

BUSINESS JUDGEMENT RULE AND CRIMINAL ACTS OF CORRUPTION THAT HARM THE FINANCES OF THE INDONESIAN STATE

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ABSTRACT

The emergence of various problems in the application of the principle of the Business Judgment Rule in Indonesia as well as the existence of the Board of Directors of SOEs who must be personally responsible for business decisions that are detrimental to the Indonesian state's finances. This study was conducted to determine the qualifications of actions that can be protected by the Business Judgment Rule principle or actions that can be subject to criminal acts of corruption that are detrimental to the Indonesian state finances. The research method used is normative juridical research conducted through library research and analyzed by qualitative research methods on the secondary data found. Data collection techniques through literature study. The results show that the SOE Directors in making their business decisions by the Business Judgment Rule principles must be freed from personal responsibility as long as the policy or business decision or transaction is carried out in good faith, with full prudence, and within the scope of their responsibilities and authorities. If there is one condition that is not met, the SOE Directors can be held personally accountable. In this case, a criminal act of corruption can be imposed because it has harmed the Indonesian state's finances.

Keywords: Business judgment rule; Corruption crime; legal liability

1. Introduction

It is often heard that BUMN/BUMD are entangled in corruption cases with a large number. From various BUMN/BUMD corruption cases were caught because they were considered negligent in carrying out their company activities. It should be noted that companies that take the form of limited liability companies are mostly profit-oriented, so that directors who occupy vital positions are given certain authority to carry out organizational management activities to obtain optimal profits in business. The form of a company in a BUMN has consequences for its openness in terms of investment and financing in the form of capital so that BUMN has the capacity and authority to manage its wealth independently (Larry, 1983). BUMN operate in various business sectors, for example agriculture, fisheries, plantation, manufacturing, forestry, mining, post and communication, transportation, finance, industry and trade, construction, electricity, and so on. As one of the drivers of the country's economy, of course, there is encouragement from the state to BUMN to continue to develop and make business decisions that are able to provide optimal benefits to the state (Aji & Hartiwingsih, 2023). However, it is undeniable, like private companies, BUMN are also faced with similar challenges and risks in which every business decision taken contains the potential to gain profits or vice versa, result in losses. It has become a natural thing when the state finally decides to participate in the trading business in the form of companies to obtain profits which are then used as sources of financing in the government (Salam, 2003).

Basically, even though BUMN appear to have various advantages and conveniences when compared to private companies, in fact BUMN in terms of development have more laws that must be considered so that BUMN do not have the flexibility that private companies have. BUMN has more regulations that regulate business processes to business decision making when compared to private companies. This has implications for flexibility in business development, especially in decision making (Salam, 2003). Before going any further, it is necessary to understand the existence of the term "high risk, high return" which means that the risks taken in running a business are proportional to the profits to



be obtained. Companies that are profit-oriented will of course be faced with risky choices to get that profit.

Recklessness and carelessness in taking which risks to take or failure to assess and measure risks can bring losses to the company which can bring directors and commissioners to account for these decisions, both civil and criminal, but on the other hand, reluctance to take risks. can hinder the development of the company. For the record, the reluctance to take the risk is also considered a “decision”. Until finally, the directors came into a situation full of dilemmas, whether to take a risk or not, both of which were translated as a “decision”. The business judgment rule plays a role when the board of directors of a company makes a decision that affects the company which is accompanied by a lawsuit by the prosecution alleging that the board of directors violates corporate boundaries (Hasiholan et al., 2023). The court will evaluate the company based on the business judgment rule. Under such conditions, the court will uphold the decision of the board of directors, only if: the decision is made on the basis of good faith, the decision is made with due regard to the interests of the company (fiduciary duty), the decision is made based on adequate data (informed base), the decision is made based on decisions are not made on the basis of futility (duty of care), and decision making is not based on personal interests (loyalty).

The decision-assessment mechanism based on the business judgment rule can be a protective measure for the board of directors for decisions that are detrimental to the company. In Indonesia itself, the implementation of the business judgment rule by the board of directors in accountability is carried out before the General Meeting of Shareholders (GMS). If the responsibility is accepted, the board of directors will be released from the company's responsibility including the losses suffered by the company, but if the minority shareholder has a different opinion with the majority shareholder, the loss suffered by the company can be brought to court and the board of directors can defend. When the board requests to apply the business judgment rule and the court finds out that the presumption is true, then the defendant has an obligation to prove that the business judgment rule does not apply. On the other hand, when the court finds the fact that the assumption is wrong, the board must accept the truth that the decision of the board of directors was carried out with fairness and honesty (Ansari, 2019).

The matters mentioned above are crucial to provide guarantees to the board of directors to make decisions in carrying out their duties. But in reality, there are still law enforcement officers or business actors who do not have sufficient knowledge of the business judgment rule in the accountability of corporate organs, in addition to the absence of detailed rules regarding the scope of protection of company organs, the boundaries between the business judgment rule and corruption, the absence of a detailed definition. related to company interests and personal interests that are directly related to company activities (Bainbridge, 2004). Basically, the board of directors is given the authority to make decisions that are deemed necessary in relation to carrying out a company's business affairs. This authority is protected by law and cannot be contested even if the decision causes losses to the company as long as the decision taken meets the criteria above (Isfardiyana, 2007). According to Sutan Remi Sjahdeni, if you look at the provisions in the business judgment rule, the business decisions taken by the board of directors cannot be contested by anyone, including shareholders and the courts, except in certain cases and conditions (Sjahdeni, 2001).

Cases in the business judgement rule are relatively easy to decide (Isfardiyana, 2017; Simbolon, 2018). The following hypothesis illustrates how this can happen. As in the example, if the board of directors decides to sell the company's valuable assets as individuals and the shareholders make a claim against the decision, no party can interfere with the board's decision in making a claim on the grounds that the board's resolution is a protection against the business judgment rule (Easterbrook & Fischel, 2004). In this scenario, the board of directors has a conflict of interest, where in making a business decision, the shareholders (the Board) must give approval (or at least some) so that the court will judge that the decision is fair for the company. Conflicts of interest in a decision will tarnish the decisions taken by the board of directors and strip the board of protection that is usually provided through the business judgment rule (Manning, 1984).



The Board of Directors by default has the obligation to run the company with all its business affairs and ensure that the company can continue to survive and compete in the field of business it does, as well as provide profits/profits with all decisions or policies that are felt to bring maximum benefits/benefits to the company. However, the next problem that arises is what if the board of directors in making the decision on the other hand causes losses or is a counter-productive step for the company so that the board of directors must be responsible for the decision (Brown & Phillips, 1980). The Board of Directors' accountability can be in the form of civil liability or criminal liability (Akram & Fanaro, 2019). Starting from the background of the problem that has been described in the introduction, then two formulations of the problem can be formulated, namely: What are the elements of a crime that is detrimental to the State's finances in BUMN, and How is The relationship between the board of directors' business decisions that cause state financial losses based on the Business Judgment Rule and Corruption Crimes (Hinsey, 1983).

This study uses several references to previous research conducted by several researchers who discussed the Business Judgment Rule. The results of previous studies will be used to support this research, namely as follows. Research conducted by Akram, Muhammad Hafizh, and Nisriina Primadani Fanaro with the title Implementation of the Business Judgment Rule Doctrine in Indonesia with the results of the study that the Business judgment rule is a doctrine that protects directors not to be personally responsible if the business decisions taken cause harm to the company. company. Relying on a literature review, the business judgment rule is regulated implicitly in Article 92 paragraph 1 and 97 paragraph 5 of Law no. 40 of 2007 concerning Limited Liability Companies, several cases related to the business judgment rule, this paper intends to analyze the implementation of the business judgment rule doctrine in Indonesia.

Research conducted by Bainbridge, Stephen M. with the title The business judgment rule as abstention doctrine with the results of the study establishing control and monitoring mechanisms to prevent personal interests in negotiations that harm social interests, avoid conflicts of interest and the possibility of opportunism by managers. One instrument that is relevant to the problem is the manager's various tasks (and consequent retaliation for non-compliance) in a system of checks and balances. With managers' responsibilities - particularly about civic responsibility to society -, there is growing judicial oversight of business decisions, resulting in defensive and daunting management problems, to the detriment of society and the economy as a whole. The rule of business judgment presents itself as an instrument that brings calm in the tension this creates (Wijaya, 2020). Moreover, on its own, it would produce a powerful weapon to combat agency costs, the investment costs required to ensure that agents match their behavior with the principal. Research conducted by Wijaya, Ivan Satria. With the title Accountability of the Management of State-Owned Enterprises Against State Financial Loss in the Management of Persero With the research results obtained in the form of an answer that BUMN Persero is a legal entity like a limited liability company so that the Persero also attaches the characteristics of a legal entity, especially separation the assets of the company from the founders and or shareholders, therefore the legal status of ownership of the assets of the Persero originating from separated state assets is no longer included in state finances but is the finances of the company itself.

2. Method

Judging from the type of research, the author uses qualitative research. Methods of data collection and data analysis, the author uses a literature review or literature and interviews both academics and practitioners. The collected data is analyzed by technical content analysis (content analysis). The types of data used in this research are primary data and secondary data. Primary data in this study consists of empirical data in the form of behavior (behavior) and non-empirical data (symbolic meaning). Secondary data consists of primary legal materials, secondary legal materials, tertiary legal materials. The primary legal material used is statutory regulations. Secondary materials are materials that provide explanations for primary legal materials, in the form of publications on law, both books, research results, magazines, journals, which are related to the research of this journal. For tertiary legal materials, relevant materials such as dictionaries and encyclopedias are used. In

addition to legal materials, this research will also use non-legal materials, namely books with the theme of philosophy, economics, politics, and culture, as long as they are used to assist and enrich the discussion. This study uses primary data and secondary data. Secondary data includes (1) primary legal materials, (2) secondary legal materials, and (3) tertiary legal materials (Soekanto, 2005, 2007). Primary data in legal research can be seen as data that is the legal behavior of citizens (Fajar & Achmad, 2010).

3. Result and Discussion

3.1. Elements of criminal acts that are detrimental to the State's finances in State-Owned Enterprises

Associated with state assets, and BUMN, corruption has a strong correlation. As regulated by Article 2 paragraph (1) of the Corruption Law. Corporations as legal subjects of criminal acts of corruption are stipulated through Article 1 number 3 of the Corruption Law which states that "everyone" so that consequently the corporation can be held accountable and can be imposed a crime. In the case of a criminal act of corruption committed by or on behalf of a corporation, criminal prosecutions and impositions can be made to the corporation or the management as individuals (Suhariyanto, 2018). The main punishment that can be imposed on corporations is only a fine with a maximum penalty plus 1/3 (Suhariyanto, 2018).

In relation to criminal liability, it will arise when the Board of Directors commits an unlawful act that enters the realm of criminal law (Affandhi et al., 2016). The legal act in question, especially in BUMN, is a criminal act of corruption. The case that ensnared the BUMN Directors who were accused of committing acts of corruption with the argument that the company he led had caused state losses. This is due to the provision that stipulates that the capital obtained by BUMN Persero is at least 51% of the total capital as stipulated in Article 1 point 2 of the BUMN Law (Hartono & Rini, 2021). If it is related to the elements of corruption offenses as stated in the Corruption Law, it is quite reasonable if law enforcement officials assume that the policy of a SOE Board of Directors that can harm state finances is an act of corruption offense, because in Article 2 paragraph (1) which states the conditions "financial loss / state economy". State finances according to the Anti-Corruption Law are state assets in any form, whether separated or not, including all parts of state assets. The provision stipulates that as long as there is an actual loss to the BUMN, it is considered to have harmed the state finances so that the directors are accountable for criminal acts of corruption (Affandhi et al., 2016).

Tuanakotta (2009) There are four accounts that can be a source of state losses, Tuanakotta describes them in a tree of state financial losses as follows:

1. asset
2. liability
3. revenue
4. expenditure

On the same occasion, Tunakotta divided the concept of the method of calculating state losses into 6, namely:

- a. Total loss Through this concept, state losses are calculated by valuing the entire amount paid and expressed as state financial losses.
- b. Total Loss with Adjustments Similar to the concept of calculating total losses by adjusting upwards.
- c. Net loss There is no significant difference between the concept of calculating losses with net losses and total loss, but adjustments in this concept are made with downward adjustments.
- d. Reasonable Price Through this concept, the calculation of state financial losses is compared to the fair price as the realized price.
- e. Opportunity cost Through this concept, opportunity cost is used if there is an opportunity or opportunity to get the best result, but this opportunity is sacrificed, so that the loss of this opportunity is counted as a loss.



f. Interest is an important element in state losses, especially in financial transactions such as for example the placement of assets, interest which is time dependent so that the calculation of state losses includes the calculation of the period (period) and the applicable interest rate.

State losses arising from losses suffered by BUMN generally come from wrong business decisions. Understanding that business decisions have risks, profits or losses, but the essence of consideration and business decision making is balancing or balancing the risks to be considered. Faced with the benefits or benefits to be obtained or expected (Silondae & Fathoedin, 2010). It is natural that business risk cannot be predicted mathematically accurately even though it is based on sufficient factual information (qualitative or quantitative). To assess the business risk of the Board of Directors in making business decisions based on their instincts, the data and information obtained are weighed and rethought so that their decisions are not wrong. In the business decisions taken by the Board of Directors, their instincts often cannot be translated into systematic analysis so that they cannot be understood by other parties (Irawan et al., 2022).

Even if all decision-making requirements and procedures have been complied with, there is no guarantee that the decision will always produce the predicted result, sometimes it may even result in the opposite of the prediction. At the outset, in Stephen M. Bainbridge's opinion, such risks are normal business risks (Bainbridge, 2004). This is where the business judgment rule doctrine comes to protect decision makers. As previously discussed, state losses based on Article 1 point 15 of the Supreme Audit Agency Law and Article 1 number 22 of the State Treasury Law, state losses are determined by a real and definite reduction in money, securities, and state property resulting from unlawful acts. either intentionally or negligently. However, when talking about the reasons for the loss in a BUMN, it can lead to various factors as follows (Wijaya, 2016; Lestari et al., 2018; Mayasari, 2014).

- i. Market factors, exchange rates, government policies in maintaining market prices which are beyond the control of SOEs that have the potential to harm the company and the state if referring to the State Finance Law and will be a business risk if referring to the BUMN Law.
- ii. Procurement of goods and services will be difficult to carry out if the results of the tender for similar types of goods/services from one BUMN are compared with the results of the tender for another BUMN where the difference in the excess price of the tender is considered as a loss to the state.
- iii. The absence of policy considerations between the element of profit certainty and the element of trying to create doubts and concerns for BUMN implementers to take a decision or the ability to act in corporate acting by considering the absence of business risk factors considered by the Government against BUMN.

The element of criminal acts created about State-Owned Enterprises is a criminal act of corruption caused by the occurrence of losses to the state. The existence of state financial losses is the main factor/basis in determining whether an act can be categorized as a criminal act of corruption or not. However, it is necessary to first review the meaning of state finances in a juridical sense which is explained through Article 1 point 1 of Law Number 17 of 2003 concerning State Finances which defines state finances as "all the rights and obligations of the state that can be valued in money, as well as everything in the form of money or goods that can be used as state property in connection with the implementation of these rights and obligations." This is in line with what is regulated in Law Number 19 of 2003 concerning State-Owned Enterprises in Article 1 paragraph (1) which states. Determination of an act as a criminal act of corruption refers to Article 2 paragraph (1) of Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 which states that corruption is an unlawful act that can harm the country's finances or economy which is carried out to gain for themselves or other parties.

If the approach is that the assets of State-owned enterprises are separated state assets, it can be seen that every loss suffered by State-owned enterprises is a criminal act of corruption, so that this places the board of directors as business decision-makers who incur losses can be accounted for as a



criminal act of corruption. whereas in reality not all losses experienced by State-owned enterprises are intended to obtain personal gain or are carried out to benefit other parties. The above description when reviewed creates a conflict with Article 28 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which states that "everyone has the right to recognition, guarantees, protection, and fair legal certainty as well as an equal treatment before the law". This is based on several reasons such First, "which can harm state finances or the state economy" which has an open interpretation so that every party who reads it cannot catch the impression of legal certainty to justice seekers and law enforcers, because the act in question is not yet real and does not necessarily occur with a definite amount (Firmansyah et al., 2020).

Second, there is no meaning of "state loss" which provides legal certainty even though Article 1 paragraph (22) of the State Treasury Law and Article 1 point 15 of the Supreme Audit Agency Law state that state losses are defined as a shortage of money, securities, and real and definite amount. Losses experienced through the business decisions of the board of directors are closely related to management duties, which include the authority to collaborate with third parties to increase the company's revenue. However, this authority is the dominant cause of state losses if it is not handled with care, as in the case of Hotasi Nababan as Director of the Merpati Nusantara Airlines Limited Liability Company and Tony Sudjiarto as the former General Manager of the Merpati Nusantara Airlines Limited Liability Company who were charged with committing a criminal act of corruption in the practice of leasing Boeing 737-400 and Boeing 737-500 aircraft which cost the state as much as US\$ 1 million.

In 2006 PT. MNA entered into a rental agreement in a financial condition that was in a state of deficit with an indication of its low production capability but large operating costs, its fleet was only 25 units but had many employees. So as Hotasi's director and General Manager Tony Nababan took a rescue step by leasing an aircraft belonging to the Thirdstone Aircraft Leasing Group (TALG), based on an agreement by paying a security deposit of US\$ 1 million. However, the State suffered heavy losses because Thirdstone Aircraft Leasing Group (TALG) did not send the agreed aircraft even though they had received the money (Akram & Fanaro, 2019). When referring to the approach that state losses can be accounted for as a criminal act of corruption, the example case can be categorized as a criminal act of corruption because it has reduced state money contained in the finances of State-Owned Enterprises that are real and have a definite amount.

3.2. The relationship between the board of directors' business decisions that cause state financial losses based on the Business Judgment Rule and Corruption Crimes.

Relating the business decisions of directors that cause state financial losses to criminal acts of corruption, basically according to Eman Radjaguguk, has an element of conflict which he stated in Article 2 paragraph (1) of the Law on Criminal Acts of Corruption, contrary to Article 1 paragraph (3) of the Constitution of the Republic of Indonesia. Indonesia in 1945 which states that Indonesia is a state of law. This opinion is based on the following reasons (Radjaguguk, 2006) "The drafters of the Draft Law or the drafters of the law have the obligation to comply with the principles of the Rule of Law. As part of that obligation, they must ensure that their design framework is clear, thorough, and consistent. Without clarity and thoroughness, laws are unpredictable. The rule of law principle demands that as many people as possible know what they are ordered to do under the law, what is given to them under the law, and what behavior they expect from officials. The existence of clarity and thoroughness in the Draft Law itself places the task of drafting the Draft Law as the basis of clean governance and development (Mahyani, 2019).

Obligations to draft laws that are clear and thorough are also derived from the demands of a democratic government that seeks to carry out reforms; to use laws that change problematic behaviors and in decision-making impartially. Both of these require the use of the law in encouraging behaviors that are the target of legislation - both citizens and officials. In the development of the main task of the law is to regulate the behavior, both the behavior of the main role and of officials in implementing institutions (law enforcement). Democracy demands and scrupulousness of the legislators. In principle, through laws and regulations made by a democratically elected legislature, the people determine the behavior of the rulers. The principle of the rule of law will collapse if the



officials who are targeted by judges and other law enforcers do not obey the law. Without it, democracy is in a very weak position. Legislators are obliged to ensure that their laws encourage the desired behavior of officials, because it is under the principle of the rule of law, namely that government must be based on law, as stated in Article 1 paragraph (3) of the 1945 Constitution: state law".

To ensure that predictions can be made, to encourage behavior that is under clean governance, and to ensure that government officials comply with the provisions of the law, and the parties to whom the law is addressed have easy access to the contents of the law in question. As the first condition of ease of access, the legal framework for disclosure of its overall structure, details on who does what, as well as clarity, thoroughness, and consistency of sentences in the law to provide certainty for the intended parties regarding their obligations. they obey the law. To ensure that predictions can be made, and to ensure that laws encourage the desired behaviors both to achieve development and non-unilateral decision-making and to protect democratic control over government, drafters of Bills must be able to produce laws. - detailed, thorough, clear, and accessible laws. Article 2 paragraph (1) which contains the sentence: "which can harm the State's finances", uses vague words. How the law should be enacted, or punishment imposed based on an event that has not occurred, does not necessarily occur or may not occur. The words which can harm the State's finance", in practice these words can mean anything according to the choice of the reader. How big the consequences for the suspect who was sentenced based on the words above, but it turned out later that the loss to the State did not occur. When a case is brought to court, it implicitly gives the judge the authority to formulate the necessary detailed rules.

The uncertainty of such words is certainly undesirable. Vague drafting laws is not good, a term that vaguely gives authority to every official who implements the law, indefinitely. This can lead to the so-called "Judicial Dictatorship" which of course contradicts Article 1 paragraph (3) of the 1945 Constitution: "The State of Indonesia is a state of law". When viewed in Article 2 paragraph (1), it means that corruption is an act that can harm state finances or the state economy which can absorb every director of a State-owned Enterprise that causes state losses on the results of business decisions that he makes contrary to Article 28 paragraph (1) The 1945 Constitution of the Republic of Indonesia which states that everyone has the right to recognition, guarantee, protection, and legal certainty, as well as the board of directors in the realm of making their decisions. Even though it was finally declared that the state had suffered a loss due to the decision, the directors were still entitled to legal protection.

According to Erman Radjaguguk, this is seen from the hierarchical point of view of the legislation:

1. "Article 2 paragraph (1) of the Corruption Crime Law should not be treated because it is contrary to Article 1 paragraph (3) and Article 28 paragraph (1) of the 1945 Constitution, or the word "can" is omitted so that it reads: a person who unlawfully commits an act of enriching himself or another person or a corporation that is detrimental to state finances..."
2. The foregoing will not create a legal vacuum, with an understanding that brings legal certainty, as stated in the definition of loss as referred to in Article 1 paragraph (22) of Law no. 1 of 2004 concerning the State Treasury.
3. The reason for the invalidity of Article 2 paragraph (1) of Law no. 31 of 1999 as amended by Law no. 20 of 2001, also by the principles of Criminal Law as referred to in Article 1 paragraph (2) of the Criminal Code: "If the law is changed after the act is committed, the suspect is subject to provisions favorable to him". Furthermore, according to Erman Radjaguguk, there has been a change in the meaning of "State Loss" by the legislators because Law no. 1 of 2004 concerning the State Treasury also contains criminal sanctions, Article 64 of Law no. 1 of 2004 states: "Treasurers, non-treasury civil servants, and other officials who have been appointed to compensate the state/regional losses may be subject to administrative sanctions and/or criminal sanctions. Criminal decisions do not exempt from demands for compensation.
4. The occurrence of a change in the law is marked by a change in legal feelings (beliefs) in legislators. Any changes, both in the legal sense of the legislators, as well as in circumstances due to time, may be accepted as changes to the law in the sense of the word Article 1 paragraph that such

changes are not mentioned in the editorial of Article (2) of the Criminal Code; although 2 paragraph (1) of the Corruption Crime Law no. 31 of 1999 which has been amended by Law no. 20 of 2001".

4. Conclusion

By law, the assets of BUMN Persero cannot be immediately categorized as state finances, because the wealth in BUMN Persero is a separated state asset originating from separated state finances. Although subsequently through the Constitutional Court Decision No. 48 and 62/PUU-XI/2013 which state that BUMN is an integrated part of state finances. However, through Decision No. It is also stated that the management of BUMN/BUMD is also subject to the business paradigm (business judgment rule) so that the directors can become the subject of protection for decisions that cause state losses through the business judgment rule. This is very reasonable considering that business decisions are strongly related to the risk of loss. Concerning the decisions of the Company's SOEs, every decision taken by the board of directors is a corporate decision that is carried out solely for the benefit of the company which is by the goals and objectives of the company as regulated in the company's articles of association. Even so, not only every SOE decision can be free from criminal responsibility. There are several criteria that must be met, such as the fulfillment of the common law and fiduciary duties of the board of directors as stated in Article 97 paragraph (2) and Article 92 paragraph (1) and Article 97 paragraph (5) of the Limited Liability Company Law.

The BUMN Directors have two functions in carrying out their duties and responsibilities, namely the management function and the representation function as set out in the ADRT. The BUMN Board of Directors has full power, authority and responsibility for the BUMN commissioning. With the magnitude of the duties and authorities, it is vulnerable for the Board of Directors to be prosecuted for civil and criminal liability. So it is imperative that the directors get protection against the business decisions they make. This legal protection is known in company law as a business judgment rule which is defined by definition as not being accountable for the board of directors for losses resulting from a business decision of the board of directors who have carried out common law and fiduciary duty. Business decisions made by BUMN Directors based on the principle of trust (fiduciary duty) cannot be held personally responsible even though the BUMN suffer losses from the decision. This can be interpreted as a manifestation of the legal protection of the BUMN Directors who are responsible for the sustainability of the company entrusted to it through the General Meeting Of Shareholders.

With regard to the form of accountability of the Board of Directors that has caused losses to BUMN, Article 97 of the PT Law can be applied so that as is known, business entities in the form of Limited Liability Companies such as BUMN Persero have separate assets characteristics, there is a clear separation between the management of the Company and the power of the owners of wealth (separate legal). entities). Capital divided into shares (shares). With this separate legal entity, the Persero can separate itself from the influence of the state and can take legal action within the scope of private law (*privatrechthandeling*) or conduct business (*bisnizakelijik*) without any interference from the government or the state.

Indonesia adopted a Business Judgment Rule through Law Number 40 of 2007 concerning Limited Liability Companies as measures to provide protection to directors and commissioners. The Board of Directors can be responsible for business decisions taken individually or collectively if the Board of Directors is proven negligent or guilty and does not have good intentions and is full of responsibility in operating the company, so that the State suffers losses as referred to in Article 97 paragraphs 3 and 4 of the Company Law. A director is required to be careful in making decisions by considering all risks and based on sufficient information and data, and to do so in good faith. In addition, the implementation of the management duties must also comply with the standard of care or the criteria for caring with the following elements:

- a. Carry out their duties in good faith.
- b. Carry out their duties with full care and prudence as if running their own business.
- c. Carry out their duties with logical considerations (reasonably believe) and carried out in the best interest of the company (best interest).




The consistency of the board of directors in carrying out their duties according to these provisions can legalize the application of the business judgment rule principle which can become the doctrine of the right to immunity from law on the board of directors. This immunity from the law does not mean that the board of directors is free from all lawsuits, but rather the court respects the business decisions of the board of directors and acknowledges the inability of the court to give a second opinion on the business decisions of the board of directors. The meaning of granting immunity is to encourage the recipient of immunity to have the freedom to make independent judgments, especially on controversial and risky matters in situations or situations that require the implementation of decisions relating to important matters in making a decision. This will enable the effective exercise of tasks, roles, or rights, and leave decision makers from doubting. In other words, immunity is given to the person when it is necessary to make decisions that involve interpretation so that they can make the best decisions they can make rather than just making safe decisions.

The settlement of cases related to the company losses in Indonesia is dominated by the construction of corruption crimes, as the case with the allegations against Hotasi Nababan (Former Director of Merpati Nusantara Airlines) in which the Court refused to apply the principle of the business judgment rule and punished the director's business decisions with corruption. The discussion of the business judgment rules in Indonesia is more normative in nature regarding its regulation in Limited Liability Company Law which leaves a lack of understanding of the business judgment rule in Indonesia, both from law enforcement circles to the directors of State-Owned Enterprises (BUMN) so that there are doubts for the board of directors to make strategic and high-risk business decisions. Even so, the application of the business judgment rule has been successfully applied to the release of former Pertamina President Director Karen Agustiawan from the indictment of a corruption case by taking into account the principle of the business judgment rule. In his consideration states that "the decision of the board of directors in a company activity cannot be contested by anyone, even this causes losses for the company, but it is a risk in doing business which starts from business characteristics that are difficult to predict and cannot be determined with certainty".

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