

Reconsidering Functions and Roles of Corporate Executive Officer: Legal and Managerial Dilemmas between Employee Executive, Trustee, and Fiduciary Duty

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The current economic activity is inseparable from the role of corporations as the main supporting factor of economic growth. The Board of Directors is one of the company's structures that has an important role in conducting corporate activities. The relationship between the Company and the Board of Directors is unique in that the Board of Directors is based on the principle of trust (fiduciary duty). The members of the Board of Directors are generally from the company's employees, who are proposed and appointed as Executive Officers of the company and served as members of the Board of Directors. This raises the issue of how the employee's status in his/her employment relationship with the company is due to their inherent capacity as employees, the Directors and Executives of the Company's representatives, and therefore there are three laws, namely the Manpower Law, Corporation Law and Civil Code.

Key words: *Employee executive, trustee, fiduciary duty.*

Introduction

Limited company or business entity (hereinafter referred to as the Company) is one of the supporting factors of national economic growth and development. These are contributors to foreign exchange and taxes to the state and provides employment, whose presence in daily life cannot be ignored (Tambunan, 2008) and have become a necessity that cannot be bargained



(Nadapdap, 2009). Based on data from the Central Statistics Agency (BPS) which conducted the Economic Census in 2016, the number of companies in Indonesia was 26.7 million. This figure increased compared to the results of the 2006 Economic Census of 22.7 million companies (Agustinus, 2017). If at least 1 Director is needed for each company, then in all of Indonesia there are approximately 22.7 million Directors needed to manage and run the company.

There are three important organs in a limited company, namely, Directors, Board of Commissioners, and General Meeting of Shareholders. Of the three organs, the Board of Directors has a central role whose existence greatly determines the policy direction and implementation of the Company's operations. The Board of Directors itself is fictional (abstract), as is the case with the Company, and the existence of the Board of Directors is represented in the individual person of the Board of Directors.

Once the role of the Director is important in a company, it requires an individual who has competence, expertise, experience, mentality, loyalty, and most importantly integrity to the Company (the term Company is used by the author to emphasize the employment relationship as referred to in the Manpower Act, differentiating it from the Company, which more refer to terms in relation to the Limited Liability Company Law), to be able to occupy this important position.

The Board of Directors carries out the management functions of the Company and is held by individuals who originate as internal employees of the Company or in the case of meeting specific needs, the Company can also utilize professional personnel from outside the Company. Individual employees are monitored, reviewed, selected, and after going through other stages of assessment, then nominated by the Company to become a candidate for Company representatives to assume the position of director of the Subsidiary. The process ends with the appointment of the relevant Director of the Subsidiary through the mechanism of the General Meeting of Shareholders of the Subsidiary as stipulated in the Company's articles of association or Limited Liability Company Law.

This raises a problem regarding the status of the working relationship between the Company and Directors appointed from within the Company's internal circles, as well as how the arrangements are based on which laws and regulations apply. Related to this, the problems that arise are formulated in questions that are interrelated with one another, namely, how the roles and functions of the Executive Officer are the bridging function between the Parent Company and its Subsidiaries? And second, how the law in Indonesia regulates the legal basis for the existence of a Company Executive Officer in Indonesia. It is expected that this research can provide clarity about the legal status of employees who are appointed as Directors related to the rights of the employees as well as the form and status of work relationships between

employees, Parent Companies and Subsidiaries where the employees are placed as Executive Representatives of the Parent Company with the position of Director.

Research Methods

The method/methodology used in this research is a means to reveal a truth, which is chosen based on the material to be examined, and must be equipped with knowledge that will be used to examine the material (Hartono, 1994). The method in research is formulated as a type of thinking used in research and assessment, or a particular way to carry out a procedure, a technique that is common to science (Soekanto, 1984). The method in research serves to explain how the data was collected, analysed, and how the results of the analysis will be written (Hatta, 2000; Monette, Sullivan, & Dejong, 2013). Therefore this study uses normative juridical research methods that include analytical descriptive, empirical juridical research methods, legal comparison methods, and qualitative research methods.

Executive Managerial and Legal Position

The role of the Company in the economic development of a country began to increase rapidly in the late 18th century when a legal expert named Otto von Gierke (1841-1921) introduced the concept of organ theory (Ali, 2005), refuting fiction theory as put forward by Friedrich Karl Von Savigny (2002), who states that a legal entity is something abstract (fiction). Otto von Gierke (1900) argues that a legal entity is not a wealth (rights) that is not subjected to or abstract (fiction) but is a real organism, which lives and works like an ordinary human being, becoming a real incarnation in the association of law, which forms its will with the mediation of the organs. With this organ theory, legal subjects that were originally only humans (*natuurlijk persoon*), then expanded to include a legal entity (*rechts persoon*). The expansion of the legal subject causes the principle of non-potest/corporate societal delinquere cannot commit crime (the company cannot commit a crime) which has so far been rooted in the culture of justice and public awareness can no longer be maintained, changed to the principle of *societas delinquere potest* which allows criminal liability to the Company.

Recognition of the Company as a subject of criminal law, then became worldwide, with the convening of the 14th International Conference discussing the Criminal Liability of Corporation held in Athens on July 31, 1994. Countries that originally did not regulate the Company as subjects of criminal law could ask for criminal responsibility, then arrange it. The company/legal entity as a legal subject as a natural person, began to be recognized in Indonesia's positive law in Emergency Law No. 7 of 1955 concerning Investigation, Prosecution, Judicial Economic Crimes, Law No. 23 of 1997 concerning Environmental Management and Law Law Number 40 of 2007 concerning Limited Liability Companies (hereinafter in this paper the author will call the Limited Liability Company Law).

Based on the Law on Limited Liability Companies, there are 3 organs in a company, namely:

1. Directors, authorized and fully responsible for the management of the Company for the benefit of the Company and in accordance with the aims and objectives of the Company and represent the Company, both inside and outside the court in accordance with the provisions of the articles of association (article 92 of the Limited Liability Company Law);
2. The Board of Commissioners is tasked with supervising the management policies, general management of the Company and the Company's business and providing advice to the Directors (Article 108 of the Limited Liability Company Law), and
3. General Meeting of Shareholders has the authority not given to the Directors and/or Board of Commissioners within the limits specified in the Limited Liability Company Law and/or basic budget.

The requirements and procedures for the appointment, replacement, dismissal, resignation of the Company's directors will always be clearly regulated in the Company's articles of association, referring to the Limited Liability Company Law, bearing in mind that the Director is a position held by an individual from an internal employee of the Company (in this study the Company is interpreted as a Holding Company, which has a certain amount of shares in a Subsidiary/Affiliate Company).

Evaluation, appraisal, selection, and the appointment of an Employee to serve as Director of a Subsidiary are carried out through the Company's internal mechanisms and procedures (Standard Operation Procedure). An Employee who is elected as a Director of a Subsidiary is an executive (Executive Officer/Person in Charge, which in this paper the author will refer to as an Executive Employee) because he is a representative of the Parent Company as a shareholder who has the right to place his representative as one of the Directors in the Subsidiary.

The managerial role of executive employees is described in the Black's Law Dictionary which defines directors as people who manage, guide, or order; or a person appointed or elected to sit on a board that manages corporate or other organizational affairs by selecting and exercising control over its employees. While legally, according to the Limited Liability Company Law in Indonesia, it explains that the directors are the organ of the company that are authorized and fully responsible for the management of the company for the benefit of the company, in accordance with the aims and objectives of the company and represent the company, both inside and outside the court in accordance with the provisions of the articles of association. Directors run the management of the company for the benefit of the company and in accordance with the aims and objectives of the company.



Furthermore, in employment relations, the position of Directors is not specifically mentioned in Law No. 13 of 2003 concerning Manpower. Although the tendency embodied in the Manpower Act categorizes Directors as Entrepreneurs, but if grammatical interpretation of Article 1 of the Manpower Act states that Employers are individuals who run and own a company, the authors see this phrase as very contrary to the Directors' function according to Article 1 The Limited Liability Company Law, which states that the Board of Directors is a corporate organ that carries out management based on the principle of fiduciary duty where the Directors are trustees, managing an asset belonging to another party (beneficiary).

Specifically regarding executive employees, their duties can be broad or limited and are usually preferred in formal authority delegations. Generally, the CEO/MD serves as a communicator, decision maker, leader, manager (manager), and executor. The role of the communicator involves the press and the rest of the outside world, as well as management and employees of the organization. The role of the decision maker includes high-level decisions related to policies and strategies. As a leader, the CEO/MD advises the board of directors, motivates employees, and drives changes in organs. From some of these sources, it can be said that the Executive is someone who holds the highest position in the company, is given responsibility for managing the whole organization, is appointed by and is therefore responsible to the Board of Directors, and for the appointed employees as a representative for the parent company and appointed as director of the subsidiary. The authors are named in this paper as "executive employees" (Executive Officers, Person in Charge in Affiliate Companies) to distinguish them from the CEO as defined above.

Executive Staff and Fiduciary Duty Principles

The development of corporate activities has grown in line with the targets set by the company in the company's annual business plan. As a profit-oriented institution, the company will always strive to increase profits from year to year in various ways, efforts, and strategies both in terms of production and sales. This is accompanied by business efficiency efforts supported by improving the quality of human capital which becomes the backbone of the company, starting from the Directors as the highest level to the level of the Executor (operator).

This corporate action is carried out in various ways including forming joint ventures with other parties (joint ventures) or becoming one of the shareholders in a company engaged in certain business fields, so that the parent company can place its representatives as one of the directors at these companies which is then recorded in the portfolio as a Subsidiary (Affiliate Company).

In order to protect the interests of the company over the investment value that has been invested in the Subsidiary, of course the Company must place a candidate/prospective representative of the Company that has competence, expertise, loyalty, commitment, and high integrity to the Parent Company. This is because in the hands of this candidate, the trustee of the Parent



Company will be entrusted shareholders in a Subsidiary (Fiduciary Duty principle). Such is the magnitude of the role of this company representative, so it is not easy for someone to be appointed as a Company Director. In general, companies will look for candidates from internal employees, namely employees who hold certain positions, have good performance, high loyalty, have certain qualifications/expertise, have completed various kinds of education (education), training (training) both organized internally and external (commonly termed Career Director). This does not rule out the possibility of finding candidates from professionals outside the environment of the Parent Company if the required qualifications cannot be fulfilled by the Internal Parent Company (often referred to as a Non-Career/Professional Director).

The process of determining an employee who is appointed as a representative of the Company and at the same time as a Director in a Subsidiary Company will eventually lead to a prolonged polemic regarding the status of their employment relationship, whether they are the only subject to the provisions of the Limited Liability Company Law, or bound by the employment relationship as a worker/labourer as regulated in Labour Law.

This can lead to legal uncertainty because the Parent Company still carries out managerial functions for Executive Employees, such as monitoring, evaluating job performance, promotion, bonus giving, career advancement based on the Manpower Act. On the other hand, Executive Employees who have held the position of Director in a Subsidiary must work under the Limited Liability Company Law.

Polemics and pros and cons over the dualism of the Director's status continue to arise as long as there are no laws and regulations that bridge this status. There are some Directors who explicitly submit themselves to the Limited Liability Company Law so that all remuneration and other benefits as Directors are determined by the General Meeting of Shareholders (AGM) of the Company, which will certainly be much greater when compared to the salary of an ordinary employee.

Contrarily, some Directors refused to disengage from their employment status. This is because it can be seen that the Director's tenure which was relatively short ranged from two to three years, was considered to be the same as a "contract" employee. Therefore, when the Director's term was not extended by the AGM, then the person concerned will automatically lose his job, aka become unemployed.

In order to answer polemics and questions related to the dualism of the working relationship status of the Director with the Parent Company and its Subsidiaries, the authors use three approaches, namely:



1. Existence of Executive Employee Position as Company Representative (Trustee) (Widjaja, 2008).
2. The concept of Fiduciary Duty in work relations between the Company and Executive Employees (note describe elements of the employment relationship)
3. Documents to HRD as Law for the Parties in it

Three approaches are used by the author to find a new concept or theory to bridge the Labour Law and the Limited Liability Company Law in a working relationship of Executive Employees as Directors and Parent Companies. In journals, papers and other similar research, these have never been reviewed and there is a strong tendency that Directors is not a labourer/employee and as such is only subject to the Limited Liability Company Law.

As previously noted by the author, an Executive Officer is an employee who is appointed as a representative for a Parent Company and is appointed as a Director in a Subsidiary. Executive Employees have a unique position because they are in a dual condition, on one hand bears the title/status of the Employee (labour/worker) according to the Manpower Act, and at the same time functions as a trustee (Company representative) with the position of director in a Subsidiary.

The Origin and Implications of the Fiduciary Duty Concept

As explained in the Introduction, based on the Limited Liability Company Law, three organs within a company are known, namely the Board of Directors, the Board of Commissioners and the General Meeting of Shareholders. The Board of Directors has a very important task in carrying out its management functions, because in the hands of the Directors, the Company will run according to its aims and objectives. Therefore, the Board of Directors is given legal protection (corporate veil) in carrying out their duties. This relies on the condition that the Board of Directors has carried out its duties based on the principle of trust (Fiduciary Duty), a concept that explains the trust relationship between the Directors and the Company (fiduciary relation) which has appointed them as Manager and representatives for the company, in all kinds of legal actions to achieve the aims and objectives, as well as for the interests of the Company (Widjaja, 2008).

The concept of fiduciary duty was originally developed in countries with a common law system that originally developed from trust legal institutions that gave rise to a fiduciary relationship. In this trust law institution, a trustee manages an asset belonging to another party (beneficiary) as well as possible. For the managed assets, double ownership applies, where the trustee owns the asset legally (the legal owner) and the beneficiary has it based on the benefit principle (beneficiary owner) (Sitepu, 2011). This concept then interacts with legal concepts in the Civil

Law legal system and this can be seen in Article 97 paragraph 1 of the Limited Liability Company Law.

Legal protection is also given to the Directors for every business decision that is a transaction of the Company, as long as it is carried out within the limits of authority and with prudence and good faith (Business Judgment Rule) (Widjaja, 2008).

Thus, the Board of Directors in carrying out its management functions, must always pay attention to the following matters:

1. The actions of the corporation and/or management must be in accordance with the aims and objectives of the establishment of the corporation as stated in the articles of association/deed of establishment of the corporation and based on the applicable laws and regulations (*intra vires*). The purpose and objectives of the establishment of the corporation, binding all shareholders, Directors and Board of Commissioners. It can be said that the formulation of goals and objectives in the articles of association of a legal entity is a limitation of the legal entity's ability to act, so that legal actions carried out by corporations while those actions are not explicitly or implicitly included in the aims and objectives, are null and void because the law (Tumbuan, 2007).
2. Carry out the management function in good faith by carrying out the principle of prudential action (corporate prudential principle) and
3. In accordance with standard operation procedure (SOP), which is a corporate self-regulatory.

The three things mentioned above also constitute a limitation of corporate and management civil liability, which if violated, can result in the disclosure of a legal protection (piercing corporate veil).

The implication, there is a relationship of trust (fiduciary relations) that gave birth to the concept of fiduciary duty for the Directors of the Company, *mutatis mutandis*, also applies to Executive Employees appointed by the Parent Company as Directors and representatives of the Parent Company in Subsidiaries, because between Executive Employees and The Parent Company is a form of interdependent relationship, where:

- a. The existence of a Parent Company is the reason for the existence of Executive Employees, without a Parent Company, there is never an Executive Officer.
- b. The activities and activities of the Parent Company in the Subsidiary depend on the Director as an organ entrusted to manage the Subsidiary (Widjaja, 2008; Pragati and D. Varsha, 2018).

Executive Staff as Trustees of the Parent Company

For the Parent Company, Executive Employees are ordinary Employees (employee), who have a work relationship based on work agreements that meet the elements of work, wages, and orders. However, from the Subsidiary's point of view, Executive Employees are members of the Board of Directors appointed by the GMS to carry out the management duties of the company based on the provisions stipulated in the Limited Liability Company Law, by obtaining remuneration as determined by the GMS of the Subsidiary. Therefore, at the same time two capacities will be attached to the parties concerned, namely, (1) as Director of a Subsidiary, therefore subject to Limited Liability Companies Law, and (2) as Employees/Employees of the Parent Company, bound by Labour Law.

The authority, duties and responsibilities of individual Employees in their capacity as Directors and Employees, although expressly stipulated in different statutory regulations, leave questions and polemics as outlined earlier in this paper. If the appointment of Employees as Directors causes a working relationship with The Parent Company to automatically end on its own, the person concerned is only subject to the Limited Liability Company Law. This condition occurs if there is a condition in which the Employee submits an application to resign or vice versa. The company terminates the employment relationship of the Employee, based on the provisions of Chapter XII of the Manpower Act concerning Termination of Employment.

To answer this problem, the author uses one more perspective, namely from the perspective of the Employee as a representative of the Parent Company (trustee) in the Subsidiary, so that thus, the relevant person is now attached to three capacities, namely:

1. As Director of a Subsidiary.
2. As Employees/Employees of the Parent Company, and
3. Executive representatives of the Parent Company to Subsidiaries.

The next question that arises is if the person acting in the capacity as a Director or Employee, the provisions governing it are the Limited Liability Company Law and the Manpower Act. What about the third capacity status? Namely as Executive Employee, what laws overshadow this status/position considering that both the Limited Liability Company Law and the Manpower Act do not regulate the provisions regarding this Executive Officer?

To answer this question, the author has conducted closed research and obtained data and information, in the series of the process of determining and selecting an Employee to be a candidate for Company Executive. Therefore, Employees and the Parent Company will negotiate to find mutual agreement related to many matters relating to the appointment plan of Employees as a representative of the Parent Company as well as a Director of a Subsidiary.



Agreement or disagreement (in the event that for one reason or another employee refuses or does not want to be placed in a subsidiary as a representative of the Parent Company), will always be stated in civil documents, can be either in the form of (1) Statement; (b) Commitment Letter; (c) Agreement Letter, (d) other supporting documents, where the letters or documents contain all matters agreed by both parties (Employee and Company).

Based on Article 1601, Article 1601 a, Article 1320 and Article 1338 of the Civil Code as outlined in chapter III above, the letters or documents signed by the Executive Officer and the Company, will apply and bind the parties therein as law -invite. The managerial function of the Company continues to be carried out for Executive Employees wherever placed. The Parent Company will routinely carry out evaluations and assessments to Executives to determine the performance and performance of Executive Employees in managing Subsidiaries. The Parent Company periodically makes and determines the calculation of total annual net income consisting of basic salary, holiday allowances, work gifts and other benefits, which are formulated based on the status of the position and rank of Executive Employees.

Based on these calculations, the Subsidiary will then pay the rights of the Executive Employees together with the deduction of contributions either determined by the government such as BPJS Ketenagakerjaan, BPJS Kesehatan, as well as those of the parent company policies such as pension contributions, health insurance, and others.

Because the status of the Executive Employee is a worker/Employee, an Employee ID Card and Employee Identification Number are given to him as the Employee Identity of the Executive Employee in the Subsidiary. Under these conditions, this study argues that for Executive Employees, particularly in Indonesia, three laws and regulations apply, namely (1) Law Number 13 of 2003 concerning Manpower, (2) Law Number 40 of 2007 concerning Limited Liability Companies, and (3) Civil Code.

The managerial function of the Parent Company for Executive Employees placed in the Subsidiary, automatically switches to the Subsidiary when the management of the managerial function is transferred by the Parent Company to the Subsidiary. This is so that the Executive Employee will become the responsibility of the Subsidiary and there is no working relationship with parent company.

Resolving the Managerial and Legal Dilemmas in the Role of Executive Officer

Based on the matters that have been described above, this study identifies a position that is an Executive Officer which is very important in the management activities of a corporation that functions as a bridging position to safeguard and ensure all the interests of shareholders is well represented in the corporate activities of the Subsidiary.

An Executive Employee is an employee who is assigned as an executive who acts as a representative of the parent company (trustee) to sit as a member of the Board of Directors of a Subsidiary, based on the principle of fiduciary duty (trust), where there is a relationship of interdependence between the Parent Company and Employees:

- a. The existence of a Parent Company is the reason for the existence of Executive Employees, without a Parent Company, there is never an Executive Officer.
- b. The activities and activities of the Parent Company in the Subsidiary depend on the Director as an organ entrusted to manage the Subsidiary.

With the identification of the functions and position of this Executive Officer, it can reinforce the legal status of a Director nominated by the Parent Company as a shareholder, that the person concerned remains an Employee (worker/labour) as referred to in the Manpower Act, because he is not attached to an employment relationship cut off with the Parent Company whose work, wages and orders are.

With this clarity of status, the legal protection granted to Executive Employees covers three different legal scopes, namely the scope of labour, corporate and civil law, in accordance with each occupational capacity carried and attached to Executive Employees. So that if there is a legal problem, then what is used is the law that oversees the scope of the capacity of the Executive Staff where legal problems arise, in order to determine what law will be used to resolve the legal problem.

Conclusion

To address the problems that arise due to the dualism of the legal status of the Company Director, the author recommends that the position of Executive Employees, who serve as directors of the Company be immediately standardized in existing legislation, namely the Manpower Act and Limited Liability Company Law, bearing in mind the theory and concept order law, a company representative (trustee) who serves as director has long been known and implemented in corporate activities.

Because it takes a long time to revise the law, the position of Article 1320 of the Civil Code becomes important because it will become the law for the parties making an agreement, in this case the Company and Executive Employees. This can provide clarity on the legal basis used when appointing and appointing an employee who is an Executive and is placed as a representative of the Company with the title of Director of a Subsidiary.



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