

Limited Liability Company: Resolving Demission State of Directors and Board of Commissioners Issue Through Company Law

Daniel Suhardiman

Universitas Pelita Harapan, MH Thamrin Boulevard 1100, Tangerang

Nindyo Pramono

Universitas Gadjah Mada, Bulaksumur, Daerah Istimewa Yogyakarta

Abstract

The Directors and Board of Commissioners are the two main organs that carry out the management and supervisory functions of the company. Based on Law No. 40 of 2007 concerning Limited Liability Companies ("Law No. 40/2007"), the two organs of the company have a term of office for a certain period of time as stipulated in Article 94 paragraph (3) and Article 111 paragraph (3) of Law No. 40/2007. However, Law No. 40/2007 does not definitively determine the length of term of office that can be held by the Directors and Board of Commissioners. Therefore, in practice the term of office for the Board of Directors and Board of Commissioners varies according to the articles of association of each company. Obstacles that may occur in the practice of running a company are obstacles in reappointing or replacing Directors and Commissioners whose term of office has ended. This is due to the absence of preventive arrangements in terms of the reappointment or replacement of the Directors and the Board of Commissioners whose term of office has ended due to a deadlock in holding the General Meeting of Shareholders ("GMS"). The Directors and Board of Commissioners will be in a state of demission and will no longer be able to act for and on behalf of the Company. This study aims to discuss and analyze the company's legal stance in dealing with the issues of the Board of Directors and Board of Commissioners who are in a state of demission.

Keywords: Limited Liability Company, Company Organs, Demission State.

INTRODUCTION

Limited Liability Companies have organs that carry out management and supervisory functions, namely the Directors and the Board of Commissioners. Law No. 40 of 2007 on Limited Liability Companies ("**Law No 40/2007**") stipulates that the two organs are appointed for a certain period of time and can be re-appointed through a General Meeting of Shareholders ("**GMS**") decision. Furthermore, Law No. 40/ 2007 also mention that when the term of office of the Directors and the Board of Commissioners has ended, the Directors and Board of Commissioners are no longer entitled to act for and on behalf of a Limited Liability Company. In such case, then all actions taken outside of their position will become personal responsibility.

In connection with the term of office of the Directors and the Board of Commissioners, it is found that there is a legal vacuum which contained risks to the management of the company.

The legal vacuum concerns the issue in the event when the Directors and Board of Commissioners are on state of demission. In simple terms, demission state is a condition where the term of office of the Directors and Board of Commissioners has ended, however both company organs have not been re-appointed or replaced with new management and are still running the management of the company. The demission state of all members of the Directors and Board of Commissioners may occur mainly due to the failure to convene the GMS. The GMS may fail to be held due to the negligence of the shareholders or disharmony between the shareholders which results in deadlocks in every decision-making.

Technically, the aforementioned issue can be even more complicated if the Limited Liability Company has 50-50 share ownership. Moreover, it becomes even more difficult since there are no provisions governing the demission state in Law No. 40/2007. As a result, there will be a vacuum in the company's management and the company's activities will be paralyzed. Such conditions have not been anticipated by the legislators of Law No. 40/2007 and thus creates uncertainty in the management of the Company. Nonetheless, as the main guideline governing company law, Law No. 40/2007 has a set of instruments to resolve problems that arise in the practice of running the company, including the issues of demission state of Directors and Board of Commissioners.

METHODS

This research is normative legal research supported by interviews with informants. The nature of this research is descriptive. The approach used in this research is descriptive analysis and statutory approach. The primary data in this study were obtained through interviews with informants, while the secondary data from this study were obtained through a literature study which was analyzed using qualitative methods.

RESULTS AND DISCUSSION

Limited Liability Company's Management Board Absence due to Demission State of Directors and Board of Commissioners

Directors and Board of Commissioners are the two organs of a Limited Liability Company which hold essential functions in the course of the company's business activities. Directors hold the management function which includes legal actions which are explicitly included in the aims and objectives and business activities of the company as stipulated in the articles of association ("AoA"). In addition to that, legal actions that according to custom, fairness and decency can support the company's business activities. These actions include the appointment and dismissal of workers or in the case of buying a plot of land for the purposes of a place of business. The function of the Board of Commissioners in a Limited Liability Company is to supervise and provide advice to the Board of Directors. The supervisory and advisory functions are carried out so that the company in carrying out its business activities does not commit unlawful acts that may harm the company or its shareholders.¹

The implementation of management and supervisory functions by the Directors and Board of Commissioners as organs of a Limited Liability Company is the main key for a company to carry out its business activities. All actions carried out by the company as a legal entity are basically

¹Ridwan Khairandy, 2014, *Hukum Perseroan Terbatas*, FH UII Press, Yogyakarta, pp. 242-243. See also *ibid*, Article 108 paragraph (1) and paragraph (2).

carried out by the organs within it. Normatively, the law recognizes that there are legal subjects other than humans who can bear rights and perform legal actions. The legal subject is a legal entity. Otto von Gierke with his Organ Theory states that a legal entity is an entity whose will is formed through the mediation of the organs within it (*eine leiblichgeistige heit*).² Thus, all decision made by the organs of the legal entity is the will of the legal entity. Furthermore, Otto von Gierke stated that the functioning of a legal entity is equated with humans who can carry out their daily activities because there are organs that support their lives.³ In connection with the operation of Limited Liability Company, a company can only operate properly if the company's organs can function properly.

The absence of the Directors and Board of Commissioners will have a fatal impact on the internal company. The vacant position of the organ holding the management and supervisory functions of the company will directly paralyze the company's business activities. The paralysis of the company's activities can result in several internal company issues. Among the most important internal problems is that a Limited Liability Company under certain circumstances may experience problems in carrying out its obligations to workers. In this regard, the company's obligations in fulfilling the rights of workers including paying the workers' salaries. If the company fails to make payment, this can result in a strike action which will have an impact on decreasing the company's productivity.⁴ In short, the paralysis of the company's activities due to vacancies in the positions of organs that carry out management and supervisory functions will have an impact on internal problems that will affect the company's productivity. In such case, the worst risk that may occur is that the company completely stops operating. If such condition happens, the impact will be far-reaching and could even disrupt the stability of the national economy.

In relation to the disturbance of the company's activities, the issues that arise can reach into external aspects. External issues may cause a wider impact than internal issues due to the involvement of third parties. However, internal problems also cannot be ignored. The main external problems include the Company's image which will get a negative stigma from the business community which includes principals, partners, colleagues, suppliers and consumers. Furthermore, the company will not be able to carry out their obligations to their creditors. The company will not be able to make any payment for the tax since a company that is no longer operating or unable to carry out its business activities do not have the ability to pay its taxes.

It should be noted that the issues that may arise are not only in the field of taxation. In carrying out its business activities, Companies also deal with credit facilities obtained through financial institutions, which in general are banks. If the company's business activities are forced to stop, then the company will experience financial distress, so that its ability to fulfill its obligations will be hampered and non-performing loan can occur. Non-performing loan can result in a company going bankrupt due to its inability to pay the debts as they fall due.⁵ Therefore, issues with external third parties may threaten the continuity of the company's business.

²Riduan Syahrani, Syahrani, Riduan, (1985), *Seluk Beluk dan Asas-asas Hukum Perdata*, Alumni, Bandung, pp. 28.

³Ibid.

⁴Hesty Diyah Lestari, 2011, "Director's Duty to Employees: Co-Relation Between Corporate and Labour Laws", *Jurnal Mimbar Hukum*, Special Edition, pp. 60.

⁵Hadi Shubhan, 2008, *Hukum Kepailitan Prinsip, Norma, dan Praktik di Peradilan*, Kencana, Jakarta, pp. 88.

Alternatives to Address Demission State of Board of Directors and Board of Commissioners

The absence of norms in the context of positive law can be interpreted as an absence of law and regulation or more precisely said as a vacuum of laws or regulations (*rechtvacuum*). A legal vacuum occurs due to circumstances that have not been regulated in statutory regulations, or even though they have been regulated in statutory regulations, the stipulation is unclear or even incomplete. Legal issues as identified above, not only obstruct the Company's business activities but also have the potential to freeze all of the Company's activities. The aforementioned issues happened since the Director and the Board of Commissioners are two key organs that affect the continuity of the Company's business. Provisions in Law No. 40/2007 and its implementing regulations have not been able to answer and resolve the problems of the outgoing Director and Board of Commissioners.

Authority is a legal action that is regulated and given to a position based on the applicable laws and regulations governing the position in question. Based on Law No. 2/2014 jo. Law No. 30/2004, Notary as a public official has attributive authority which is divided into general authority and special authority as follows:⁶

1) General Authority of Notary

Article 15 paragraph (1) Law No. 2/2014 jo. Law No. 30/2004 confirms that one of the authorities of a notary is to make deeds in general. This is a general authority of a Notary based on the following legal principles:⁷

- a. Notary is authorized as long as it concerns the deed they made.
- b. Notary must be authorized insofar as it concerns the person for whose benefit the deed was drawn up.
- c. Notary must be authorized as far as the place where the deed was made.
- d. Notary must be authorized as long as it is related to the time of making the deed.

2) Special Authority of Notary

Article 15 paragraph (2) Law No. 2/2014 jo. UU No. 30/2004 regulates special authority of a notary to take certain legal actions. Those authorities are validating signatures and setting special dates for private documents by registering in a special book, recording private documents by registering in a special book, validating photocopies of compatibility with the original documents, providing legal counseling in connection with making deeds, making deed relating to land, or making a deed of minutes of auction.

Legal counseling is one of the special powers possessed by a Notary. Legal counseling is one of the activities of disseminating information and understanding of legal norms and applicable laws and regulations in order to create and develop public legal awareness so as to create a legal culture in the form of orderly and obedient or obedient to applicable legal norms and laws and regulations for the sake of upholding rule of law. The objectives of legal counseling are to:⁸

- 1) make people understand the law, in the sense of understanding the provisions contained in

⁶Article 15 paragraph (1), (2), and paragraph (3) Law No. 2 of 2014 tentang Amendment of Law No. 30 of 2004 on Notary.

⁷G.H.S. Lumban Tobing, 1996, *Peraturan Jabatan Notaris*, Erlangga, Jakarta, pp. 49-50.

⁸Soerjono Soekanto, 1983, *Suatu Tinjauan tentang Pola Penyuluhan Hukum*, Rajawali Pers, Jakarta, pp. 73-74.

the legal regulations that govern their lives as individuals; and 2) fostering and increasing the legal awareness of community members so that every citizen obeys the law and voluntarily carries out their legal rights and obligations.

Based on the provisions of Article 15 paragraph (2) letter e of Law No. 2/2014 jo. UU No. 30/2004, one of the authorities possessed by a Notary besides making authentic deeds is to provide legal counseling and provide information in the context of making these authentic deeds. In establishing a Limited Liability Company, the Notary must provide to the founders a clear picture of the concept of a company compared to other forms of business entities that are not incorporated, including comparisons between companies with legal entities and non-legal entities in relation to their responsibilities.⁹ Notaries are not only deed maker for their clients, but notaries also need to examine whether what their clients are asking for does not violate, conflict with laws and regulations, decency, public order and must have thoughts that use legal logic. In conducting legal counseling at the time of founding the company, the Notary must clearly explain the legal consequences of each choice that will be taken by the founders. For instance, the consequences of holding 50-50 shares ownership and provisions regarding the GMS quorum in the Company's AoA.

Convening GMS through Circular Resolution by the Shareholders

Basically, the demission state of the Directors and Board of Commissioners is derived from the failure to replace the management of a Limited Liability Company. The GMS is an organ of a Limited Liability Company that holds authorities that is not owned by the Directors and Board of Commissioners. One of these authorities is to appoint and dismiss the Directors and Board of Commissioners.¹⁰ Law No. 40/2007 recognizes 2 (two) types of GMS, namely the Annual GMS¹¹ and other GMS which are also known as Extraordinary GMS.¹² The Annual GMS must be held within 6 (six) months after the end of the financial year and can only discuss and decide on meeting agendas which are limitedly stipulated in Law No. 40/2007, namely:

- a. Approval of the Annual Work Plan prepared by the Directors along with the Board of Commissioners;
- b. Approval of the Annual Report prepared based on financial accounting standards;
- c. Approval of the balance sheet and income statement for the relevant financial year.

Extraordinary GMS can be held at any time and can only discuss matters that are not included in the authority of the Annual GMS. The matters include approval for changes to the AoA and change to company data, approval for the appointment and dismissal of members of the Directors and Board of Commissioners of the company. The holding of GMS, both the Annual GMS and the Extraordinary GMS, is the responsibility of the Directors. In the event that the terms of office of Directors and Board of Commissioners have ended, both of them no longer have the authority to summon the GMS to replace the management.

⁹Siti Fauziah, "Peran Notaris dalam Proses Pembuatan Akta Pendirian Perseroan Terbatas", *Lex Renaissance*, Vol. 3, No. 2, pp. 407-422.

¹⁰Article 1 paragraph 4, Article 94 paragraph (1), Article 111 paragraph (1) Law No. 40/2007.

¹¹*Ibid*, Article 78 ayat (1).

¹²*Ibid*, Explanation of Article 78 paragraph (1).

There are other ways provided by Law No. 40/2007 in the form of making decisions based on the agreement of all shareholders. Apart from going through the GMS, there-appointmentofmembersoftheDirectorsandBoardofCommissionerswhose term of office has ended can also be carried out by making binding decisions outside the GMS by the shareholders. It is regulated in Article 91 of Law No. 40/2007, with the following provisions: "Shareholders can also make binding decisions outside the General Meeting of Shareholders (GMS) on condition that all shareholders with voting rights agree in writing by signing the relevant proposal"

Decision-making outside the GMS is known in practice as a "circular resolution". The decision is not made by physically presenting the shareholders in a forum, but by sending in writing a proposal to be decided upon to all shareholders which will then be approved in writing by all shareholders. The decision is legally binding like a GMS decision. It can be said that a circular resolution is a decision made based on the permission of the shareholders, bearing in mind that a new decision will have legal force fall shareholders permit or give approval to a proposed proposal.

Convening GMS through Court Order by Filing Petition

Basically, the authority to summon the GMS in a Limited Liability Company rests with the Directors.¹³ In the event that the Directors does not call for a GMS, then the Board of Commissioners shall call for a GMS. However, in practice it is relatively possible that there is a situation in a company which results in the GMS being unable to be held. One of the reasons is due to the expiration of the term of office of members of the Directors and Board of Commissioners. Efforts that can be made in the event that members of the Directors and Board of Commissioners are unable to hold a GMS are by submitting a petition for a permit to hold a GMS. Law No. 40/2007 provides attributive authority to the Chairman of the District Court to issue an order regarding the granting of permission to hold a GMS. This is regulated in Article 80 paragraph (1) as follows:

"In the event that the Board of Directors or Board of Commissioners does not call for a GMS within the period referred to in Article 79 paragraph (5) and paragraph (7), the shareholder requesting the holding of the GMS may submit a request to the Chairman of the District Court whose jurisdiction covers the domicile of the company to stipulates the granting of permission to the applicant to carry out the summons for the GMS himself"

It is mentioned in Law No. 40/2007 that shareholder representing at least 1/10 (one-tenth) of the total number of shares with voting rights are given the authority to submit a request to the chairman of the district court in the event that the Board of Directors and Board of Commissioners do not hold a GMS.¹⁴ As for the things required by Law No. 40/2007 so that the request can be granted is in accordance with the following provisions:¹⁵

"The chair main of the district court after summoning and hearing the applicant, the Directors and/or the Board of Commissioners, determines the granting of permission to hold a GMS if the

¹³*Ibid*, Article 81 paragraph (1).

¹⁴*Ibid*, Article 79 paragraph (2) and Article 80 paragraph (1).

¹⁵*Ibid*, Article 80 paragraph (2).

applicant has in summary proven that the requirements have been met and the applicant has a reasonable interest in holding a GMS."

The applicant, who in this case is a shareholder, must briefly prove that there is a reasonable interest in holding the GMS. A "brief authentication" means that the petitioner shall prove his legal standing and interest in submitting the petition in a simple manner. In this regard, the petitioner shall prove that:¹⁶ 1) the petitioner represents 1/10 (one-tenth) of the total number of shares with voting rights; 2) a request for a GMS has been submitted to the Directors, but up to 15 (fifteen) days since the request was submitted there is no summons for a GMS; and 3) there is an urgency to immediately hold a GMS;

The reasonable interests referred to in Article 80 paragraph (2) Law No. 40/2007 depend heavily on the circumstances and conditions of the Limited Liability Company being requested to hold the GMS. The most important thing that must be proven is the existence of an interest or urgency to immediately hold a GMS. For example, issues regarding the term of office of members Directors and Board of Commissioners that have expired so that it is necessary to re-appoint or replace management. This condition causes a reasonable urgency or interest to immediately hold a GMS to re-appoint or replace with new management so that there is no vacancy.¹⁷

The result of the submitted petition will basically be in the form of a court order. The court order will contain provisions regarding the form of the GMS, the GMS agenda in accordance with the request of the shareholders, the period for summons for the GMS, the quorum for attendance, and/or provisions regarding the requirements for making GMS decisions, as well as the appointment of the chairman of the meeting, in accordance with or without being bound by the provisions of Law No. 40/2007 or the AoA.¹⁸

It should be noted that the issues that arise in running the company are very diverse and it is possible that there may be conditions where the GMS cannot be held. As an example of the case for holding a GMS, can be seen in the Bale Bandung District Court Order No. 72/Pdt.P/2009/PN.BB dated 21 July 2009 ("Bale Bandung District Court Order").¹⁹ This case started with a petition filed by "S" as the owner of 50% (fifty percent) shares of PT MG domiciled in Bandung Regency. Apart from being the owner of 50% (fifty percent) of PT MG shares, "S" is the President Director of PT MG and "EG" is also a commissioner. His second term ended on March 3, 2008. Issues arose when "EG" held a GMS on June 17, 2008. S did not attend the GMS because it was held by a commissioner whose term of office had ended. The GMS was still held without the presence of "S" and even appointed new management of PT MG, namely "GG" became the Director replacing "S" and "EG" still served as Commissioner.

Even though a new management board has been appointed, PT MG has never carried out any activities. The appointment of a new management without "S" approval as a shareholder, the absence of PT MG's activities (vacuum), and the failure to respond to "S" request to hold an

¹⁶Interview with Lecturer of Universitas Kristen Indonesia on 19 April 2021.

¹⁷Ibid.

¹⁸Ibid, Article 80 paragraph (3).

¹⁹Court Order of Bale Bandung District Court No. 72/Pdt.P/2009/PN.BB dated 21 July 2009.

Extraordinary GMS, served as the basis for “S” to submit an application to the district court to be able to hold an Extraordinary GMS and adjust the AoA and PT MG's Bylaws against Law No. 40/2007 with the aim that PT MG can run and continue its business. In its consideration, the Bale Bandung District Court stated that the petition had sufficient reasons and was based on law so that it was accepted and granted. The Court Order of the Bale Bandung District Court Judge Number 72/Pdt.P/2009/PN.BB dated 21 July 2009 is as follows:²⁰

1. Granted the Petitioner's request in its entirety;
2. Determined to give permission to the Petitioner to personally summon the Extraordinary General Meeting of Shareholders of PT MG;
3. Stipulates that the agenda for the PT MG Extraordinary General Meeting is to replace the management of PT MG and adjust PT MG's articles of association and bylaws with Law Number 40 of 2007 concerning Limited Liability Companies;
4. Determine the period for calling for the Extraordinary General Meeting of Shareholders no later than 14 (fourteen) days before the Extraordinary General Meeting of Shareholders (EGMS) of PT MG;
5. Determine the quorum for the Extraordinary General Meeting of Shareholders (EGMS) to be held with 33.3% (thirty-three-point three percent) of shareholders present;
6. Appoint the applicant as the Chairman of the Meeting;
7. Charged the Petitioner to pay court fees of Rp144,000. - (one hundred forty four thousand rupiah).

Efforts to submit a petition by shareholders to obtain a court order as a permit to carry out a GMS is a solution offered by Law No. 40/2007 in situation where members of the Directors and the Board of Commissioners do not hold a GMS. The provided solution does not mean that the problem of disputes between shareholders has been resolved, especially in Limited Liability Companies with 50-50 share ownership. Even if the Judge grants the petition filed by the shareholders to hold a GMS, there are still many obstacles which are very likely to occur such as the non-fulfillment of the quorum for reaching GMS decisions.

In case Number 72/Pdt.P/2009/PN.BB, the court order issued by the Bale Bandung District Court did not necessarily resolve the problem at hand. PT MG has a 50-50 shareholders composition consisting of 50% (fifty percent) of shares owned by “S” and 50% (fifty percent) of shares owned by “EG”. The Bale Bandung District Court granted the petition submitted by “S” by giving permission for “S” to personally call for the Extraordinary GMS of PT MG and determine the agenda for the GMS to replace PT MG's management, and set an attendance quorum of 33.3% (thirty-three-point three percent). The GMS, which was later held by “S” based on the court order, could not be carried out completely. The court order determines a quorum of 33.3% (thirty-three-point three percent) only for the attendance quorum, while the decision-making quorum must still be based on the provisions of Law No. 40/2007. A valid decision is reached if it is approved by more than 1/2 (one half) of the total votes cast. Even though the attendance quorum can be met with “S” share ownership of 50% (fifty percent), this amount is not sufficient to make GMS decisions since “EG” as another shareholder who owns the remaining 50% (fifty percent) shares disagrees with “S”. Thus, even though the court grants

²⁰*Ibid.*

a GMS permit, the decision making of the GMS will still experience deadlocks due to the 50-50 share ownership.

Hypothetically, the issues will be more complex if all members of Directors and Board of Commissioners have ended their term of office and the agenda item for the GMS for which permission is to be requested is the re-appointment of management whose term of office has ended. A court decision granting permission to hold a GMS may become non-executable²¹ due to: 1) shareholders who object to the appointment of members of the Directors and the Board of Commissioners may fail to fulfill the quorum for decision-making so that the GMS will be deadlocked; and 2) even though a decision can be made at the GMS, other shareholders who object to the appointment of members of the Directors and Board of Commissioners can challenge the GMS decision. Thus, the court order as stipulated in Law No. 40/2007 cannot be a complete and permanent solution to the issues of the Directors and Board of Commissioners who are in a demission status.

Granting permission to hold a GMS is an attributive authority granted by law to the court. With this authority, the court should be able to overcome or at least minimize the issues. The court through the Judge must pay attention to the expediency aspect in giving decisions regarding the issues of holding a GMS. Jeremy Bentham states that the purpose of law is to have utility for society in order to achieve maximum happiness.²² The benefits are intended to meet the legal needs of the community. Benefit theory assumes that the concept of justice rests on the ability to provide greater benefits. In relation to the application for a permit to hold a GMS, the court must pay attention on a case-by-case basis what the Company needs so that the GMS can be carried out through the stipulation given. Thus, the need for legal arrangements for the company will be fulfilled through a court order.

CONCLUSIONS AND SUGGESTION

In the perspective of the implementation of Law No. 40/2007, legal issues arise when all members of the the Directors and Board of Commissioners are in demission status. Under such conditions, it is clear that there is a vacuum in the company's organs authorized to carry out the business activities of the company. This will be detrimental not only in terms of the Company's interests but also to other related parties, both internal and external. The most affected parties are shareholders, workers, business partners, and even the government, especially from the tax sector. Normatively, Law No. 40/2007 has indeed provided a way, namely by carrying out a circular resolution and also submitting a request by 1/10 (one-tenth) of the the share h olders to the District Court to be able to hold a GMS to. However, it must be admitted that such solutions in practice do not work as expected. Circular resolution cannot be carried out if there is a dispute or disharmonious relationship between shareholders. In addition to that, court orders also often can not be carried out as they should. There are several legal issues that become obstacles even though the court has issued an order and a summons for the GMS has been made. The legal issues include: 1) the stipulated attendance quorum is not met; 2) even though the GMS can be held, the the Directors and the Board of Commissioners cannot be appointed since the decision-making quorum is not fulfilled; and 3) even though here

²¹Yahya Harahap, 2009, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata*, Sinar Grafika, Jakarta, pp. 335-337.

²²Max Hocutt, *op.cit*, pp. 704.

solutions of the GMS are obtained, the results of the GMS can be challenged by shareholders who do not agree.

As a result, access to the company's Legal Entity Administration System (SABH) was blocked by the Ministry of Law and Human Rights due to a dispute. Thus, the notification of the results of the GMS to ratify the appointment of the Directors and the Board of Commissioner cannot be carried out because there are 30 (thirty) days provided that the results of the GMS must have been notified to SABH. The current Company Law is still unable to provide a solution and legal certainty. Such conditions will cause the issues to become more protracted without legal certainty. In addition to harming the interests of the company, including its shareholders, the vacuum of the Directors and Commissioners of the Limited Liability Company will disrupt a number of external interests, including tax institutions and the business situation in Indonesia.

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