

NOTES ON PERTAMINA'S RESTRUCTURING AS OIL AND GAS HOLDING

Not long ago, a national daily published an article entitled "Restructuring and IPO of Sub Holding Do Not Violate the Law." The article refers to a webinar held by EnergyWatch in Jakarta, on July 27, 2020 with the title "Pertamina's New Chapter Restructuring as Oil and Gas Holding". In the webinar, Pertamina's President Director, Nicke Widyawati, said that her party and shareholders in carrying out this corporate action had already reviewed from a legal point of view using a credible third party. Furthermore, she also stated that there are three legal bases that underlie the restructuring activities of Holding-sub-holding and IPO sub-holding, namely Article 33 UUD 45, Oil and Gas Law No. 22/2001 and the BUMN Law No. 19/2003.



The implementation of Pertamina's restructuring indeed should pay attention to the Indonesian Constitution of 1945 as the main legal basis. The Oil and Gas Law is also used as a basis because Pertamina is a company whose main business is in the energy, oil and gas sectors. Meanwhile, BUMN Law is used as a basis because Pertamina is a State-Owned Enterprise in the form of a Persero which is subject to BUMN restructuring provisions.

However, in addition to these matters, the implementation of restructuring of the business group with holding and sub-holding as well as the IPO sub-holding plan also uses the following provisions as the basis: (1) Law No. 40/2007 on Limited Liability Companies, (2) Law No.8/1995 concerning Capital Market, and (3) Law No.5/1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition.

Limited Liability Company Law

UU no.40/2007 does not explicitly regulate the meaning of holding or sub-holding. The Limited Liability Company Law does allow the formation of a holding company structure, because a limited liability company can own shares in another limited liability company, and so on, thus creating a share ownership structure by the corporation / business group.

Share ownership can also be grouped into certain sectors so that a group of companies is formed under a business entity which established under the group's holding company. This is known as sub-holding. The definition of holding, In Indonesian can be defined as "induk". However, the definition of sub-holding needs to find a suitable equivalent in Indonesian. Sub-holding, which is short for subordinate holding or another alternative, the term secondary holding can be used, so that the meaning is "induk sekunder" in Indonesian.

In relation to the structure of the holding and sub holding in this business group, one that is important to note is the arrangement of granting authority between the holding and the sub holding and the extent to which management in the sub holding can carry out its obligations and functions.

The Limited Liability Company Law does not completely regulate the relationship between the authorities of the holding and the members of the business group, let alone the relationship between the holding and the sub holding. The view of pure independence of a limited liability company as an independent legal entity, which is free from interference from other parties (majority shareholder or stakeholders or beneficial owners) indeed often collides with the corporate group structure which continues to develop in accordance with development of the times.

It is also necessary to consider the extent of the authority of the sub holding Board of Directors in making decisions to take an action, so that the company's objectives can remain in line with the objectives of the business group outlined by the holding company. In the context of the Pertamina group, this includes direction from the government as shareholder who determines the direction and the main beneficial owner. However, a narrow limit of authority for the sub holding Board of Directors to make decisions can cause the sub holding to be inflexible and not nimble in day-to-day operations to navigate the companies in its group.

Capital Market Law

UU no.8/1995 along with related regulations and implementing regulations relating to the capital market became the reference for implementing the Initial Public Offering (IPO) Sub-Holding. When Pertamina designed its holding and sub-holding structure, of course, an analysis of the corporate benefits that Pertamina as a business group can get, namely increasing efficiency, transparency and professionalism in order to nourish Pertamina and improve

Pertamina's performance and value as a business group, should be considered and calculated by Pertamina and the Government as shareholders if an IPO is to be held.

The advantage of using a holding and sub-holding structure, among others, is that having a sub holding conduct an IPO allows the group to obtain funding. Meanwhile, from the holding company side, the government can remain 100% shareholder in Pertamina. Of course, a deeper review process can be carried out in the IPO implementation phase after a comprehensive due diligence of the sub holding that will conduct the IPO.

Prohibition of Monopolistic Practices and Unfair Business Competition

No less important are the aspects related to the prohibition of monopoly and unfair business competition. Pertamina is indeed a business entity engaged in the energy sector, which is a strategic industrial sector. However, as a large business group, it is hoped that corporate action will not seek protection from the monopoly privileges of BUMN in strategic sectors. This is

because the implementation of corporate action by a business actor may cause unfair business competition that is detrimental to other business actors, both because of the agreement made by the business actor and the existence of restrictions on business opportunities and access due to certain regulations / policies.

Last year, news circulated in the mass media about allegations of Pertamina's monopoly on the sale of aviation fuel at Soekarno-Hatta Airport. This has even received the spotlight from President Joko Widodo, because this aircraft fuel problem has an impact not only on the aviation industry but also on other industries, such as the hotel and tourism industry. Thus, of course, an assessment of the business competition aspect is an important thing that must be carried out by Pertamina as a BUMN and a large business group.

With Pertamina's transformation into an Oil and Gas Holding Company, we certainly hope that Pertamina can move towards its vision of "becoming a world-class national energy company" and continue to make a significant contribution to the country.

*The article above was prepared by **Michael A. Kaihatu** (Partner).*

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