

Legal Analysis of Government Control Over the Company Subsidiaries in State-Owned Enterprises Holding

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ABSTRACT

State-owned enterprises (SOEs) are one of the business entities aiming to advance people's wellbeing. Government Regulation (PP) No. 72 of 2016 concerning Procedures for Participation and Stock Capital Administration in State-Owned Enterprises and Limited Companies states that SOEs which are used as capital participation of other SOEs become subsidiaries of these other SOEs. It is considered to undermine the function of the The House of Representatives and make the state seem to have lost control of the former SOEs. The PP was tested materially because it was considered not in accordance with Law no. 19 of 2003 concerning SOEs. Based on the judicial review, the Supreme Court (MA) rejected the lawsuit. However, the Supreme Court's consideration stated that SOEs which are SOEs subsidiaries remain state-owned and are inversely proportional to the Constitutional Court decision No.01/PHPU-PRES/XVII/2019 dated June 24, 2019, which in its consideration stated that SOEs must be considered the composition of its state-owned shares. The status of SOEs that has changed to become a SOEs subsidiary is no longer categorized as SOEs but becomes Limited Companies with special rights with a special assignment from the Government because it has series A shares (merah putih shares). The status of the State's Wealth of the former SOEs becomes the assets of the former SOEs but still within the scope of State Finance.

INTRODUCTION

The BUMN roadmap shows the grouping of SOEs that will be incorporated into SOE Holding, one example of SOEs that have passed the Holding Company, namely three mining SOEs that were transferred to PT Indonesia Asahan Aluminium Persero (Inalum). With the signing of the deed of inbreng Holding by Rini Soemarno as Minister of SOEs, the government's shares in PT Bukit Asam (Persero) Tbk (PTBA), PT Aneka Tambang (Persero) Tbk (Antam), and PT Timah (Persero) Tbk belong to PT Inalum as the Holding aka the parent of SOEs in the mining sector. Previously, Government Regulation No. 47 of 2017 concerning the Increase of State Capital Participation of the Republic of Indonesia into the Share Capital of the Company PT Indonesia Asahan Aluminium was issued on that basis the investment was carried out.

If you look at the original status before the Holding, the subsidiary company under the Holding company has the status of a SOE.(Kim, 2018) As is known that SOEs are companies whose capital is divided into shares whose entire or at least 51% (fifty-one

percent) shares are owned by the State of the Republic of Indonesia whose main purpose is to pursue profits. (Kusmono & Margono, 2018) Then the holding occurs, the shares of the state-owned company will move to its parent. Described by example, namely series B shares of PT. Bukit Asam Tbk as much as 65.02% (sixty-two point zero two percent), PT. Timah Tbk 65% (sixty-five percent), and PT. Antam Tbk 65% (sixty-five percent) was transferred to Inalum as an additional state capital participation.

This means that initially the majority and in accordance with the SOE Law that at least 51% (fifty-one percent) is controlled by the state, it can only be said to be SOEs.(No, n.d.) After there were no more government shares in the three companies, the SOE status fell and switched to PT. Inalum. This is a very interesting phenomenon to discuss and research. The legal basis that became the main umbrella of SOEs was Law No. 19 of 2003 concerning State-Owned Enterprises which was then issued Government Regulation No. 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies, after the government regulation (PP) ran for 11 years then the PP was amended by Government Regulation No. 72 of 2016 concerning amendments to Government Regulation No. 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies. Then on March 14, 2017 the PP was tested materially because it was considered not in accordance with Law No. 19 of 2003. Finally, the Supreme Court issued Supreme Court Decision Number: 21 P / HUM / 2017 dated June 8, 2017 in one of its points of consideration stated that:

"....., that the participation of state capital (PNM) in state shares in SOEs to SOEs or other limited liability companies does not contradict higher laws and regulations and the form of SOEs that become subsidiaries of SOEs does not turn into ordinary Limited Liability Companies, but remains SOEs, then the provisions of article 2A paragraph (6) and (paragraph) 7 of the object of HUM a quo do not conflict with Law Number 19 of 2003, so that based on this, SOE subsidiaries can obtain special assignments."

In this consideration, it is stated that SOEs that turn into subsidiaries of SOEs do not turn into ordinary limited liability companies. Translatable still remains as SOE. This is in contrast to the decision of the Constitutional Court Number: 01 / PHPU-PRES / XVII / 2019 dated June 24, 2019. In one of the points, the applicant submitted an application against the results of the 2019 Presidential and Vice Presidential elections regarding the formal defect of the requirements for the Vice Presidential candidate, candidate pair 1, namely Ma'ruf Amin, who is considered not to have resigned from his position as a BUMN official and is still listed on the official website of the State-Owned Bank, namely Bank Syariah Mandiri, BNI Syariah Mandiri as chairman of the Sharia Supervisory Board.(Bahri & Barthos, 2023) In the decision of the Constitutional Court in one of its points of consideration stated that:

"that article 1 of Law number 19 of 2003 concerning State-Owned Enterprises (SOE Law) defines SOEs as business entities all or most of their capital is owned by the state through direct participation derived from separated state assets.(Number, 19AD) Based on this definition, it can find out whether Bank BNI Syariah and Bank Syariah Mandiri are SOEs or not, one of which is by knowing the composition of capital or shares of the two banks."(Hidayat & Fageh, 2022)

In the next point of consideration it is stated:

"that the capital or shares of Bank BNI Syariah are owned by PT Bank Negara Indonesia (Persero) Tbk and PT BNI Life Insurance (proof of PT-20). The composition of

Bank Syariah Mandiri's shareholders is PT. Bank Mandiri (Persero) Tbk and PT Mandiri Sekuritas (proof PT-21). Thus, because there is no direct capital or shares from the state, most of which are owned by the state, the two banks cannot be defined as SOEs, but have the status of subsidiaries of SOEs because they were established through the participation of shares owned by SOEs or in other words, the capital or shares of the two banks are mostly owned by SOEs."

From the two considerations above, there is a contradiction in the consideration between the decision of the Supreme Court and the Constitutional Court regarding subsidiaries in SOE Holding. How can the status of the subsidiary still be categorized as a SOE after becoming a subsidiary company of a SOE Holding company.(Rambe, 2022)

Referring to Article 1 Number 1 of Law No. 19 of 2003 which states that "SOEs are business entities whose entire or majority of capital is owned by the state through direct participation derived from separated state assets".(Wahyudi, 2023) In terms of separated wealth, it is the separation of state wealth from the State Budget (APBN) to be used as state capital participation in SOEs, then the development and management are no longer based on the APBN, but the development and management are based on sound corporate principles. (Sitinjak, 2022) This means that capital participation is separate from the state budget directly, meaning there is no connecting level. While the subsidiary is owned by the parent, this indicates that the state has no direct rights to the subsidiary company, meaning that there is a level between the state and the company under the holding company(Phillips, Petersen, & Palan, 2021).

From the description above, a problem arises regarding how government control over SOEs that are subsidiaries of the Holding.(Susanti & Firmansyah, 2018) If a SOE that is a subsidiary company of a holding company does not have a clear position, how is the control of the state (government) in managing the subsidiary or SOE. Therefore, it is necessary to conduct a research on "Legal Analysis of Government Control of Subsidiaries in SOE Holding".

METHOD

This type of research is normative legal research because this research only refers to written legal instruments and related literature. This normative legal research method is also known as doctrinal research, which examines and analyzes all legal norms sourced from written law or sourced from court decisions only, where this research only refers to written legal instruments. This research is descriptive, meaning that this research is to obtain a complete and clear picture of government control over subsidiaries in SOE Holding companies according to Law No. 19 of 2003 concerning SOEs and other regulations related to the matter.

This research was conducted through a statutory approach (Statute Approach) and a conceptual approach (Conceptual Approach).(Yuliartini & Mangku, 2020) In the method of legislative approach, researchers need to understand the hierarchy, and the principles in laws and regulations. In this case, various applicable laws and regulations regarding limited liability companies, SOEs, and state finances will be seen. Then also by taking a conceptual approach, namely looking at the views and doctrines that develop in legal science. Views or doctrines will clarify ideas by providing legal understandings, legal concepts, and relevant legal principles related to the problem under study.

The data collection method used in this study is the study of documents or library materials, or literature (library research) whose affairs are related to the object that is the source of research with the aim of obtaining secondary legal materials.(Kanneth,

2023) Secondary legal material is in the form of opinions from various experts published in literature, as well as articles from both print and electronic media. The primary legal material of this study is in the form of related laws and regulation.

Data analysis is the process of systematically searching and compiling data obtained from interviews, field notes, and other materials so that they can be understood easily and the findings can be informed to others. In terms of this research, data processing is systematized against written legal materials, then qualitative analysis is carried out. Qualitative analysis is intended to analyze with explanations in the form of interpretation set forth in a sentence or text so as to provide explanations that present the results of the data obtained. Based on the analysis of the substance of the discussion in this writing, interpretation can be carried out using interpretation methods known in legal science. Finally, the results of this juridical interpretation are expected to be able to answer the problems posed in this study completely. As well as by using the method of drawing conclusions deductively, namely general to particular.

RESULTS AND DISCUSSION

Restructuring SOEs by Forming SOE Holding

The legal basis regarding the holding company, especially for SOEs, has not been found clearly explicitly regulating the holding. Therefore, the laws or regulations related to SOE holding are:

- a. Law Number 19 of 2003
- b. Law No. 40 of 2007
- c. Government Regulation No. 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies.
- d. Government Regulation No. 72 of 2016 concerning amendments to Government Regulation No. 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies. The legal basis for SOE holding can be found clearly in this PP. Explained in the explanation section of article 9 letter d which states "....., Transfer or transfer of state-owned shares in SOEs or Limited Liability Companies to SOEs and / or other Limited Liability Companies as State Capital Participation, among others, in the context of forming a BUMN holding company (holding)" this means that there is a definition and understanding of holding after some time the word holding has been used but there is no legislation that explains the meaning of holding alone. Then in this PP is also regulated about something special regarding the shares of SOEs that are subsidiaries of other SOEs, the government must have shares with privileges which will be described further in the next discussion.

In terms of the establishment of a SOE holding, the government has planned to create a SOE holding, namely:

1. Stipulation of Government Regulations regarding the sector to be held.
2. Determination of the Decree of the Minister of Finance (KMK) regarding the value of adding State shares in the holding as a result of the selection of State shares in the holding member to the parent holding.
3. GMS written holding on approval of acceptance of transfer of state shares in holding member or subsidiary holding.
4. Signing of the Deed of Inbreng by the Minister of SOEs and the President Director of Holding.

5. Notification of the agenda of the Extraordinary General Meeting of Shareholders (EGMS) by the holding subsidiary to OJK.
6. Written announcement to employees by the holding subsidiary in connection with the change of status.
7. Announcement in 2 (two) daily national newspapers regarding inbreng.
8. Announcement of EGMS of holding subsidiaries in national newspapers
9. Summoning EGMS of subsidiary holdings in national newspapers.
10. Implementation of EGMS holding SOE subsidiaries for amendments to the Articles of Association of SOE subsidiary holdings.
11. Notification of the results of the EGMS regarding changes to the Articles of Association by Notaries to the Ministry of Law and Human Rights and the Stock Exchange.
12. Notification of the Minister of SOEs to the Ministry of Finance regarding the implementation of the transfer of shares and changes in state capital.
13. Crossing shares on the Stock Exchange/Listing on DPS by the Securities Administration Bureau.

SOEs that have become SOE holdings have legal impacts or consequences on both, either being SOE Subsidiaries or SOE Parents. As for the legal consequences of the establishment of a state-owned enterprise holding:

- a) Subsidiaries of SOE Holding in which there are state shares result if the company wants to be sold / privatized after obtaining the approval of the House of Representatives because there are still state shares in it and there is special treatment that is different from ordinary limited liability companies.
- b) The status of the ex-BUMN company changes to a subsidiary of the holding parent SOE. This is regulated in article 2A paragraph (2) of PP 72 of 2016. With the change of SOEs into subsidiaries of SOEs, the SOEs turn into Limited Liability Companies and not become SOEs anymore but still apply government assignments or public services only if in the subsidiary there are shares with special rights owned by the state and include special policies from the government and / or state including natural resource management with certain treatment, among others, related to the process and form of licensing, the right to obtain HPL, land expansion activities and/or participation in state or government activities involving SOEs. For the discussion of the contradiction between the Supreme Court decision regarding SOE subsidiaries, it will be discussed in the discussion of the position of children in SOE Holding.
- c) Regarding the shares of subsidiaries of state-owned holding companies owned by the holding parent in the amount of saha included in capital participation through government regulations. For the state, it still has Series A shares with privileges (red and white shares), in contrast to subsidiaries whose capital participation from SOEs does not have direct state share ownership, resulting in this company no A Dwi Warna classification greetings (red and white shares)
- d) Regarding the responsibility of the SOE Holding Company, which is limited to the shares it owns.

Article 24 paragraph (5) of Law number 17 of 2003 states "The Central Government can sell and/or privatize state companies after obtaining DPR approval" which means that in the case of selling SOEs, it must obtain approval from the DPR. Then related to capital participation in the establishment of SOEs must also go through the APBN mechanism.

That is with the recommendation of the House of Representatives committee dated September 24, 2014 which requested to stop holding that has the potential to eliminate SOEs. Every state official must comply with the recommendations of the House of Representatives. However, this recommendation refers to examples of cases that are internal corporate actions of SOE directors who sell/release/transfer and Joint Operations ("KSO") SOE assets to private third parties that are different from the Holding formation transaction. On this report, the Ministry of SOEs asked the Attorney General for an opinion regarding the need for DPR approval regarding the establishment of an Oil and Gas Holding. Based on letter number B-088/A/Gph.1/05/2016 dated May 23, 2016 addressed to the Minister of SOEs in connection with Constitutional Court Decisions Number 48/PUU-XI/2013 and Number 62/PUU-XI/2013 and Recommendation of the BUMN Asset Panja Commission VI of the House of Representatives, the State Attorney (JPN) argued:

"That DPR approval in relation to the establishment of Oil and Gas Holding is not required because it is not a process of state asset sale/privatization that requires DPR approval. That DPR approval in relation to the establishment of Oil and Gas Holding is not required because it is not a process of state asset sale/privatization that requires DPR approval."

Then it is also explained in article 2A paragraph (1) which states that State Capital Participation derived from state wealth in the form of state-owned shares in SOEs or Limited Liability Companies to SOEs or other Limited Liability Companies, is carried out by the Central Government without going through the mechanism of the State Budget, which means without going through the Law and the approval of the House of Representatives.

It is also strengthened by the Supreme Court's legal consideration of the material test of PP 72 of 2016 which at one of the points of consideration:

"That the provisions of article 2A paragraph 1 of the object of HUM a quo the material content is regarding State Capital Participation (PMN) which has been in the form of state-owned shares in SOEs which will be placed as State Capital Participation (PMN) in SOEs or other Limited Liability Companies then no longer need to go through the APBN mechanism, it can be justified because in principle state shares are state assets separated in the form of state shares in SOEs and have been in the private law field managed in a healthy corporate manner, and from the beginning it has gone through the APBN mechanism and received approval

HOUSE. This is certainly still in line with the intention of article 24 paragraph (1) of Law Number 17 of 2003 concerning State Finance, but because it has been transformed into state wealth separated in the form of shares, the transfer to SOEs or other Limited Liability Companies in the form of PMN (sale and purchase of shares or takeover) is in the field of private law, so there is no need for further approval from the DPR through the APBN mechanism but simply by the decision of the GMS / Minister"

There is no need for DPR approval because in principle a BUMN can be merged, merged with an existing SOE. Then the DPR in giving approval, namely by capital participation to other SOEs with the APBN mechanism, which means the release of state wealth into separated state wealth. In this case, state wealth has been separated first through the APBN mechanism and becomes separated state wealth. This means that it has become the wealth of SOEs and no longer needs BUMN approval because it is not for sale or transfer.

The establishment of SOE Holding is not the same as Privatization because privatization aims one of them is to expand public ownership, but in holding, the majority share ownership is still in the hands of the state through the parent SOE. And in SOE Holding, the government only transfers SOE shares to other SOEs, in contrast to Privatization which releases SOE shares to the wider community.

State Wealth Position in SOE Holding Subsidiaries

Subsidiaries of BUMN Holding that were previously former SOEs have unique share ownership. In this case, the shares are divided into 2 parts. Series B shares or ordinary shares owned by the parent of a state-owned enterprise. For example, in the mining SOE sector. PT. Antam is a subsidiary of state-owned holding Inalum which owns 65% (sixty-five percent) shares of PT. Antam. Share position of PT. Inalum is the controller. And there are 35% (thirty-five percent) of public shares, but not as controllers (non-controllers).

Then there are Series A shares totaling 1 (one) owned by the Government of the Republic of Indonesia as well as Controlling or Special shares. because state ownership through Dwi Warna series A shares is still recognized by granting privileges, so that control (supervision) over

Subsidiary companies can still be carried out by the state through the parent SOE and do not reduce the purpose of state control.

And every SOE that will become a subsidiary of the state SOE holding must have shares with privileges in accordance with article 2A paragraph (2) PP 72 of 2016. This is what distinguishes ordinary Limited Regulations and other SOE subsidiaries from SOE Holding subsidiaries.

Regulation of the Minister of SOEs Number: Per-13 / MBU / 09/2014 concerning Guidelines for Utilization of Fixed Assets of State-Owned Enterprises explained that the Utilization of Fixed Assets, namely tangible assets owned and / or controlled by SOEs for use in SOE operations is not intended to be sold in the framework of normal company activities and has a useful life of more than one year The utilization is carried out alone by SOEs or through cooperation with other parties. The implementation of asset utilization carried out alone is the authority of the board of directors in accordance with internal mechanisms. Meanwhile, cooperation is further regulated in the annex to the Candy. However, this rule has been revoked and declared no longer valid by the SOE Minister Regulation Number: Per-03 / MBU / 09/2017.

When viewed from the minutes of the extraordinary GMS of PT. Antam made in deed number 88 dated November 28, 2017 by notary Jose Dima Satria (notary in Jakarta) that the assets of PT. Antam is still managed by PT. Antam. Although the shares of PT. Antam is mostly owned by PT. Inalum.

The position of SOE subsidiaries in the BUMN holding concept based on article 2A paragraph 2 of Government Regulation Number 72 of 2016 concerning Amendments to Government Regulation Nomor 44 of 2005 concerning Procedures for Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies explains explicitly about SOE subsidiaries, namely:

"in the event that State assets in the form of State-owned shares in SOEs as referred to in Article 2 paragraph 2 letter d are used as State capital participation in other SOEs so that most of the shares are owned by other SOEs, then these SOEs become subsidiaries of SOEs provided that the State is obliged to have shares with privileges stipulated in the articles of association."

Government Regulation Number 72 of 2016 also gives privileges to SOE subsidiaries, in Article 2A paragraph 7 stipulates that SOE subsidiaries can be treated the same as SOEs in terms of carrying out general duties and given special policies to manage natural resources.

When viewed from the capital status of SOE subsidiaries, based on Article 2A paragraph 2 of Government Regulation Number 72 of 2016 as has been implemented, SOE subsidiaries get State capital derived from the shares of the parent company of SOEs. Basically, State capital participation is the separation of State wealth from the State Budget (APBN) or the determination of reserves of other companies to be used as capital for SOEs and / or other Limited Liability Companies and managed corporately.

In substance, the participation of state capital is the same as the participation of government capital. The term State capital participation contained in Government Regulation Number 73 of 2016 Amendments to Government Regulation Number 44 of 2005 concerning procedures for participation and administration of State capital in SOEs and Limited Liability Companies, while the term government capital participation is contained in Government Regulation Number 6 of 2006 concerning State/Regional Property.

The participation of State capital to SOE subsidiaries based on Government Regulation 72 of 2016 Article 2A is:

(1) The participation of state capital derived from state wealth in the form of state-owned shares in SOEs or limited liability companies to SOEs or other limited liability companies, shall be carried out by the Central Government without going through the mechanism of the State budget.

(2) In the event that State assets in the form of State-owned shares in SOEs are used as State capital participation in other SOEs so that most of the shares are owned by other SOEs, the SOEs become subsidiaries of SOEs provided that the State is obliged to have shares with privileges stipulated in the articles of association.

(3) State wealth that is used as state capital participation in SOEs or Limited Liability Companies is transformed into shares / state capital in these SOEs or Limited Liability Companies. And the transformed state wealth becomes the wealth of the BUMN or Limited Liability Company. As a result, the wealth of SOEs derived from the source of the State Budget is transformed into the assets of these SOEs or Limited Liability Companies. This is in line with the Fatwa of the Supreme Court issuing a Fatwa with Number WKMA / Yud / 20 / VIII / 2006 that SOE debt is not state debt because it has become a separate state wealth and its development and management are based on sound corporate principles.

The participation of State capital into SOE subsidiaries as explained in Article 2A paragraph 1 of Government Regulation Number 72 of 2016 explains that in the event that capital participation in the form of State-owned shares in other SOEs to SOE subsidiaries is carried out without going through the APBN mechanism because State-owned shares in SOEs or Limited Liability Companies are essentially State assets that have been separated from the State budget, so that the transfer of shares to be used as participation in SOEs or Limited Liability Companies is no longer carried out through the APBN mechanism.

Given that the separated wealth that has been further managed based on the principle of a healthy company comes from the participation of State capital to SOE subsidiaries as described above comes from the shares of the parent company.

Government Control (Ministry of SOEs) over Subsidiaries in SOE Holding

The government can control subsidiary companies in SOE holding in several ways, including:

First, Control through Series A Shares (Golden Share) Dwiwarna Shares or Series A shares or with other terms, namely golden shares, namely shareholders have more rights than other shareholders. That extra right is especially in the process of appointing company directors. In Indonesian capital market law, bicolor shares are also known as preferential shares. Like the mining holding sector through PP No. 47 of 2017 article 3 states:

"With the transfer of Series B shares, the state exercises control over PT Aneka Tambang Tbk, PT Timah Tbk, and Bukit Asam Tbk through dual-color Series A share ownership with authority as stipulated in the Articles of Association."

The same thing is also done the same as the oil and gas holding, which is the holding company of PT. Pertamina (Persero) through PP 6 of 2018 concerning the Increase of State Capital Participation of the Republic of Indonesia into the Share Capital of the Company (Persero) PT. Pertamina. However, unlike the plantation holding in 2014, the state still has a 10% (ten percent) stake in the subsidiary of BUMN Holding through PP 72 of 2014.

Second, Indirect Control through the Control of the Parent Company of SOE Holding Companies

It can be concluded that, the government still supervises the subsidiary company through the control of the parent company, but the parent company is in control of running its business. The government is not responsible if the subsidiary company goes bankrupt or things happen not as expected.

Third, Control in the Appointment of Members of the Board of Directors and Board of Commissioners

Based on the provisions of Article 14 of the Regulation of the Minister of SOEs Number PER-03 / MBU / 2012 concerning Guidelines for Members of the Board of Directors and Members of the Board of Commissioners of SOE Subsidiaries stipulates that the Articles of Association of SOEs can stipulate that the Board of Directors of SOEs seek prior approval from the Board of Commissioners/Supervisory Board of SOEs or GMS/Minister, before appointing a person as a Board of Directors or Board of Commissioners of a Subsidiary. In line with this, the Government, in this case, the Ministry of SOEs also has the authority to appoint Members of the Board of Directors and Commissioners in accordance with the privileges regulated in PP 72 of 2016.

Fourth, control in the transfer of assets of subsidiaries in SOE holding

Since the enactment of Law Number 19 of 2003 concerning State-Owned Enterprises and Government Regulation Number 44 of 2005 concerning Procedures for Participation and Administration of State Capital in SOEs and Limited Liability Companies, the establishment of SOE holdings is carried out based on Article 2 Paragraph 2 letter d, Article 3 Paragraph 1, Article 5 letter c and Article 7 is associated with the explanation of Article 4 of the SOE Law. Based on these Articles, State Shares in a SOE that are used as capital participation are categorized as other State assets as referred to in Article 2 letter d of PP Number 44 of 2005.

In the Explanation of Article 2 paragraph (2) letter d of Government Regulation 44 of 2005 states that in the event that other State assets have not been included in the State Budget, the process is carried out through the APBN mechanism, namely recording

the assets referred to in the State Budget as revenue and at the same time issued as State Capital Participation.

Fifth, Control through the Enforcement of SOE Minister Regulations by GMS of Subsidiaries

The Minister of State-Owned Enterprises issued Regulation of the State Minister of State-Owned Enterprises Number PER-03 / MBU / 2012 concerning Guidelines for the Appointment of Members of the Board of Directors and Members of the Board of Commissioners of Subsidiaries of State-Owned Enterprises. With this regulation, all the authority of the subsidiary will be related to the decision taken by the GMS of the subsidiary. In the GMS of the Subsidiary there is a parent company engaged in it.

Sixth, Control Through Parent Accountability SOE Holding Companies The government can exercise control over subsidiaries through the responsibility of the parent company, but in this case it is limited unless stated in the subsidiary ADRT. The form of responsibility of the Holding Company for the legal actions of the Subsidiary has limitations, because the subsidiary has its own entity. The state of the holding company must be responsible for the legal actions of its subsidiaries, namely in the case of:

- 1) The holding shall be responsible for the actions of its subsidiaries in complementary contractual properties
- 2) In the case of statutory provisions governing voluntary complements.
- 3) Low Capitalization (Undercapitalization)
- 4) In case on the basis of abuse of the rules.

Seventh, Control Through the consolidated financial statements of the parent holding company, the government control through the consolidated financial statements of the parent is reporting that presents the financial position and results of operations for the parent company (controlling entity) and one or more subsidiaries (controlled entity). Which is a single entity of the company. Consolidated financial reporting is needed to prevent and control the occurrence of irregularities committed by subsidiaries.

CONCLUSION

Based on the description above, the following conclusions can be drawn: First, the position of SOEs that are subsidiaries of SOE holding companies is no longer categorized as SOEs but becomes Limited Liability Companies with Privileges. This is in line with Law No. 19 of 2003, PP No. 72 of 2014, PP NO. 72 of 2016, PP No. 6 of 2018, PP No. 76 of 2018. However, there are two different opinions in the two highest courts in Indonesia. First, the consideration of Supreme Court Decision No.21 / P / HUM / 2017 which states that SOEs that are subsidiaries of SOEs are still categorized as SOEs. Second, the Constitutional Court's consideration in decision No. 01/PHPU-PRES/XVII/2019 which states to see a company is said to be a SOE or not seen from the composition of shares owned by the state.

Second, the position of state wealth separated from SOEs which turned into subsidiaries of SOE Holding into subsidiaries of BUMN Holding itself because the SOE Holding subsidiary has its own entity and resulted in having its own wealth separate from its shareholders means that state wealth is transformed into the wealth of SOEs or subsidiaries of SOE holding. However, it remains State Finance in line with the Constitutional Court decision Number: 48 / PUU-XI / 2013 and the Constitutional Court decision Number: 62 / PUU-XI / 2003 which basically confirms the position of state wealth separated from SOEs is included in the scope of state finance.

Third, the State can control SOE subsidiaries through Series A shares regulated by the Articles of Association, including the right to approve the appointment of Members of the Board of Directors and Commissioners, changes to the Articles of Association, changes in the shareholding structure, and mergers, separations, and dissolution, as well as takeovers of companies by other companies. The state can also exercise control through the enactment of SOE Ministerial Regulations. In addition, it can also be controlled indirectly through the Parent Company holding SOEs.

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