dismissal of members of the Board of Commissioners. Furthermore, regarding the provisions for companies whose business activities are related to collecting and/or managing public funds, issuing debt acknowledgments to the public, or public companies, they are required to have several commissioners, the same as the provisions for the Board of Directors. This is because companies whose business activities are related to the interests of the community require greater supervision. This is also to balance the number of members of the Board of Directors required by the number of members of the Board of Commissioners who are also required by law, so as to facilitate supervision.

Process for Re-appointment of Directors and/or Commissioners

Due to the fact that the company still has not received extensive knowledge and insight about reappointment, sometimes the Directors and Commissioners experience problems or are constrained, such as not being able to make credit at the bank, being unable to take projects, so that the performance of the Directors and Commissioners is constrained and they are unable to carry out their duties, responsibilities, and responsibilities fully and efficiently. So in this case, this study tries to observe and analyze the reappointment of the position in accordance with Law Number 40 of 2007 concerning Limited Liability Companies. Here is a list of what needs to be done to get the same people back on the Board of Directors and the Board of Commissioners: The process of submitting an application for reappointment at a notary So, for the first stage, the Board of Directors and the Board of Commissioners come to the notary's office to submit an application for reappointment and documents as required above to the notary or notary staff. The notary will check whether the requirements have been completed or not. After the requirements are complete, the notary will make a draft of the GMS deed first. Usually, the process of making a deed takes 1-2 days. After the deed of the GMS has been drafted, the next thing to do is that the Notary will contact the company to make an appointment when the GMS will be signed. It is mandatory when signing the GMS that the attendance at the meeting must be 100%. In this case, the shareholders, the board of directors, and the board of commissioners must come together to sign the GMS before a notary. However, if there are parties who are unable to attend, then a power of attorney can be made. Later, the party who is unable to attend will be represented by the recipient of the power of attorney to sign the deed of the GMS.

The process of submitting a decree to the Ministry of Law and Human Rights of the Republic of Indonesia begins after the shareholders, the Board of Directors, and the Board of Commissioners have signed the deed of the GMS. The next thing that must be done

is that the notary must register the deed of the GMS with the Ministry of Law and Human Rights of the Republic of Indonesia. Indonesia After the notary copies the deed, the notary, through the ahu.go.id website, will enter the company's data. After entering the company's information, the notary must upload a copy of the deed to the ahu.go.id website. The decree is then ready to be printed online. Although the decree can be printed online, the notary is still required to submit the company's physical documents no later than thirty days afterward. An Application Letter for Legalization of the Company's Deed of Amendment must be sent along with supporting documents like a copy of the Deed, Photocopy of Decree, Business Domicile, and company tax number that have been signed by a Notary and say "Photocopy of the original."

CONCLUSION & SUGGESTIONS

Conclusion

Based on the results of the research conducted, it can be concluded that the company was established with the aim of seeking financial benefits, so that legal insight is still minimal in dealing with various problems, one of which is related to procedures for reappointment of the positions of the Board of Directors and the Board of Commissioners, so that the Board of Directors and the Board of Commissioners have difficulty exercising their authority fully. So this study helps describe the procedure for reappointment of the Board of Directors and Board of Commissioners with the aim that, in the future, the company will no longer make mistakes caused by a lack of knowledge of the law and also promote various consultations regarding the legal aspects of the company in order to become a provision for companies to be able to create good corporate governance.

SUGGESTIONS

Dari kesimpulan diatas, dapat diberikan saran agar perusahaan memperhatikan prosedur dan tata cara pengangkatan kembali jabatan Direksi dan Dewan Komisaris sesuai dengan ketentuan yang ada. Prosedur pengangkatan kembali jabatan Direksi dan Dewan Komisaris tersebut memberikan/ menjamin suatu kepastian hukum, sehingga tidak menimbulkan permasalahan keabsahan jabatan dan wewenang kepada Direksi dan Dewan Komisaris yang diangkat kembali tersebut.

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