

CROSS HOLDING LAW IN LIMITED LIABILITY COMPANY BASED ON THE LAW OF THE REPUBLIC OF INDONESIA NUMBER 40 OF 2007 CONCERNING LIMITED LIABILITY COMPANY

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ABSTRACT

Cross holding in a limited liability company could only happen if the company has some shares issued by another company that has the company's shares, either directly or indirectly. Cross holding can occur in the limited liability company through the transition process objects in general, as stocks including moving objects, because the stock is an evidence of shareholders' participation in the company and at the same time as an evidence of ownership of common property that is bound in a limited liability company, its existence must get through to the mechanism of registration in the minister of law and human rights. To the private limited liability company above, the transition is stipulated in the company's articles of association which is submitted to the policies shareholders based on the general meeting of shareholders. For the public company, the transition to another shares passes through the general meeting of shareholders, with the assistance of company securities and stockbrokers with a meeting at the stock exchange. In the limited liability company, the elucidation of article 36 states that: basically, the issuance of shares is an endeavour to raise capital and so is the obligation to pay up shares should be charged to some other party. For the sake of certainty, this article specifies that companies are not allowed to issue shares for themselves to own. This prohibition also includes a prohibition on cross holdings which occur if a company owns shares issued by some other company which directly or indirectly owns shares in that company. The definition of direct cross holding is if the first company owns shares in a second company without any ownership in one or more "intermediate companies" and in reverse the second company owns shares in the first company. The definition of indirect cross holding is the ownership by the first company of shares in a second company via ownership in one or more "intermediate companies" and in reverse the second company owns shares in the first company.

Key words : limited liability company, cross holding, the general meeting of shareholders

Introduction

In connection with the development of national and global economies, the law serves as the foundation of economic activity. If there is no rule of law, Indonesian economy will be left behind from other countries. Thus, the role of national law and the laws of economics in particular should be able to establish a framework of legal arrangements underlying economic activity in the business world. The setting is closely related to the economic law to provide guidance on the legal basis of economic activity by economic actors so that the performance of the economic actors would be able to become more efficient.

The role of law in the face of free trade can be seen from the publication of law number 40 year 2007 concerning limited liability company which is the government's efforts to boost national economic development in the world of business by continuously renewing the law governing the establishment of a limited liability company (Elucidation of Law of The Republic of Indonesia Number 40 of 2007 Concerning Limited Liability Companies).

The national economy, which is operated on a basis of economic democracy with principles of community, efficiency, justice, sustainability, environmental awareness, independence and safeguards for balanced progress and national economic unity has the aim of creating prosperity for society. The increasing development of the national economy needs the support of an act regulating limited liability companies which can secure a conducive climate for the business world. Up to this moment, the limited liability companies have been stipulated by the Limited Liability Companies Act No. 1 of 1995, which also replaced legislative regulations originating from the colonial period.

Progress however, of the best kind, the provisions in that act are viewed as no longer complying with legal developments and the needs of society because the economic situation and progress in science, technology, and information are developing so swiftly, particularly in the era of globalisation. Besides, the increase in demand from society for quick service, legal certainty and the demand for development of the business world in accordance with principles of good corporate governance, demands the improvement of the Limited Liability Companies Act No. 1 of 1995.

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

In the context of complying with society's demand for swift service, the act provides procedures for the electronic media: (Elucidation of Law of The Republic of Indonesia Number 40 of 2007 Concerning Limited Liability Companies)

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

Having legal authority with an administration system information technology services has made many circumstances to be done properly compared to implementing the manual systems. Regarding to applications for ratification of Companies as legal entities, it is explicit that such applications constitute the authority of the founders jointly which they can exercise themselves or they can empower a notary to exercise.

A company's deed of establishment which has been ratified and deed of amendment of the articles of association which has been approved and/or notified to the Minister must be recorded in the register of Companies and announced in the Supplement to the State Gazette of the Republic of Indonesia made by the Minister. In the matter of grants of status as a legal entity, approvals and/or receipts of notification of amendments to the articles of association, and changes to other data, this Act has no connection with the Mandatory Company Registration Act (Elucidation of Law of The Republic of Indonesia Number 40 of 2007 Concerning Limited Liability Companies).

To further clarify and make explicit provisions involving Company Organs, this Act amends provisions involving the holding of General Meetings of Shareholders (GMS) by using technological developments. Thus, a GMS can be held by electronic media such as teleconferences, video conferences, or other electronic media facilities. This Act also clarifies and makes explicit the tasks and responsibilities of the Board of Directors and Board of Commissioners. This Act provides for independent and delegated commissioners.

In accordance with the development of business activities based on sharia principles, this Act obliges Companies doing business on the basis of sharia principles to have a Sharia Supervisory Board as well as a Board of Commissioners. The Sharia Supervisory Board's task will be to give the Board of Directors advice and suggestions and to supervise the Company's activities so that they will be in accordance with sharia principles.

The provisions in this Act regarding Companies' capital structure remain the same, i.e., it consists of authorised capital, subscribed capital, and paid-up capital. However, Companies' authorised capital has been changed to be at least Rp. 50,000,000 (fifty million rupiah), while there is an obligation to fully pay up subscribed capital. With regard to buying back shares issued by the Company, it can be done in principle with the proviso of a 3 (three)-year time limit for the Company to own shares which it has bought back. Especially for the use of profits, this Act explicitly states that the Company may allocate profits and set aside the mandatory reserve if the Company has a positive profit balance (Elucidation of Law of The Republic of Indonesia Number 40 of 2007 Concerning Limited Liability Companies).

Globalization of law in the economic field is shown by the various laws and agreements that spread beyond national boundaries which resulted in melting of legal principles in a State to another State. The Limited Liability Companies Act No. 40 of 2007 on the development and renewal then adopted the principles of other countries such as Corporate Social Responsibility/CSR, Repurchase of Shares by the Company (Buy Back), Spin Off. Besides, there is also a discussion about Cross Holding.

The definition of direct cross holding is if the first Company owns shares in a second company without any ownership in one or more "intermediate companies" and in reverse the second company owns shares in the first company. The definition of indirect cross holding is the ownership by the first company of shares in a second company via ownership in one or more "intermediate companies" and in reverse the second company owns shares in the first company (Article 36 Paragraph (1) The Limited Liability Companies Act No. 40 of 2007).

Act No. 1 of 1995 there are no regulations concerning the ban on cross-ownership. The prohibition contained in Article 29 of Law No. 1 of 1995 is a prohibition to the limited liability company to issue shares for the purpose of self-owned and the ownership ban also applies to subsidiaries of the shares issued by the main company. The reason of the ban is adhered to the principle that the issuance of shares intended to raise capital, thus depositing shares liability should be borne by the other party. The reason why subsidiaries are prohibited from owning shares issued by the main company is that the subsidiaries and the main companies considered to constitute a single business entity that cannot separate the ownership among them, either by the main company and the subsidiaries.

With the cross-ownership (cross holding) itself in terms of capital, specifically in the context of issuing new shares, then obviously there is no payment of capital in real terms entered into the company and of the management, cross-ownership tends to lead to a mixture of ownership of management to be independent again (Widjaja; 2008;50).

Therefore, the Company Law as one of the main elements of the regulation in the economy, was amended to adopt a variety of emerging developments in the world of international business which also works as one of the main reasons the enactment of Law No. 40 of 2007 on Limited Liability Companies which replaces Law No. 1 Year 1995 regarding Limited Liability Company.

In the development of the business so rapidly, the government has a large role in making regulations to prescribe the community in conducting its business activities in the national and international scale. According to Leonard J. Theberge in his "law and economic development," the main factor to be strong involvement of law in economic development is whether the law is able to create "stability", "predictability", and "fairness".

In connection with what is mentioned above, it can be said that the role of law in economic development is to protect, manage and plan economic life, so that the dynamics of economic activity that can be directed to the progress and prosperity for all people.

Identification of Problems

1. How is the regulation concerning the cross holding in The Limited Liability Companies Act No. 40 of 2007?
2. How is the process of cross holding of shares?
3. What is the impact of cross holding in the limited liability company on the business activities?

The Rule of Law

Rule of law is a legal maxim that suggests that no one is above the law and governmental decisions must be made only by applying known legal and moral principles. The Rule of Law limits the powers of government by judicial defense of laws and the Constitution which is based on recognized basic legal values, established in international law. The Rule of Law is meant to prevent dictatorship and to protect the rights of the people.

The rule of law is especially important as an influence on the economic development in developing and transitional countries. Constitutional economics is the study of government spending, which, in many transitional and developing countries, is completely controlled by the executive. The standards of constitutional economics can be used during annual budget process. The availability of an effective court system, to be used by the civil society in courts in situations of unfair governmental distribution of national money is a key element for the success of the rule of law in developing countries.

Justice must apply to everyone, hence was born the doctrine of "rule of law". According to (Friedman, 1959) rule of law is the doctrine of the spirit and ideals of justice. Rule of law is classified:

- a. In the formal sense which organizes public power or public power is organized, such as a country.
- b. Understanding the essentials (ideological sense) are closely related to uphold the rule of law because it involves legal measures of good and bad.

Rule of law should guarantee that obtained the relevant community or nation is seen as justice, particularly social justice (Sunarjati Hartono, 1982). Rule of law as a social institution has its own social structure and culture (Satjipto Raharjo; 2003). Rule of law grew and developed hundreds of years along with the growth of European society.

Movement of people who wish that the power of the king and state officials should be limited and regulated through a legislation and implementation in conjunction with all laws and regulations that are often termed the rule of law.

Understanding the rule of law based on the substance or its contents is strongly associated with the legislation that is in force in the country. Consequently, each country would say based on the rule of law in the life of the country, although the country is an authoritarian state. For this reason it is recognized that it is difficult to determine the sense of the rule of law universally, because each society spawned different sense.

In particular, Joseph Raz has argued that the rule of law should be limited to formal values – although formal values wider than merely maintaining law and order. These include transparency of law making, non-retroactive law, the independence of the judiciary and wide access to the courts, and the right to a fair trial. He suggests that the rule of law has become a by-word for general political ideals, separate from its actual meaning: "if the rule of law is the rule of good law then to explain its nature is to expound a complete social philosophy". Instead, he identifies principles of "open and relatively stable" lawmaking, and laws that the public can live their lives by. This concept is a merely formal one, he identifies, because this could be achieved through dictatorship, democracy, or any other means. He expresses confidence that this conception is not a restricted approach as to be meaningless.

Raz drew on similar ideas expressed by Friedrich Hayek, including "stripped of all technicalities, (the rule of law) means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." Raz identifies eight principles instead: prospective, open and clear laws; relatively stable laws; laws based on stable, open and open and clear rules; the independence of the judiciary; the principles of natural justice (unbiased judiciary); judicial review of implementation; accessible courts; and no perversion of the law by policing discretion. However, he considers the list incomplete.

In the formal sense of the rule of law that is contained in the 1945 Constitution and articles of the Constitution the Republic of Indonesia in 1945. The principles of rule of law formally (UUD 1945):

- a. The State of Indonesia shall be a state based on the rule of law (article 1 paragraph (3));
- b. All citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exceptions (article 27 paragraph (1));

- c. Every person shall have the right of recognition, guarantees, protection and certainty before a just law, and of equal treatment before the law (article 28D paragraph (1));
- d. Every person shall have the right to work and to receive fair and proper remuneration and treatment in employment (article 28D paragraph (2)).

The principles of rule of law in the material / essential:

- a. The enforcement of the Rule of Law;
- b. The success of the enforcement of the rule of law depends on the national identity of each nation (Sunarjati Hartono, 1982);
- c. Rule of law has social roots and the roots of European culture (Satjipto Rahardjo, 2003);
- d. Rule of law is also a legalism, the flow of legal thought to contain social insight, the idea of the relationship between people, society and the state;
- e. Rule of law is a liberal legalism (Satjipto Rahardjo, 2003).

According to Albert V. Dicey in Introduction to the law of the constitution, introduced the term the rule of law which is simply defined as a legal order.

The rule of law is emphasised through many separate ideas. Among them are that law and order in contrast to anarchy; the running of government in line with the law ("legal government") and normative discussion about the rights of the state as compared to the individual. Albert Venn Dicey described the rule of law as acting in three ways:

- a. The predominance of regular law as opposed to the influence of arbitrary power;
- b. Equality before the law; and,
- c. That constitutional laws are not the source but the consequence of the rights of individuals

Piercing the Corporate Veil

The development of increasingly complex problematic in the corporate world would be a lot of implications juridical also the responsibility of the organs in it. Limited liability company is the kind of company capital divided into shares. In the limited liability companies act No. 40 of 2007, Article 31 Paragraph (1) Authorized Capital of the Company shall consist of total nominal value of shares and (2) The provision as referred to in paragraph (1) does not preclude the possibility of the legislative provisions in the field of capital market to regulate the Company's capital to consist of shares without nominal value.

Responsibilities of the shareholders, in act No. 40 of 2007 (the limited liability companies) provided in Article 3 Paragraph (1) the company's shareholders are not personally liable for agreements made on behalf of the Company, and are not liable for the Company's losses in excess of their prospective shareholding and Paragraph (2) The provision as referred to in paragraph (1) do not apply if: the requirements for the Company as a legal entity has not been or is not fulfilled; the relevant shareholders, either directly or indirectly, with bad faith, exploits the Company for their personal interest; the relevant shareholders are involved in illegal actions committed by the Company; or the relevant Shareholders, either directly or indirectly, illegally utilizes the assets of the Company, which result in the Company's assets become insufficient to settle the Company's debt.

Article 3, Paragraph (1) The provisions in this paragraph make the character of a Company explicitly that shareholders are only liable for the amount paid up on all of the shares they own and it does not cover their personal assets. Paragraph (2) In certain circumstances it is not impossible for limited liability to be eliminated if it is proved that the matters stated in this paragraph have occurred. It is possible for shareholders' liability in the amount of all the shares they own to be eliminated if it is proven that, among others, there has been a mixing of the shareholder's personal assets and the Company's assets so that the Company was established purely as a tool to be used by the shareholder to reach his personal aims as contemplated in subparagraphs a and d.

In certain cases it is possible that abolishment of limited liability is proved if that things happen as follows:

- a. Terms of the company as a legal entity have not been or are not being met;
- b. The shareholders are concerned either directly or indirectly by utilizing the company's bad faith solely for personal gain;
- c. The shareholders' concern are involved in the unlawful act committed by the company; or
- d. The shareholders are concerned either directly or indirectly, unlawfully using the company's wealth of riches lead the company become insufficient to pay off its debts.

From the above, it can be seen that shareholders are not limited responsible or liable personally to the fullest. Provision known as the elaboration of the principle of piercing the corporate veil. The basic criteria and universal that one piercing the corporate veil can legally imposed as follows:

- a. Fraud;
- b. Obtained an injustice;
- c. Oppression;
- d. Illegality;
- e. Excessive dominance of shareholders;
- f. The Company is the alter ego of the majority shareholder.

In fact, piercing the corporate veil has been identified as "the most litigated issue in (United States) corporate law". Even in one of the journals published by Westlaw, it was mentioned that piercing the corporate veil is the hottest issue in American corporate law and can be seen in its development started it in 1839.

Group Company

The group company is a company that aims to own shares of one or more other companies and / or regulate one or more other companies. Others refer to it as a unit of the economy where the company's corporate authorities in the organization are bound such that they are under one leadership. From the two previous discussions, the understanding in principle have the same points in the aspects of economy, where the central leading company subsidiaries. The central companies also known as the main company/controlling company whose main activity is to carry out investments in subsidiaries and further control and supervise the activities of management of subsidiaries and also oversee the activities between subsidiaries.

The term is usually heard in a group company restructuring activities the company, whether through merger, consolidation, acquisition and spin off. However it is likely that the company formed groups for their cooperation agreements such as joint ventures (Fuady; 1999, 2001, Sulistiowati; 2010).

Principles of Good Corporate Governance

Good corporate governance is basically a system (input, process, output) and a set of rules that stipulate the relationship between the various parties (stakeholders), especially in the narrow sense of the relationship between shareholders, board of commissioners and board of directors for the achievement of company objectives. Good corporate governance inserted to regulate these relationships and prevent significant errors in the company's strategy and to ensure that the errors that occur can be solved immediately.

Generally, there are five basic principles of good corporate governance, namely:

1. *Transparency*
2. *Accountability*
3. *Responsibility*
4. *Independency*
5. *Fairness*

Discussion

Definition, Types and Classification Shares

Limited liability company, hereinafter referred to as the company, means a legal entity constitutes a capital alliance, established based on an agreement, in order to conduct business activities with the company's authorized capital divided into shares and which satisfies the requirements as stipulated in this law, and its implementation regulations (paragraph 1 law act no. 40/2007).

All legal actions undertaken by the limited liability company will always be insured by the association property capital which will then appear in a state of good assets of the company or gain reduction.

Capital in the company's further divided into shares showing the extent of participation of each depositor's part of capital into the company. In general, capital structure in a limited liability company comprised of authorized capital, issued, subscribed and paid-up capital.

Gunawan Widjaja said: "The stock is proof he has done full remittance of capital subscribed by the shareholders limited liability company. That also means the stock shows a part of joint ownership of all shareholders in a limited liability company".

From the definition above, Gunawan Widjaja shares his pursuant to the stocks and they are:

- a. Proof of participation of shareholders in a limited liability company with the rights attached to the shares;
- b. Proof of ownership of property that is bound in a limited liability company, which has its existence through the mechanism of registration in the Ministry of Justice

Prior approval is submitted to the Minister of Justice and Human Rights, the founders of the company is required to perform a full deposit each share taken part into the company.

Basically rights to shares depends on the type of shares held. As they are mentioned in the classification of the shares, they can mention the publication of several types of stocks from different classifications, it serves as an attraction for investors that are willing to invest in a limited liability company that issued the shares. And for the founders who want their existence recognized as the founder of the company, hence the founders granted special rights in the ownership of the company.

As with receivables that are known in theory and in practice, as the share of receivables can be divided into:

- a. *Op naam*
- b. *On bearer, aan toonder* (paragraph 49 law no. 1/1999)
- c. *To the bearer*

Of the three types of shares, Act No. 40 of 2007 (Company Law) only recognize registered shares, which is said by Article 48 paragraph (1) of the Company Law that the company's shares issued in the name of its owner. Article 40 paragraph (1) The shares possessed by the Company due to buy back, transfer by operation of law, grant or bequest, may not be used to cast votes in the GMS, and shall not be counted in determining the number of quorum which must be achieved in accordance with this Law and/or the articles of association.

Limited Liability Company may have one type of stock or several stocks at once. Distribution of shares to the various types of the so-called class of shares. Article 53 paragraph (1) Articles of association shall determine 1 (one) or more share classifications; paragraph (2) Each share in the same classification provides its holders the same rights; paragraph (3) In the event that there are more than 1 (one) share classification, the articles of association shall determine one of them as ordinary shares; paragraph (4) Share classifications as referred to in paragraph (3) are, among others:

- A. Shares with voting right or without voting right;
- B. Shares with special right to nominate member of the board of directors and/or member of the board of commissioners;
- C. Shares which after a certain period of time will be withdrawn or exchanged with other shares classification;
- D. Shares which provide rights to its owner to receive dividends firstly over the other shareholders from different shares classification for the distribution of dividend cumulatively or non-cumulatively;
- E. Shares which provide rights to its owner to receive allocation of the remainder of the company's assets in liquidation firstly over the other shareholders with different shares classification.

In addition to ordinary shares absolutely exist in every limited liability company, the limited liability company may also (but not necessarily) issue shares in other classifications such as. In Article 53 paragraph (3) In the event that there are more than 1 (one) share classification, the articles of association shall determine one of them as ordinary shares. Share classifications as referred to in paragraph (3) are, among others:

- A. Shares with voting right or without voting right;
- B. Shares with special right to nominate member of the board of directors and/or member of the board of commissioners;
- C. Shares which after a certain period of time will be withdrawn or exchanged with other shares classification;
- D. Shares which provide rights to its owner to receive dividends firstly over the other shareholders from different shares classification for the distribution of dividend cumulatively or non-cumulatively;
- E. Shares which provide rights to its owner to receive allocation of the remainder of the company's assets in liquidation firstly over the other shareholders with different shares classification.

Stocks are known to have the characteristics of high risk-high return. That is to have high profit opportunities, but also have a high risk potential. Stocks allow investors to have profit (capital gain) in large quantities in a short time. But along with the fluctuation of stock prices, stock may also make investors suffered huge losses in a short time.

Shareholding in PT can be divided into (Widjaja; 2008):

- a. Ownership through a Holding Company
- b. Pyramids by the Company Owners
- c. Ownership by the Company
- d. Ownership by subsidiaries
- e. Cross holding
- f. Ownership by Nominee

Types of Shares

In setting up a limited liability company, which is established with the agreement, at least two parties may find their founders which later is called as a shareholder when the limited liability company obtains legal status.

Among those shareholders, the party holds the largest share which is referred to the majority shareholder. Meanwhile, the other so-called minority shareholders, who by Black's Law Dictionary (1999) is called: "In general, the majority shareholder, which controls more than half shares issued legally by the company is the controlling shareholder unless it can be proven otherwise". However, it should be considered in terms of shareholding composition comprising two or more subjects of law as the owner of the shares, then the possibility of controlling shareholders is not the party that controls or owns more than half the shares issued legally by the company.

Contacting the controlling shareholder, if he can control the company's management indirectly through the placement of its representatives as members of the board of directors and the company's board members even though they are not the majority shareholder. While the minority shareholders are shareholders who have absolutely no control over how the company, they are generally given the minimum protection by law or statute in force in each country

Through the Company's Ownership Group

Cooperation among the companies known as the group company or enterprise groups, generally can be given a sense as an array of companies that legally remain independent and with each other as an economic entity headed by the main company

According to Black's Law Dictionary, holding company is: "A company that usually confines its activities to own stock, and supervise the management of other companies. A holding company usually owns a controlling interest in the companies whose stock it holds".

The existence and juridical recognition of the group companies has been into one debate that has lasted a long time and involved many different jurisdictions. The opinion differences regarding the juridical sense by this group companies are caused by the lack of juridical recognition of the group companies' status.

Pyramids by the Company Owners

In addition to the ownership through the main companies, there are also some possessions of the company's share ownership occurs in a pyramid. The ownership of this pyramid consists of two-tier pyramid and three-tier pyramid. In a two-tier pyramid, the manager of minority shareholder handles a controlling stake in a main company which in turn holds a controlling stake in the company that runs the operating company. In the three-tier pyramid, the main company (primary holding company) takes a control over the secondary main company (secondtier holding company) which in turn holds control of the company that runs the operations (operating company).

Ownership by the Company

The law prohibits the company to issue shares either to be owned by itself or owned by another company whose shares are directly or indirectly owned by the company. Because basically, the issuance of shares is an attempt to do an announcement, hence capital stock of depositing liability should be guaranteed by the other party.

Aside from the direct ownership or controlling, the company may have its own shares that can create arbitrariness in the limited liability company, therefore it become a limited liability company which cannot be controlled and supervised anymore.

Ownership by subsidiaries

Banning the ownership by a subsidiary is a prohibition that is addressed to a limited liability company to be the owner and/or to control the stake in its main company. This type of ownership ban is often called as "banning its own shares indirectly/indirect ownership ban." It was called 'indirect' because the company owns and or controls its own shares through an intermediary company. Indirect ownership or direct control of the company by its subsidiaries can obviously reduce the effectiveness of the control and supervision and is feared to create arbitrariness in the limited liability company, because of the limited liability company is no longer able to control and be controlled and implemented supervisory function properly. Thus, this works as a result of the ownership and management of the company as a cross between the two.

Cross ownership

In Law No. 1 of 1995 there are no regulations concerning the ban on cross-ownership. The prohibition contained in Article 29 of Law No. 1 of 1995 is a prohibition to the limited liability company to issue shares for the purpose of its own. And the ownership ban also applies to subsidiaries of the shares issued by the main company. The reason that the ban exists is adhered to the principle that the issuance of shares intended to raise capital, thus depositing shares liability should be borne by the other party. And the reason why subsidiaries are prohibited from owning shares issued by the main company is that the subsidiaries and the main companies considered to constitute a single business entity that cannot be separated ownership among them, either by the main company and the subsidiaries.

In the current company law, the term of cross ownership can only be found in the explanation of Article 36 of the company law which stated that "... the ban also includes a ban on cross ownership (cross holding) that occurs when the company owns shares issued by another company that has shares of the company, either directly or indirectly...". Cross-ownership directly happens if company A owns shares in Company B directly without going through ownership in a company and vice versa if the company B owns shares in company A.

According to the Law, the cross-ownership ban of a company is a ban on ownership arising as a result of issuance of new shares to a wholly owned subsidiary company. Thus, the meaning of the three types of shareholding limited liability company by a subsidiary is a result of issuing new shares that are strictly prohibited.

Case examples of problems Cross Ownership Shares of PT. Indosat, Tbk. and PT. Telkomsel by Temasek Holdings Pte Ltd.

Initially, telecommunication activity in Indonesia was controlled by the state and operated by State-Owned Company, PT. Telkom, Plc. Government owned the shares for 51. 19% until 2006 and monopolized domestic telecommunication service. In 1980 Government performed an acquisition of PT. Indosat, Plc.. ("Indosat") and monopolized telecommunications service for international access;

The revolution of telecommunication technology in Indonesia was started with the inception of PT. Satelindo Palapa Indonesia ("Satelindo") in 1993 that owned a license for International Access, cell phone, and an exclusive rights to control some communication satellites. Satelindo introduced cell phone service in November 1994. By 2000, Satelindo was a joint venture company with the following structure of share ownerships : PT Bimagraha Telekomindo ("Bimagraha"), 45%; Detemobil Deutsche Telecom Mobilfunk GmbH, 25%; Telkom, 22.5%, and Indosat, 7.5%;

On 26 May 1995, PT. Telekomunikasi Selular ("Telkomsel") was founded. PT. Telekomunikasi Selular ("Telkomsel") is a provider of cellular telecommunication service as well as the first provider in Asia that provides prepaid card service. By 2000, Telkomsel was the subsidiary of Telkom and Indosat with the following structure of share ownerships : Telkom, 42.5%; Indosat, 35%; PTT Telecom BV of Netherland, 17.28%, and Setdco Megacell Asia, 5%.

In October 1996, PT. Excelcomindo Pratama ("XL") began to enter cellular market and to take part in enlivening the competition of cellular telecommunication operator in Indonesia: In May 2001, PT. Indosat Multi Media Mobile ("IM3") was founded by Indosat and began to enter cellular market in August 2001 and to take part in enlivening the competition of cellular telecommunication operator in Indonesia;

In 1999, the Law No. 36/1999 on Telecommunication was published aiming at promoting telecommunications industry under the principles of fair competition as it stated in Article 10 and its elucidation (Article 10 of the Law No 36/1999 : (1) In operating telecommunication business, it is not permitted to conduct activities which lead to monopoly practice and unfair competition among the operators (2) The prohibition as it mentioned in (1) is prescribed by the regulation. The elucidation of the Article is: the Article is made it possible to create fair competition among operators. The valid Law for this purpose is the Law. No. 5/1999 on the Prohibition of Monopoly Practice and unfair competition along with its implementation regulation).

To follow up the Ministerial Decree No.72/1999, on 3 April 2001 PT Indosat and PT Telkom agree to divest their ownership at Telkomsel, Satelindo and Lintas Artha. Such an agreement has changed the ownership structures in Telkomsel and Satelindo. Telkom gained additional shares in Telkomsel from Indosat as high as 35%, while Indosat gained additional shares in Satelindo from Telkom as high as 22.5% ("The Blueprint [Transportation Ministerial Decree No. 72/1999] call for progressive elimination of these shareholdings to promote competition and avoid any actual or potential conflict of interest in more competitive telecommunication environment and the Proposed Transaction are consistent with this Blueprint.... Mobile phone service: Pursuant to the conditional SPA, the current joint-shareholdings by Telkom and the Company [Indosat] will be dissolved and the mobile market will be fully competitive as provided in the Blueprint, Indosat, 2000 Annual Report, Form 20-F, hal 41).

Further, Indosat performs an acquisition of Bimagraha's shares that owns as high as 45% of Satelindo's shares. In June 2002, Indosat gains 25% of Satelindo's additional shares that used to be owned by Detemobil. Since then, Indosat controls 100% of Satelindo's shares.

At the end of 2001, the shares of Telkomsel owned 17.28% by KPN Netherland and 5% owned by Sedtco Megacell Asia are bought out by SingTel through SingTel Mobile and followed then by the selling of 12.7% Telkomsel's shares owned by PT. Telkom to SingTel Mobile in 2002. Totally, the shares ownership of SingTel Mobile in Telkomsel rises too 35%;

In May 2002, the 8.1% shares of Government of Indonesia (GOI) in Indosat was divested through global tender. Later, on 15 December 2002 the 41.9% shares of the GOI in PT. Indosat was divested to Singapore Technologies Telemidia ("STT") and then owned by its subsidiary, Indonesia Communication Limited ("ICL"), founded in Mauritius. Thereby, the shares of ownership structure of Indosat are as follow: The GOI, 14.44%; ICL, 41.9%; Public, 45.19%;

Following the acquisition of STT, Indosat realized its plan to perform vertical merger with its subsidiaries, Satelindo, Bimagraha and IM3 on 20 November 2003. It aimed at focusing its business in cellular telecommunication service. By now, Indosat is the second leading cellular telecommunication operator in Indonesia and possesses 25.15% of market share in 2006; By 2006, the market structure of telecommunication industry in Indonesia is played by some business actors such as PT. Telkom, PT. Telkomsel, PT. Indosat, Plc., PT. Excelcomindo, Bakrie Telecom, Mobile 8, Sampoerna Telekomunikasi Indonesia, and NTS

Temasek through SingTel performed an acquisition of 22.3% Telkomsel shares from KPN Netherlands in 2001. Later in July 2002, SingTel increased its share ownership by acquiring 35% of Telkom's shares in Telkomsel and as its compensation, PT. Telkom transferred the assets of Telkom Mobile to Telkomsel including its license to operate DCS 1800.

On 1 August 2004 and 1 August 2005 Indosats launched Employment Stock Owner Program (ESOP) which created dilution to its shareholders including STT that rise its share ownership to 39.96%. Then, the STT through ICPL, bought 0.86% Indosat shares so that the whole shares of ICPL came out to 41.16%. The buying process of the shares was reported to Bapepam (The Investment Supervisory Board) on 4 May 2006.

In 2006, STT established AMHC and along with Qatar Telecom controlled AMH. The composition of share ownership of AMH is 75% for AMHC and 25% for Qatar Telecom. The ownership of STTC over ICL was transferred in whole to AMHC. (BAP AMH, ICL, and ICPL, dated 25 June 2007)

Based on the description above, the closest meaning of the definition of "majority share" to interpret Article 27 of the Law No. 5/1995 is a control possessed by a business actor over other business actors;

From the perspective of its values, there is no absolute value that can be counted to determine the availability of a control. The share ownership with the voting rights to 50% is almost certainly to give a control to its owner (positive control). The share ownership under 50% and to 25% is almost certainly to give an ability to its owner to defend against strategic decisions that need majority agreement (negative control). Therefore, the share ownership of to 25% or more in one company also gives significant control over the company, while those with the share ownership under 25% does not mean that it automatically has no control over the company because certain factors need to be taken into account to know whether such shareholders own decisive influence (EU's term) of material influence (UK's term) over company policies. The influence toward company policy shows that such shareholders are able to control the company although their shares are not controlling shares.

Based on the accumulated facts, Temasek through its subsidiaries owns 35% of Telkomsel shares which have rights to nominate directors and commissioners, as well as an authority to determine company policy directives especially on budget endorsement through and to veto general meeting decision on Statutes amendment, to buy back company shares, to merger, to take over, to dismiss and to liquidate a company.

It occurs as well in Indosat, Temasek through its subsidiaries owns 41.94% of Telkomsel shares which have rights to nominate directors and commissioners, as well as an authority to determine company policy directives of Indosat. The other shareholders

are the Government of Indonesia 15% and public 43.06%. The shares are sold in Indonesian and American stock exchanges that always be changing ownership, therefore, it is almost impossible for the shareholders to perform together as a result Temasek remains to become an active majority (positive control) in Indosat.

Concerning the clearance of allegation that is postulated by Temasek and Telkomsel, Council of Commission (KPPU) thinks that the suspected infringement has been clear and consistent namely the infringement of Article 27.a that has been conducted by Temasek Business Group and suspected infringement of Article 17 paragraph (1) and Article 25 paragraph (1) b conducted by Telkomsel, with the following description.

Decision of Council of Commission (KPPU) :

To state that Temasek Holdings, Pte. Ltd., Singapore Technologies Telemedia Pte. Ltd STT Communications Ltd., Asia Mobile Holding Company Pte. Ltd, Asia Mobile Holdings Pte. Ltd., Indonesia Communication Limited, Indonesia Communication Pte. Ltd., Singapore Telecommunications Ltd., and Singapore Telecom Mobile Pte. Ltd were legally and convincingly violated Article 27 of Law No. 5/1999.

To state that PT. Telekomunikasi Cellular were legally and convincingly violated Article 17 (1) Law No. 5/1999.

To state that PT. Telekomunikasi Cellular were legally and convincingly violated Article 25 (1) letter b Law No. 5 / 1999.

To instruct Temasek Holdings, Pte. Ltd., Singapore Technology Telemedia Pte. Ltd., STT Communications Ltd., Asia Mobile Holding Company Pte. Ltd, Asia Mobile Holdings Pte. Ltd., Indonesia Communication Limited, Indonesia Communication Pte. Ltd., Singapore Telecommunications Ltd., and Singapore Telecom Mobile Pte. Ltd to stop their share ownership in PT. Telekomunikasi Selular and PT. Indosat, Tbk. by divesting the whole share ownership to one of the company, PT. Telekomunikasi Selular or PT.Indosat, Tbk., as from 2 (two) years since the decision final and binding.

To instruct Temasek Holdings, Pte. Ltd., together with Singapore Technologies Telemedia Pte. Ltd., STT Communications Ltd., Asia Mobile Holding Company Pte. Ltd, Asia Mobile Holdings Pte. Ltd., Indonesia Communication Limited, Indonesia Communication Pte. Ltd., Singapore Telecommunications Ltd., and Singapore Telecom Mobile Pte. Ltd to decide the company want to divest its ownership and release voting right and rights to nominate directors and commissioner in one of the company, PT. Telekomunikasi Selular or PT. Indosat, Tbk., until the shares divest in a whole as it is instructed in dictum 4 above.

The divestment of share ownership as it meant in dictum 4 above shall be performed under the following condition : a.to each buyer is limited to maximum 5% of the total divested shares; b.the buyer may not associate with Temasek Holdings, Pte. Ltd. and or other buyers in whatever form.

To punish Temasek Holdings, Pte. Ltd., Singapore Technologies Telemedia Pte. Ltd., STT Communications Ltd., Asia Mobile Holding Company Pte. Ltd, Asia Mobile Holdings Pte. Ltd., Indonesia Communication Limited, Indonesia Communication Pte. Ltd., Singapore Telecommunications Ltd., and Singapore Telecom Mobile Pte. Ltd to pay fine each for amount ofRp 25,000,000,000 (twenty-five billion rupiahs) which have to be transferred that must be transferred to State.

To instruct PT. Telekomunikasi Selular to stop practicing high tariff and decrease cellular service tariff at least15% (fifteen percent) from valid tariff at the date this decision announce.

To punish PT Telekomunikasi Selular to pay fine for amount ofRp 25,000,000,000 (twenty-five billion rupias) which have to be transferred that must be transferred to State.

Thus, based on one of the dictums of the Commission's decision, stated that Temasek Holdings has proved to have violated the provisions of Article 27 of the Law No.5/1999 is issued as a model to support the aims. The Article states that it is forbidden to be a majority shares ownership in a number of companies that operate in the same market if it leads to the control of to 50% of market shares. The complete statement of Article 27 of the Law No.5/1999 is: A business actor is not allowed to own majority shares in some companies that perform similar business activities at the similar relevant market if such ownership causes:

- a. a business actor or a group of business actor control to 50% (fifty percent) of a market share of one kind of certain goods or services.
- b. two or three business actors or a group of business actor that control to 75% (seventy five percent) of a market share of one kind of certain goods or services.

To the infringement conducted by Reported, Investigation team in the Report of Follow-up Investigation Result (LHPL) principally state that Temasek Business Group has performed cross-ownership to Telkomsel and PT. Indosat, Tbk., that make Telkomsel conduct monopolistic practice and abuse of dominant position in relevant market in a form of excessive tariff fixing and hindering interconnection so that causes consumer loss. By such things above, the Investigation team conclude that Temasek Business Group has infringed Article 27 letter a and Telkomsel has infringed Article 17 paragraph (1) and Article 25 paragraph (1) b of the Law Number 5/1999.

That the suspected infringement of Article 17 paragraph (1) of the Law No.5/1999 conducted by Telkomsel, is in the process of verification of KPPU's Investigation team, had used the principle of "Per-Se Illegal" that can be seen in the sentence "by implementing/keeping high tariff, Telkomsel then has infringed Article 17 paragraph (1). The usage of such principle of verification "Per-Se Illegal" is incorrect, because in conducting an evidence to the suspected infringement of Article 17

paragraph (1) the Law No. 5/1999 shall implement the principle of “Rule of Reason” in which KPPU does not only prove, - quad non -, the existence of market control by Telkomsel but also monopolistic practice or unfair competition caused by market control by Telkomsel.

We deny the suspected infringement of Article 25 paragraph (1). b of the Law No. 5 / 1999 reported by KPPU, by the reason of: KPPU Investigation team does not have evidence at all (even early evidence) indicates a suspected infringement of Article 25 paragraph (1) conducted by Telkomsel.

Thus, it can be said cross ownership of Temasek in Telkomsel and Indosat is inseparable from the government's fault in determining the policy of privatization which can be seen from the following processes:

- 1) Escape of Temasek in Indosat divestment tender can be a potential cross ownership in Telkomsel and Indosat.
- 2) Incautiousness government declared a subsidiary of Temasek (STT) as the winning bidder 41.9% of Indosat (after Temasek owns 35% stake in Telkomsel through another subsidiary SingTel Mobile).
- 3) That the impact of cross-ownership by Temasek business group that brought the consequences of excessive rates for consumers and unfair competition for businesses.

In article 36 Paragraph (1), In principle, the issuance of shares is an endeavour to raise capital and so the obligation to pay up shares should be charged to some other party. For the sake of certainty, this Article specifies that Companies are not allowed to issue shares for themselves to own. This prohibition also includes a prohibition on cross-holdings which occur if a Company owns shares issued by some other Company which directly or indirectly owns shares in that Company. The definition of direct cross-holding is if the first Company owns shares in a second Company without any ownership in one or more “intermediate Companies” and in reverse the second Company owns shares in the first Company. The definition of indirect cross-holding is the ownership by the first Company of shares in a second Company via ownership in one or more “intermediate Companies” and in reverse the second Company owns shares in the first Company. Paragraph (2) Share ownership which results in the ownership of shares by the Company itself or ownership of shares by means of cross-holdings is not prohibited if the ownership of shares was obtained by transfers by operation of law, by grant, or by bequest because in such cases there was no issuance of shares which needed to funds to be paid up from another party and so they do not breach the prohibition contemplated in paragraph (1).

Cross-ownership in the context of the issuance of new shares by the Company Law led to the company on the capital side is clearly no capital injection in the real coming into the company is and the management side, then cross-ownership is likely to lead to mixing between the ownership and management of the company, so in this case management is no longer independent of each other.

The effect of the cross-ownership is similar to the effect that the company undertake a merger, consolidation, acquisition and separation. Either the private company, public or holding companies (private/public). The difference, lies in the scale of the effect itself (wide or narrow). Cross-ownership in the company covered it difficult to see, therefore we are more find examples of cross-ownership in a publicly listed company.

Single ownership

In Article 7 paragraph (1) that is The Company shall be established by 2 (two) or more persons based on a notarial deed drawn up in Indonesian language. Elucidation in Article 7 Paragraph (1) : “Person” means an individual Indonesian or foreign citizen or an Indonesian or foreign legal entity. The provision in this paragraph makes explicit the principle effective under this Act that basically as legal entities, Companies must be established pursuant to a contract and therefore they must have more than 1 (one) shareholder.

In the article 7 paragraph (2) Each founder of the Company is obliged to subscribe shares upon the establishment of the Company. (3) The provision as referred to in paragraph (2) does not apply in the context of Consolidation. In the event that a Consolidation of all of the assets and liabilities of a consolidating Company become the capital of the Company resulting from the Consolidation and the founders do not subscribe shares, the founders of the Company resulting from the Consolidation are the consolidating Companies and the names of the shareholders of the Company resulting from the Consolidation are the names of the shareholders of the consolidating Companies. And in paragraph (4) The Company obtains legal entity status on the date of the issuance of Ministerial Decree regarding the ratification of the Company's legal entity.

In the event that the company has the status of a legal entity and the shareholders into 1 (one) people, then Article 7 paragraph (5) If after the Company obtains its legal entity status and the number of shareholders becomes less than 2 (two) persons, then within the period of not later than 6 (six) months as from such condition, the relevant shareholders is obliged to transfer part of their shares to other persons or the Company shall issue new shares to other persons.

In Article 7 paragraph (6) In the event that the time period as referred to in paragraph (5) has exceeded, and there is still less than 2 (two) shareholders, the shareholders shall be personally liable for all agreements/legal relationship and the Company's loss, and upon the request of the interested party, the District Court may wind up the Company. The legal relationships and losses of the Company for which shareholders are personally liable are legal relationships and losses which arise after the 6 (six) months have passed. “Party concerned” means the public prosecutor's office in the public interest, the shareholder, the Board of Directors, the Board of Commissioners, the Company's employees, creditors and/or other stakeholders.

Another consequence of the single ownership is can cause the dissolution of the company by the District Court at the request of interested parties, including the prosecutor's office to the public interest, the shareholders of directors, board of Commissioner, employees of the company, creditors and / or stakeholders others.

The provision which requires the Company to be established by 2 (two) or more persons as referred to in paragraph (1), and the provision on paragraph (5), as well as paragraph (6) do not apply to : a. State Owned Limited Liability Company; or b. Companies managing security exchange, clearing house and underwriting, custodian and settlement institution, and other institutions regulated in the Law on Capital Market. Because of their special status and characteristics, the requirement for the number of founders for the Companies contemplated in this paragraph are provided for in separate legislative regulations. "State Limited Liability Company" means a business entity belonging to the State in the form of a Company whose capital is divided into shares as provided for in the State Owned Enterprises Act.

Conclusion

1. In Act No. 40 of 2007, the elucidation of Article 36 paragraph (1). Basically, the issuance of shares is an endeavor to raise capital and so the obligation to pay up shares should be charged to some other party. For the sake of certainty, this Article specifies that companies are not allowed to issue shares for themselves to own. This prohibition also includes a prohibition on cross-holdings which occur if a company owns shares issued by some other company which directly or indirectly owns shares in that company. The definition of direct cross-holding is if the first company owns shares in the second company without any ownership in one or more "intermediate companies" and in reverse, the second company owns shares in the first company. The definition of indirect cross-holding is the ownership by the first company of shares in a second company via ownership in one or more "intermediate companies" and in reverse, the second company owns shares in the first company. Sharing ownership which results in the ownership of shares by the company itself or ownership of shares by means of cross-holdings is not prohibited if the ownership of shares was obtained by transfers by operation of law, by grant, or by bequest because in such cases there was no issuance of shares which needed to funds to be paid up from another party and so they do not breach the prohibition contemplated in paragraph (1). That Law Number 40 Year 2007 regarding Limited Liability Company (Company Law), which focused on is to

get good corporate governance, does not expressly regulate the ban on cross ownership.

2. Cross ownership can occur in a limited liability company through the transition process objects in general, as stocks including moving objects. Because the stock is evidence of participation of shareholders in the company and at the same time evidence of ownership of common property that is bound in a limited liability company, its existence must be through the mechanism of registration in the Ministry of Justice. To the company's private stock above transition is stipulated in the Articles of Association of the company which happen to be submitted to the shareholders based on general meeting decision policy. For the public company, the transition is to share through the general meeting decision, with the assistance of company securities and stockbrokers with a meeting at the stock exchange.

3. Cross ownership in the context of new shares issuance by the limited liability company is led to the company from the capital side is clearly no capital payment in real terms that fit into the company. Being from management, then the cross ownership is likely to lead to mixing between the ownership and management of the company, so that in this case the management is no longer independent of each other. The result is the two or more companies that will integrate with each other under the same ownership and management, horizontal integration and death caused reduced competition, vertical integration led to the company's ability to set prices and conglomerate integration at the macro-economic impact caused by the death of small businesses.

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