

The Implementation of Receivables Write-Off of the State-Owned Banks in Indonesia

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ABSTRACT

This research reviews two issues: Firstly, it describes the implementation of the receivable write-off of State-Owned Bank (BUMN Banks) in Indonesia, and secondly, it describes the relevance of the independence principles of directors and Good Corporate Governance to the implementation of receivables write-off of state-owned banks in Indonesia. This research uses normative and empirical juridical approaches. The normative approach includes research on the independence principles of directors and Good Corporate Governance to the implementation of receivables write-off of the state-owned bank, while empirical research is conducted to determine the process of claim abolishment by state-owned banks in Indonesia. The outcomes of the research indicate that the unresolved legal problem related to the state financial position in the state-owned banks due to conflict of public and private law norms causes the directors of state-owned banks have not dared to do the process of claim abolishment. Therefore, considering that the principle of autonomy of directors and good corporate governance is enforced properly, no one is concerned about the risk of corporate policies related to the process of claim abolishment from a state-owned bank because, in its very essence, it is a Business Judgment Rule in the banking business practice.

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1. Introduction

Problems with bad debt or non-performing loans actually always stem from director's disobedience to prevailing legal provisions and prudential levels in terms of credit granting.¹ Besides, moral issues and good intention from related parties such as management (directors), commissioners, shareholders, bank officials, and debtors often take part in becoming the trigger of non-performing loans in banks. Therefore, when the bank grants credit, then the risk of unpaid credit always overshadows, therefore it

¹ Provision of Article 2 of Law No. 7 of 1992 as amended by Law No. 10 of 1998 on Banking, states that: "Indonesian Banking in conducting its business is based on economic democracy using the prudential principles."

is necessary for bank obligations and requirements to conduct in-depth analysis before the credit is granted, to measure the potential risks faced by the bank. This means that if all procedures have been executed and in the end the credits remain stalled then this is a risk that must be faced by banks as business risk of banking credit management which based on the principles of sound bank management (Good Corporate Governance), and Business Judgment Rule (BJR).

In general, the efforts made by the bank in case of cumulating non-performing loans are usually rescue the credit prior to the settlement of credit. The policy of non-performing loans rescue, can be done through:² rescheduling the credit (*rescheduling*), changing the terms of credit (*reconditioning*), and credit restructuring while the effort of settlement of non-performing loans conducted by bank/creditor through several legal efforts, among others are as follows;³ Settlement through court, Commercial Court (Bankruptcy), Agency Compulsory Institution, and Settlement through Committee of State Receivable Management specifically for BUMN Bank.

After the enactment of Government Regulation No. 33 of 2006 on Amendment to Government Regulation Number 14 of 2005 concerning Procedures for the Write-off of State/Regional Receivables which in the provisions of Article 2 letter a expressly states that the Management of State/Regional Companies Receivables is subsequently performed in accordance with the provisions of the law applicable in the field of Limited Liability Companies and State-Owned Enterprises and their implementation regulations. This provision implies that the management of BUMN bank receivables shall be conducted solely by BUMN Bank through a corporate mechanism with reference to the corporate law, namely Law No. 40 of 2007 on Limited Liability Companies and Law Number 19 of 2003 on BUMN. Therefore, the presence of Government Regulation No. 33 of 2006 is certainly expected to provide certainty and legal foundation for state banks to undertake the write-off of receivables either through the policy of write-off program, haircut as conducted by private banks in general.

The management and arrangement of the BUMN bank receivables has been at the peak of its legitimacy after the Constitutional Court Decision Number 77/PUU-IX/2011 dated September 25, 2012, which basically states that PUPN no longer has the authority to carry out the task of managing the receivables of state-owned enterprises (BUMN), receivables of BUMD and receivables of enterprises which the capitals are partly or wholly owned by the BUMN/BUMD. With regard to the Decision of the Constitutional Court, the Minister of Finance stipulate Regulation of the Minister of Finance No. 168/PMK.06/2013 concerning Return of Receivable Management Derived from Submission of BUMN/BUMD which has been followed up by return of receivable management from the delivery of BUMN/BUMD to each Submitter of Receivables. This provision implies that PUPN/BUPLN/DJPLN/KP2LN is no longer legally authorized to carry out the management and arrangement of the receivables of BUMN banks. This means that the authority of management and arrangement of BUMN bank receivables become the authority of BUMN banks in settling non-performing loans in the country.

Nevertheless, until now the mechanism of write-off of BUMN bank receivables by haircut in the for the settlement of non-performing loans is still viewed by several parties that associate the wealth of BUMN banks as state assets so that the impact of

² Sukatendel, F.M. (2006). *Kredit dan Masalah Keuangan: Panduan Bantuan Hukum Di Indonesia*, YLBHI and AusAID, Jakarta, p. 154-155.

³ Djumhana, M. (2003). *Hukum Perbankan di Indonesia*, PT. Citra Aditya, Bandung, p. 433-444.

the write-off of BUMN bank receivables through the mechanism of haircut, often identified as a form of state loss that can be categorized as a criminal act of corruption. Whereas the mechanism of write-off, haircut is an instrument of effort to rescue bad debt that are commonly used by the banking circles and not all wrote-off and haircut bad debts are sentenced. This means that to decide whether non-performing loans is categorized as corruption criminal law or not, the process should be considered, as long as the credit decisions that eventually stalled is taken based on business judgment, disconnected without any conflict of interest, and has been accountable, it should not be declared criminally wrong.

However, on the other hand, it is important to be aware that the policy of settlement of non-performing loans of BUMN banks is very vulnerable to the potential of moral hazard in the implementation of the receivable write-off since each phase of removal either through write off or haircut is very vulnerable and potentially not only performed by the creditor but is also openly performed by a stalled debtor using various means to recapture its assets. The credit history in Indonesia before the crisis occurred massively, how the debtors were credit partying, even receiving credit from their own banks, write it off on their own, bought it themselves. In short, the stalled debtors are still able to get their assets and loan back. Remembering the BLBI case in the 1997 financial crisis, and Century Bank of 2008 that had a "systemic" impact; which the owner robbed his own bank. In addition, the potential intervention of interests of various parties contribute and utilize the mechanism of write-off of non-performing loans for personal and their group's interests.

Broadly speaking, the most important factor causing the adverse crisis as described above is the very bad corporate governance. The awareness of the importance of enforcing good corporate governance in banking management including BUMN banks is an important alternative that is expected to overcome various inconsistent problems due to a conflict of interest between the parties related to the implementation of the future receivables write-off. Therefore, the need to enforce the independence principle of the board of directors and the principles of good corporate management in implementing the policy of receivables write-off are expected to answer the concerns that occur considering the directors in exercising their authority and responsibility solely for the interests and objectives of the company and subject to applicable law and the company's articles of association.

This research is the development of thinking about the company's application of legal norms and regulations that govern the banking industry business venture upholding the principles of corporate management in the Indonesian state-owned banks. Hence, having observed the developments as described above, the issue to be discussed in this paper is, how does the implementation of receivable write-off of BUMN Banks in Indonesia? Also, what is the relevance of the independence principles of directors and Good Corporate Governance to the implementation of receivables write-off.

2. Method

The type of research used was normative legal research and empirical legal research. Normative legal research is a legal research conducted by examining library materials or secondary data so that it can be called normative legal research or literature research⁴ by focusing on the object studied. While the main legal empirical research

⁴ Soekanto, S. (2007). *Introduction to Legal Research*, UI Press, Jakarta, p. 13-14

examined the primary data obtained through field studies. In accordance with the object under study, this research was based on the availability of secondary data and primary data.

3. The Implementation of Receivable Write-off of BUMN Bank in Indonesia

The legal basis for the implementation of receivables write-off of BUMN Banks in Indonesia is regulated and guided by Law No. 49 Prp 1960 on PUPN. The provisions of the Act are then followed up by Government Regulation (PP) No. 14 of 2005 on Procedures for the Write-off of State Receivables and Regulation of the Minister of Finance (PMK) no. 31/PMK. 07/2005 on Procedures for Submission of Proposals, Research and Stipulation on the Write-off of State/Regional Company Receivables and State/Regional Receivables and Decision of the Minister of Finance No. 300/KMK. 01/2002 on the Management of State Receivables as the implementation regulation which regulates the execution of the receivable write-off of the State derived from business entities which capital is partially or wholly owned by the State or owned by BUMN, especially BUMN banks is transferred to PUPN. Based on the regulation, there are two forms of write-off on BUMN banks' receivables, namely are conditional and absolute. Conditional write-off is a write-off on bookkeeping, but it does not remove the claim rights while the absolute write-off is the write-off of the bookkeeping and at the same time also removes the claim rights. The conditional write-off of BUMN bank receivables is done by the BUMN bank itself. In addition, BUMN banks can also make absolute write-off, however, specifically for interest receivable, fines, or fees. Based on the above description, it is known that the settlement of receivables/credit of BUMN (Persero) bank does not have the authority to haircut the remaining debtor's principal debt obligations in the settlement of non-performing loans as commonly owned and conducted by private banks.

Arrangement of receivable write-off of BUMN Bank is regulated in Government Regulation No. 33 of 2006 as revision of Government Regulation No. 14 of 2005 on Procedures for the Write-off of State/Regional Receivables. This revision eliminates Article 19 and Article 20 of Government Regulation Number 14 of 2005 and subsequently states that the Management of BUMN bank receivables is in accordance with the provisions of laws of Limited Liability Companies and State-Owned Enterprises and their implementation regulations and the Arrangement of receivable write-off of BUMN Bank that have been submitted to PUPN and proposal of Write-off of State/Regional Companies Receivables that have been submitted to the Minister of Finance through DJPL are still implemented pursuant to Law No. 49/Prp/1960 on PUPN and Government Regulation Number 14 of 2005. The presence of Government Regulation Number 33 of 2006 on Amendment to Government Regulation Number 14 of 2005 concerning on Procedures for the Write-off of State/Regional Receivables is then followed up by Regulation of the Minister of Finance No. 87/PMK.07/2006 on Arrangement of State/Regional Company Receivables.

The presence of Government Regulation No. 33 of 2006 on Amendment to Government Regulation No. 14 of 2005 on Procedures for the Write-off of State/Regional Receivables also provides clarity and affirmation that the arrangement, management, and settlement of BUMN receivables, including the settlement of non-performing loans at BUMN banks are no longer seen as state receivables. Therefore, its arrangement, management and settlement are not subject to the regulations on state receivables but are performed in accordance with healthy corporate principles.

Nevertheless, the problems faced by BUMN banks are not over yet. There are still other fundamental issues that have not been resolved despite the revision of Government Regulation No. 14 of 2005 with Government Regulation No. 33 of 2006, that the issue of differences in views on BUMN receivables is still questioned because the Law No. 49/Prp./1960 has not been revised. It is expected that the amendment to Government Regulation No. 14 of 2005 is intended to accommodate the unclear laws concerning the status of BUMN banks' receivables against state receivables. However, the standing of Government Regulation is under the Law so that the enactment of Government Regulation No. 33 of 2006 is indirectly cannot override the notion of state receivable in Law No. 49/Prp./1960 on PUPN. In other words, the revision of Government Regulation No. 14 of 2005 on Procedures for the Write-off of State/Regional Receivables with Government Regulation No. 33 of 2006 are legally not strong enough to equate the perception of current legislation on the status of receivables of BUMN banks.

The presence of Decision of the Constitutional Court Number 77/PUU-IX/2011 aims to answer the conflicts of related laws, uncertainty and legal injustice to the process of receivables write-off of BUMN banks for non-performing loans. Decision of the Constitutional Court legitimates Government Regulation Number 33 of 2006 on Amendment to Government Regulation No. 14 of 2005 on Procedures for the Write-off of State/Regional Receivables and Decision of Supreme Court related to the status of BUMN receivables and mechanisms for the write-off of BUMN receivables through corporation actions which subject to BUMN Law and PT Law by BUMN companies including Banks turns out to be not strong enough to be implemented.

Therefore, the final decision issued by the Constitutional Court, then gives a binding legal effect that on all parties. The legal consequences among others are that the phrase "agencies" contained in Law No. 49 of 1960 on PUPN are contradictory to the 1945 Constitution and have no binding legal force. This means that all state receivables that have been submitted by "agencies" to PUPN, the settlement is no longer conducted by PUPN, but must be returned to the parties who have submitted it including BUMN banks. Thus, the settlement of BUMN bank receivables can be done using a corporate mechanism that is solved by the management of each BUMN bank itself by restructuring either in the form of haircut, conversion or rescheduling based on sound corporate principles. This Constitutional Court ruling has a beneficial effect on the debtor of BUMN banks so as to obtain legal certainty and receive fair treatment. In addition, this decision also clearly gives direction for BUMN banks in performing their duties professionally based on the RUPS related to the policy of write-off of BUMN bank receivables in the future.

Following up the decision of the Constitutional Court Number 77/PUU-IX/2011 concerning the case of Tests of Law Number 49 Prp. of 1960 on State Receivables Committee against the 1945 Constitution of the State of the Republic of Indonesia, then the government through the Minister of Finance shall issue Regulation of the Minister of Finance No. 168/PMK.06/2013 on Procedures of Returning the Management of Receivables arising from the submission of State-Owned Enterprises/Regional-Owned Enterprises which capital is partially or wholly owned by State-Owned Enterprises/Regional-Owned Enterprises. The scope of the return of receivables arrangement include all receivables that arrangement have been handed over by the submitter of Receivables to PUPN Branch, in the form of receivables which still actively managed by PUPN Branch, and has been declared by PUPN Branch as a temporary receivable

yet to be billed.⁵ Nevertheless, in fact there is still concern and reluctance from the management of BUMN banks to implement the Receivables Write-off based on the Decision of the Constitutional Court and the law protecting it.

The presence of Decision of the Constitutional Court Number 48/PUU-XI/2013 concerning the testing in Law Number 17 Year 2003 regarding State Finances and Decision of the Constitutional Court Number 62/PUU-XI/2013 Law Number 15 of 2006 concerning the Audit Board increasingly contradict existing law related to the concept of separated state property and state finances. The impact has caused legal uncertainty and implicated for the implementation of the receivables write-off of BUMN bank in Indonesia. The condition of the lack of synchronization of the legal protection of the receivables write-off of BUMN bank has become a classic problem, so far it has caused concerns for BUMN banks to perform receivables write-off on non-performing loans that occur because it is considered detrimental to state finances or tangled by criminal acts of corruption.

As it turns out in practice, however, based on the research results on 4 (four) respondents of the BUMN Bank respectively, namely: PT. Bank Mandiri (Persero)⁶, PT. BNI (Persero)⁷, PT. Bank BRI (Persero)⁸ and PT. BTN (Persero)⁹, it can be seen that in general, the policy of write off of non-performing loans has been implemented by the 4 (four) BUMN banks in Indonesia but for the granting of haircut policy on the remaining obligations of debtors' debts on interest and penalties is only conducted by the management of PT. Bank Mandiri, PT. Bank BNI, and PT. Bank BTN while PT. Bank BRI does not grant haircut.

Regarding the policy of granting the haircut on the remaining principal debt obligations of debtors, there is a difference in the policy. For PT. Bank Mandiri, PT. Bank BNI, and PT. Bank BTN, in principle if there is clarity of legal protection related to principal debt status of debtors, then to 3 (three) BUMN banks are open to run the haircut policy as performed by private banks, while according to PT. Bank BRI granting the haircut does not have direct implication to BRI's business growth. In addition, the provision of haircut may result in other non-operating costs in off balance sheet for branch offices so that the mechanism of haircut has not been done to this date, even the provision of haircut will indirectly reduce the portion of non-performing loans in BRI from the figures wise but there is no increase in the profit wise of the company.

Especially for haircut on stalled debtor receivables due to natural disasters and exceptional circumstances, the 4 (four) BUMN banks have the same policy in granting haircut on principal receivables and haircut on the remaining obligations on interest, penalties, requirements of coordination and memorandum of understanding, between

⁵ Article 2 Paragraph (1) and (2) Regulation of the Minister of Finance No. 168/PMK.06/2013 on Procedures for Handling Returns receivables derived from the delivery of State-Owned Enterprises / Regional-Owned Enterprises that invest partly or wholly owned by State-Owned state/Regional-Owned Enterprises

⁶ The result of the Interviews with Taufik Hidayat, Vice President of Wholesale Credit Recovery Group Bank on 14 March 2015.

⁷ The result of the Interviews with Saridatun, BNI Center in Jakarta, on September 2, 2015.

⁸ The results of the interview with Andre Wijaya, Settlement Restructuring Division NonPerforming Loans (RPKB) BRI in Jakarta on August 10, 2015.

⁹ The results of the interview with the Head of Asset Management Division and the Consumer Collection and Remedial Division, the State Savings Bank (BTN) Center in Jakarta, August 11th, 2015

BUMN banks and the Government, Bank Indonesia and related agencies, including law enforcement agencies.

Furthermore, the problem faced by the 4 (four) BUMN banks currently is the fear of being criminalized by law enforcement officers in the event of performing haircut on the remaining debtor principal debts due to the perception which in the 4 (four) BUMN banks is as state finances. According to the 4 banks, if performing hair cut on the debtor principle receivables that are stalled, it is the same as detrimental to state finances so that it can be considered a corruption. Law enforcement officers often lead or withdraw the problem of non-performing loans that are detrimental to BUMN banks into the field of corruption because it is considered detrimental to the State's finances even though there has been a decision of Constitutional Court no. 77/PUU-IX/2011 that has settled the receivables of BUMN banks as not being state receivables.

The following will be classified the policies of each BUMN bank related to the implementation of the receivables write-off after the enactment of Government Regulation No. 33 of 2006 on the Amendment to Government Regulation No. 14 of 2005 concerning Procedures for the Write-off of State/Regional Receivables and Decisions of the Constitution Court No. 77/PUU-IX/2011 are:

Table 1. The Policy of Receivables Write-off of State-Owned Bank in Indonesia (Period of entry into force the PP No.33 of 2006 - Post MK Decision No 77/PUU-IX/2011)

No	PT. Bank Mandiri (Persero) Tbk.	PT. Bank BNI (Persero) Tbk.	PT. Bank BTN (Persero) Tbk.)	PT. Bank BRI (Persero) Tbk.
1	Write-off has been performed	Write-off has been performed	Write-off has been performed	Write-off has been performed
2	Haircut on BDO has been performed.	Haircut on BDO has been performed.	Haircut on BDO has been performed.	Haircut on BDO has not been performed
3	Haircut on principal receivable has not been performed because it is still perceived as state finance	Haircut on principal receivable has not been performed because it is still perceived as state finance	Haircut on principal receivable has not been performed because it is still perceived as state finance	Haircut on principal receivable has not been performed because it is not increasing the profit
4	Haircut performed to debtors located in areas affected by natural disasters and affected by extraordinary events	Haircut performed to debtors located in areas affected by natural disasters and affected by extraordinary events	Haircut performed to debtors located in areas affected by natural disasters and affected by extraordinary events	Haircut performed to debtors located in areas affected by natural disasters and affected by extraordinary events

Source: Primary data (edited).

In general, the practice of non-performing loans settlement undertaken by the 4 (four) BUMN banks always prioritize the settlement through non-litigation through negotiation and mediation approach as described above aimed at making the debtor able to re-pay the credit payment as it should be through rescheduling, reconditioning or restructuring which in banking term is better known as 3R in order to rescue the credit. The negotiation and mediation approach is most likely to be implemented by both parties (the Bank as the creditor with the debtor) since from the very beginning the position of both parties in the process of credit proposal and approval as set forth in the credit agreement processed through negotiation and of course the mediation approach also becomes the agreed choice in the credit agreement if both parties do not

perform the obligations as agreed in the credit agreement. Administratively, the credits settled through non-litigation are credits that were previously classified as substandard, doubtful or non-performing, which then cultivated to be fixed so as to have a smooth collectively. The settlement of non-performing loans through non-litigation conducted by BUMN banks is based on Bank Indonesia Circular Letter Number 30/16/UPPB dated February 27, 1998 which is commonly pursued in the banking world.

The approach of BUMN Bank to debtors experiencing Non-performing loans by taking alternative settlement through rescheduling, reconditioning and restricting is conducted in accordance with the internal regulations of each BUMN bank. In addition, in accordance with the Decree of the Board of Directors of Bank Indonesia No. 31/50/Kep/DIR dated November 12, 1998, prior to credit restructuring, the bank shall be obliged to conduct an analysis or reviews both on the legal aspects of the debtor and/or the insurer, credit collateral and its binding and projects to be financed with credits to be restructured as well as reviewing the legal aspects of potential debtors who will be given the credit facilities.

In its development one of the final alternatives currently being executed by the BUMN bank as the last action in the course of the implementation of the settlement of non-performing loan is to use the instrument of haircut either on the remaining principal obligations arrears of debtor or interest arrears and fines so that the debtor is expected to continue its business in the future, therefore it is expected to pay the principal obligations on the debtor's debt to the bank. The instruments of receivables write-off of BUMN Bank through this mechanism have been described in previous discussions. The positive impact of the implementation of the receivables write-off of BUMN Bank, against the BUMN Banks, among others are:

Table 2. The advantage of Receivables Write-off of State-Owned banks

BUMN Banks	Debtors	National Economy
The financial condition of the bank remains healthy	Business can run again	Helping the Government to covers APBN deficit.
Increased capital	Getting more credit from Bank	Increasing state revenues from tax.
Wider expansion space of credit	Reduced credit expense due to the 1997 financial crisis.	Revitalize the business sector.
Improving the performance of BUMN banks		

Source: Primary data (edited).

As a result, the policy has not been fully implemented by BUMN Bank in Indonesia because there are still concerns from the directors and management of BUMN banks for the act of haircut is due to non-performing loans status of BUMN banks, especially related to principal debt that is still perceived by law enforcement officers as state finances. This perception is very strong and dominant as described by the 4 (four) BUMN banks which are then reinforced by the opinion of the Audit Agency (BPK) of RI which states that state finances in BUMN banks are not only limited to debtors' principal receivables but also interest receivables or penalties. For BPK, the status of

state assets separated from BUMN banks is still in the scope of state finances.¹⁰ Therefore, the implementation of haircut of the remaining obligations of principal receivables of debtor of BUMN banks has been limited to non-performing loans due to natural disasters or the impact of extraordinary events (force majeure), whereas beyond that is not dare to perform haircut in particular the remaining principal obligations/receivables of debtor as they are still perceived as state finances by BPK and law enforcement agencies such as the Judiciary.¹¹

Such views or perceptions in authors opinion is strongly influence the implementation of independence of directors on the implementation of the write-off of bank receivables, especially related to the remaining principal debt obligations because it is still perceived as state receivable (state finances) by directors and officials of BUMN banks and is a reflection of uneasiness of BUMN banks directors which have been targeted by law enforcement officials with their interpretations that at times haunt the directors of BUMN. Besides, the burden of regulation and disharmonizing of legislation related to the unfinished BUMN bank receivables contributed to the position and independence of the directors of BUMN banks so far in the settlement of non-receivable banks in the country.

After the issuance of the decision of the Constitutional Court Number 77/PUU-IX/2011 dated September 25, 2012 brought legal consequences to the status of BUMN bank receivables. Consequently, all BUMN Banks receivables are no longer part of the state's receivables and the full authority over the write-off (or deduction) of receivables is now in the management of BUMN and the write-off procedure becomes more concise, because it is no longer passes the existing bureaucratic flow in PUPN. Therefore, BUMN banks should have been able to implement policies/decisions of haircut of BUMN banks receivables without having to wait for the new legislation in place of the PUPN Law. Haircut can be implemented based on the prevailing laws such as Bank Indonesia Regulation No. 14/15/PBI/2012 on Asset Quality Rating for Commercial Banks, Government Regulation No. 33 of 2006 on Amendment to Government Regulation No. 14 of 2005 concerning Procedures for the Write-off of State/Regional Receivables and Decisions and Law Number 40 of 2007 concerning Limited Liability Companies, Law Number 19 of 2003 on BUMN, Law Number 8 of 1985 concerning Capital Market and Law Number 10 of 1998 concerning the Amendment of Law Number 7 of 1992 concerning Banking.

Nevertheless, the fact is there is still anxiety of the directors of BUMN banks so far related to the uncertainty about the settlement of non-performing loans owned by BUMN banks despite the existing legal protection, it was eventually not strong enough for BUMN bankers to dare to haircut the principal receivables of debtor from non-performing loans they have currently. Doubtless of the directors of BUMN banks are caused by misguided views by various parties including BPK¹² and law enforcement agencies, such as the Attorney General's Office, including haircut measures on non-performing loans, which can always be included in criminal law and corruption.

¹⁰ Interview result with Sri Haryati, Head of Inter-Agency Relations, Bureau of Public Relations and International Cooperation, BPK RI in Jakarta, September 13, 2017

¹¹ Interview results with Sugeng Purnomo, Coordinator of Corruption Crime, Deputy Attorney General for Special Crimes, Attorney General of the Republic of Indonesia in Jakarta, Agustus 5, 2015

¹² Sri Haryati, *Op. Cit.*

These conditions make the bankers of BUMN banks currently questioning the effectiveness of PP No. 33 of 2006, as there are differences of opinion between the Ministry of Finance, Bank Indonesia (BI), Attorney and Audit Agency (BPK) on haircut issues. The Ministry of Finance¹³ considers haircut as a reasonable corporate action in the banking business world, while the Attorney and BPK considers it as an act that could harm the state finances.

In its development, although there is legal regulation which gives flexibility for BUMN banks to restructure their non-performing loans as confirmed by Constitutional Court Decision No. 77/PUU-IX/2011, but in practice the directors of BUMN Bank are still thinking twice in settling non-performing loans through the receivables write-off programs as has been done by private banks so far. The sentence of 10 years imprisonment given by the Supreme Court (MA) to three former Directors of PT. Bank Mandiri Tbk has made the bankers hesitate in solving problem loans at their bank which resulted in the increasing level of NPL in BUMN Banks from year to year. This condition is very different from the process of haircut in private banks which is simpler because it only needs approval of the RUPS.

4. The Relevance of Independence Principles of Directors and GCG on the Write-off of BUMN Receivables

In order to understand the relevance of independence principle of directors and GCG on the process of receivables write-off of BUMN banks, it is necessary to deepen one of the substantive characteristics that stand out from the concept of limited company as an independent legal entity, namely its wealth separated from its shareholders¹⁴. This means that all existing wealth is owned by the agencies itself and is not owned by the members or shareholders. This is a major advantage of legal entities. Thus, ownership of wealth not based on members or shareholders is a property that is considered important for corporate status as a legal entity that distinguishes it from other forms of company.

As previously explained that the conditions faced by the directors of BUMN banks at this time is a concern and fear in taking the policy on haircut process of the remaining principal obligations on interest, penalty, or cost related to the settlement of non-performing loans in the country. The concern is caused by differences in interpretation and opinion of the conception or understanding of state finances scattered in various existing laws. The unresolved legal problem is a fundamental problem faced by all parties, both business actors of BUMN banks, government, respected people's representatives, as well as law enforcement officers and academics.

The presence of the Constitutional Court is expected as the last protection to place the synchronization of conception or the definition of state finances spread in various laws and regulations in fact not providing a solution but contribute to sharpen the difference of meaning and understanding of the conception or understanding of state finances that is not synchronized since the very beginning. Overlapping issues and the lack of synchronization of laws currently certainly raises concerns for business actors in BUMN banks in the country. This can be seen from the increasing number of

¹³ Interview results with Purnama T. Sianturi, Plh. Director of the Directorate General of State Receivables and Other Property, Directorate General of State Assets, Ministry of Finance Republic of Indonesia in Jakarta, on August 4, 2015

¹⁴ Khairandy, R. (2014). *Company Law Limited*, FH UII Press, First edition, Yogyakarta, p.15

regulations that contain criminal threats not only against individuals, but also against the company as a legal entity. Concern of directors of BUMN banks related to the lack of synchronized laws occurs when the write-off of debtor hair cut receivable against principal receivables is still perceived by BPK and law enforcement officers as state finances and potentially cause a state loss so that it is drawn into the area of corruption. This means that non-performing loans (NPL) of BUMN banks can be linked to state losses and can be accused as criminal acts of corruption.

Such thinking or understanding according to Sulistiowati¹⁵ occurs due to conflict of norms and provisions between civil and criminal law, especially related to the application of settlement of banks' non-performing loans. The differences also occur on the meaning of the nature of the wealth of BUMN banks, namely as state money or not. Corruption Law refers the wealth of BUMN as state finances but if it is linked to the Law on Limited Liability Companies and BUMN Law, the wealth of BUMN is not state finance. That the conflict of norms of laws in the public and private sectors has not been completed and should not be allowed to continue because it will hamper the speed of investment and future business prospects. Therefore, there are needs for a legal reform to overcome the legal problems that still overlap and contradict to each other.

The issue of directors of BUMN banks that is also highlighted is the regulatory burden that binds the directors' space so that there is no flexibility for the directors of BUMN to make efforts to resolve non-performing loans in the country. Some of the Public Law, especially the BPK Law, the State Finance Law and the Corruption Law which still perceive the BUMN finance as state finance justify the BPK and the law apparatus to attract the problems of BUMN losses caused by non-performing loans (banking crime) and immediately brought to the area of corruption. Principally, the issue of non-synchronized regulations is used as an instrument for BPK and the legal apparatus and even the people's representatives in the DPR to intervene in the performance of BUMN banks that are supposed to be self-reliant, free of any interest. These interventions implicated the position and independence of directors, especially the directors of BUMN banks. However, the need for enforcement of the independence principles of corporate organs, especially the directors of BUMN banks and good corporate governance in the banking world is very important in supporting the directors and commissioners of the company to carry out the restructuring of non-performing loans through the program of receivables write-off. It aims to increase the independence of directors and commissioners of the company to run the management of BUMN banks in order to achieve corporate objectives as set forth in the company's articles of association.

The Board of Directors is the driving force of the operational wheels/activities of banks. The Board of Directors conducts bank activities because they have the mandate or power of the bank to run its activities. The Board of Directors of the bank is an organ that runs the bank's activities daily and is fully responsible for the management of the bank for the interests and purposes of the bank itself, as well as representing the bank both inside and outside the court in accordance with the provisions of the said bank's statutes. The main principles of corporate governance that need to be considered for the implementation of good corporate governance practices by the directors of BUMN

¹⁵ Sulistiowati, Key Witness at the alleged corruption trial of credit irregularities in BRI and Bank Mandiri in the Corruption Court of Semarang on Wednesday, May 24, 2017, <https://klikrdi.blogspot.co.id/2017/07/ahli-perbankan-sebut-terjadi-konflik.html>, Accessed on August 31, 2017.

banks in the implementation of restructuring and settlement of non-performing loans through the mechanism of the write-off of BUMN bank receivables are fairness, transparency, accountability and responsibilities.¹⁶

Implementation of good corporate governance for BUMN banks aims to improve the performance of the Bank, protect the interests of Stakeholders, and improve compliance with laws as well as the ethical values prevailing in the banking industry. In addition, Banks are also required to conduct business activities in accordance with Good Corporate Governance principles as stipulated in the Financial Services Authority Regulation Number 55/POJK.03/2016 concerning the Implementation of Good Corporate Governance for Commercial Banks, hereinafter referred to as POJK Governance of Commercial Banks on the Implementation of Good Corporate Governance on the banking industry should always be based on 5 (five) basic principles of Good Corporate Governance as follows:

- a. Transparency is openness in expressing material and relevant information and openness in executing decision making process
- b. Accountability is the clarity of the function and implementation of the Bank's organ liability so that its management runs effectively.
- c. Responsibility is the conformity of the Bank's management with the legislation and principles of sound bank management.
- d. Independency is the professional management of the Bank without the influence or pressure of any party.
- e. Fairness which is justice and equality in fulfilling the rights of Stakeholders which arise based on agreement and regulation.

The Bank's obligation to apply Good Corporate Governance principles in every business activity of the Bank at all levels of the organization is realized in the performance of duties and responsibilities of the Board of Directors and Board of Commissioners; completeness and execution of the duties of committees and working units exercising internal control functions; c. implementation of compliance function, internal audit, and external audit; implementation of risk management; provision of funds to related parties and provision of substantial funds; the strategic plan; and transparency of financial and non-financial conditions.¹⁷

In order to apply the principles of good governance as described above, the directors should at least form an internal audit work unit; risk management work units and risk management committees; and compliance work units.¹⁸ In addition, the Board of Directors shall follow up the audit findings and recommendations of the Bank's internal audit work units, external auditors, the results of supervision of the Financial Services Authority and/or the results of supervision of other authorities¹⁹ and shall be responsible for the performance of the duties to shareholders through the RUPS.²⁰ The implementation of GCG requires the existence of Independent commissary and

¹⁶ Wilamarta, M. (2002). *The Rights of Minority Shareholders in the framework of good corporate governance*, the Graduate Program in the Faculty of Law, University of Indonesia, Jakarta, p.2-3

¹⁷ Provision of Article 2 paragraph (1) and (2) Regulation of the Financial Services Authority Number 55/POJK.03/2016 on Implementation of Governance for Commercial Banks

¹⁸ Article 13 Regulation of the Financial Services Authority No. 55/POJK.03/2016 on Implementation of Governance for Commercial Banks

¹⁹ Article 12 Regulation of the Financial Services Authority No. 55/POJK.03/2016 on Implementation of Governance for Commercial Banks

²⁰ Article 14 Regulation of the Financial Services Authority No. 55/POJK.03/2016 on Implementation of Governance for Commercial Banks

independent parties. The existence of independent parties, is expected to overcome the impact of moral hazard and create checks and balances, avoid conflicts of interest in the execution of their duties and to protect the interests of stakeholders, especially the owners of funds and minority shareholders. In addition, the OJK Regulation also requires banks to submit GCG Implementation Reports at the end of every financial year and no later than 4 months after the end of the financial year. For banks that do not comply with the provisions in OJK Affairs will be subject to sanctions.

In applying the principles of Good Corporate Governance, Banks are required to apply risk management effectively, adapted to the objectives, business policies, size and complexity of business and the ability of the Bank²¹ guided by the requirements and procedures as provided in the Financial Services Authority's provisions concerning the implementation of risk management for commercial banks. In addition, in order to avoid the failure of the Bank's business as a result of the concentration of provision of funds and increase the independence of the Board of Directors and the Board of Commissioners of the Bank on the potential intervention from related parties, the Bank shall apply prudential principles in the provision of funds by applying the distribution or diversification of the funds provisioning portfolio given. Implementation of the provision of funds to related parties and/or the provision of large funds (large exposures) shall be guided by the provisions regulating the maximum limit of credit granting of commercial banks.²²

Based on the above description, it can be described that so important the principle of GCG implemented for BUMN banks in the Process of Write-off of BUMN Bank Receivables. Nevertheless, the implementation of GCG principles by Board of Directors, Commissioners and Officials of BUMN Banks is also accompanied by the principle of good intention in the policy of receivables write-off of BUMN banks in Indonesia considering good faith is the main principle in business and law and is a pillar in carrying out contract, related to the credit granting as a bank instrument in obtaining its income all this time.

Thereby examining the relationship of the use of the principle of faith in the application of the principle of good corporate governance in the field of business law is very relevant and appropriate, Siti Ismijati Jennie,²³ thought that when viewed from the perspective of civil law, the balance of the relationship between corporate organs and between company organs and shareholders and stakeholders is the application of the principle of good intention either in the sense of objective (propriety), or honesty in a dynamic sense so that the principle of good faith should be one of the guidelines in solving various legal problems that arise. It should be re-straightened that the general business decision-making principle applies to a legal entity in the form of a limited liability company to be re-established. Good intention, corporate interests, good business practices, and principles supporting the independence of the board in making good decisions must be supported by the intention of the state, to provide full independence to the directors of BUMN banks related to restructuring policies and settlement of non-performing loans that become the burden of BUMN banks so far.

²¹ Article 56 Regulation of the Financial Services Authority No. 55/POJK.03/2016 on Implementation of Governance for Commercial Banks.

²² Article 57-58 Regulation of the Financial Services Authority No. 55/POJK.03/2016 on Implementation of Governance for Commercial Banks.

²³ Jenie, S.I. (2009). *Itidak Baik, Perkembangan Dari Asas Hukum Khusus Asas Hukum Umum di Indonesia*, Bulaksumur; Menggagas Kesejahteraan Sosial, Purnagama (KAGAMA) and IMPULSE, Kanisius, Yogyakarta., *Op. Cit*, p. 14

Therefore, based on the writer's opinion, if the principle of independency of directors and the principles of GCG can be enforced properly, there will be no concern about the risk of corporate policies related to the receivables write-off of BUMN bank which is actually BJR (Business Judgment Rule) in banking business practices, so if there is loss from the policy, it can be accepted as business risk, not government loss. Basically, if the directors actually apply the GCG principles, and do the decision making independently for the limited liability company as the necessities and the goals as stipulated in the articles of association by concerning the principle of separate legal entity as the representative in doing Business Judgment Rule (BJR), as long as it is able to prove as stipulated in Article 97 Paragraph (5) on Law for PT, which states that the loss is not a mistake or neglect of the company, which has done the good faith and prudent administration for the company necessities and goals, has no conflict of the necessities, directly or indirectly, on the act results in losses, and it has taken action to prevent the losses or continuation losses, thus, according to the writer, the risk of receivables write-off of BUMN bank should be understood as business risk in banking business.

5. Conclusion

The BUMN bank directors in Indonesia, until now, does not brave enough to do receivables write-off of bad debts because there is concern and anxiety of being criminalized towards the bad debts which cause BUMN bank losses is always linked to criminal corruption act because they are considered in causing Financial Government Losses. In addition, the regulation burden which binds the directors' movement and the unfinished problem of law as the effect of norm conflict between public and private law and the incompatibility of laws and regulations is also, nowadays, the factor of the problem faced by the BUMN bank directors.

Hence, the relevance of implementation independent directors' principles and good corporate governance related to the process of receivables write-off of BUMN Bank in Indonesia, desires that the enforcement of business decision making principles which is generally valid for all independent legal entity must be reinforced. Good faith, the prioritization of company necessity, good business practices, and the supported principles for the independent directors in making the decision should be supported by the government goals in order to give the complete independent towards the directors of BUMN bank related to the settlement of bad debts which has become the burden for BUMN bank.

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