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THE VALIDITY OF CONTRACTS IN THE DUAL POSITION OF DIRECTOR IN A LIMITED LIABILITY COMPANY

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Adeline Humaira Audrey[1], Dipo Wahyoeno Hariyono[2]

[1] *Faculty of Law,* Universitas 17 Agustus 1945, *adelinehumaira.audrey2002@gmail.com*
[2] *Faculty of Law,* Universitas 17 Agustus 1945, *dipo@untag-sby.ac.id*

Abstract: The phenomenon of directors holding dual positions in two or more related limited liability companies raises legal issues regarding the validity of contracts signed by the same party for two different entities. This study aims to analyze the legal consequences of the validity of contracts made by directors with dual positions. The purpose of this study is to determine the validity of contracts in the case of directors with dual positions in limited liability companies and the legal consequences of the validity of such contracts. The method used is normative juridical with a legislative and conceptual approach. The results of the study show that contracts made by directors in dual positions have the potential to be legally flawed if they do not meet the principles of good faith, fiduciary duty, and Good Corporate Governance. These contracts can be canceled if there is evidence of a conflict of interest or misuse of internal information that violates the doctrines of self-dealing and insider trading. Therefore, transparency and supervision through the approval of the Board of Commissioners or the General Meeting of Shareholders are important mechanisms to ensure the validity of contracts in modern corporate practice.

Keywords: Contract Validity; Dual Position of Directors; Fiduciary Duty; Insider Trading; Limited Liability Company

I. INTRODUCTION

In modern corporate activities, the practice of establishing more than one business entity by an entrepreneur or group of shareholders has become a common phenomenon. The purpose of establishing several Limited Liability Companies (PT) is generally based on business strategy, risk separation, business unit grouping, and optimization of taxes and asset management. In such circumstances, it is often found that two or more PTs that are legally independent entities are, in substance, under the control of the same party. In practice, one person can even serve as a member of the Board of Directors in two different PTs at the same time (duality of position or concurrent positions).

This situation has the potential to cause legal problems, especially when two PTs under the same control enter into a business agreement or contract with each other, and the contract is signed by the same person in their capacity as a director of each party. Such a situation gives rise to a real potential *for conflict of interest*, because one person acts as a representative of two legal entities that should have independent and different interests.[1]

Law Number 40 of 2007 concerning Limited Liability Companies (Law 40/2007) does not explicitly prohibit directors from holding positions in two different limited liability companies. However, Law 40/2007 imposes strict limitations and principles of responsibility on directors, particularly in managing the company professionally, responsibly, and free from conflicts of interest. FirstArticle 97 paragraphs (1) to (3) of Law No. 40 of 2007 stipulate that the Board of Directors holds full and collective responsibility for the management of the company and is obligated to carry out such management in good faith, with due care, and full accountability.

In the context of duality of positions in two companies involved in a contract, this provision implies that the members of the Board of Directors are obliged to ensure that their actions do not cause losses to either or both of the entities they represent. If it is proven that losses have been incurred as a result of unprofessional or disproportionate actions, then legal responsibility can be imposed personally on the

[1] Komang Gede Trisnowinoto & R.A. Retno Murni, 2019. *Perlindungan Hukum Terhadap Pemegang Saham Perseroan Terbatas Akibat Putusan Pailit*. Kertha Semaya : Journal Ilmu Hukum 7, no. 5, p. 1. https://doi.org/10.24843/km.2019.v07.i05.p01.

Board of Directors concerned.[2] It expressly prohibits members of the Board of Directors from using their positions and authority for personal, family, other parties, and/or certain groups' interests, if such actions directly or indirectly harm the company. In practice, if a director who holds dual positions drafts an agreement between two companies under his control, and the content of the agreement turns out to only benefit one party, then there is a potential violation of this norm. This can be interpreted as an abuse of position, especially if the director does not demonstrate the independence and prudence that should be inherent in business decision-making.

Every member of the Board of Directors who has *a conflict of interest* in a transaction must explicitly disclose this condition to the other members of the Board of Directors and the Board of Commissioners. This not only confirms the existence of a possible conflict of interest in the practice of dual positions, but also requires disclosure. Failure to do so may be considered a violation of the principles of corporate accountability and integrity.

Although Law 40/2007 does not explicitly prohibit dual directorships in two different companies, a general norm can be drawn that the management of a company must be carried out with due regard to the principles of loyalty, prudence, independence, and avoidance of conflicts of interest. In the event of a deviation from these principles, the directors concerned may be held legally liable, both civilly and corporately.

II. RESEARCH METHODS

Method used in this study is normative juridical, using a conceptual approach and a regulatory approach.[3] The legal materials used consist of primary legal materials, secondary legal materials in the form of literature, legal journals, and expert opinions, namely related laws and tertiary legal materials such as legal dictionaries and corporate governance guideline documents. The analysis was conducted descriptively and analytically by examining the legal norms and doctrines relevant to the validity of contracts made by the Board of Directors in a dual position.

[2] Fahham Achmad Muchaddam, 2011. *Tanggung Jawab Sosial Perusahaan dan Penerapannya pada Perusahaan di Indonesia*. Aspirasi: Jurnal Masalah - Masalah Sosial 2, no. 1, p. 111 – 119.

[3] Peter Mahmud Marzuki, 2016. *Metode Penelitian Hukum*. Jakarta: Prenada Media.

III. ANALYSIS AND DISCUSSION

a. Contract Validity From The Perspective of Civil Law and Limited Liability Companies

Contracts or agreements are the main source of legal relationships between parties. Based on article 1313 of the Indonesia Civil Code states that agreement is make by which one or more persons bind themselves to one or more other persons.[4] This definition shows that a contract is a tangible form of the legal will of the parties to produce certain legal consequences. For a contract to be declared valid and legally binding, it must meet the requirements specified in Article 1320 of Indonesia Civil Code:

1) Existence of an agreement between the parties who are bound by it;
2) Capacity to enter into an agreement;
3) Existence of a specific subject matter; and
4) Existence of a lawful cause.

Has two requirements are subjective because they relate to the subjects entering into the agreement, while the latter two requirements are objective because they relate to the object or substance of the contract. The absence of one of these requirements has different legal consequences. Violation of subjective conditions causes the agreement to be voidable (*vernietigbaar)*, while violation of objective conditions results in the contract being null and void (*nietig)*.[5] Thus, the validity of a contract depends not only on the free will of the parties, but also on the legitimacy of the object and purpose of the agreement.

b. Legal Consequences For Contract Validity in The Dual Position of Directors

In corporate law, contracts made by a Limited Liability Companies have their own characteristics because the legal subject that binds itself is not an individual, but a legal entity represented by certain organs. Article 98 paragraph (1) of Law No. 40/2007 state that Board of Directors acts for and on behalf of the company both in and out of court.

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[4] I Dewa Gede Oka Nuryawan, 2018. *Rekonstruksi Perjanjian Kerja Bersama dalam Undang - Undang Nomor 13 Tahun 2003 Tentang Ketenagakerjaan*. Jurnal Analisis Hukum 1, no. 2, p. 255. https://doi.org/10.38043/jah.v1i2.415.

[5] Abdul Bari Alkatiri, et al., 2024. *Perlindungan Hukum Bagi Pemilik Saham Aslinya (WNA) Terhadap Wanprestasi Pemegang Saham Nominee: Dikaji dari Aspek Perjanjian*. Journal of Innovation Research and Knowledge 4, no. 2, p. 689 – 700.

Thus, every legal action taken by the Board of Directors in its official capacity is considered an action of the company itself.[6]

Article 97 paragraph (2) of Law 40/2007 stipulates that company director must manage the company in good faith and with full responsibility. This means that every action taken by company director, including signing contracts, must be based on the principles of *duty of care*, *duty of loyalty*, and *duty of responsibility*. If the Board of Directors violates these principles, then the actions taken can be classified as abuse of authority.[7]

Furthermore, Article 98 paragraph (2) of Law 40/2007 underscores that the directors is not authorized to act on behalf of the company in situations where a conflict of interest arises between the directors and the company.This provision implies that the validity of a contract made by the directors does not only depend on the fulfillment of civil law elements, but also on its compliance with the principles of *good corporate governance* (GCG). Thus, contracts made under conditions of a conflict of interest can be considered *ultra vires* and potentially void ab initio.

In corporate practice, it is not uncommon for someone to serve as a director in two different companies, even in companies that have legal or affiliate relationships. This condition is known as *dual directorship* or dual director position. Legally, dual positions give rise to the potential *for self-dealing transactions*, which is a situation where one individual acts on behalf of two parties with different interests in a contract.

The problem arises because the element of "agreement" in Article 1320 of the Civil Code becomes unclear: the legal intent that should come from two different subjects is represented by the same person. In this context, the element *of consensus ad idem* (true agreement of will) is not substantially fulfilled. As a result, contracts signed by directors in dual positions have the potential to be flawed in terms of intent and lose their legal legitimacy[8] .

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[6] Jelly Nasseri, 2021. *Perjanjian Pemegang Saham dan Dampaknya Terhadap Pemangku Kepentingan Lainnya di Perusahaan*. Aksara: Jurnal Ilmu Pendidikan Nonformal 7, no. 3, p. 1017. https://doi.org/10.37905/aksara.7.3.1017-1028.2021.

[7] Amrul Akbar, et al., 2022. *Hubungan dan Kedudukan Hukum Atas Special Purpose Vehicle dalam Transaksi Pembiayaan Proyek*. Jurnal Sains Sosio Humaniora 6, no. 1, p. 987 - 1003. https://doi.org/10.22437/jssh.v6i1.21224)

[8] I Kadek Sridana, et al., 2020. *Perlindungan Hukum Terhadap Pemegang Saham Minoritas pada Perseroan Terbatas yang Melakukan Merger*. Jurnal Analogi Hukum 2, no. 1, p. 59 - 62. https://doi.org/10.22225/ah.2.1.1618.59-62.

In addition, the dual position of the Board of Directors has the potential to violate the principle *of fiduciary duty* because it is impossible for someone to prioritize the interests of two different companies without causing a conflict of interest. When the interests of one party are prioritized, the contract no longer fulfills the principles of fairness and good faith, which are the basis for the validity of the contract. To avoid this, corporate law emphasizes the importance of disclosure and *approval* mechanisms from supervisory bodies, namely the Board of Commissioners or the General Meeting of Shareholders. If the Board of Directors enters into a contract in a dual position without such disclosure mechanisms, the action is considered to exceed legal authority and can be categorized as *ultra vires.*

Contracts made by the Board of Directors in a dual position without regard to the principle of prudence and without the approval of the supervisory body can have two main legal consequences. First, the contract may be voidable (vernietigbaar) if the defect lies in the element of intent or imbalance of information that causes harm to one of the parties. Second, the contract is null and void (nietig) if the actions of the Board of Directors are proven to exceed its authority or violate the provisions of the law and the company's articles of association.

In both cases, the Board of Directors cannot hide behind the principle of limited corporate liability. Based on Article 97 paragraph (3) of Law 40/2007, the Board of Directors is fully personally liable for losses incurred by the company if they are guilty of or negligent in performing their duties. This principle is reinforced by the provisions of Article 97 paragraph (5) of Law 40/2007, which grants the Board of Directors the right to defend themselves only if they can prove that the actions were carried out in good faith, with due care, and without a conflict of interest.

Thus, the legal consequences arising from contracts made by Directors in dual positions not only affect the validity of the agreement, but also give rise to personal liability implications for the Directors. Actions that are not in accordance with the principles *of Good Corporate Governance* have the potential to damage corporate trust, cause losses to shareholders and third parties, and open up the possibility of civil lawsuits in the form of *derivative suits* by aggrieved shareholders.

The validity of contracts signed by Directors in dual positions is highly dependent on the fulfillment of the principles of contract law and corporate law. If the contract is made without disclosure of conflicts of interest and without the approval of the supervisory

body, then substantively the contract can be classified as legally defective. In this case, there are two possible legal consequences:

1) The contract may be voidable *(vernietigbaar)* – if there is a defect of intent due to a conflict of interest that was not disclosed transparently, as stipulated in Article 1321 of Indonesia Civil Code.
2) The contract is null and void *(nietig)* – if the actions of the Board of Directors exceed the authority granted by the articles of association or are contrary to the provisions of Article 98 paragraph (2) of Law 40/2007.

This means that corporate legal protection for directors (through the *business judgment rule* doctrine) does not apply if the directors are proven to have acted in bad faith or violated the principle of prudence. Thus, contracts entered into by the Board of Directors in a dual position without *disclosure* procedures and approval from the supervisory body can be categorized as *ultra vires* actions. Within the framework of GCG, the principles *of transparency, accountability,* and *fairness* are the main parameters. Every transaction involving an affiliate relationship must be carried out based on the *arm's length transaction* principle, which is a transaction carried out as if the parties did not have a special relationship. Failure to uphold this principle results in the loss of the moral and legal validity of the contract and opens up civil liability for the directors concerned.

From the perspective of corporate law doctrine and practice, the dual position of directors must be viewed as a high-risk condition that requires legal mitigation through internal control mechanisms. Based on the General Guidelines for Good Corporate Governance, every company officer must avoid conflicts of interest that could affect the independence of decisions. The prohibition of sales or transactions between affiliated companies without independent approval is part of the principles *of responsibility* and *fairness* in GCG.

When linked to the doctrine *of self-dealing*, directors who act for two different entities without supervision have violated the principle of equality of the parties in a contract. Meanwhile, when viewed from the perspective *of insider trading,* the use of internal information to benefit one party is also a violation of corporate ethics. Therefore, strict supervision by the GMS or Board of Commissioners is essential to prevent abuse of position that is detrimental to the company.

In the Indonesian corporate legal system, the director is an organ with a dual function: as *a management organ* and as *a legal representative* of the company. In the context of *dual directorship*, this responsibility faces serious challenges because a director can be in two legal positions that are potentially conflicting.

The phenomenon of dual positions is often categorized as *a self-dealing transaction*, where an individual acts for two different legal interests but originates from a single will. In this case, there is a problem with the element of agreement in Article 1320 of the Civil Code, because the agreement that should arise from two independent parties actually arises from the same legal subject. As a result, the purity *of the consensus of wills* (*)* is questionable, and the contract is potentially legally flawed.

From the perspective of *fiduciary duty*, a Director is obliged to place the interests of the company above personal interests. If the same Director represents two companies in one contract, then he inherently faces *a conflict of duties*. In this case, the Director is required to make *full disclosure* to supervisory bodies such as the Board of Commissioners or the GMS as stipulated in Article 120 paragraph (1) of Law 40/2007. Failure to do so can be classified as a violation of the principles of transparency and integrity in GCG.

In Indonesian positive law, there are no rules that explicitly prohibit sales or transactions between companies within a single business group. However, restrictions on such practices are substantively regulated through the principles of Good Corporate Governance (GCG), the Limited Liability Company Law, and capital market authority regulations. Article 98 paragraph (2) of Law 40/2007 expressly prohibits members of the Board of Directors from representing a company if they have a conflict of interest with the company. Violations of this provision may result in the cancellation of contracts and personal liability of Directors as stipulated in Article 97 paragraph (3) of Law 40/2007. This provision is in line with the General Guidelines for GCG (KNKG, 2006), which emphasize that every manager must avoid conflicts of interest and ensure that every transaction is carried out fairly and independently.

From a GCG perspective, sales transactions within a company involving affiliated parties must comply with the principles *of transparency*, *responsibility*, and *fairness*. The board of directors is required to make full disclosure to the company's corporate governance body, particularly the board of commissioners or the general meeting of shareholders, to ensure that there is no abuse of authority. If transactions are carried out without supervision and contrary to GCG principles, they can be considered *self-dealing*, which violates corporate law and ethics. Legally, violations of these principles can have three consequences:

1) Civil law consequences, namely contract cancellation or transfer of liability to the Board of Directors personally.
2) Administrative consequences, in the form of sanctions from the OJK or supervisory agencies if a public company is involved.

3) Ethical and reputational consequences, in the form of damage to the company's credibility and violation of good governance standards.

Thus, although there is no explicit prohibition on intra-company sales, Indonesian law affirms a substantive prohibition through the principles of GCG, the Limited Liability Company Law, and OJK regulations. Therefore, every inter-company transaction involving affiliate relationships or dual positions of directors must be conducted with full transparency, good faith, and the approval of the supervisory body to ensure the legality and integrity of the agreement.

In modern corporate practice, the concept of contract validity cannot be separated from the principles of integrity and transparency, which form the basis of *good corporate governance* (GCG). One form of violation of these principles is the misuse of internal information, known as the doctrine *of insider trading*. Although this doctrine is better known in the context of capital markets, conceptually *insider trading* is closely related to the phenomenon of dual positions held by directors because both pose the risk of abuse of authority and violation of the principle of fiduciary duty.

Insider trading is generally defined as the act of using material information that is not yet available to the public by insiders to obtain personal gain or provide benefits to certain parties. Insiders in this context include directors, commissioners, employees, and other parties who, due to their position, have access to strategic company information. In the context *of dual directorship*, misuse of information can occur when a director who serves on the boards of two companies uses internal information from one company for the benefit of the other company that he or she also represents.

This situation creates *a direct conflict of interest*, as the Directors concerned are no longer acting independently for and on behalf of each company. Legally, such actions violate the principles *of duty of loyalty* and *duty of confidentiality,* which are an integral part of the fiduciary duty of directors. Violations of these principles not only have an impact on corporate ethics, but also have implications for the validity of contracts signed.[9]

From a civil law perspective, contracts that arise from processes tainted by misuse of information or breach of fiduciary duty do not reflect a valid agreement as referred to in Article 1320 Indonesia Civil Code. The element of agreement (*consensus ad idem)* in this

[9] Riri Lastiar Situmorang & Rasji, 2023. *Perlindungan Hukum Pemegang Saham Minoritas pada Perseroan Terbatas Terbuka*. Jurnal Ilmu Hukum Fakultas Hukum Universitas Riau 12, no. 1, p. 113 - 130.

case becomes impure, because one party (or even both parties) acts based on unequal information. This imbalance of information gives rise to *vitiated consent* or defective intent, which makes *the agreement voidable*.[10]

From a corporate governance perspective, *insider trading* in the context of dual positions of directors is also a violation of the principles *of transparency* and *fairness* as contained in the Indonesian GCG General Guidelines (National Committee on Governance Policy, 2006). The principle *of transparency* requires every company officer to openly disclose any information relevant to decision-making, while the principle *of fairness* requires fair treatment of all *stakeholders*. When a director uses confidential information from one company to benefit another company that he or she also represents, such action substantively violates both principles.[11]

In the context of corporate law, violation of this principle can result in the cancellation of contracts or the emergence of personal legal liability for the Directors. This principle aligns with the *business judgment rule* doctrine, which affords legal protection to members of the directors only when their decisions are undertaken in good faith, with proper diligence, and free from any conflict of interest. If the opposite is proven, then this protection is void, and the Directors may be held civilly or administratively liable for the losses incurred.

IV. CONCLUSION

Contracts made by directors who hold dual positions in two limited liability companies have a high level of legal vulnerability, because the existence of a conflict of interest has the potential to eliminate the purity of the will of the parties and violate the principles of fiduciary duty and Good Corporate Governance. The validity of the contract under these conditions is not only determined by the legal requirements of the agreement according to the Civil Code, but also by compliance with the obligation of disclosure, the precautionary principle, and the prohibition of acting in situations of conflict of interest as stipulated in Law 40/2007. If the director acts without disclosing the conflict of interest and without the approval of

[10] Syahrijal Syakur, 2022. *Pertanggungjawaban Pidana oleh Pemilik Manfaat (Beneficial Owner) sebagai Pelaku Pencucian Uang dan Kejahatan Lainnya dalam Perseroan Terbatas*. Journal of Anti-Money Laundering / Countering the Financing of Terrorism 1, no. 1, p. 101 - 112. https://doi.org/10.59593/amlcft.2022.v1i1.28)

[11] Yoga Partamayasa, 2020. *Back Door Listing: Kewenangan Badan Usaha dan UMKM untuk Melakukan Initial Public Offering Tanpa Melewati Proses IPO*. Media Iuris 3, no. 3, p. 383. https://doi.org/10.20473/mi.v3i3.19518.

the supervisory organ, the action can be categorized as ultra vires, so that the contract can be canceled or even considered to have never existed. In such circumstances, legal protection through the business judgment rule doctrine does not apply, and the director may be held personally liable for any losses incurred. Therefore, supervisory mechanisms through the approval of the Board of Commissioners or GMS and the application of the principle of transparency are important instruments to ensure the integrity and validity of contracts in modern corporate practice. This research shows that there is a need to strengthen regulations and technical guidelines related to related party transactions and directors' dual positions in order to minimize the risk of conflicts of interest, as well as provide direction for future research on the application of legal protection in complex business groups.

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