

## EXPANSION OF GROUP COMPANIES IN INDONESIA REVIEWED FROM LAW NUMBER 40 OF 2007 CONCERNING LIMITED LIABILITY COMPANIES

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### ABSTRACT

*The existence of group companies in business activities in Indonesia has not yet become a justification for the need for juridical recognition of group companies vis-à-vis other legal entities. The existing legislation only regulates the relationship between the parent and the subsidiary and does not regulate the group company. Therefore, group companies refer to the reality of the business of joining companies to form a group company as an economic entity. Law No. 40 of 2007 concerning Limited Liability Companies does not explain specifically and deeply about the implementation of construction group companies in Indonesia. Law No. 40 of 2007 concerning Limited Liability Companies is not intended to regulate group companies. Law No. 40 of 2007 concerning Limited Liability Companies more regulates a single company.*

*Keywords:* group company, expansion, limited liability company

### INTRODUCTION

Ten years there has been a very rapid growth of coal mining companies in Indonesia. This is because increasing demand for coal as an energy supplier in the future makes this industry has a very big attraction for investors. Coal is one of the important energy commodities in Indonesia. Its mining has been going on since the Dutch Colonial period. Coal mining by Dutch Colonial was first carried out on the islands of Kalimantan and Sumatra, which are currently the main producers of coal in Indonesia (Irwandy, 2014:37).

The first coal business was carried out in Pengaron, South Kalimantan, in 1849 by NV Oost Borneo Maatsnappij "Golden Fortress". Furthermore, the Netherlands also established two other coal mining companies near Martapura, namely Julia Hermina and Delft. In 1888, coal mining was opened in Batu Panggal, Kutai, East Kalimantan by L.H. Menten. Menten also opened the first petroleum exploitation effort in the Kutai region (John A. Huston).

During President Joko Widodo's administration, the PLTU construction project continued. The power plant project is sheltered in the 35,000 MW program and is expected to be completed within the next 5 (five) years. The inauguration of this project was carried out at Samas Beach, Bantul, Yogyakarta on May 4, 2015. President Joko Widodo stressed that the 35,000 MW project was not an ambitious infrastructure project. On the same occasion, President Joko Widodo also said that the government has a debt to the people that must be met because many Indonesians have not yet enjoyed electricity (<http://finance.detik.com>).

Companies engaged in mining in Indonesia are usually in the form of groups. The group companies continue to expand their business in the coal mining sector. Of course the goal is to obtain a return on investment and contribute to a broader economic and social environment. To achieve its objectives, group companies face increasingly fierce competition from competitors who have the same goals, with products offered and methods that are almost the same.

The method that can be used to form group companies is by merging, acquiring or forming a new company. Companies expand through mergers, acquisitions or form new companies with the intention of reducing competing companies or reducing competition. In addition, expansion through mergers, acquisitions or forming new companies will encourage companies to have a larger type of business without having to do it from the start.

The coal mining sector is prone to monopolistic practices and unfair business competition, both in area control, share ownership and coal marketing. The phenomenon that occurs in the mining sector is currently ownership by group companies. Indonesia does not have legislation that specifically regulates group companies. The regulatory framework of companies incorporated in group companies still uses a single company approach. Therefore, until now there has been no juridical recognition of group companies (Sulistiwati, 2010:19).

Departing from the absence of laws and regulations governing group companies, making the author raise the topic or discussion about the existence of company groups, especially in the coal mining sector. The existence of a group company in the coal mining sector has become important and a serious concern for the author, considering that the expansion of these companies continues to occur today, on the other hand there are no specific regulations governing group companies. The ongoing group company expansion in the coal mining sector has made the writer worried that it would lead to monopolistic practices and unfair business competition. Therefore, the author will examine and analyze the expansion of these group companies in the coal mining sector based on laws and regulations, including: the 1945 Constitution of the Republic of Indonesia, Law No. 4 of 2009 concerning Mineral and Coal Mining, Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition.

## COMPANY EXPANSION

The company must make a breakthrough effort so that the continuity of life can be maintained, namely through business development investment or more commonly known as company expansion. Expansion is a manifestation of the desire to maintain the company's existence in the long term. A company is not established with the intention of stopping after obtaining a temporary profit. Expansion is carried out to provide growth for the company. Expansion is to enlarge the company both by setting up new businesses with new products or products that already exist elsewhere or also increasing the production of goods that have been produced (Halina Ward).

Companies that want to maintain their survival must be sensitive to the opportunities and threats that exist. This is intended as part of efforts to achieve a better corporate life by meeting consumer needs. Bambang Riyanto (1999) explained that in the context of expansion, there are two main motives underlying an enterprise to expand, namely economic motives and psychological motives. Regarding the two motives are described as follows:

### 1. Economic Motives

If the expansion of a company is based on consideration to enlarge or stabilize the profits obtained. This happens for example because of the increasing demand for products or services produced by a company. The greater the amount of production that can be sold, means the more likely it is to get a bigger profit, so that each company leader has hope and desire to be able to always develop and expand the company.

This encouragement is reasonable because the company can maintain and even develop the company's existence must get a profit. The benefits obtained by the company have several functions or uses, including the following:

- a. Measuring company performance.
- b. Can be used to fulfill company obligations.
- c. As a source of corporate funds.

### 2. Psychological Motives

Expansion carried out in this category of psychological motives often or does not even carry out previous economic calculations. This expansion is based on the personal ambition of the owner or leader of the company to gain greater prestige and power. The thing that stands out from psychological motives is more driven by instinct or judgment in the form of courage to take risks even without being supported by consideration of mature rationality.

Thus, expansion is a form of business expansion both in increasing the components of current assets, fixed assets or other as a motive that increases economic value and personal ambition from the leadership of the company to achieve a goal.

## LAW NUMBER 40 OF 2007 CONCERNING LIMITED LIABILITY COMPANIES

The national economy, which is operated on a basis of economic democracy with principles of community, efficiency, justice, sustainability, environmental awareness, independence and safeguards for balanced progress and national economic unity has the aim of creating prosperity for society. Increasing development of the national economy needs the support of an act regulating limited liability companies which can secure a conducive climate for the business world. To date limited liability companies have been governed by the Limited Liability Companies Act No. 1 of 1995, which replaced legislative regulations originating from the colonial period. However, in their development, the provisions in that Act are viewed as no longer complying with legal developments and the needs of society because the economic situation and progress in science, technology, and information are developing so swiftly, particularly in the era of globalization. Besides, the increase in demand from society for quick service, legal certainty and the demand for development of the business world in accordance with principles of good corporate governance demand the improvement of the Limited Liability Companies Act No. 1 of 1995 (John Grierson;1995).

This Act accommodates various provisions concerning Companies, both in the form of the addition of new provisions, the improvement of others and the keeping of old provisions evaluated as still relevant. To further clarify the essence of Companies, this Act makes explicit that a Company is a legal entity which constitutes an alliance of capital established pursuant to a contract in order to carry on business activities with an authorized capital all of which is divided into shares and which fulfils the requirements stipulated in this Act and its implementing regulations.

In the context of complying with society's demand for swift service, the Act provides procedures for the electronic:

1. submission of applications for and the granting of ratification of legal entity status;
2. submission of applications for and the granting of approval for the amendment of articles of association;
3. delivery of notifications and receipt of notifications of amendments to articles of association and/or notification of and receipt of notification of other changes to data

by legal entity administration system information technology services besides manual systems still being possible in certain circumstances. With regard to applications for ratification of Companies as legal entities, it is made explicit that such applications constitute the authority of the founders jointly which they can exercise themselves or they can empower a notary to exercise.

A Company's deed of establishment which has been ratified and deed of amendment of the articles of association which has been approved and/or notified to the Minister must be recorded in the register of Companies and announced in the Supplement to the

State Gazette of the Republic of Indonesia made by the Minister. In the matter of grants of status as a legal entity, approvals and/or receipts of notification of amendments to the articles of association, and changes to other data, this Act has not connection with the Mandatory Company Registration Act.

To further clarify and make explicit provisions involving Company Organs, this Act amends provisions involving the holding of General Meetings of Shareholders (GMS) by using technological developments. Thus, a GMS can be held by electronic media such as teleconferences, video conferences, or other electronic media facilities. This Act also clarifies and makes explicit the tasks and responsibilities of the Board of Directors and Board of Commissioners. This Act provides for independent and delegated commissioners. In accordance with the development of business activities based on sharia principles, this Act obliges Companies doing business on the basis of sharia principles to have a Sharia Supervisory Board as well as a Board of Commissioners. The Sharia Supervisory Board's task will be to give the Board of Directors advice and suggestions and to supervise the Company's activities so that they will be in accordance with sharia principles.

The provisions in this Act regarding Companies' capital structure remain the same, i.e., it consists of authorised capital, subscribed capital, and paid-up capital. However, Companies' authorised capital has been changed to be at least Rp. 50,000,000 (fifty million rupiah), while there is an obligation to fully pay up subscribed capital. With regard to buying back shares issued by the Company, it can be done in principle with the proviso of a 3 (three)-year time limit for the Company to own shares which it has bought back. Especially for the use of profits, this Act makes explicit that the Company may allocate profits and set aside the mandatory reserve if the Company has a positive profit balance (Journal, Volume 3. European Institute for Advanced Studies in Management and UFSAL).

This Act provides for Environmental and Social Responsibility aimed at creating sustainable economic development in order to improve the quality of life and environment, which will be beneficial for the Company itself, the local community and society in general (Vivoda Vlado and Terry O'Callaghan). This provision is intended to support the ties of Company relationships which are harmonious, balanced and in accordance with the environment, values, norms and culture of the local community, and so it stipulates that Companies whose business activities are in the field of and/or related to natural resources must put into practice Environmental and Social Responsibility (William Cobb). In order to carry out this obligation of Companies, the Environmental and Social Responsibility activities must be budgeted for and calculated as Company costs to be performed with due attention to decency and fairness. Such activities must feature in Companies' annual reports. If a Company does not put into practice Environmental and Social Responsibility, the Company involved will be liable to sanctions in accordance with the provisions of legislative regulations (Wayne M. Gazur).

This Act makes explicit provisions with regard to the winding-up, liquidation and expiry of the Company's status as a legal entity with due attention to the provisions in the Bankruptcy and Suspension of Payments Act. In the context of the implementation and development of this Act, a team of company law review experts will be formed whose task will be to give input to the Minister in relation to Companies. To ensure the credibility of this team of experts, the membership of the team will consist of various elements from the government, academics, the professions, and the business world (Yuji Ijiri and Herbert A. Simon). As a comprehensive regulation which covers various aspects of Companies, it is to be hoped that this Act will meet society's demands of the law and give further legal certainty for the business world in particular.

#### **GROUP EXPANSION OF COMPANIES IN INDONESIA VIEWED FROM LAW NUMBER 40 OF 2007 CONCERNING LIMITED LIABILITY COMPANIES**

At present large scale companies are no longer run through a single company form, but use group company construction. In fact, group companies are no longer the monopolies of large companies, but also used by smaller scale companies. This shows that the size and complexity of the construction of group companies cannot be a marker of the existence of group companies (Marcelo Bombau, Marcelo Pozzetti, Zeke Solomon).

The existence of group companies in business activities in Indonesia has not yet become a justification for the need for juridical recognition of group companies vis-à-vis other legal entities. The existing legislation only regulates the relationship between the parent and the subsidiary and does not regulate the group company. Therefore, group companies refer to the reality of the business of joining companies to form a group company as an economic entity (P.B. Gurney).

Law No. 40 of 2007 concerning Limited Liability Companies does not explain specifically and deeply about the implementation of construction group companies in Indonesia. Law 40 of 2007 concerning Limited Liability Companies is not intended to regulate group companies. Law 40 of 2007 concerning Limited Liability Companies more regulates a single company (Revised Prototype Limited Liability Company Act Editorial Board).

A group company is an arrangement of companies that are legally independent and one with another is an economic entity led by a parent company. Most members of the group companies are limited liability companies, starting from the parent company, subsidiaries, grandchildren of the company, great-grandchildren, etc. The company group consists of several layers, even this layer can be infinite (unrestricted) because this is permissible and none of the legislation that prohibits it is included in the coal mining sector (Revised Prototype Limited Liability Company Act Editorial Board).

The limitation of the formation of the company's group of children (grandchildren, grandchildren and grandchildren) is not regulated in Law 40 of 2007 concerning Limited Liability Companies. The restrictions are faced with Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. This is related to the threshold number and

indications of violating Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition. However, if it has reached the threshold number, this cannot be said to violate Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition because what is prohibited in this Law is the result of these activities (Richard Rosecrance).

In group companies, usually the parent or controlling company will place its shares, directors and / or board of commissioners on each of the company's children or grandchildren. This is considered reasonable because it aims to maintain that the policies and strategies of all group companies can be controlled by a holding company. In Law 40 of 2007 concerning Limited Liability Companies, interlocking directors are not prohibited, but in this case the business actor must be careful and not to violate Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Business Competition, especially related to multiple positions (Kelly S. Ramsey).

All companies incorporated in the group company are an economic entity which in foreign literature is called a single economy entity (Robert R. Keatinge, Larry E. Ribstein, Susan Pace Hamill, Michael L. Gravelle and Sharon). Because it is an economic entity, the parent company that gives birth to children, grandchildren, grandchildren, etc. is located as the central leader. As a central leader, the parent company has the right to coordinate, control and supervise all members of the group company so that the goals of the group company are achieved (Stephen A. Rhoades). This has the effect of not being independent of the subsidiary as an independent legal entity to carry out daily activities due to control carried out by the parent company and will cause problems related to the accountability of third parties carried out by the subsidiary (Sulistiowati, 2011). On the one hand, the parent company can allocate risks to subsidiaries if the subsidiaries suffer losses or debts to third parties, resulting in bankruptcy of the subsidiaries. Therefore, based on the principle of independence of legal entities, a third party cannot hold the parent company accountable due to the separation of legal entities between the parent and subsidiaries, even though in reality the subsidiary is an extension of legal actions carried out by the parent company and the parent company can only take advantage of the benefits created by subsidiaries (Marilyn Krysl).

The group company can basically consist of companies that are not independent legal entities. For subsidiaries that are not independent legal entities, the parent company as the shareholder has responsibility for legal actions against legal actions carried out by the subsidiary (Sulistiowati, 2011). On the contrary, the parent company is not responsible for the legal actions of the subsidiary if the subsidiary is an independent legal entity. Group companies with independent legal entities are a logical consequence of legal loopholes caused by differences between juridical aspects and the reality of business group companies. This difference is caused by the still retained juridical recognition of the status of the parent and subsidiary legal entities as independent legal subjects, even though the reality of business group companies refers to an economic unity (Chalapati Rao).

Meanwhile, in group companies, financial statements must be consolidated financial statements (Syahrir Rezki and Friend, 2013). The consolidated financial statements are presented to meet the needs of financial information which includes the financial position of the parent company and its subsidiaries which are economically considered as a single business entity even though the legal entity is separate or in other words the name of the company is different (John T. Flynn).

Furthermore, within a group company, one legal entity cannot use a name that has been legally used by another legal entity. This is regulated in Article 16 of Law 40 of 2007 concerning Limited Liability Companies which explains that: (1) Companies may not use names which:

- a. have been lawfully used by another Company or are in principle the same as the name of another Company;
- b. conflict with public order and/or morality;
- c. are the same as or similar to names of state institutions, government institutions, or international institutions, except with the permission of those concerned;
- d. are not in accordance with the purpose and objective and business activities or merely show the purpose and objective of the Company without its own name;
- e. have the meaning Company, legal entity, or civil association.

(2) The name of the Company must be preceded by the phrase "*Perseroan Terbatas*" (Limited Liability Company) or the abbreviation "PT", (3) In the case of a Public Company, apart from the provisions contemplated in paragraph (2) being applicable, the abbreviation "Tbk" must be added at the end of the Company's name and (4) Further provisions regarding the procedures for the use of Company names shall be stipulated by Government Regulation.

Thus, business actors can make as many companies as possible as desired without certain quantity restrictions. In addition, the period or age of the formation of a company is also not limited in the company's budget. Applicants can even make a company term for life in the company's articles of association.

## CONCLUSION

In the coal mining sector, the dominant expansion is carried out by business actors, namely with 3 (three) ways, namely forming a holding company, acquisition, and joint venture. There are two main motives for a company to expand, namely economic motives and psikologi motives. The ekokomi motive is based on the consideration of enlarging or stabilizing the profits obtained. Psychological motives carried out do not pay attention to economic calculations. This kind of expansion is based on the personal ambition of the owner of the company to gain greater prestige and power. Various forms of corporate action to expand group companies in the mining sector have one goal, namely to control. This control function is attached to the parent company. With this control function, the company can supervise, coordinate, and control the business activities of children, grandchildren,

grandchildren, etc. so that the goals of the group company are achieved. However, it should be noted that not to expand the group's company violates Law No. 5 of 1999 concerning Prohibition of Monopolistic Practices and Unfair Competition, especially regarding prohibited activities and dominant positions.

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