

Legal Consequences of Establishing a Limited Liability Company by a Foundation in Violation of the Law

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ABSTRACT: *The purpose of this research is to analyze the responsibility of a notary and the legal consequences for a limited liability company that a foundation has established but violates the law on foundations. The research was conducted using doctrinal legal research methods. The results of the study show that: (1) Notaries as officials who are authorized in terms of doing authentic deeds, including the deed of establishment of limited liability companies established by foundations, have a great responsibility insofar as they concern the formal requirements of authenticating the deed. However, the notary is not responsible for the substance of the deed because it is the will of the parties themselves, so if what is violated is the formal terms of the deed, the notary can be sued for compensation and fines. (2) The legal consequence for the limited liability company is that it violates Article 7 of the Law on Foundations. It is null and void because the deed of an establishment violates the objective requirements of the legal terms of an agreement regulated in Article 1320 of the Civil Code. In addition, the legal status of a Limited Liability Company has been deemed to have never existed, causing all actions that have been carried out or carried out by the organs of the company to have no legal standing.*

Tujuan dari penelitian adalah untuk menganalisis tanggung jawab notaris serta akibat hukum bagi perseroan terbatas yang telah didirikan oleh yayasan tetapi melanggar undang-undang yayasan. Penelitian dilakukan dengan metode penelitian hukum doktrinal. Hasil penelitian menunjukkan bahwa : (1) Notaris sebagai pejabat yang diberi kewenangan dalam hal pembuatan akta autentik, termasuk akta pendirian perseroan terbatas yang didirikan oleh yayasan memiliki tanggung jawab yang besar sepanjang mengenai syarat formil dari autentikan akta. Namun, Notaris tidak bertanggung jawab atas substansi akta karena hal tersebut merupakan kehendak dari para pihak sendiri, sehingga jika yang dilanggar adalah

syarat Formil akta maka notaris dapat dituntut ganti rugi dan denda. (2) Konsekuensi hukum bagi perseroan terbatas tersebut yakni melanggar Pasal 7 Undang-Undang Yayasan sehingga batal demi hukum dikarenakan akta pendiriannya melanggar syarat objektif dari syarat sahnya suatu perjanjian yang diatur dalam Pasal 1320 KUHPerdara. Selain itu status badan hukum Perseroan Terbatas dianggap tidak pernah ada sehingga menyebabkan segala tindakan yang telah dilaksanakan atau dilakukan oleh organ perseroan menjadi tidak memiliki legal standing.

Keywords: *Establishment of PT, Law Foundation, Breaking the Law.*

I. INTRODUCTION

Indonesian people have known the foundation (stichting) since the Dutch East Indies colonial era. Formerly the foundation was known as a legal entity and had been accepted through jurisprudence in 1882. According to Hoge Raad, the highest judicial body in the Netherlands, the foundation is a legal entity based on applicable law so that the foundation can be established. Arrangements related to the foundation have followed the development of the community's need for legal certainty and protection in establishing a legal foundation entity. This can be seen from the issuance of laws and regulations specifically regulating foundations by the Indonesian government, which has undergone several changes (Y. K. Dewi, 2013).

We can see the definition of a foundation in Article 1 Number 1 of Law of the Republic of Indonesia Number 28 of 2004 concerning Amendments to Law of the Republic of Indonesia Number 16 of 2001 concerning Foundations (starting now abbreviated as Law 16/2001 or Law 28/2004), explaining that "a foundation is a legal entity consisting of segregated wealth and intended to achieve certain goals in the social field, religious and humanitarian who have no members".

The formulation of Article 1 number 1 of Law 16/2001 or Law 28/2004 above states that the foundation is one of the legal entities that can be established by the Indonesian people, where the legal entity status of the foundation has been obtained after the foundation makes a deed of establishment and then requests ratification from the Ministry of Law and Human Rights of the Republic of Indonesia (KEMENKUMHAM). This means that the ratification of the deed of establishment of the foundation is a determinant of the foundation's legal status as a legal entity. This formulation certainly has a legal impact on the foundation, besides that, the foundation also has a characteristic character like a human legal subject who is entitled and obliged to do or not to do legal actions (carrying out foundation activities) (Sucia, 2021).

The foundation has the right to become a trustee or establish a business entity (in this case, a limited liability company). However, in running a limited liability company or being a participant, the foundation's organs in acting must remain oriented towards the principle of a non-profit. A human legal subject can establish the legal entity of the foundation, a legal entity or established based on a will so that there is a separation of property from its founders who have a purpose in the social sphere. Based on the principle of non-profit oriented, the foundation does not seek profit, but rather the

capital and profits obtained are directed to meet the interests of people in need, Article 5 paragraph (1) of Law 16/2001 or 28/2004 states that "the foundation's property in the form of money, goods and other property obtained by the foundation under this law, is prohibited from being transferred or distributed directly or indirectly, whether in the form of salary, wages/honorarium or other forms that can be assessed in cash to the Trustees, Administrators and Supervisors" (Subiyanto & Sudarwanto, 2020).

The prohibition for foundations is to be profit-making because the foundations were founded based on the public interest, specifically in the religious, social and humanitarian fields. In addition, in the foundation, there are other interests, namely the interests of the general public and the state's interests. That is why all institutions oriented in the religious, social and humanitarian spheres are not allowed to put individual interests ahead of the public interest. Therefore it can be said that the foundation's activity belongs to an activity of generosity (Nora, Yamin, & Devi, 2022).

However, in practice, many foundations establish or include their capital in limited liability companies not to develop wealth that will be used to achieve the goals and objectives of the foundation. But it is precisely to enrich the internal organs of the foundation, such as the governing body, the supervisory body and the governing body (Zaini & Septia, 2022). This is done "one of them" by seating the trustee and supervisory organs of the foundation as Directors or Commissioners in a Limited Liability Company established by the foundation. This tendency will cause problems both for the organs of the foundation and for the notary as the official making the deed of establishment or the deed of capital participation of a limited liability company by the foundation (Saffanah & Rizkianti, 2021). In addition, it will cause legal consequences for the company that has been established. Departing from the above problems, the author will discuss two main issues, namely: (1) How is the legal responsibility of the notary as a deed-making officer (establishment of a limited liability company) by the foundation and (2) What are the legal consequences arising from the establishment of the limited liability company.

II. METHOD

Based on the above problems, the author uses doctrinal legal research methods. The word doctrine includes issues of legal concepts, principles or principles, court decisions, laws and rules. Doctrinal research is a legal research process that focuses on the concepts of relevant legal principles. This is done so that the author can find the right concept to solve the current legal problems, especially in writing scientific papers about the lawlessness of this foundation (Efendi, A'an, Susanti, & Tektona, 2019).

III. RESULT AND DISCUSSION

Responsibilities of a Notary as an official making a deed of incorporation of a limited liability company by a foundation that violates the law

Article 1 number 1 of Law of the Republic of Indonesia Number 30 of 2004 as amended by Law Number 2 of 2014 concerning the Position of Notary (starting now abbreviated as

Law 30/2004 or Law 2/2014), which states that "A notary is a general officer who is authorized to make authentic deeds and has other authorities as referred to in this Law or based on other laws". The notary, in carrying out the duties of his office, not only declares the will of the interceptors, then pours it into a form under the laws and regulations so that it becomes an authentic deed only, but the notary is also authorized to conduct legal counselling related to the content (substance) that will be promised in the deed to the parties. The affirmation of this is regulated in Article 15 paragraph (2) letter e of Law 30/2004 or Law 2/2014, which states that "Notaries are also authorized to provide legal counselling in connection with making deeds" (Sari & Fauziah, 2018), so that the legal actions to be taken are directed and not violate the law.

The implementation of the duties of the position of the notary as a general officer must always be based on laws and regulations both following the provisions regulated in Law 30/2004 or Law 2/2014, as well as other laws that require a deed to be made by a Notary in order to become an authentic deed. Article 16 paragraph (1) letter a of Law 30/2004 or Law 2/2014 requires notaries in carrying out the duties of their office "to act mandated, honest, thorough, independent, impartial and safeguard the interests of related parties in legal acts" (Salamah & Iriantoro, 2022). This action intends so that in the future, the notary and the parties do not experience problems arising from the deed that has been made.

Article 1 number 1 of Law Number 40 of 2007 concerning Limited Liability Companies (starting now abbreviated as Law 40/2007) confirms that "A Limited Liability Company, starting now referred to as a company, is a legal entity that is a capital partnership, established under an agreement, conducts business activities with an authorized capital that is entirely divided into shares and meets the requirements outlined in this law and it is implementing regulations". Furthermore, in the case of the establishment of a limited liability company, it is contained in Article 7 Paragraph (1) of Law 40/2007 which states that "The Company is established by two or more persons by a notarial deed made in the Indonesian". The establishment agreement in question is commonly known as the Deed of Establishment of a Limited Liability Company. Where the deed of establishment contains matters that are the rights, obligations and prohibitions for the parties as organs of the company in carrying out the activities to be carried out by the limited liability company and are usually referred to as the Articles of Association of the company (Theresia & Putra, 2022).

One of the business entities widely established by the public is a limited liability company because a limited liability company is included in a business entity in the form of a legal entity. This is because the limited liability company is engaged in a profit-oriented business, and the form of liability is limited to the issued and paid-up capital. In addition, shareholders who are members of a Limited Liability Company have the right to transfer all or part of the shares they own by selling to other companies (Gumilang, 2019).

Where the deed made by the parties before a Notary in the future causes problems, so it is necessary to look back at the initial process of making a deed, so that it can be seen whether the notary caused the problem or was it caused by the interceptors who gave false documents and statements to the notary (especially things that are not known for

sure by the notary), or even because there had been an agreement between the notary and the presenter (one or both). If the deed of establishment of the limited liability company is imperfect because it violates the law caused by the fault of the notary, then the notary can be held liable, it can be in the form of legal liability (civil, criminal), administrative or moral liability (Perkasa, 2021). In addition, if it is proven that the notary's mistake was made by the notary and caused losses to the parties. Thus, notaries can be sentenced to sanctions as mentioned and related to sanctions against notaries have been regulated in Law 30/2004 or Law 2/2014.

The notary must implement the principle of accuracy and prudence when making a deed that he must make. This includes the deed of establishment of a limited liability company by the foundation, by asking the position of the investors in the foundation's data by taking into account the articles of association of the foundation, especially those who will be included and seated as commissioners and directors in the articles of association (company data). Because if you do not implement the principle of accuracy and prudence, then the notarial deed that has been made will cause legal problems in the future, either against the parties themselves or even will drag the notary as the deed-making official.

In addition to having to implement the principle of accuracy and prudence, the notary must also be careful and thorough by paying attention to the regulations governing legal actions that will be poured into the form of a notarial deed so that the authentication of the deed is maintained and does not reduce the perfect nature of the proof. In relation to foundations that establish limited liability companies, Notaries must strictly pay attention to the rules contained in Article 7 of Law 16/2001 or Law 28/2004, which basically explains that the foundation can establish a business entity and make capital participation of at most 25% of the total value of the foundation's wealth to business entities whose activities are in accordance with the purpose and objectives of the foundation. However, although the foundation is given the right to establish and make capital participation, the Board of Trustees, supervisory bodies and management bodies of the foundation are prohibited from concurrently serving as Members of the Board of Directors or Management and Members of the Board of Commissioners or Supervisors of the business entity. This means that if the provisions in Article 7 are violated, it will have legal consequences for both the notary and the limited liability company and foundation.

With regard to the above process of establishing a limited liability company legal entity, a notary has a moral responsibility for his position. If the notary carrying out the duties of his position is not following the provisions stipulated in the laws and regulations and the notary code of ethics, then the notary can be held criminally, civilly and administratively liable. The civil liability of the notary may take the form of reimbursement of costs, indemnity and interest from the aggrieved parties. In addition to being able to be held legally responsible to notaries, there are also legal consequences for deeds that are made and not in accordance with laws and regulations, namely that the authentic deed only has binding power and evidentiary power as the deed under the hand, the deed can be cancelled or even the authentic deed is null and void.

Determination of the error at the time of making the deed of establishment of a limited liability company should be seen in the process of making the deed. Against the notary the deed maker can be held civil liability if the error or omission was made by the notary (concerning formal terms and material requirements). However, if the plaintiffs themselves made the error or omission, then the interceptors should not claim the loss to the notary to be reimbursed because the notary does not act as a party to the deed made before him.

The legal consequences of the deed of establishment of a limited liability company in violation of the law

A deed can be said to be an authentic deed if it is made by an official appointed by laws and regulations, including a notarial deed, because a notarial deed is an authentic deed, the evidentiary power of the notarial deed is "perfect". Article 1 Number 7 of Law 30/2004 or Law 2/2014 explains "A Notarial Deed hereinafter referred to as a Deed is an authentic deed made by or before a Notary according to the forms and procedures stipulated in this Law". There are two types of deeds that are the authority of the notary in making authentic deeds, namely: (1) The deed of the parties (Partij Acte) which is made by the way the presenters come to the notary so that the notary constates their will into an authentic deed or an action required by law to be made in the form of an authentic deed; 2. Deed of officials (Relaas acte), deeds in this form are made notaries according to what the notary himself heard, saw and knew. The deed of officials may be in the form of a deed of AGM (general meeting of shareholders), a deed of auction minutes and a deed of registration of estate (Marvin & Latumeten, 2022).

One of the party deeds is the deed of establishment of the foundation or legal activities/actions that will be carried out by the legal entity (agreements, capital participation, mergers and others). Such legal acts are required by law to be contained in authentic deeds. The foundation as a legal entity has equipment in the form of assets and foundation organs that manage, run and represent the foundation outside and in court as the subject of human law. Just like a business entity in the form of a legal entity (limited liability company) which has organs in the form of GMS, board of directors/directors and board of commissioners. The organs of the limited liability company synergize to manage and carry out the limited liability company's activities by its authority, so that the company can carry out its rights and obligations properly and follow laws and regulations, especially in the business world (Hudayanti, 2017).

A Limited Liability Company is a business entity in the form of a legal entity with character and privileges because it has better quality than other forms of business entities. The characteristic that distinguishes between a limited liability company and other business entities is seen from the separation of wealth between shareholders and the wealth of a limited liability company. The separation of wealth between the company and the liability company results in limited rights and obligations of the shareholders, which is limited to the number of shares placed or paid up in the company (Harnis, Suryanti, & Rubiati, 2018).

Based on the formulation of Article 1 Number 1 of Law 40/2007 above, the affiliate of capital is issued and paid up by shareholders with similar goals in the business field.

Because its establishment is based on an agreement between two or more persons, it will not be separated from the conditions that have been determined by the laws and regulations for the validity of an agreement, as contained in Article 1320 of the Civil Code (starting now abbreviated as the Civil Code) (Salim, 2020).

The conditions specified in Article 1320 of the Civil Code are (1) the existence of an agreement, (2) the proficiency of those who carry out the agreement, (3) a certain thing (the object of the agreement) and (4) a cause that is lawful or does not violate the law (Wibowo, Armono, & Bidari, 2022). In addition to complying with the provisions contained in Article 1320 of the Civil Code, establishing a limited liability company also requires the services of a Notary as an official authorized to make authentic deeds. Such authority is given by law to carry out the duties of his office in the making of authentic deeds, provided that as long as the authority is not reserved for other officials. Making authentic deeds is intended to realize fair legal certainty, legal protection for the parties and legal order in the state (Dewi, Surata, & Mariadi, 2022).

The requirements as determined by Article 1320 of the Civil Code include subjective conditions as well as objective conditions for the validity of an agreement. There are several procedures that must be met in the process of establishing a limited liability company in order to be legalized as a legal entity (rechts person) by the Minister of Law and Human Rights that must meet subjective requirements and objective requirements. Those conditions are cumulative, so that if one of those conditions is not met. Thus, it will invalidate the deed of establishment of the limited liability company and impact the invalidity of the company as a legal entity (Purwanti, 2021).

Articles 1451 and 1452 of the Civil Code provide for the cancellation of an agreement. If the non-fulfilment of subjective conditions will result in the agreement being submitted for cancellation by one of the parties. An agreement shall remain valid for the parties to which it is made, so long as the agreement is not submitted to the judge by the parties themselves. In addition to the right to apply for cancellation, parties who feel aggrieved by the existence of an agreement can also file a compensation claim (both formal losses and material losses). However, if what is not fulfilled is the objective condition of the deed, it will be null and void, with the cancellation of the deed after law it will cause legal consequences to the agreement that has been made to never be made (Adeline, 2020).

Provisions regarding the form of the deed are contained in Article 38 of Law 30/2004 or Law 2/2014, the subjective requirement is at the beginning of the deed. While the objective terms are in the content (substance) section, which contains the provisions and matters agreed by the parties. Because the content of the deed is included in the objective conditions, if it is violated, it will cause legal consequences to the deed, which is null and void. The consequence of a deed being null and void is that the deed will be deemed never made and the rights and obligations of the agreement to be lost.

IV. CONCLUSION

Notaries have a great responsibility in carrying out the duties of their positions as general officials, of course also for the deeds made by him. If what is violated is the formal

requirement of an authentic deed, the notary can be sued civilly or can be sanctioned. However, if what is violated is a material condition or the error comes from the parties themselves, then the parties must bear the losses caused by it without associating the notary, because the notary only constates the will of the interceptors who came to him and the notary is not a party to the deed he made.

Suppose the laws and regulations have prohibited the non-performance of an act. In that case, it must not be violated, because if it is still done, it will cause legal consequences that can harm the parties, notaries and other parties related to the deed. There are two legal consequences if the deed of agreement violates the provisions stipulated in the laws and regulations, namely relating to the subjective and objective conditions of the validity of a deed. In particular, the legal consequences for establishing a limited liability company by a foundation that violates the law become null and void, resulting in activities that have been carried out or legal actions that have been carried out by the company's organs being cancelled.

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