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Juridical Analysis of Directors Who Hold Concurrent Positions in Limited Liability Companies

Irsan Rahman[1], Herry polontoh[2], Rizky Wisudawan Katjong[3], Kadir Katjong[4], Revie Kurnia Katjong[5]

[1] Universitas Sembilan Belas November Kolaka, Indonesia; Irsanrahman@gmail.com
[2] Universitas Cenderawasih, Indonesia; 88mherry@gmail.com
[3] Universitas Muhammadiyah Papua, Indonesia; rizkywisudawan27@gmail.com
[4] Universitas cenderawasih, Indoenesia; kadirkatjong15@gmail.com
[5] Universitas Yapis Papua, Indonesia; reviekatjong@gmail.com

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Abstract

The practice of concurrent positions carried out by the Board of Directors in the management of a PT does not yet have a legal basis regulated explicitly in Law Number 40 of 2007 concerning Limited Liability Companies (UUPT). Concurrent positions lead to legal loopholes that can cause potential losses to the company. This research aims to analyze the practice's suitability with the law's provisions and compare it with policies in the United States. This research uses a normative method with conceptual and statutory approaches and secondary data from relevant regulations. The results show that concurrent positions can cause conflicts of interest, weaken management, and undermine corporate governance. Legislation changes are needed in Indonesia to limit the number of positions a director can hold and impose more severe sanctions for violators. In conclusion, a law revision is needed to strengthen the regulation of concurrent positions to promote better corporate governance.

Keywords Board of Directors; Dual Position; Limited Liability Company

Corresponding Author
Irsan Rahman
Universitas Sembilan Belas November Kolaka, Indonesia; Irsanrahman@gmail.com

1. INTRODUCTION

One of the essential organs in a Limited Liability Company (now referred to as PT) is the Board of Directors. The position of the Board of Directors in a PT is to manage and run the company's business activities. When reviewed, Article 1 number 5 of the Company Law states that "The Board of Directors is an Organ of the Company which is authorized and fully responsible for the management of the Company for the benefit of the Company, following the purposes and objectives of the Company and represents the Company, both inside and outside the court following the provisions of the articles of association" (Lubis, 2018). Strategic decision-making and managing the company's resources is the primary responsibility of the board of directors (Wulandari, 2019).

In addition to being responsible for maintaining the sustainability and stability of the company, the board of directors also has an important obligation to prepare accurate and transparent operational

reports. These reports cover the company's financial condition and other relevant operational aspects to provide a comprehensive picture of the company's performance (Muktiana Hastiwi et al., 2022). With accurate reports, shareholders and interested parties, such as investors, creditors, and regulators, can understand the company's position and prospects more clearly. Honesty and transparency in preparing these reports are essential to build trust among stakeholders (Az'zahra et al., 2024). In addition, directors play a role in formulating corporate policies and strategies that can adapt to market dynamics and changing business challenges (Sisibintari, 2015). They must be responsive to changes in technology, regulations, and economic conditions and be able to make the right decisions to maintain the company's competitiveness. By setting the right strategy, the board of directors ensures that the company stays on track but also maximizes the company's long-term growth and sustainability potential in line with shareholder expectations. (Noviawan et al., 2013).

In carrying out its role, the board of directors must be able to make the right and strategic decisions that support the growth and development of the company. As the driving force of the company's operational functions, the Board of Directors plays an essential role in upholding *Good Corporate Governance* (GCG) (Supriatna et al., 2019). At the same time, not legally binding, good corporate governance practices guide businesses to implement best practices in corporate management. These include establishing effective internal control mechanisms, enhancing transparency and accountability, and fulfilling corporate social responsibility to maintain business continuity. These practices form the basis for maintaining the integrity and overall performance of the company, thereby building *stakeholder* trust and creating long-term value (Binus University, 2023). However, the existence of concurrent directorships in Indonesia raises various complex issues in corporate governance. One of the main problems is the potential conflict of interest that can harm the company concerned (Gunawan & Robertus Bambang, 2021). Directors who hold concurrent positions in several companies tend to find it challenging to maintain independence and objectivity in decision-making, as they must consider the interests of the various business entities they serve (Kristanti & Desi, 2023). In addition, this practice also often reduces transparency and accountability in the company's management, as it is difficult to prioritize the singular interests of each company fairly and transparently. The implication is that this threatens the integrity of company management and can also reduce public and investor confidence in good corporate governance. In addition, non-compliance with GCG principles, such as independence and fairness in decision-making, is also a problem that must be addressed through strengthening regulations and stricter supervision (Bairizki & Ahmad, 2020).

The existence of concurrent positions, especially in PT Persero, is precarious. The situation where the same person holds two or more positions at once in two or more companies is known as "concurrent positions." The case in Indonesia where in August 2021, SOE Minister Erick Thohir appointed

Indonesia's Deputy Defense Minister Muhammad Herindra as commissioner of PT Len Industri, while former West Nusa Tenggara Governor Tuan Guru Bajang was appointed Deputy President Commissioner of PT Bank Syariah Indonesia, which is involved in the Joko Widodo-Ma'aruf Amin National Campaign Team, reflects a practice that raises concerns about potential conflicts of interest and non-transparent management. The Indonesian Ombudsman noted that as of 2019, 397 public officials held concurrent positions as SOE commissioners and 167 in SOE subsidiaries. Furthermore, 64% of the commissioners were ministry officials, highlighting the potential for abuse of power and lack of oversight. This move adds to the controversial record of appointments of SOE directors and commissioners, with potential conflicts of interest and a lack of transparency in the management of SOEs. The Indonesian Ombudsman noted that many public officials, including from ministries, hold concurrent positions as SOE commissioners, reflecting the need for stricter regulations to avoid abuse of power and promote better corporate governance. The problems within the company in SOEs open a loophole for corruption (Indonesia Corruption Watch, 2022).

Several countries have implemented laws that prohibit the practice of dual positions on the board of directors to avoid conflicts of interest and ensure more transparent and accountable corporate governance (International Finance Corporation, 2018). These rules are usually designed to ensure that board members can focus entirely on their duties within a single company without being torn between various interests that may conflict. These prohibitions also aim to avoid potential abuse of power and ensure that interests outside of the company do not influence decision-making at the director level. For example, in the United States, the Sarbanes-Oxley Act (SOX), implemented in the wake of the Enron scandal in 2002, strictly regulates director duality and independence. SOX requires that audit committee members of the board of directors must be independent, must not receive compensation other than from the company they serve, and must not have business relationships with the company that could affect their independence in making audit decisions.

In Indonesia, concurrent positions on the board of directors have not been strictly regulated in many applicable regulations, creating a legal vacuum that could result in conflicts of interest and less transparent corporate governance (Wahyu Purbo Santoso et al., 2023). Although some regulations, such as the Limited Liability Company Law No. 40 of 2007, have provided general guidelines regarding directors' roles and responsibilities, no rules explicitly prohibit concurrent positions. This condition is different from other countries that have implemented strict regulations related to independence and the prohibition of concurrent positions, such as those implemented through the Sarbanes-Oxley Act (SOX) in the United States. This legal vacuum results in the potential for abuse of power, where board members can engage in decision-making that may be influenced by other interests outside the company, reducing the effectiveness of oversight and accountability at the corporate level (Kusmayadi et al.,

2015). This points to the need for legal reform in Indonesia to ensure good corporate governance through clear rules prohibiting concurrent positions among directors.

From the problems in the legal vacuum in Indonesia that have been described, this research aims to evaluate the suitability of the practice of dual directorships with the Company Law and relevant regulations in Indonesia. In addition, this study also aims to compare regulations and practices in various international jurisdictions with existing practices in Indonesia to find lessons that can be applied to improve business governance in the country. Furthermore, the research will generate policy recommendations to improve regulations and supervisory practices related to concurrent positions, including legislative changes and implementing stricter business ethics standards. The research will also conduct an in-depth analysis of the legal interpretation of relevant articles to identify legal loopholes that could be used to abuse directors' authority. Through a conceptual and statutory approach, this research will explore the issue of dual position practices in limited liability company directors with a descriptive-analytical approach. This research's main reference is UUPT, the primary source in analyzing related regulations. Through this research, there is expected to be a legal discovery *(research)* that can contribute to developing legislative products related to the practice of concurrent positions in Indonesia.

2. METHOD

The type of legal research used in preparing this research is normative juridical research using conceptual and statutory approaches. This research will also be studied with a descriptive analysis of the problems mentioned in the research title, following Sugiyono's method, where the data will be described in detail without generalizing but only describing existing conditions (Sugiyono, 2014). This research will use a statutory approach and a conceptual approach. Statutory approach by examining based on laws and regulations related to the formulation of the problem to be discussed. This writing uses primary legal materials, namely the UUPT and other related regulations, which will be supported by secondary legal materials, including law books and journal articles, to describe the prescription of legal issues in this study. (Marzuki & Peter Mahmud, 2019).

3. FINDINGS AND DISCUSSION

Conformity of Dual Position Practices by Directors with the Provisions outlined in Law No. 40 of 2007 on Limited Liability Companies (UUPT) and Other Related Legislation in Indonesia

In Indonesia, the obligations and prohibitions on actions taken by directors are regulated in the Company Law, but this regulation does not yet regulate the rules of dual positions (Pratiwi & Risanti Suci, 2019). The Board of Directors represents the interests of shareholders and is responsible for setting the company's strategy and philosophy, overseeing management, and supervising internal controls.

I*nterlocking directorships* is one of the issues associated with good corporate governance (Utari et al., 2021). When a person holds executive positions or responsibilities in more than one company, either as a member of the board of directors or commissioners or as a representative of two or more companies who then becomes a member of the board of directors or commissioners of a company, interlocking directorates occur (Panggabean et al., 2023). Referring to Mizruchi's (1997) opinion, there are three main reasons for concurrent positions: collusion, co-optation, and monitoring; creating cohesion among the elite; and career advancement through collusion and cooperation between companies. In Indonesia, based on data from the Ombudsman of the Republic of Indonesia in 2019, 397 state/government officials were indicated to have concurrent positions in SOEs and 167 people in SOE subsidiaries (Fatimah, 2019). Based on KPPU's findings in 2021, 62 people held concurrent positions in various sectors, with a different number of companies for each person. Indonesian law does not explicitly prohibit or allow concurrent positions but refers to other laws and regulations (Harjono, 2022). Concurrent positions indicate weak corporate governance, which should provide direction and control and establish rights and obligations among shareholders and stakeholders. Concurrent positions can also reduce the quality of work, reduce focus, and lead to conflicts of interest (Amin Rahmad Panjaitan & Irwansyah, 2023). To increase productivity and reduce agency problems, independent directors are required. Therefore, it is imperative to examine how the Board of Directors position in a PT is organized following GCG principles (Panggabean et al., 2023).

Article 93, paragraph (1) of the Company Law only regulates the general requirements for a person to become a board of directors member but does not provide clear limitations regarding concurrent positions (Sa'adah, 2023). This provision only states that members of the board of directors must be legally capable and must not have a record of bankruptcy within the last five years, be involved in the failure of a previous company as a director or commissioner, or be convicted of a criminal offense that harms the state's finances or financial sector (Hidayat & Khalika, 2019). The article does not specify any rules on concurrent positions. This lacuna in regulation allows directors to hold multiple positions in various companies, which can lead to conflicts of interest and hurt corporate governance. In Article 100 to Article 110 of the Company Law, there are provisions that demand that directors carry out their duties and responsibilities in good faith, full of responsibility, and always prioritize the company's interests. These provisions require each board of directors member to act with high integrity, keeping the company's interests above personal or group interests. However, when a director holds multiple positions in different companies, the risk of abuse of authority becomes apparent (Multazam & Mochammad Tanzil, 2023).

The abuse of multiple positions can lead to conflicts of interest, where decisions are more favorable to one company but detrimental to others. Such conditions can trigger criminal acts such as corruption,

collusion, and nepotism. Corruption can occur if a director uses his position in various companies for personal gain, for example, by misusing company assets or using confidential information for personal gain. Collusion can arise when the official cooperates dishonestly between the companies he leads to benefit himself or a specific group. Nepotism occurs when an officer uses authority to give an advantage or position to a relative or close friend in a managed company (Islamiah, 2024). Although the Company Law does not regulate concurrent positions, policies on concurrent positions exist in other regulations. For example, Law No. 5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition sets more specific limits on concurrent positions by directors. Article 26 of Law No. 5/1999 states "A person who holds a position as a director or commissioner of a company, at the same time is prohibited from concurrently serving as a director or commissioner of another company, if the companies: a. are in the same relevant market; or b. are closely related in the field and or type of business; or c. can jointly control the market share of certain goods and or services, which may result in monopolistic practices and or unfair business competition" (Darcyando Geodewa & Ditha Wiradiputra, 2023). This regulation aims to prevent conflicts of interest and maintain fair competition in the business world. However, this regulation highlights a lacuna in the Company Law that should regulate more strictly the practice of concurrent positions within Limited Liability Companies. Revision of the relevant legislation is urgently needed so that corporate governance in Indonesia can run more transparently and accountably, and to avoid the risks arising from uncontrolled concurrent positions.

A Comparison of Dual Office Practices and Regulations in International Jurisdictions with Those in Indonesia, and Lessons Learned for Improving Corporate Governance in Indonesia

Countries with more advanced corporate governance have developed stricter regulations to limit concurrent positions to prevent conflicts of interest and ensure effective management of the company. In the United States, regulations regarding concurrent positions are strictly governed by the Sarbanes-Oxley Act and regulations of the Securities and Exchange Commission (SEC). These laws emphasize the importance of transparency and accountability in corporate governance, including restrictions on concurrent positions to avoid potential conflicts of interest. The Sarbanes-Oxley Act also requires directors and executive officers to avoid situations that could lead to conflicts of interest and to fully disclose any interests they have in other companies (Prasetyo, 2014). The prohibition against concurrency in American law is also known in the US antitrust regimes under Section 8 of the Clayton Act. This provision prevents individuals from serving on the boards of multiple competing companies (horizontal interlocks), with certain exceptions provided for by other laws, such as Section 1 of the Sherman Act or Section 5 of the FTC Act (Rosch, 2009).

The Sarbanes-Oxley Act is a United States federal law passed on July 30, 2002, in response to a series of major corporate scandals, such as Enron, Worldcom, Adelphia, and Sunbeam, that shook public

confidence and harmed stakeholders. Initiated by Senators Paul Sypros Sarbanes and Michael Garver Oxley, the law aims to enhance integrity and transparency in corporate governance and reduce potential conflicts of interest, including those arising from concurrent executive and board-level practices. The Sarbanes-Oxley Act aims to increase public confidence in the capital markets by implementing better corporate governance and stricter accountability. The Act includes various provisions, such as the establishment of independent boards to oversee audits of public companies, obligations for CEOs and CFOs to ensure the validity of financial statements, and restrictions on auditors consulting for the same company to prevent conflicts of interest. These measures aim to improve audit quality and prevent fraud and ethical violations in the corporate world.

The Sarbanes-Oxley Act is essential in strengthening control and oversight mechanisms to prevent conflicts of interest. The Sarbanes-Oxley Act ensures that executives cannot abuse their positions in multiple companies for personal or group benefit by requiring audit committee members to be financial experts and have complete transparency regarding complex financial transactions. This is relevant to the practice of concurrent employment, which often creates the potential for abuse of power, as an individual holding multiple strategic positions across multiple companies can influence decisions that negatively impact one company for the benefit of another. In addition, the SOA also prohibits public accounting firms from offering consulting services while conducting an audit of the same company. This measure is designed to eliminate potential conflicts of interest when the auditor has another business relationship with the company being audited. This is important because, in many corporate scandals, auditors with other interests in the company do not report irregularities or problems in the financial statements. The law also establishes protection for whistleblowers. This is part of an effort to strengthen transparency and accountability within companies and prevent individuals who hold multiple positions in different companies from hiding important information or abusing their positions to cover up actions that harm shareholders and investors. The practice of dual office holding in the United States, particularly in antitrust laws such as those under the Clayton Act, is also prohibited to prevent conflicts of interest between competing companies. Section 8 of the Clayton Act prohibits individuals from serving on the board of directors of more than one competing company in the same industry unless there is an exception provided by other laws such as the Sherman Act or the FTC Act. This prohibition is designed to prevent unfair influence that could harm market competition and undermine public confidence in the integrity of the capital markets. As such, the Sarbanes-Oxley Act and other antitrust laws play a crucial role in tightening the oversight and regulation of concurrent employment practices.

Although Law No. 5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition provides restrictions on concurrent positions, such as in Article 26, which limits the role of

directors or commissioners in other companies in certain situations, there is no intense harmonization between the Company Law and antitrust regulations in Indonesia (Karina, 2019). Lessons learned from US jurisdictions show that stricter regulation of dual positions can provide more protection for corporate governance and prevent conflicts of interest and market monopolization (Rhee, 2020). Therefore, Indonesia can take lessons from US practice to strengthen regulations on concurrent positions within the scope of limited liability company laws and antitrust regulations. Strengthened oversight and more straightforward regulations will improve transparency, accountability and integrity in corporate governance in Indonesia.

Policy Recommendations to Improve Regulations and Practices for Oversight of Concurrent Positions, Including Proposed Legislative Changes and Stricter Application of Business Ethics Standards

The practice of multiple directorships in Indonesia, especially in SOEs, has led to several corporate governance issues, such as potential conflicts of interest, lack of transparency, and reduced accountability. This phenomenon represents a legal vacuum that allows directors to hold multiple positions in different companies without adequate oversight. The UUPT and other relevant regulations in Indonesia currently do not explicitly prohibit or limit concurrent directorships, which can impact companies and the economy negatively. As a first step, stringent legislative reforms are urgently needed to remedy this situation. Article 93 of the Company Law should be revised to include explicit provisions prohibiting concurrent directorships, particularly between companies in the same industry or with business ties. In addition, adopting principles from antitrust laws such as those set out in the Clayton Act in the United States may help prevent collusion and anti-competitive practices in Indonesia.

Stricter application of business ethics standards is also crucial to addressing the issue of concurrent positions (Saputra, 2024). Directors should be subject to a strict code of conduct that regulates the disclosure of their positions in other companies and prohibits them from holding positions that may give rise to conflicts of interest (Wibowo, 2023). Greater transparency can be achieved through public disclosure reports covering all directors' positions and financial interests. More effective oversight is needed to ensure compliance with existing regulations (Harinurdin & Karin Amelia Safitri, 2023). Establishing an independent oversight body with the authority to monitor concurrent positions and enforce relevant regulations is an important step. This body should conduct periodic audits and monitoring of companies to ensure that they comply with the dual-holding requirements set out in the regulations (Nate, 2024).

The norms in Law No. 40/2007 on Limited Liability Companies (UUPT) require strict legislative reform to limit the practice of concurrent directorships. Article 93 of the Company Law only regulates the general requirements to become a director without setting any restrictions regarding concurrent

directorships. Therefore, it is advisable to update this article by adding a clause prohibiting concurrent directorships between companies operating in the same industry or with business ties. The addition of this clause aims to strengthen the independence and focus of directors on their duties in one company, thereby reducing the potential for conflicts of interest. Furthermore, a more explicit and firmer determination of sanctions for directors violating concurrent positions' provisions must be made. Such sanctions may include significant fines or revocation of license to practice as a director in the company concerned. Thus, this reform is expected to create better corporate governance and prevent practices that may harm the company's and its stakeholders' interests.

As a recommendation, Indonesia could adopt the principles of the Clayton Act in the United States, which strictly prohibits concurrent positions between competing companies. This aims to prevent potential collusion and anti-competitive practices that could harm the market (LAȘCOV et al., 2021). This principle can be integrated into existing legal frameworks, such as Law No. 5/1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, so that Indonesia has more explicit regulations that prohibit individuals from holding strategic positions in several companies at once, potentially creating conflicts of interest (Gunawan & Robertus Bambang, 2021). By expanding the scope of the law to prohibit concurrent positions in relevant sectors, the potential for collusion and price fixing can be minimized, keeping the market competitive and fair (Waluyo, 2016). In addition, directors need to be subject to stricter codes of conduct regarding conflicts of interest and concurrent directorships. This code of conduct should explicitly require directors to disclose all positions they hold in other companies to maintain transparency. This disclosure allows shareholders and authorities to evaluate whether there is a potential conflict of interest to the detriment of the company (Ibrahim, 2023). Furthermore, the code of conduct should also expressly prohibit directors from holding positions in other companies that have competing or conflicting interests with the leading company. This will strengthen corporate governance and promote accountability and independence in decision-making at the board level.

Further transparency can be achieved through a public disclosure report covering all directors' positions and financial interests, which should be included in the company's annual report and made publicly available so stakeholders can better assess potential conflicts of interest (Ochtorina Susanti, 2009). In addition, more effective oversight and enforcement are also needed, with the establishment of an independent oversight body authorized to monitor concurrent positions and enforce compliance with relevant regulations. This body should be able to conduct investigations, impose sanctions, and recommend necessary improvements. Companies should also be subject to periodic audits that check their compliance with the dual-holding regulations. These audits should be conducted by an

independent body to ensure objectivity and rigor in assessment, thereby promoting the implementation of better corporate governance standards in Indonesia.

4. CONCLUSION

From this research, it can be concluded that the practice of concurrent positions by directors in Indonesia requires serious attention. While the Company Law provides an essential legal foundation, legal loopholes related to concurrent directorships call for stricter regulatory reforms and strict business ethics standards. Experience from international jurisdictions shows that strict regulations and effective oversight mechanisms can help prevent conflicts of interest and promote good corporate governance. The dual position phenomenon also reflects Indonesia's urgent need for stricter regulations. Stricter regulations are needed to prevent abuse of power and ensure that public and corporate interests are appropriately safeguarded. The large number of public officials involved in concurrent positions highlights the importance of developing clear and firm policies on corporate governance in the SOE sector. In some other countries, regulations have been introduced to prohibit or limit concurrent positions in public companies. These measures aim to improve transparency, accountability, and risk management within SOEs.

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