

Review of Commercial Law in Bankruptcy Applications for State-Owned Enterprises (BUMN) and the Legal Consequences of Bankrupt BUMN

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Abstract:

BUMN is a legal entity that is independent and autonomous like other private legal entities. So that BUMN can seek profits (profit oriented) and can also experience losses from the business activities carried out. This research aims to discuss whether a BUMN can be declared bankrupt and what conditions are needed to file a bankruptcy declaration for a BUMN according to Law No. 37 of 2004. This research uses a qualitative research method with a normative approach. And the form of this research is library research, so the data is taken from book literature, journals, laws and websites. The result of this research is that debt owned by BUMN can be paid through a bankruptcy mechanism in accordance with the requirements determined by UUKPKPU. UUKPKPU does not recognize differences in bankruptcy regulations between BUMN and private legal entities, so BUMN are also subject to UUKPKPU bankruptcy regulations. The requirements for bankruptcy of a company are regulated in Article 2 paragraph (1) UUKPKPU. Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations states that the Minister of Finance is the only party who can file a bankruptcy statement for BUMN operating in the public sector. BUMN declared bankrupt by the Commercial Court will have legal consequences for the parties concerned.

Keywords: ; Bankruptcy Application;BUMN; Commercial Law

I. INTRODUCTION

BUMN has an important role in organizing the national economy in improving community welfare.(Muryati, Heryanti, and Triasih 2015) The state controls natural resources, but the state cannot step in directly to carry out business activities by means of the government managing these natural resources, because it will result in a commercial government. For this reason, the state forms business entities or commonly called BUMN with the aim of managing these natural resources for the prosperity of the people. (Nurdin 2012)

BUMN operates like other companies, the aim is to make a profit (including services to the community). BUMN in developing the company, collaborates with other parties such as financial institutions. However, the higher the opportunity to make a profit, the higher the risk which will result in losses for the BUMN. BUMNs in their journey are very likely to experience losses due to various factors such as poor management, poor political, economic, legal situations and so on. The losses experienced by BUMN resulted in the failure to fulfill its obligations to pay debts to creditors.(Tanaya and Sudiarawan 2017)

While carrying out their business, BUMN can experience the risk of losses and the potential for bankruptcy or insolvency if they are not managed professionally and do not comply with the principles of healthy and good corporate governance (Good Corporate Governance). The regulation of applications for declaring bankruptcy against BUMN in Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (hereinafter referred to as the Bankruptcy Law and PKPU) shows that the government is aware of the ups and downs of BUMN's finances.

Bankruptcy is a situation where a debtor who has been declared bankrupt by a court means that the debtor has lost his civil rights in managing all his assets and assets. Then all the assets transfer their control status to the curator for settlement and management of the assets intended to pay the debtor's debt. The definition of bankruptcy can be seen in Article 1 paragraph (1) of the Bankruptcy Law and PKPU which states that bankruptcy is a general confiscation of all the assets of a bankrupt debtor where the management and settlement of the bankrupt assets is carried out by a curator under the supervision of a supervisory judge as regulated in this law. (Subhan 2008)

So this research will explain whether State-Owned Enterprises can be bankrupted? Because in essence, BUMN is an institution owned by the state, while the institution that can issue bankruptcy decisions is also a state-owned institution, so that

in deciding on bankruptcy a BUMN institution experiences greater difficulties and obstacles.

There are several studies that examine that in fact BUMNs can be bankrupted, but there is government intervention in the case of BUMN bankruptcy, because the assets in BUMNs are still considered state assets and the separation of wealth is only limited to the management of BUMNs. The government's involvement in BUMN bankruptcy can be proven by the intervention of the Minister of Finance in bankrupting BUMN.(Wskito and Susilowati 2016) Apart from that, there is research which explains that workers can also file for bankruptcy in a state-owned company under their control.(Octaviarini 2019) So this research is more about whether, how, and who can file for bankruptcy of a BUMN.

II. RESEARCH METHODS

The research method is a scientific method used to analyze a problem. Research methods are carried out to obtain the truth as is the function of the research itself. Each study has a different research method. In research, it is impossible to uniform methods for all sciences. This research is normative legal research. The legal materials used are legal materials obtained from literature, articles, and laws and regulations relating to bankruptcy. (Firdaus and Saefudin 2023)

III. RESULTS AND DISCUSSION

1. Bankruptcy Regulations for State-Owned Enterprises (BUMN)

BUMN is a legal entity that is independent and autonomous like other private legal entities. So that BUMN can seek profits (profit oriented) and can also experience losses from the business activities carried out. Debts owned by BUMN can be paid through bankruptcy mechanisms in accordance with the requirements determined by UUKPKPU. UUKPKPU does not recognize differences in bankruptcy regulations between BUMN and private legal entities, so BUMN are also subject to UUKPKPU bankruptcy regulations. The requirements for bankruptcy of a company are regulated in Article 2 paragraph (1) UUKPKPU.

This article stipulates that debtors who have 2 (two) or more creditors and do not pay in full have at least one debt that is due. Based on this arrangement, there are 3 (three) requirements to be able to file a bankruptcy application, namely: (1) there must

be debt; (2) one of the debts is due and payable; and (3) there are 2 (two) or more creditors. (Nugroho 2018)

The first requirement for filing a bankruptcy petition is debt, the definition of debt is regulated in Article 1 number 6 UUKPKPU. Debt is an obligation that debtors must pay to creditors/creditors. The debt is paid in the form of Indonesian currency or foreign currency, either directly or in the future, arising from a debt and receivable agreement or based on provisions regulated by law. Creditors can demand payment from the debtor's assets if the debtor does not pay the debt.

The second condition is that one of the debts is due and can be collected. Every debt and receivable agreement must include a period for paying the debtor's debt to the debtor. A debt that has matured must be paid to creditors.

The third condition is that there are 2 or more creditors. In the UUKPKPU arrangement, a minimum of 2 debts is enough to apply for bankruptcy. UUKPKPU only regulates the minimum number of creditors to be able to bankrupt a debtor. The three requirements for submitting a bankruptcy application regulated by UUKPKPU are very simple.

The bankruptcy requirements of Article 2 paragraph (1) UUKPKPU are very simple. This article does not regulate the minimum requirements for debt owed by debtors, so debts with very small amounts can be bankrupted by creditors. This article also does not regulate the debtor's ability to pay debts (comparison of the amount of debt and assets). Viewed from a macroeconomic perspective, it is very urgent to revise the bankruptcy requirements for a legal entity (including BUMN) by increasing the minimum amount of debt. The reason is that the ease with which creditors can bankrupt a legal entity (especially BUMN) will have a systemic economic impact and of course this will have an impact on reducing the foreign investment climate in Indonesia. (Muhammad 2011)

However, referring to article 2 paragraph 5 of the Bankruptcy Law and its explanation, only companies that are not divided into shares can only submit a bankruptcy application by the Minister of Finance. Meanwhile, BUMN which is divided into shares should be able to be bankrupted by anyone.

2. Requirements for Legal Bankruptcy of BUMN

In the current developments, no BUMN can be declared bankrupt. If a BUMN is declared bankrupt at the first level court, at the cassation or appeal level the bankruptcy decision at the first level will be cancelled. Or if it is not canceled at the classification level, the application for bankruptcy declaration will be canceled at the

review level. This is due to the judge's understanding of the legal position of BUMN Persero regarding state finances in relation to laws and regulations that conflict with each other. Previously, bankruptcy in Indonesia was regulated in *Faillissements Verordening*, which was then amended by Perpu No. 1 of 1998 concerning amendments to the Law on Bankruptcy. This Perpu was then enacted as law, namely Law No. 4 of 1998. In connection with the many controversial commercial court decisions such as in the bankruptcy cases of PT Asuransi Jiwa Manulife Indonesia and PT Prudential Life Assurance, the intention arose to revise this law. Finally, on October 18 2004, Law No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payments was issued.

According to the BUMN Law, the definition of BUMN is a business entity whose capital is wholly or mostly owned by the state through direct statements originating from separated state assets. Based on the BUMN Law, BUMN in Indonesia consists of two types of business entities, namely Persero and Perum. Pay attention to the nature of BUMN business, namely to generate profits and carry out public benefits. (Amadja 2005)

It needs to be emphasized that the legal status of state money which has become shares has been legally transformed from public money to private money. Likewise, it needs to be emphasized if it also has the status of a private legal entity which is fully subject to the provisions of private law. Government intervention can create legal uncertainty. This is due to government intervention being too deep and the presence of the government's interests as the ruler tends to ignore other shareholders, creditors and other related parties as well as interests in the company's own interests. Regarding BUMN as the bankruptcy respondent, the Bankruptcy Law states that in this case the debtor is an insurance company, reinsurance company, pension fund or BUMN that operates in the public interest. A request for a bankruptcy declaration can only be submitted by the Minister of Finance. Based on the explanation of article 2 paragraph (5) of the Bankruptcy Law, it is explained that what is meant by a BUMN operating in the public interest is a BUMN whose entire capital is owned by the state and is not divided into shares. (Anon n.d.)

3. Commercial Law Review of Bankruptcy Applications for BUMN

When applying for bankruptcy to a State-Owned Enterprise (BUMN), it must be looked at from several angles as follows:

1. BUMN Persero can be bankrupted

The Company as an independent legal object is capable and authorized in its name and for its own interests. Establishing various legal relationships regarding assets in an effort to carry out its aims and objectives. The consequence and reality is that every company can request a bankruptcy declaration by its creditors. If the bankruptcy petition is decided, the legal effect is to give the authority to manage and settle all of the company's assets included in the bankruptcy estate to the curator from the date the bankruptcy declaration is decided. (Prisintyas 2021)

2. Parties who can submit a BUMN Bankruptcy Application

Article 2 Paragraph (5) UUK and PKPU, in the event that the debtor is an Insurance Company, Pension Fund, or BUMN which operates in the public interest sector, the bankruptcy application is submitted by the Minister of Finance. Explanation of Article 2 Paragraph (5) UUK and PKPU means that BUMN which operates in the public interest sector is BUMN whose entire capital is owned by the state and is not divided into shares.

Furthermore, referring to Article 1 number 4 of the BUMN Law, that BUMN whose capital is not divided into shares is a Public Company (Perum). BUMN in the form of a Limited Liability Company (Persero) is not included in this category because all of the Persero's capital is divided into shares which are wholly or mostly owned by the state. (Hartini 2017)

3. Juridical Basis Regarding Bankruptcy Applications Against State-Owned Companies

Referring to the provisions of Article 1 Paragraph (1) UUK and PKPU, what is meant by bankruptcy is a general confiscation of all the Bankrupt Debtor's assets, the management and settlement of which is carried out by the Curator under the supervision of the Supervisory Judge as regulated in this Law. Debtors as referred to in Article 1 Paragraph (1) UUK and PKPU are people who have debts due to agreements or laws whose repayment can be claimed before the court.

Article 2 Paragraph (1) UUK and PKPU states that a Debtor who has two or more Creditors and does not pay in full at least one debt which is due and can be collected, is declared bankrupt by a Court decision, either at his own request or at the request of one or more of his Creditors. The words of Article 2 Paragraph (1) are cumulative, meaning that the requirements for a Debtor to be declared bankrupt must fulfill all the requirements above. If these conditions are met, the Judge "must declare bankruptcy", not "can declare bankruptcy", therefore the Judge does not have enough room to make a broad assessment as in other cases. (Fuady 2014)

Article 8 Paragraph (4) UUK and PKPU further strengthen this, namely that the application for declaring bankruptcy must be granted if there are proven facts or circumstances that the requirements for declaring bankruptcy as intended in Article 2 Paragraph (1) have been fulfilled. If you look again at the requirements above, it turns out that there is not a single requirement for an unhealthy financial condition for the Debtor who wants to go bankrupt.

In Indonesia, an "insolvency test" is not implemented before filing a bankruptcy application. Insolvency is one of the important processes in bankruptcy, namely when the debtor's assets are divided to pay off his debts, the debtor is still considered capable (solvent) to fulfill his debts by means of peace. If the debtor has been declared insolvent (unable) then his assets will immediately be divided, although this does not mean that the business of the bankrupt company cannot continue. (Antasari and Fauziah 2018)

4. Consequences of BUMN Bankruptcy Law

Separate property is one of the elements of a legal entity. Separate property is a characteristic that a legal entity is an association of capital while a business entity that is not a legal entity is an association of people. Separate assets means that the assets of shareholders and the assets of a legal entity are separate (limited liability).

Article 3 paragraph (1) of the Company Law concerning PT stipulates that "Company shareholders are not personally responsible for agreements made on behalf of the company and are not responsible for the company's losses in excess of the shares they own. Then Article 39 of the BUMN Law stipulates that "the minister is not responsible for any legal actions made by the public company and is not responsible for losses to the public company that exceed the value of state assets that have been separated into the public company". Even if you receive an injection of funds from the state, the injection of funds is still counted as BUMN debt. (Nating 2005)

BUMN Debtors and Creditors who have fulfilled the bankruptcy requirements in accordance with the provisions of the UUKPKPU can apply for bankruptcy by the creditors to the commercial court. When a commercial court decides that a BUMN is bankrupt, there are several legal consequences that result. A bankruptcy decision of a BUMN results in all of the BUMN's assets and everything obtained during the bankruptcy being in general confiscation from the time the decision to declare bankruptcy is pronounced (Article 24 paragraph (1) UUKPKPU). BUMN loses its right to do something regarding the control and management of assets included in

bankruptcy from the date the decision is issued (calculated from 00.00 local time) (Article 24 paragraph (2) UUKPKPU) which declares BUMN bankrupt. The curator is given the authority to manage and settle bankruptcy assets (Article 69 paragraph (1) UUKPKPU).

Even though the bankruptcy estate is managed and settled by the curator, Article 22 a, b, c of the UUKPKPU provides exceptions to several things, namely:

1. Objects, including animals that are really needed by the debtor in connection with his work, equipment, medical equipment used for health, beds and equipment used by the debtor and his family, and food for 30 days for the debtor and his family, which is in that place.
2. Everything the debtor obtains from his own work as remuneration for a position or service, as wages, pensions, waiting money or allowances, to the extent determined by the supervising judge.
3. Money given to a debtor to fulfill an obligation to provide support according to law. So when a BUMN is declared bankrupt, the BUMN no longer has the right to control and manage its assets, but the BUMN can still take other legal actions as long as it does not touch the assets because they are already under general confiscation.

BUMN bankruptcy decisions not only have legal consequences for debtors but also have legal consequences for creditors. After the bankruptcy decision, creditors do not have the right to request payment of debts unilaterally but rather they are managed and settled by a curator under the supervision of a supervisory judge (Article 1 number 1 UUKPKPU). The appointment of a curator is based on the decision to declare bankruptcy, in the sense that the decision to declare bankruptcy must state that there is an appointment of a curator (Article 15 paragraph (1) UUKPKPU).

BUMN is subject to the principles of legal entity following the transformation of financial status from public finance (state finance) to private finance (BUMN finance). Article 11 of the BUMN UU states that BUMN is subject to the company principles regulated by the 2007 UUPT. Article 3 UUPT 2007 states that shareholders are not personally responsible for agreements made in the name of the company and are not responsible for the company's losses in excess of the shares owned (limited liability), this proves that there is separate wealth between shareholder wealth and BUMN wealth. (Sastrawidjaya 2006)

5. The Role of the Minister of Finance in Submitting Bankruptcy Applications for Debtors of State-Owned Enterprises (BUMN)

The Minister of Finance acts on behalf of the State and can bankrupt a State-Owned Enterprise (BUMN) which operates in the public interest, in this case a BUMN in the form of a Public Company (Perum) for the benefit of the State's economy, or as a way to save the State's economy through bankruptcy. , because the person who knows the country's economy as a whole is the Minister of Finance. The role of the Minister of Finance in the bankruptcy of BUMN in accordance with Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations is as an applicant for bankruptcy declarations against State-Owned Enterprises (BUMN) which operate in the field of public or public interest.

State-Owned Enterprises (BUMN) operating in the public interest sector or BUMN in the form of Public Companies that will be filed for Bankruptcy by the Minister of Finance must refer to Law Number 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. The stage that will be carried out by the Minister of Finance is to assess whether a BUMN is in a state of insolvency or whether it can meet the requirements for bankruptcy.

According to Goodman Law's explanation, insolvency is a financial condition, namely a financial condition that occurs when the debts (not just one debt) of the debtor exceed his assets. From this explanation, the Minister of Finance must provide an assessment of State-Owned Enterprises (BUMN) in the form of Public Companies (Perum) whose Bankruptcy Application will be submitted as to whether they are insolvent or not.(Sjahdeini 2016)

The Minister of Finance will also pay attention to the requirements for bankruptcy. The bankruptcy requirements that the Minister of Finance must pay attention to are as follows: "Debtors who have two or more creditors and do not pay in full at least one debt that is due and can be collected, are declared bankrupt by a court decision, either at his own request or at the request of one or more of his creditors."

The Minister of Finance does not need an advocate to submit a bankruptcy petition, because if he refers to Article 7 paragraph (2) of Law no. 37 of 2004 concerning Bankruptcy and Suspension of Debt Payment Obligations. The provisions as intended in Article 7 paragraph (1), namely that it must be submitted by an advocate, do not apply if the application is submitted by the prosecutor's office, Bank Indonesia, the Capital Market Supervisory Agency, and the Minister of Finance. So the Minister of Finance can submit a request for a bankruptcy declaration against a BUMN directly to the Chief Justice without having to go through an attorney. (Hutajulu 2020)

IV. CONCLUSION

The first requirement for filing a bankruptcy petition is debt, the definition of debt is regulated in Article 1 number 6 UUKPKPU. Debt is an obligation that debtors must pay to creditors/creditors. The second condition is that one of the debts is due and can be collected. The third condition is that there are 2 or more creditors.

Based on the BUMN Law, BUMN in Indonesia consists of two types of business entities, namely Persero and Perum. Pay attention to the nature of BUMN business, namely to generate profits and carry out public benefits. It needs to be emphasized that the legal status of state money which has become shares has been legally transformed from public money to private money. Likewise, it needs to be emphasized if it also has the status of a private legal entity which is fully subject to the provisions of private law.

Furthermore, referring to Article 1 number 4 of the BUMN Law, that BUMN whose capital is not divided into shares is a Public Company (Perum). BUMN in the form of a Limited Liability Company (Persero) is not included in this category because all of the Persero's capital is divided into shares which are wholly or mostly owned by the state.

In Indonesia, an "insolvency test" is not implemented before filing a bankruptcy application. Insolvency is one of the important processes in bankruptcy, namely when the debtor's assets are divided to pay off his debts, the debtor is still considered capable (solvent) to fulfill his debts by means of peace. If the debtor has been declared insolvent (unable) then his assets will immediately be divided, although this does not mean that the business of the bankrupt company cannot continue.

When a commercial court decides that a BUMN is bankrupt, there are several legal consequences that result. A bankruptcy decision of a BUMN results in all of the BUMN's assets and everything obtained during the bankruptcy being in general confiscation from the time the decision to declare bankruptcy is pronounced (Article 24 paragraph (1) UUKPKPU). BUMN loses its right to do something regarding the control and management of assets included in bankruptcy from the date of publication of the decision in Article 24 paragraph (2) UUKPKPU) which declares BUMN bankrupt. The curator is given the authority to manage and settle bankruptcy assets (Article 69 paragraph (1) UUKPKPU).

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