
Dualism of Subsidiaries in Indonesia: Between Juridical Independence and Economic Dependence of Subsidiaries in a Group of Companies

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Abstract: *In the limited liability company law currently in force in Indonesia, holding company and subsidiaries in the form of limited liability companies are seen as independent and separate legal entities, where each company has the right to independently carry out legal actions in accordance with the company's interests. This differs from the concept of "group of companies" which consists of a collection of legally independent companies, where the subsidiaries are controlled by the holding company. This kind of concept raises fundamental questions considering that there is a contradiction between the principle of independence possessed by the company as an independent legal entity on one hand, and the reality of control by the holding company over its subsidiaries as a unitary economic entity. To answer this kind of problem, our paper offers a systematic explanation based on a normative and case approach to the company's legal regime in Indonesia. This paper argues that the contradiction between the principle of independence and the reality of control by a parent company over its subsidiaries as an economic unit has the potential to prevent subsidiaries from moving independently based on their own business interests. The amount of control authority that the holding company has over its subsidiaries – as this paper will show – must be exercised by taking into account several things, including: the control does not conflict with legal regulations, does not cause losses to the subsidiaries, and does not harm the interests of the third parties as the limitation of control by the holding company.*

Key Words: *Company Law; Corporate Law; Company's Legal Regime; Group of Companies; Independence of Subsidiary Company; Control of Holding Company; Indonesia.*

Introduction

The objectives of the activities carried out by a company, in general, is to make a profit.¹ In order to maintain the existence of the company and be able to compete with other companies, one strategy that can be carried out by the company is to expand its business and renew or restructure its company. One way of expanding this business can be done through the formation of a group of companies, where the formation or development of a group of companies itself cannot be separated from the business realities that happen when business management through the formation of a group of companies is considered to provide more economic benefits compared to a single company. In this regard, A. Goto revealed that the motivation to form a group of companies stems from an understanding that a group of companies is a coalition of companies that pursue common interests through a system that coordinates decisions made by the companies that join as members in it.²

The phenomenon of groups of companies is very common as the development of companies in the modern era in various countries. However, not all countries have regulations that specifically regulate the existence of groups of companies. In England, although there are no regulations that specifically regulate groups of companies, regulations regarding the existence of holding companies and subsidiaries are regulated in the Article 1162 of the Company Act 2006.³ Apart from that, there is a doctrine in company law, namely the “shadow director” doctrine, which can be applied in the construction of a group of companies in the context of “wrongful trading” where the holding company in *de facto* exercises control as regulated in the Article 214 of the *Insolvency Act* 1986.⁴ This is different from Germany, as stated by K. J. Hopt, who already has regulations that specifically regulate groups of companies in the 1965 Aktiengesetz that divides groups of companies into two forms, namely contrac-

¹ BROSCHE, N. Corporate Purpose: From a “Tower of Babel” Phenomenon towards Constructive Clarity. *Journal of Business Economics* [online]. 2023, vol. 93, pp. 567-568 [cit. 2024-04-29]. ISSN 1861-8928. Available at: <https://doi.org/10.1007/s11573-023-01137-9>.

² GOTO, A. Business Groups in a Market Economy. *European Economic Review* [online]. 1982, vol. 19, no. 1, p. 61 [cit. 2024-04-29]. ISSN 1873-572X. Available at: [https://doi.org/10.1016/0014-2921\(82\)90005-8](https://doi.org/10.1016/0014-2921(82)90005-8).

³ *Company Act 2006* [The United Kingdom].

⁴ *Insolvency Act 1986* [The United Kingdom].

tual groups of companies and *de facto* groups of companies.⁵ In connection with this, until the time this paper was written, Indonesia did not yet have laws and regulations that specifically regulate groups of companies. The regulatory framework for groups of companies in Indonesia still uses the Limited Liability Company Law as regulated in Law Number 40 of 2007 concerning Limited Liability Companies as amended by Law Number 6 of 2023 concerning Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 concerning Enactment of Work Creation Law Bill into Law (hereinafter referred to as the “UUPT”). Even though amendments have been made to the UUPT, the provisions in the UUPT are still limited to regulating limited liability companies and do not yet regulate groups of companies.

The existence of groups of companies and the single form company approach in limited liability company law has not yet regulated the existence of groups of companies consisting of two or more companies in the form of limited liability companies which considered to be companies, each of which is separate as an independent legal entity. The current limited liability company law considers that a limited liability company is a separate legal subject from the personal legal subject who is the founder or shareholder of the company (separate and distinct from its owner). This is in accordance with the doctrine of corporate separate legal personality, which essentially states that a company, in this case a company, has a personality that different from the person who created it. This doctrine became known as the doctrine of *separate legal entity*.⁶ On the other hand, from an economic perspective, a group of companies is a single unity,⁷ where the holding company as the central leader of the group of

⁵ HOPT, K. J. Groups of Companies – A Comparative Study on the Economics, Law and Regulation of Corporate Groups. *ECGI – Law Working Paper No. 286/2015* [online]. 2015, p. 10 [cit. 2024-04-29]. Available at: <https://ssrn.com/abstract=2560935>.

⁶ WAQAS, M. and Z. REHMAN. Separate Legal Entity of Corporation: The Corporate Veil. *International Journal of Social Sciences and Management* [online]. 2016, vol. 3, no. 1, p. 2 [cit. 2024-04-29]. ISSN 2091-2986. Available at: <https://doi.org/10.3126/ijssm.v3i1.13436>; BUDUSTOUR, Y. and L. BUDUSTOUR. *The Doctrine of Separate Legal Personality and It's Significance in International Business* [online]. 2023, p. 2 [cit. 2024-04-29]. Available at: <https://doi.org/10.2139/ssrn.4384050>; and HIDAYAT, M. H. Badan Hukum, Separate Legal Entity dan Tanggung Jawab Direksi dalam Pengelolaan Perusahaan. *National Journal of Law* [online]. 2019, vol. 1, no. 1, p. 68 [cit. 2024-04-29]. ISSN 2686-2778. Available at: <https://doi.org/10.47313/njl.v1i1.673>.

⁷ BACHMID, M. Liability of the Holding Company for Unlawful Actions in Group Companies: (Case Study of Supreme Court Decision Number 89 PK/Pdt/2010 concerning Violations

companies can provide instructions to subsidiaries in order to achieve the collective goals of the group of companies.

This is different from the single company approach as adopted in the UUPT which views holding company and subsidiaries as independent legal entities and each company should have the right to independently carry out legal actions in accordance with the interests of the company, but in a group of companies consisting of legally independent companies, there are subsidiaries controlled by the holding company.⁸ Even though the existence of a group of companies can make a positive contribution to the development of the economic sector and has been developing for a long time in Indonesia, there are no regulations that specifically regulate the relations between holding company and subsidiaries in the development of a group of companies. This condition causes the single company approach as regulated in the UUPT continue to be used and views subsidiaries as independent legal entities, without looking at the relationship that exists between the holding company and subsidiaries in the group of companies. This is in accordance with the opinion expressed by A. S. Achmad & A. A. Indradewi that based on the UUPT, the relationship between a holding company and subsidiaries in a group of companies is no more and no less than the relationship between a company and its shareholders, where any form of special relationship between a holding company and subsidiaries will not give rise to direct responsibility to the holding company for actions taken by its subsidiaries.⁹ In fact, this can be denied, where several studies show that subsidiaries as part of a group of companies lose their independence in making business decisions. Sulistiowati revealed that in a group of companies, the holding company is the shareholder and central leader in the group of companies, where as the central leader, the holding company has the power to con-

of Distribution). *Unram Law Review* [online]. 2021, vol. 5, no. 1, p. 30 [cit. 2024-04-29]. ISSN 2549-2365. Available at: <https://doi.org/10.29303/ulrev.v5i1.134>.

⁸ ARTSIDAKIS, S., Y. THALASSINOS, T. PETROPOULOS and K. LIAPIS. Optimum Structure of Corporate Groups. *Journal of Risk and Financial Management* [online]. 2022, vol. 15, no. 2, p. 1 [cit. 2024-04-29]. ISSN 1911-8074. Available at: <https://doi.org/10.3390/jrfm15020088>.

⁹ ACHMAD, A. S. and A. A. INDRADEWI. Hubungan Hukum antar Perusahaan dalam Sistem Perusahaan Grup Ditinjau dari Undang-Undang Nomor 40 Tahun 2007 Tentang Perseroan Terbatas. *Jurnal USM Law Review* [online]. 2021, vol. 4, no. 2, p. 481 [cit. 2024-04-29]. ISSN 2621-4105. Available at: <https://doi.org/10.26623/julr.v4i2.3912>.

trol its subsidiaries in order to achieve common goals as a single economic entity.¹⁰

Furthermore, T. Kishita & N. Hayashi revealed that in the context of a pure holding company, there are several factors that influence the extent of control by the holding company over its subsidiaries, namely: (1) the holding company's control over its subsidiaries will be greater, if the holding company has subsidiaries that carry out business activities which geographically and/or industrially close; (2) the holding company's control will be stronger if the holding company has subsidiaries that run businesses with similar technology; and (3) conversely, the holding company's control over its subsidiaries will be different if the holding company and subsidiaries operate in different industries.¹¹ Then according to D. Palombo, if a group of companies is a multinational company, usually there is a holding company that exercises direct or indirect control over the subsidiary. In this context, the holding company is domiciled in a different country from its subsidiaries, where he gave the example of the holding company being in England, while the subsidiaries are in Bangladesh, India, China and Brazil. This condition causes the legal responsibilities of the holding company and subsidiaries to be regulated based on the national laws where the company is located. This happens because being trapped in the national dimension, the law fails to capture the fundamental aspects of multinational businesses, since even though they are conglomerates of different domestic entities, they act as a single economic entity in the international arena.¹² This then creates a conflict between the principle of independence that a company should have as an independent legal entity and the actual control of the holding company over its subsidiaries as a single economic entity. In connection with this, we consider that the provisions in the UUPT are inappropriate to be applied for groups of companies and express our support for several stud-

¹⁰ SULISTIOWATI. Extension of Parent Company's Liability against Third Parties of Subsidiary Company. *Mimbar Hukum* [online]. 2011, p. 45 [cit. 2024-04-29]. ISSN 2443-0994. Available at: <https://doi.org/10.22146/jmh.16156>.

¹¹ KISHITA, T. and N. HAYASHI. Parental Control on Subsidiaries in Corporate Groups with a Pure Holding Company. *Review of Integrative Business and Economics Research* [online]. 2019, vol. 8, no. 3, p. 47 [cit. 2024-04-29]. ISSN 2304-1013. Available at: http://gmp-riber.com/uploads/3/4/9/8/34980536/riber_8-3_03_s18-214_43-53.pdf.

¹² PALOMBO, D. The Duty of Care of the Parent Company: A Comparison between French Law, UK Precedents and the Swiss Proposals. *Business and Human Rights Journal* [online]. 2019, vol. 4, no. 2, p. 266 [cit. 2024-04-29]. ISSN 2057-0201. Available at: <https://doi.org/10.1017/bhj.2019.15>.

ies which show the reality of control carried out by holding company over its subsidiaries within a group of companies, hence there is a need to limit holding company's control over its subsidiaries.

This paper is divided into four parts. First, it begins by discussing the development of groups of companies in Indonesia, by observing that although there are no statutory regulations that specifically regulate groups of companies, in reality the existence of groups of companies has existed as part of development of companies in Indonesia. Second, we will discuss the position of subsidiaries as limited liability companies, which are legal entities that equated with a person who should have independence in carrying out their business activities. Third, after looking at the legal independence that subsidiaries should have, it will describe the reality in the group of companies which shows the holding company's control over its subsidiaries. Fourth, the case that occurred in Indonesia was based on a court decision which has permanent legal force, where in this case it shows the existence of control by the holding company over the business activities of its subsidiaries. This description will be accompanied by criticism regarding the potential loss of independence that subsidiaries should have in carrying out their business activities, since there are no regulations regarding the limits of control by the holding company over its subsidiaries in making business decisions.

Results and Discussion

1 Group of companies in Indonesia

In order to maintain the existence of the company and be able to compete with other companies, one strategy that can be carried out by the company is to expand its business and renew or restructure its company. One way of expanding business can be done through the formation of a group of companies, where the formation or development of a group of companies itself cannot be separated from the business realities that occur when business management through the construction of a group of companies is considered to provide more economic benefits compared to a single company. In connection with this, K. Samphantharak states that the benefits that can be obtained through the formation of a group of companies come from flexibility in the composition of ownership and the limited liability in case a member of the group of companies goes bankrupt, therefore bankruptcy that happen on one of the members has no im-

pact towards the other members of the group of companies.¹³ Furthermore, through the formation of a group of companies, the holding company as the central leader in the group of companies obtains several benefits, for example improving cash flow management, reducing the volume of invested capital, improving the holding company's negotiating position, and diversifying risks (reducing liability risk).¹⁴ Meanwhile, in our opinion, one of the benefits that can be obtained through the formation of a group of companies is creating a new market, where companies that become member of a group of companies can carry out transactions between each other.

There are various reasons for establishing a group of companies, one of the most important reasons is development of company. At some point, a company might reach a size that makes it impossible (or at least difficult) to manage. To continue operating and competing in the market, companies must decide on a decentralized type of management, where one popular way to overcome this problem is to separate the various components of the company into independent economic entities and create a holding structure on this basis. This solution addresses the problems associated with excessive management concentration while allowing further coordination of the activities of the (now legally independent) subsidiary entities with the parent entity's influence on the subsidiary's decision making.¹⁵ In this regard, as explained previously, legally the existence of this group of companies has not been explicitly regulated in Indonesian laws and regulations. Even though there is no formal legitimacy in the provisions of statutory regulations, in practice there are many groups of companies in Indonesia, where the existence of the first group of companies in Indonesia has existed since the end of the 19th Century with the formation of Oei Tiong Ham Concern. Oei Tiong Ham Concern

¹³ SAMPHANTHARAK, K. *The Choice of Organization Structure: Business Group versus Conglomerate* [online]. 2007, pp. 5-6 [cit. 2024-04-29]. Available at: <https://doi.org/10.2139/ssrn.975549>.

¹⁴ FICBAUER, D. and M. REŽŇÁKOVÁ. Holding Company and Its Performance. *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis* [online]. 2014, vol. 62, no. 2, p. 336 [cit. 2024-04-29]. ISSN 2464-8310. Available at: <https://doi.org/10.11118/actaun.201462020329>.

¹⁵ GAJEWSKI, D. The Holding Company as an Instrument of Companies' Tax-financial Policy Formation. *Contemporary Economics* [online]. 2013, vol. 7, no. 1, p. 77 [cit. 2024-04-29]. ISSN 2300-8814. Available at: <https://doi.org/10.5709/ce.1897-9254.75>.

(OTHC) is a conglomerate founded by a Chinese businessman born in Semarang, Oei Tiong Ham in 1893.¹⁶

Company development as the reason for the formation of subsidiary as described previously, occurred in one of the largest group of companies in Indonesia, namely PT Astra International Tbk., which was founded in Jakarta in 1957 as a general trading company under the name Astra International Inc. which then in 1990, the name was changed to PT Astra International Tbk. Astra then developed its business in various sectors, including automotive; financial services; heavy equipment, mining, construction & energy; agribusiness; infrastructure and logistics; information technology; and property. Until now, Astra has developed into a group of companies that carries out business operations spread throughout Indonesia, managed through 270 subsidiaries, joint ventures and associated entities, and supported by 198,203 employees (Astra Group Profile).¹⁷ A similar condition happened to PT Bakrie & Brothers Tbk, which was founded in 1942,¹⁸ that established a simple trading business which later developed into a group of companies in Indonesia. Related to this, there are several benefits that can be obtained through the formation of a group of companies:¹⁹

- a. Separation of assets and liabilities. Company's assets cannot be claimed by other companies, nor is the liability on the poor financial performance of one company to be carried by another company, even though they are part of the same group of companies.
- b. Diverse investment opportunities. Investors can assess the performance of each company that is part of a group of companies, so that they can make the right investment decisions. Apart from that, investors' liabilities are also limited since the performance of one compa-

¹⁶ FAKHRIANSYAH, M. Bisnis Raja Gula Dunia dari Semarang Ini Hancur dalam Semalam. In: *CNBC Indonesia* [online]. 2023-07-06 [cit. 2024-04-29]. Available at: <https://www.cnbcindonesia.com/entrepreneur/20230705123014-25-451513/bisnis-raja-gula-dunia-dari-semarang-ini-hancur-dalam-semalam>.

¹⁷ About Astra. In: *PT Astra International Tbk* [online]. 2024 [cit. 2024-04-29]. Available at: <https://www.astra.co.id/about-astra>.

¹⁸ History. In: *Bakrie & Brothers* [online]. 2024 [cit. 2024-04-29]. Available at: <https://bakrie-brothers.com/discover-bakrie/history/>.

¹⁹ PAI, V. Group Companies – Analysis of the Concept and Its Implication in India, UK, and US with Special Reference to Inter Corporate Transactions of Small Companies under Companies Act, 2013 – Thresholds and Exemptions: A Cross-jurisdictional Analysis. *Journal of Legal Research and Juridical Sciences* [online]. 2022, vol. 1, no. 2, pp. 79-80 [cit. 2024-04-29]. ISSN 2583-0066. Available at: <https://jlrjs.com/wp-content/uploads/2022/01/10.-Vedanta-Pai.pdf>.

- ny will not have an impact on other companies even though they are members of the same group of companies.
- c. Loans and guarantees. Companies can obtain loans from other companies that are members of the same group of companies with lower interest rates than loans from banks and other financial institutions. In addition, one company can be a guarantor for debts belonging to other companies that are part of a group of companies.
 - d. Better management. Each company is a separate legal entity, but within a group of companies, decentralization can be carried out to create a better control and coordination over each company's operations and governance.
 - e. Company sales. A company may be established in a group structure with the aim of being sold in the future. This does not interfere with the functioning of other companies and the funds from the sale can be distributed among members within the group.
 - f. Tax benefits. Often time in various jurisdictions, there are certain tax exemptions for transactions between members of a group of companies, hence the companies not only will obtain profit from the transaction but also at a lower cost than usual.
 - g. Centralized asset management. The holding company can own property or intellectual property that can be rented or licensed to other companies that are part of the same group of companies.

Even though the existence of a group of companies has not been explicitly regulated, the existence of a holding company can be established by forming a new company, taking over shares (acquisition) or by separation as regulated in the UUPT.²⁰ Furthermore, according to M. Fuady, the process of forming a group of companies can be carried out using three procedures, namely (1) residual procedure: the original company is divided according to each business sector, where then the original company becomes a holding company that owns shares in the split company and other companies if any, (2) full procedures: in the residual process the holding company is an independent company that has just been formed or an independent company that already existed and is still under the same ownership (affiliated) or through an acquisition carried out by companies that are not related to each other, and (3) programmed procedures: In programmed procedures, the established company is founded and prepared from the beginning to become a holding company in the

²⁰ Law No. 40 of 2007 concerning Limited Liability Companies [Republic of Indonesia] [2007-08-16].

construction of a group of companies, so that when the company expands or develops its structure it will be accompanied by the formation of new companies or acquiring other existing companies.²¹

2 Position of subsidiary company as an independent legal entity

Limited liability company is a legal entity,²² therefore a subsidiary company in the form of a limited liability company which is part of a group of companies is an independent legal entity. The significance of a limited liability company as a legal entity is that the limited liability company has rights, obligations and assets in its own name that separate from those of its shareholders or management, where the founders or shareholders also have limited liability. This is different from the form of unlimited liability in sole partnership and partnership.²³ Apart from that, according to the basic principles of law, a business entity with the form of a legal entity has the privilege and authority to run its business, acquire and own assets, carry out transactions, and can make lawsuits and be sued in its own name, where this does not apply to companies that not a legal entity. As a legal entity, the subsidiary company in the form of a limited liability company obtains legal entity status based on a ministerial decision regarding ratification of legal entity in the form of company,²⁴ where the characteristic of a limited liability company as a legal entity according to Agus Budiarto as quoted by M. S. Prabowo & Y. Z. Umami is by the separation of assets of a limited liability company with its founders, have its

²¹ FUADY, M. *Hukum Perusahaan: Dalam Paradigma Hukum Bisnis*. 1st ed. Bandung: PT Citra Aditya Bakti, 2018, p. 84. ISBN 978-979-491-132-7.

²² PURANTO, H. Y. Juridical Review of Individual Companies and Limited Liability Companies. *Jurnal Cakrawala Hukum* [online]. 2022, vol. 13, no. 3, p. 263 [cit. 2024-04-29]. ISSN 2598-6538. Available at: <https://doi.org/10.26905/idjch.v13i3.6086>.

²³ BLAIR, E. S., T. M. MARCUM and F. F. FRY. The Disproportionate Costs of Forming LLCs vs. Corporations: The Impact on Small Firm Liability Protection. *Journal of Small Business Strategy* [online]. 2009, vol. 20, no. 2, pp. 26-27 [cit. 2024-04-29]. ISSN 2380-1751. Available at: <https://libjournals.mtsu.edu/index.php/jsbs/article/view/127>; and LASNITA, F. A. and M. A. R. UTAMA. Authorized Failure: How is Company Status?. *Indonesian Journal of Advocacy and Legal Services* [online]. 2020, vol. 2, no. 2, pp. 230-231 [cit. 2024-04-29]. ISSN 2686-2611. Available at: <https://doi.org/10.15294/ijals.v2i2.37721>.

²⁴ BUTAR BUTAR, E. Juridic Review On-line Approval of the Deed of Establishment of a Limited Company through Sisminbakum. *Journal of Law Science* [online]. 2020, vol. 2, no. 2, p. 62 [cit. 2024-04-29]. ISSN 2684-9658. Available at: <https://doi.org/10.35335/jls.v2i2.1617>.

own goals and interests, have its own management, and being able to carry out legal actions in their own name.²⁵

In connection with the characteristics of a limited liability company as a legal entity as described above, a subsidiary in the form of a limited liability company should have its own objectives and interests and have independence in making business decisions. Based on the principle of independence of legal entity, then legally in principle (conventionally), the holding company does not have the legal authority to interfere with the management and policies of its subsidiaries, where according to M. Fuady in legal theory (conventionally), the involvement of holding company who is also a shareholder in a subsidiary is only possible in the following terms:²⁶

- a. through directors and commissioners appointed by the holding company as long as it does not conflict with the company's articles of association;
- b. through contractual relationships as long as it does not conflict with the company's articles of association.

Legal entities must have their own objectives that are clearly formulated. Even though they sometimes intersect, the goals of a legal entity are not the personal goals of its members. Strictness in the formulation of the objectives of a legal entity is highly necessary to distinguish it from the personal objectives of its members. In addition, since a legal entity's legal actions are always executed by its person (management), clearly formulating its objectives is a necessity.²⁷ However, it is also important to look at the independence possessed by the subsidiary, which is interpreted as the extent to which the subsidiary can maintain its independence as a legal entity that independent from influence or interference that can be carried out by the holding company as the central leader in the group of companies as well as the shareholder in the subsidiary.

²⁵ BUDIARTO, A. *Kedudukan Hukum dan Tanggung Jawab Pendiri Perseroan Terbatas* [The Legal Position and the Responsibility of Limited Liability Founders]. 1st ed. Jakarta: Ghalia Indonesia, 2002. 234 p. ISBN 979-450-415-7; and PRABOWO, M. S. and Y. Z. UMAMI. The Existence of a Company in the Society and Its Legality in Indonesian Law. *Journal of Private and Commercial Law* [online]. 2018, vol. 2, no. 1, p. 44 [cit. 2024-04-29]. ISSN 2599-0306. Available at: <https://doi.org/10.15294/jpcl.v2i1.13962>.

²⁶ FUADY, M. *Hukum Perusahaan: Dalam Paradigma Hukum Bisnis*. 1st ed. Bandung: PT Citra Aditya Bakti, 2018, p. 133. ISBN 978-979-491-132-7.

²⁷ BUDIONO, A. R. *Pengantar Ilmu Hukum*. 1st ed. Malang: Bayumedia Publishing, 2005, p. 63. ISBN 979-3695-48-X.

3 Reality in the control of subsidiary by holding company

A company is said to be independent if it is not influenced and controlled by other entities.²⁸ The independence that a subsidiary should have as an independent legal entity is in conflict with the existence of its holding company in the group of companies. In a group of companies, the holding company has the duality of being a shareholder in the subsidiary company and being the central leader of the group of companies.²⁹ However, based on the applicable provisions in the UUPT, it only looks at the existence of the holding company as a shareholder in the subsidiary company, this happens because the UUPT does not yet regulate the existence and relationship between the holding company and subsidiaries in the group of companies.

According to F. A. Gevurtz, the relationship between a holding company and a subsidiary is a relationship where one company has all or part of the controlling shares in another company or through joint ownership where the same individual, entity or cohesive group has a controlling interest which is then called as corporate group or affiliated corporations,³⁰ in this paper are called group of companies. The role of the holding company as a central leader in the group of companies illustrates the possibility of the holding company in exercising its rights in the form of direction to its subsidiaries which are decisive in nature, with the holding company's influence in the group of companies being able to reduce the rights or dominate the rights of other companies (subsidiaries). This is in line with the opinion of Bonbright and Means who define a holding company as a company that has a position to control or significantly influence the management of one or more other companies, through ownership of shares in that company.³¹

²⁸ MOISEJEVAS, R. and D. URBONAS. Problems Related to Determining of a Single Economic Entity under Competition Law. *Yearbook of Antitrust and Regulatory Studies* [online]. 2017, vol. 10, no. 16, p. 109 [cit. 2024-04-29]. ISSN 2545-0115. Available at: <https://doi.org/10.7172/1689-9024.yars.2017.10.16.5>.

²⁹ BADRIYAH, S. M., S. MAHMUDAH and M. DJAIS. Legal Impacts from the Bankruptcy of Subsidiary Company to Holding Company as the Corporate Guarantor. *IOP Conference Series: Earth and Environmental Science* [online]. 2018, vol. 175, no. 1, p. 5 [cit. 2024-04-29]. ISSN 1755-1315. Available at: <https://doi.org/10.1088/1755-1315/175/1/012214>.

³⁰ GEVURTZ, F. A. Groups of Companies. *The American Journal of Comparative Law* [online]. 2018, vol. 66, no. 1, p. 181 [cit. 2024-04-29]. ISSN 2326-9197. Available at: <https://doi.org/10.1093/ajcl/avy015>.

³¹ ECHANIS, E. S. Holding Companies: A Structure for Managing Diversification. *Philippine Management Review* [online]. 2009, vol. 16, p. 1 [cit. 2024-04-29]. ISSN 2094-3393. Available at: <https://journals.upd.edu.ph/index.php/pmr/article/view/1794>.

The holding company is considered to carry out the function of central leadership with the authority of the holding company to control subsidiary companies collectively as a management unit (R. S. Devi).³² The control exercised by the holding company over subsidiary companies is a fact, where the holding company has an interest in exploiting all the resources in its possession in order to achieve the interests of the group of companies as an economic unit. In the business competition law that applies in the European Union, there is a doctrine known as “single economic entity.” Unfortunately, this doctrine does not generally apply in company law even though there is the potential for holding company control over subsidiaries for the benefit of the entire group of companies as an economic unit. The fact of control carried out by the holding company also reflects the business reality of a group of companies which have the character of an economic unit, where, in this regard, Sulistiowati believes that in general the degree of control from the holding company over its subsidiary companies can be divided into two, as follows:³³

- a. The degree of control is the domination of the holding company over its subsidiary company, when the holding company gives instructions that must be carried out by the subsidiary company, thereby causing all management of the subsidiary company to be aimed at the interests of the group of companies. It is as if the subsidiary company has lost its independence to exercise its own management for the interests of the concerned subsidiary company.
- b. On the other hand, the degree of control is the influence of the holding company on its subsidiary companies, when the holding company formulates strategic policies to support the management of the subsidiary company, while the subsidiary company has independence in managing the company’s daily operational activities.

4 Cases in Indonesia

One case that shows the reality of control carried out by the holding company over its subsidiary companies that are members of the group of companies can be seen in the case of PT Effem Foods Inc. and PT Effem

³² DEVI, R. S. Status Hukum dan Tanggung Jawab Anak Perusahaan PT (Perseroan Terbatas) dalam Suatu Kelompok Perusahaan. *Jurnal Ilmiah Kohesi* [online]. 2020, vol. 4, no. 1, pp. 86-87 [cit. 2024-04-29]. ISSN 2655-4429. Available at: <https://kohesi.sciencemakariz.org/index.php/JIK/article/view/113>.

³³ SULISTIOWATI. *Tanggung Jawab Hukum pada Perusahaan Grup di Indonesia*. 1st ed. Jakarta: Erlangga, 2013, p. 37. ISBN 978-602-241-752-1.

Indonesia against PT Smak Snak which has been examined and decided by the Supreme Court at the Judicial Review level. In this case PT Effem Foods Inc. is the holding company while PT Effem Indonesia is a subsidiary, where the shares of PT Effem Indonesia is owned by PT Effem Foods Inc. as the holding company by as much of 90 % and the remaining 10 % is owned by Effem Inc. which is also an affiliate company of PT Effem Foods Inc.³⁴

This case started when PT Smak Snack which is the sole distributor of PT Effem Foods Inc. based on the distribution agreement, feels disadvantaged by the actions taken by PT Effem Foods Inc. and PT Effem Indonesia. This action began when PT Effem Foods Inc. established a subsidiary company, namely PT Effem Indonesia. In 1999 when the distribution agreement was still in effect, PT Effem Foods Inc. appointed PT Effem Indonesia to market its products in Indonesia without notification and approval from PT Smak Snack. Next PT Effem Foods Inc. and PT Effem Indonesia in various ways began to diminish the role of PT Smak Snack as the sole distributor who usually imports products directly from PT Effem Foods Inc., but since 2001 PT Smak Snack must purchase products from PT Effem Indonesia. Other than that the area of product distribution for PT Smak Snack, which originally covered the entire territory of Indonesia, began to be narrowed down unilaterally by PT Effem Foods Inc., became only for the area of South Jakarta, Bogor and Bali, even then PT Smak Snack as the sole distributor was asked to become a mere distributor under the multi-distributor system.³⁵

Even in May 2003, PT Effem Indonesia sent notifications to several customers of PT Smak Snack, where PT Effem Indonesia asks customers to register the products under the name of PT Effem Indonesia so that PT Effem Indonesia can send goods directly to customers. In this notification PT Effem Indonesia also stated that this request by PT Effem Indonesia to its customers is a follow-up to the agreement between PT Effem Indonesia and PT Smak Snack, even though in fact the statement made by PT Effem Indonesia is totally misleading, because PT Smak Snack never gave approval to PT Effem Indonesia.³⁶

PT Effem Indonesia without approval from PT Smak Snack, has also sent notifications to several customers stating that starting April 1, 2004,

³⁴ *Decision of the Supreme Court of the Republic of Indonesia Ref. No. 89 PK/Pdt/2010.*

³⁵ *Decision of the Supreme Court of the Republic of Indonesia Ref. No. 89 PK/Pdt/2010.*

³⁶ *Decision of the Supreme Court of the Republic of Indonesia Ref. No. 89 PK/Pdt/2010.*

product distribution for the Jabotabek area which usually was carried out by PT Smak Snack, will be taken by PT Effem Indonesia. Until at last, PT Effem Indonesia even unilaterally stopped product procurement and subsequently several large-scale customers with significant contribution to PT Smak Snack's revenue (key accounts), for example Carrefour, Makro, Hero Supermarket, Matahari, Indo Group and Alfa Group, which are usually managed by PT Smak Snack was unilaterally transferred to to PT Effem Indonesia without approval from PT Smak Snack and ultimately managed directly by PT Effem Indonesia.³⁷ In this case, the Supreme Court in its decision stated that it rejected the request for judicial review submitted by PT Effem Foods Inc. and PT Effem Indonesia, so that the Supreme Court's decision at the Judicial Review level strengthens the judge's decision at the previous level which essentially punished PT Effem Foods Inc. and PT Effem Indonesia to be jointly and severally responsible for paying the losses suffered by PT Smak Snack.

The unlawful acts committed by PT. Effem Indonesia which caused losses to PT. Smak Snak shows the control carried out by PT. Effem Foods Inc. as the holding company for PT. Effem Indonesia as a subsidiary in making business decisions, so in this case PT. Effem Indonesia as a subsidiary company seems to have lost its independence in making business decisions. The degree of control exercised by the holding company over the subsidiary company as described above, shows that in the construction of a group of companies the holding company can influence the subsidiary company through the formulation of strategic policies to support the management of the subsidiary company, even the holding company can dominate the subsidiary company which causes the subsidiary company to seem as losing its independence. This is absolutely contrary to the provisions in the UUPT, where all company organs, including shareholders, commissioners and directors, exercise their authority solely in the interests of the company.

This also shows that the reality in the construction of a group of companies allows the holding company as the central leader in the group of companies to be involved in making business decisions for subsidiary companies, and the holding company can even dominate through controlling and coordinating all subsidiary companies as an economic unit, where this issue is still not covered in the UUPT regulations. The dominance of the holding company in controlling the subsidiary company, so

³⁷ *Decision of the Supreme Court of the Republic of Indonesia Ref. No. 89 PK/Pdt/2010.*

that the subsidiary company seems to have lost its independence, gives rise to legal problems related to the independence that the subsidiary company in the form of a limited liability company should have as a legal entity to follow or not follow instructions from the holding company.

Conclusions

The results of the research show that subsidiaries in the form of limited liability companies should have independence in making business decisions, where business decisions must be taken based on their interests, because basically the reason for establishing a company is to gain profit. In this case the business decisions taken by the subsidiary company should aim to provide benefits for the subsidiary. Apart from that, the provisions of the UUPT also regulate that shareholders, directors and commissioners who are organs of a limited liability company have the obligation to carry out all their authority and responsibilities in the interests of the limited liability company.

However, in groups of companies there is great potential for interference from holding company in the business decisions taken by its subsidiaries. It then creates a conflict between the principle of independence that a company should have as an independent legal entity and the reality of control exercised by the holding company over its subsidiaries, where the UUPT which is the legal basis for limited liability companies in Indonesia does not yet cover this issue. This is because the UUPT does not yet regulate the existence and relationship between holding company and subsidiary companies within a group of companies, and views holding company only as shareholders in subsidiaries.

The reality of the holding company's involvement in its subsidiaries is demonstrated in the case as described in the discussion, where the holding company exercises control over its subsidiaries, so that the subsidiaries only become agents of the holding company and lose their independence. In this case it is also seen that the abuse of control authority carried out by the holding company caused losses to third parties and was an unlawful act. Based on this, we are of the opinion that the amount of control authority that the holding company has over its subsidiaries should be implemented by taking into account several things, including: 1) the control does not conflict with the law; 2) does not cause losses to subsidiaries; and 3) does not harm the interests of third parties. These three things can be used as limits in exercising the control by the holding company over its subsidiaries. This thinking can be applied as the basis

for the formation or renewal of the UUPT as an effort to reform company law in Indonesia.

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