

## JURIDICAL ANALYSIS OF INTERLOCKING DIRECTORATE IN THE PERSPECTIVE OF FIDUCIARY DUTY THEORY

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### ABSTRACT

**Abstract:** This article discusses the issue of concurrent positions of directors in a company has resurfaced in Indonesia, causing problems lately. The practice of holding multiple positions presents a potential avenue for individuals to exploit their authority for personal gain, as well as for the benefit of affiliated parties. The potential for conflicts of interest, including corruption, collusion, and nepotism, even exists in concurrent positions. The research method used is normative because what is studied is the legality of the interlocking directorate of directors and board of commissioners in the Company as seen from its regulations in the Law and other related regulations. This study focused on examining the legality of the interlocking directorate of directors and board of commissioners in PT. The result is that concurrent positions are not explicitly prohibited by the Limited Liability Company Law, but it is very important for the Board of Directors and the Board of Commissioners to have a ban on concurrent positions in the Company Regulations, Articles of Association, and Code of Ethics and Business Conduct. Code adherence ensures all stakeholders comply with company policies. Law Number 5 of 1999, especially Article 26, prohibits concurrent positions if the companies in which the directors serve are not in the same relevant market, have a close relationship, or jointly control the market share of certain goods and services, which has the potential to result in a monopoly. Unfair business practices and competition.

**Keywords:** Board of Directors; Limited Liability Company; Concurrent Positions

### Introduction

The welfare of the people in a country can be reflected in the country's economy. The economy can be affected by business actors, both individuals and business entities, whether in the form of legal entities or non-legal entities, carrying out business activities in the economic sector. Business actors who are established and domiciled or carry out activities in the jurisdiction of the Republic of Indonesia, must comply and comply with applicable laws and regulations.

Capital collection by companies has the potential to contribute to economic development. The legal structure of a corporation, such as a Limited Liability Company or Corporation, establishes a clear separation between the assets of a business and the assets of its owners or shareholders. This article discusses the nature of the Company or Limited Liability Company which is a State-Owned Enterprise in the form of a limited

liability company with capital divided into shares. The Republic of Indonesia owns at least 51% of the shares, and the company's main goal is to pursue profits (Badruzzaman, 2022).

Legal provisions that apply to Limited Liability Companies also apply to the Company which is one type of business entity that can be in the form of state-owned or non-state-owned enterprises. This thesis explores the concept of a parent company as a corporate structure that has partial ownership of several business entities. The legal framework of State-Owned Enterprises includes not only Law Number 40 of 2007 concerning Limited Liability Companies, but also Law Number 19 of 2003 concerning State-Owned Enterprises, which applies specifically to companies with dominant state shareholding. The State Minister of State-Owned Enterprises has the responsibility to regulate and supervise the coordination of State-Owned Enterprises, as most are owned by the state (Khameswary, 2019).

The influence of Performance Leaders (Directors) on a company is a significant factor. A close relationship between individual performance and company performance is very important in achieving company goals, because the tasks and responsibilities that individuals perform must be aligned with those goals. The proper functioning and development of a company depends on the compliance of interested parties with their respective roles and responsibilities while avoiding actions that violate legal or regulatory requirements or company policies. It is common for companies to have their own unique management structure, with various positions and functions.

The phenomenon of multiple positions arises when a person holds membership in two or more boards of directors or represents several companies convened on the board of directors of one organization. The utilization of interrelated directorates can serve as a mechanism for companies to assess their corporate strategies. This thesis proposes that companies can leverage observations of other companies' behavior to reduce uncertainty around strategic initiatives, ultimately leading to effective monitoring of company performance by the board (Pratiwi, 2019).

The issue of concurrent positions of directors in a company has resurfaced in Indonesia, causing problems lately. The practice of holding multiple positions presents a potential avenue for individuals to exploit their authority for personal gain, as well as for the benefit of affiliated parties. The potential for conflicts of interest, including corruption, collusion, and nepotism, even exists in concurrent positions (Gunawan, 2021).

The concurrent position arrangement in Law No. 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as UUPT) is not expressly regulated. Provisions regarding directors and commissioners can be observed in Article 93 paragraph (1) and Article 110 paragraph (1). Although the Law does not regulate strictly speaking, the arrangement of concurrent positions must also look at other related provisions such as Law Number 19 of 2003 concerning State-Owned Enterprises (hereinafter referred to as the SOE Law), Law Number 25 of 2009 concerning Public Services (hereinafter referred

to as the Public Service Law), Regulation of the Minister of State-Owned Enterprises Number 2 of 2015 concerning Requirements and Procedures for Appointment and Dismissal of Members of the Board of Commissioners and Supervisory Board of Owned Enterprises State (hereinafter referred to as CANDY BUMN No. 2), Regulation of the Minister of SOEs Number PER-03 / MBU / 02/2015 concerning Requirements, Procedures for Appointment and Dismissal of Directors of State-Owned Enterprises (hereinafter referred to as CANDY BUMN No. 3) and Regulation of the Financial Services Authority Number 33 of 2014 concerning Directors and Board of Commissioners of Issuers or Public Companies (hereinafter referred to as POJK) (Wahyuni, 2017).

This article examines the issue of concurrent positions in the light of the 2007 Law. While the practice of holding multiple positions is not explicitly prohibited or regulated, conflicts of interest can arise when directors hold multiple positions. Concurrent positions can take various forms, including directors of Limited Liability Companies who concurrently hold directorships in other Limited Liability Companies. The Board of Directors may face management dilemmas related to the performance of fiduciary duties in Limited Liability Companies. While such action may be expected in some cases, it could potentially be a breach of fiduciary duty in other Limited Liability Companies.

Based on the description above, the problem arises what if the phenomenon of Concurrent Positions of Directors when studied from the juridical aspect of the Concurrent Positions carried out by the Board of Directors and how the view in the Fiduciary Duty Theory arises.

### Research Method

This type of research is normative research because what is studied is the legality of the interlocking directorate of directors and board of commissioners in the Company as seen from its regulations in the Law and other related regulations. This study focused on examining the legality of the interlocking directorate of directors and board of commissioners in PT.

The legal materials used in this study are primary legal materials and secondary legal materials. Primary legal material is all legal rules formed and/or made officially by a state institution, and/or government bodies, for the sake of which will be sought based on coercion officially carried out by the state apparatus.

### Result And Discussion

#### Concurrent Position Arrangement of Directors

When referring to Law Number 40 of 2007 concerning Limited Liability Companies ("UUPT") as amended by Law Number 11 of 2020 concerning Job Creation ("UUCK"), it is stated that the Board of Directors is one of the company's organs that plays an important role and is fully responsible for the management of a company, namely representing the interests of the PT in accordance with the aims and objectives of the PT, both inside and outside the court in accordance with the provisions of the articles of association.<sup>29</sup> While the Board Commissioner is the company's organ in charge of

conducting general and/or special supervision in accordance with the articles of association and providing advice to the Board of Directors (Harianja, 2021).

According to the Board of Directors and Board of Commissioners, these two positions are very important and have a significant impact on the growth and development of the organization. In addition, considering the authority and responsibility of the Board of Directors and the Board of Commissioners as stipulated in Article 91 to Article 121 of the Law, the Board of Directors and the Board of Commissioners with their authority must carry out their duties and obligations. its responsibilities in good faith and full of responsibility and in the best interests of the company.

Concurrent positions are not expressly prohibited or permitted by the Law. Given the importance of the responsibilities and roles of the Board of Directors and Board of Commissioners, it is necessary to include a ban on concurrent positions in the Company Regulations, Articles of Association, and Code of Ethics and Business Conduct. Company policy. Compliance with the code of ethics and business conduct is intended to ensure that all stakeholders comply with and implement all company policies (Pratiwi, 2019).

In accordance with Law No. 5 of 1999 concerning Business Competition, a Director or Commissioner can represent the company in legal proceedings. If the Board of Directors and Commissioners exercise their authority, it will be easier for two or more companies to regulate the market and eliminate fair competition, simply put. To prevent this, Article 26 of the Business Competition Law regulates the prohibition of concurrent positions, namely:

"A person who holds a position as a Director or Commissioner of a company at the same time is prohibited from concurrently serving as a Director or Commissioner in another company, if the company: a. is in the same relevant market; or b. has a close relationship in the field and / or type of business; or c. jointly control the market share of certain goods and or services, which may result in monopolistic practices and/or unfair business competition."

Furthermore, if the ban on concurrent positions is violated, then based on the provisions in Article 48 paragraph (2) of the Business Competition Law related to the principal crime, it is stipulated that:

"Violation of the provisions of Articles 5 to 8, Article 15, Articles 20 to Article 24, and Article 26 of this Law shall be punished with a fine of as low as 5,000,000,000.00 (five billion rupiah) and a maximum of Rp. 25,000,000,000.00 (twenty billion rupiah), or imprisonment in lieu of a fine of up to 5 (five) months."

### **Impact of Concurrent Board of Directors Unfair Business Competition**

With the concurrent position of a board of directors, it can certainly make the possibility of a dominant position (*market power*) which is a position where a company has a large market share, so that the company can carry out actions or strategies that cannot be influenced by competing companies (Jiwa, 2018). The definition of dominant position can be found in Article 1 Number 4 of the Business Competition Law which states that: "Dominant position is a condition where business actors do not have significant competitors in the relevant market in relation to market share controlled, or business actors have the highest position among competitors in the relevant market in relation to financial capabilities, the ability to access supply or sales, as well as the ability to adjust the supply or demand for certain goods or services (Fauzi, 2021).

This can be described in 2 (two) ways, namely:

1. If in two competing companies (direct interlock) occupied by someone who has power and authority in both companies, then the horizontal relationship of these companies can form a joint strategy related to market allocation, pricing, and determination of production quantities.
2. Concurrent positions in vertical relationships can result in vertical integration of activities. Vertical integration is one of the strategies in business, where there is a merger of several companies covering the entire production phase. In other words, vertical integration is a combination of several companies working at different levels in a production process.

### **Conflict of Interest and KKN (Corruption, Collusion and Nepotism)**

Concurrent positions have a negative impact because individuals who have concurrent positions can monitor the business activities of a company and even make decisions that accommodate their own interests and the interests of many parties. There is an opportunity for the Board of Directors and Commissioners, as corporate organs that have decision-making authority, to abuse their authority if they hold concurrent positions in several companies that are similar or of different types and/or that have direct or indirect relationships. As a result, this creates a conflict of interest (Hadiani, Rizani, & Nailiah, 2022).

When someone has a personal interest, he can influence decisions and policies in carrying out company duties that are not in accordance with the company's mandate, but prioritize his own interests (Harjono, 2022). There is often a conflict of interest between the Board of Directors or Commissioners and the company. Even though Article 97 Paragraph 3 of the Law states, "Each member of the Board of Directors is personally responsible for the Company's losses if the person concerned is guilty or negligent in carrying out his duties." In addition, Article 97 paragraph 5 letter c states that a member of the Board of Directors cannot be held responsible for a loss if he can prove that he does not have a conflict of interest either directly or indirectly with the management action that resulted in the loss. 62 This also applies to the Board of Commissioners, as stated in Article 114 paragraph 3 of the Law: "Each member of the Board of Commissioners is personally responsible for the Company's losses if the person

concerned is guilty or negligent in carrying out his duties." And according to Article 114 paragraph 5 letter b, members of the Board of Commissioners cannot be held responsible for the company's losses if they can show that they do not have a direct personal interest in management actions that harm the Board of Directors (Harianja, 2021).

The above provisions make it very clear that all decisions and policies taken by the Board of Directors and the Board of Commissioners must be in accordance with the aims and objectives of the Company and not for personal gain. Similarly, if a member of the Board of Directors or Board of Commissioners serves in 2 (two) companies simultaneously, it can influence the Board of Directors or Board of Commissioners to prioritize their personal interests so as to cause a conflict of interest. Person A, for example, is a Director at Pertamina. Then person A has a business in the oil and gas industry and serves as a Commissioner. So, in this case, the potential consequences of the dual position held by person A can create a conflict of interest where in the tender selection process, person A who serves as a Board of Directors and as Commissioner can decide that the business field he owns will be awarded a contract to prioritize his personal interests. Concurrent positions cause conflicts of interest as well as corruption, collusion, and nepotism (KKN) (Sandhi, 2018). Corruption is often referred to as a structural crime, meaning that the perpetrator will not feel as though he has committed the crime because its structure allows it. In this case, corruption results directly from power politics. Someone with a concurrent position has the potential to commit corruption. This is consistent with Giddens' view that "power" is the ability to act or intervene in the world or retract those interventions, with the effect of consciously or unconsciously affecting a particular process or state (Pulungan, Nurdin, & Santiago, 2023).

### **Juridical Analysis of Concurrent Directors in the Perspective of Fiduciary Duty Theory**

A country can develop and develop if various companies can live sustainably. This can be realized if the principles of good corporate governance are implemented in the company's managerial process. Good Corporate Governance or GCG is a principle that becomes a reference to control the company so that there is a balance between power and authority (checks and balances) between each stakeholder (stakeholders) and shareholders (shareholders) (Sari, 2016).

Concurrent position (interlocking directorate) itself is a condition where there is the same person sitting on two or several boards of directors of a company or being a representative of two or more companies that meet in the board of directors of one company where this includes concurrent positions among the parent company, one member of the parent company with subsidiaries of other members or subsidiaries of various holding companies. This position conflict can arise due to financial linkages and joint ownership of shares (Kamila, Ginting, Harianto, & Azwar, 2023).

In accordance with Fiduciary Duty Theory, the existence of concurrent positions by the Board of Directors is a violation of this principle, because the Board of Directors is



obliged to avoid procuring, making, or signing agreements, or performing actions that place them in a position that prevents them from acting impartially for the objectives and interests of the Company. Concurrent positions will certainly hinder the Board of Directors in carrying out their duties optimally, especially if they hold concurrent positions in two Persero (Kholifah & Baso, 2022).

From the perspective of Fiduciary Duty Theory, prevention seeks to prevent the Board of Directors from taking unreasonable advantage of the Company that appoints itself as Director. In addition, this obligation prohibits Directors from putting themselves in positions that allow them to act in their own best interests.

Considering that the Board of Directors is the only organ in the Company that is authorized and authorized to act for and on behalf of the Company. This has the consequence that the Board of Directors is fully responsible for the running of the company, including the management of its wealth. This means that the Board of Directors is also responsible for managing the company's assets as part of its duties to manage the company. Therefore, when viewed from the perspective of fiduciary duty, the phenomenon of Concurrent Position is strictly prohibited

### Conclusion

From the description above, the author concludes that the phenomenon of concurrent positions is not expressly prohibited or permitted by the Law. Given the importance of the responsibilities and roles of the Board of Directors and Board of Commissioners, it is necessary to include a ban on concurrent positions in the Company Regulations, Articles of Association, and Code of Ethics and Business Conduct. Company policy. Compliance with the code of ethics and business conduct is intended to ensure that all stakeholders comply with and implement all company policies. However, the provision regarding the prohibition of concurrent positions can be found in Law No. 5 of 1999, especially in Article 26, which only prohibits concurrent positions if the companies in which the directors serve are not in the same relevant market; or; have a close relationship in the field and / or type of business; or jointly can control the market share of certain goods and/or services, which can lead to monopolistic practices and/or unfair business competition."

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