NOMINEE SHAREHOLDER POSITION IN INDONESIAN POSITIVE LAW

(KEDUDUKAN *NOMINEE SHAREHOLDER* DALAM HUKUM POSITIF INDONESIA)

Christiari Gratiani Gamaitarak
Program Magister Fakultas Hukum Universitas Pelita Harapan
E-mail : christiarigamaitarak@gmail.com

Elvi Chaerani
Program Magister Fakultas Hukum Universitas Pelita Harapan
E-mail: elvi.chaerani@gmail.com

Borgias Punto Billyarta
Kantor Advokat Joko Yunanto & Partners
Program Magister Fakultas Hukum Universitas Pelita Harapan
E-mail: puntoborgias1@gmail.com

ABSTRACT

Economic development in Indonesia which is experiencing growth with the presence of integrating foreign capital in the business sector, makes foreign investors who wants to carry out business activities in Indonesia wants overall ownership or control of the business being carried out. These restrictions are regulated in Law Number 25 of 2007 concerning Investment, Law Number 40 of 2007 concerning Limited Liability Companies, and Burgelijk Wetboek (BW). The way to overcome these difficulties, foreign parties usually borrow names (nominee) in share ownership (nominee shareholder) by entering into a nominee arrangement. In this paper, we will discuss about the concept of the nominee shareholder and the position of the nominee shareholder according to Indonesian positive law.

Keywords: nominee, nominee shereholder, nominee arrangement

ABSTRAK

Perkembangan perekonomian di Indonesia yang mengalami pertumbuhan dengan hadirnya penanaman modal asing dalam bidang usaha, membuat investor asing yang ingin melakukan kegiatan usaha di Indonesia menginginkan kepemilikan atau penguasaan secara keseluruhan atas usaha yang dilakukan. Pembatasan tersebut diatur dalam Undang- Undang Nomor 25 Tahun 2007 tentang Penanaman Modal, Undang- Undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas, serta *Burgelijk Wetboek (BW)*. Cara untuk mengatasi pembatasan- pembatasan tersebut, pihak asing biasanya melakukan pinjam nama (*nominee*) dalam kepemilikan saham (*nominee shereholder*) dengan melakukan perjanjian pinjam nama (*nominee arrangement*). Dalam penulisan ini akan dibahas tentang konsep *nominee shereholder* dan kedudukan *nominee shareholder* menurut hukum positif Indonesia.

Kata kunci: *nominee*, *nominee shereholder*, *nominee arrangement.*

I. INTRODUCTION

The economic development of a country, especially developing countries, is largely determined by the growth of foreign investment. The flow of foreign investment itself fluctuates, depending on the existing investment climate in the country. Foreign investment itself is an investment activity to conduct business in the territory of the Republic of Indonesia carried out by foreign

investors based on an agreement (contract). Investment is the activity of investing money or depositing capital to increase or at least maintain the value of capital.[1]

The provisions in Article 5 paragraph (2) of Law Number 25 of 2007 concerning Investment (hereinafter referred to as the PM Law) explain that in the case of foreign investment, investors are required to use a business entity (Limited Liability Company) based on Indonesian law and domiciled within the territory of the country. Republic of Indonesia. A limited liability company is a form of legal entity and this form of business entity is the one most widely used in the business world today. A limited liability company is a legal entity, meaning an entity that meets the scientific requirements to support rights and obligations.[2]One of the reasons why business actors use limited liability companies as business entities is because shareholders who include their capital in the form of a company are only responsible to the extent of the capital included which becomes the company's assets.

The provisions in Article 7 paragraph (1) of Law Number 40 of 2007 concerning Limited Liability Companies (from now on referred to as the Regulations regarding PT) explain that one of the requirements for establishing a limited liability company is that it be established by two or more people with a notarial deed made in Indonesian. In principle, the establishment of a limited liability company must be carried out with an agreement of at least two founders, both Indonesian citizens and foreign citizens.[3]The initial capital participation in establishing a PT is divided into shares where each person (founder) of the PT will receive shares by the agreed share price and shares issued, the percentage of shares owned is by the amount of capital participation which will hereinafter be referred to as shareholders.

The provisions in the Regulations regarding PT do not regulate the requirements for becoming a shareholder so that, apart from being owned directly by the shareholder, share ownership in the company is also often held in nominee form. A nominee is a person or individual who is specifically appointed to act on behalf of the person who appointed him (beneficiary), to carry out a certain act or legal action. The provisions in the Regulations regarding PT do not prohibit it, so in practice, it is often encountered and it is not uncommon for disputes to arise from nominee practices.

The Regulations regarding PT also does not prohibit the use of nominee shareholders, so it can be said that there is a vacuum in the norms of the Regulations regarding PT. In practice, this has resulted in many local and

[1]Ida Bagus Rachmadi Supancana, *Kerangka Hukum dan Kebijakan Investasi Langsung di Indonesia*, (Jakarta: Ghalia Indonesia), 2006, p. 1.

[2]Zaeni Ashhadie, 2006, *Hukum Bisnis*, PT Raja Grafindo Persada, Jakarta, p. 41.

[3]Mulhadi, 2010, *Hukum Perusahaan Bentuk-Bentuk Badan Usaha di Indonesia*, Ghalia Indonesia, Bogor, p. 84.

foreign investors using the nominee concept by creating a nominee shareholder structure, one of which is to fulfill the requirements for the establishment of a PT the use of nominees is also used in restricted business fields, especially for Foreign Direct Investment (PMA).

Examples of use cases *include shareholder*s in limited liability companies this happened to PT Aldevco (PT Aluminum Development Corporation) which was founded in 1988 by AR Soehoed, a former minister in the era of President Soeharto. PT Aldevco was founded by AR Soehoed, former Minister of Industry of the Republic of Indonesia from 1978-1983, together with two of his friends, Leon Harun Iskandar Sumantri and Paul Sumadiono Samadikun. On February 29, 1988, a statement letter was made which was signed by the founders of PT Aldevco, namely AR Soehoed, Leon Harun Iskandar, and Paul Sumadiono that all PT Aldevco shares belonged to the government. In this case, the founders of the company only borrow the name (nominee arrangement) so that in the future the shares will be handed over to the government. Then, on October 20 2011 Alm. AR Soehoed has also made Will Deed No. 4 before Notary Mintarsih Natamihardjah whose will states that all shares and assets of PT. Aldevco is owned by the Government where AR Soehoed, Leon Harun Iskandar Sumantri, and Paul Samadiono Samadikun only borrowed their names (Nomine Arrangement) and later PT shares. Aldevco will be handed over to the Government of the Republic of Indonesia, in the will the deceased also appointed the President Director of the company, Middyningsih as the executor of the late AR Soehoed's will. With the latest records, AR Soehoed owns 624 shares, while Trenggana only owns 1 share with a share price of Rp. 1 million per share. PT Aldevco, which originally belonged to the shareholders, then became the property of the government, which in this case was represented by the Directorate General of State Assets, Ministry of Finance. Then from this, a dispute arose between the Government of the Republic of Indonesia and two heirs of AR Soehoed, who were the biological children of the late AR Soehoed. The two heirs are Conny Zahara Gondoimah and Syarif Anwar Soehoed who have filed a civil lawsuit at the South Jakarta District Court (PN), with number 341/Pdt.15/2017/PN.JKT-SEL dated May 24, 2017. Meanwhile, the defendants are the government and five directors from PT Aldevco.

Nominee practice is generally carried out by agreeing between the beneficiary and the nominee by making a nominee arrangement as a binding relationship between the rights and obligations between the two. From the description above, a question arises about the concept of the nominee arrangement and the validity of the nominee arrangement in Indonesian law.

II. RESEARCH METHODS

The research method used in writing this journal is normative juridical, namely research that focuses on examining the rules or norms in applicable positive law. The definition of the type of normative juridical research is research that aims to provide a systematic exposition of the legal rules that regulate certain areas of law, analyzing the relationship between one legal rule and another.

The approach used in this research is a statutory approach and a conceptual approach. The legislative approach is an approach taken by examining all laws and regulations related to legal issues. As well as studying whether there is consistency and conformity between laws and other laws or between regulations and laws.

III. RESULTS AND DISCUSSION

3.1 *Nominee shareholder*

According to Black's Law Dictionary, the meaning of nominee is "A person appointed to act in place of another usually in a very limited way." "A party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." A nominee is defined as someone appointed to act for another person as his or her representative in a somewhat limited sense. It can be used to signify an agent or trustee. However, it has no connotation other than acting for another person, representing another person, or as the recipient of another person's gift as well as distributing funds or capital for the benefit of another person.

According to the Definitive Dictionary of Law Enforcement, a nominee shareholder can be defined as "a company member who holds the shares registered in his name for the benefit of another. The identity of the person with the true interest may be subject to disclosure and to investigation under the Companies Act."[4]From this definition, it can be interpreted that every shareholder is appointed to represent the interests of the original owner of the shares, and where the shareholder will act for and on behalf of the original owner of the shares with the same rights and obligations as shareholders in general by company law. applicable.

Looking at the glossary of the Supreme Audit Agency's regulations also explains the meaning of Nominee shareholders and/or shareholders for other people and/or also known as dummy shareholders, namely shareholders of a company who have no interest or benefit from it, but only for the benefit of other people.[5]These three definitions explain that every person appointed as a nominee shareholder will act for and on behalf of the original owner with the same rights and obligations as shareholders in general and for the benefit of the original owner (beneficiary)

[4]Graham Gooch and Micheal Williams, Dictionary of Law Enforcement, Oxford, p. 254.

[5]JDIH Glossary, BPK RI, accessed 15 May 2023, https://peraturan.bpk.go.id/Home/Glosarium?huruf=N&page=2

of the shares. Actions that can be taken by nominee shareholders for the benefit of the original owner (beneficiary) are generally regulated in advance in a nominee arrangement.

Nominee shareholder concept

The nominee concept is a legal relationship between a nominee who is registered as legally valid and (the beneficial owner) who enjoys every profit and benefit from the actions carried out by the nominee which arise through an agreement (arrangement), where there are two parties in the nominee arrangement. which gives rise to two types of ownership, namely the registered and legally recognized owner (legal owner/juridische eigendom) and the actual owner (beneficiary/economische eigendom) who enjoys the profits and losses arising from the objects owned by the nominee.[6]

De jure, the nominee is the holder of legal rights to the object, which of course has the right to transfer, sell, encumber, guarantee, and take any action on the object in question, while the de facto beneficiary is not legally recognized as the owner of the object. In practice, the formation of nominee shareholder structures in Indonesia can be categorized into 2 (two) types, namely:

1. Direct Nominee Structure

A direct nominee structure is a nominee structure that is formed by directly making an agreement and/or statement confirming that share ownership in a limited liability company is for and on behalf of another person. This structure is generally formed by making a nominee agreement or nominee statement.[7]This direct nominee structure in the formation of the nominee structure is also equipped with absolute power given by the nominee to the beneficiary to carry out all actions related to the shares held by the nominee in the company, including attending the General Meeting of Shareholders (GMS) held by the Company, receive dividends, and/or transfer rights to shares.

2. Indirect nominee structure (indirect nominee structure)

An indirect nominee structure is a nominee structure that is formed by making several multi-layered agreements with the aim that the beneficiary can indirectly control and receive benefits from the share ownership.[8]In carrying out an indirect nominee structure, generally, a layer of agreement will be created after making the nominee arrangement, namely by forming agreements as follows:[9]

[6]Lucky Suryo Wicaksono, " *Kepastian Hukum Nominee Agreement Kepemilikan Saham Perseroan terbatas* ", Ius Qua Iustum Law Journal, Vol.23 No.1, January 2016, p. 48.

[7]Syahrijal Syakur, *Urgensi Pengaturan Nominee Agreement Dalam Rangka Pencegahan Tindak Pidana Pencucian Uang*, (Jakarta: PPATK), 2020, p. 26.

[8]*Ibid.,*p. 28.

[9]David Kairupan, *Aspek Hukum Penanaman Modal Asing Di Indonesia*, (Jakarta: Kencana, 2013), p. 92-93.

a. Credit Agreement, between the principal investor as creditor and nominee shareholder where the loan will be used by the debtor to pay the share capital deposit in the company in question;
b. Share Pledge Agreement between the principal investor as the pledgee and the nominee shareholder (pledgor), where shares issued for deposits made using loan money are pledged by the nominee shareholder to the principal investor.
c. Cession Agreement on Dividends between the principal investor and nominee shareholder, where the rights to dividends distributed by the company to nominee shareholders as shareholders are transferred to the principal investor.
d. Absolute Power of Attorney for a GMS in which the nominee shareholder as a shareholder in the company gives absolute power to the principal investor to be able to request a GMS to be held, attend, and vote at the AGM of the company concerned.
e. Absolute Power of Attorney to Sell Shares given by the nominee shareholder to the principal investor, where if certain events occur, the principal investor can sell the shares owned by the nominee shareholder.

From several agreements made, if they are connected they will produce nominee shareholders so that the beneficiary can control the nominee to carry out certain actions or business activities on behalf of the beneficiary's orders and interests.

The characteristics or characteristics of using the share nominee concept include:[10]

a. there are 2 (two) types of ownership, namely legal ownership (juridische eigendom) and beneficial ownership (economische eigendom);
b. the name and identity of the nominee will be registered as the owner of the shares in the Company's Shareholders Register in terms of share ownership by the nominee;
c. The nominee receives a fee of a certain amount as compensation for using his or her name and identity for the benefit of the beneficiary.

Position of nominee shareholders

The concept of nominee arrangement does not receive recognition in the legal system in Indonesia, especially in nominee shareholders in Limited Liability Company legal entities. The concept of share ownership adopted in the Regulations regarding PT is absolute share ownership (dominium plenum). The Dominium Plenum concept is reflected in

[10]Gunawan Widjaja, " *Nominee Shareholders Dalam Perspektif UUPT Baru dan UU Penanaman Modal Baru Serta Permasalahannya Dalam Praktik*", dalam Jurnal Hukum dan Pasar Modal, Volume III Edition 4 August-December 2018, p. 43.

Article 52 paragraph (2) of the Regulations regarding PT which states that "Each share gives its owner indivisible rights." However, in reality, nominee shareholders are still used by foreign investors to invest directly by creating nominee arrangements.

In particular, the beneficiary/trustee structure is a product of English common law and a concept that is not directly recognized in civil law countries, including under the Indonesian legal system. However, even though it may be a matter of substance, a similar arrangement can be implemented in Indonesia based on the Third Book of Burgerlijk Wetboek (BW) which regulates provisions regarding contract law, which adheres to an open system.[11]This system allows parties to make agreements based on their needs and does not conflict with the principles in the agreement, other than those recognized in the BW.

*Nominee Arrangement*can be declared valid, if it fulfills the conditions for the validity of the agreement according to Article 1320 BW, namely:

a) There must be an agreement between the parties agreeing;
b) Agreements are made by competent people;
c) There are certain objects regulated in the agreement; And
d) Agreements are made for acceptable reasons (halal causes).

The first and second requirements are subjective for the agreement to occur because they relate to the subject of the agreement. Meanwhile, the last two conditions are objective because they relate to the object of the agreement. Violation of subjective terms can cause an agreement to be canceled. In that case, either party can ask the court to cancel the agreement. On the other hand, violations of objective conditions cause the agreement to become null and void. In this way, the agreement is deemed to have never existed and all legal actions will be returned to their original state before the agreement.

Article 1320 paragraph (4) BW states that one of the conditions for the validity of an agreement is if it is made for "a lawful cause". Article 1337 BW determines that "a cause is prohibited, if it is prohibited by law, or if it is contrary to good morality or public order." It can be concluded that as long as it is not due to a cause (causa) that is halal (prohibited) by law, then everyone is free to agree.

The nominee arrangement must not conflict with the law, therefore this is the reason nominee shareholders in Indonesia cannot be sued for its fulfillment or implementation before the law. This is because shares conflict with Article 52 paragraph (4) of the Regulations regarding PT regarding the concept of dominium plenum share ownership, as well as one of the conditions for establishing

[11]Maulana Reyza Alfaris, " Validitas Penggunaan Nominee Agreement Dalam Kepemilikan Saham Di Indonesia ", JEBLR, Vol. 2, no. 1, May 2022, p. 68.

a limited liability company consisting of two or more people in the sense that there are 2 or more shareholders in Article 7 paragraph (1) The Regulations regarding PT becomes contradictory if the desired achievement of the parties in the nominee arrangement is to own 100% of shares in the company. Whereas the PM Law states that there are sanctions that prohibit the occurrence of a Name Borrowing Agreement (nominee arrangement) under certain circumstances. Whereas in Article 33 paragraph (1) it is stated that "Domestic investors and foreign investors who invest in the form of limited liability companies are prohibited from making agreements and/or statements confirming that share ownership in a limited liability company is for and on behalf of another person." Article 33 paragraph (2) states that "if domestic investors and foreign investors make agreements and/or statements as intended in paragraph (1), the agreements and/or statements are declared null and void."

In the explanation of Article 33 paragraph (1) it is stated that this provision aims to avoid the occurrence of a company that is normatively owned by someone, but materially or substantially the owner of the company is someone else. From these provisions, it can be seen that for capital investment activities in the form of a limited liability company, the investor declares that the share ownership he owns is for and on behalf of another person whose name is not listed as a shareholder in the company. This means that the shareholder is only a nominee of someone who has the capital in establishing the company (beneficial owner), so by the provisions of Article 33 paragraph (2) of the PM Law, the agreement is null and void.

The provisions of Article 33 paragraphs (1) and (2) of the PM Law are in line with the provisions of Article 48 paragraph (1) of the Regulations regarding PT which states that Company Shares are issued in the name of the owner (*registered Stock*). Meanwhile, in the explanation of the provisions of Article 48 paragraph (1) of the PT Law, it is stated that what is meant by this provision is that companies are only permitted to issue shares in the name of their owners and companies may not issue shares on behalf of bearers.[12]For share ownership, shareholders are given proof of share ownership for the shares they own. This means that a shareholder of a limited liability company cannot declare or enter into an agreement that the shares he owns are for and on behalf of another person or that the shareholder is only a nominee.

3.2 Case analysis of PT Aldevco

Neg. Court Rulingeri South Jakarta Number 341/Pdt.G/2017/PN JKT.SEL, dated 9 July 2018. In this decision, the Panel of Judges who examined the a quo case did not consider (nominee arrangement) as the basis for

[12]Muh. Afdal Yanuar, " *Tinjauan Hukum Terhadap Nominee Agreement Kepemilikan Saham Pada Penanaman Modal Asing Berbentuk Perusahaan Joint Venture* ", Majalah Hukum Nasional Volume 51 Number 1 of 2021, p. 116.

handing over all shares and assets of PT Aldevco to the Government of Indonesia. In this case, it is contrary to applicable laws and regulations, which is proven by a statement letter dated February 29 1988 signed by the founders of PT Aldevco, namely AR Soehoed, Leon Harun Iskandar, and Paul Sumadiono, which stated that all of PT Aldevco's shares Aldevco is government property, as well as Will Deed No. 4 dated 20 October 2011 which stated that all shares and assets of PT. Aldevco is owned by the Government where AR Soehoed, Leon Harun Iskandar Sumantri, and Paul Samadiono Samadikun have only borrowed their names (nominee arrangement).

In this case, it does not fulfill the objective requirements of the agreement in Article 1320 paragraph (4) BW which states one of the conditions for the validity of an agreement if it is made for "a lawful cause", which is further explained in Article 1337 BW explaining that "a cause is prohibited if it is prohibited by law, or if it is contrary to good morality or public order." Therefore, in this case, it cannot fulfill "a halal cause", because it is contrary to the PM Law in Article 33 paragraph (1) which explains that the purpose of this provision is to avoid the occurrence of a company that normatively owned by someone, but materially or substantially The owner of the company is another person (beneficial owner), then paragraph (2) explains that the agreement is null and void. And it also contradicts Article 48 paragraph (1) of the Regulations regarding PT which explains that what is meant by this provision is that companies are only permitted to issue shares in the name of their owners and companies may not issue shares on behalf of bearer stock.

M. Yahya Harahap, SH, and Prof. Dr. Nindyo Pramono, SH, MS also explained about "*nominee arrangement*" in court decision Number: 304/Pdt.P/2016/PN.Jkt.Sel dated 08 March 2016 pages 62 to 63, which provided testimony in the trial under oath as follows:

> "That the legal consequences when a nominee arrangement occurs are null and void according to the Investment Law"
>
> "That the provisions regarding grants also apply from the private sector to the government"
>
> "That if there is a nominee arrangement, then it still has to be proven materially if a share belongs to the government, not the private sector so that in this case the Limited Liability Company Law and the Investment Law apply"

Regarding the above statutory regulations, especially Article 48 paragraph (1) of the Regulations regarding PT and Article 33 paragraphs (1) and (2) of the PM Law which is supported by expert information M. Yahya Harahap, SH and Prof. Dr. Nindyo Pramono, SH, MS who gave testimony in the trial under oath in the trial of case number 304/Pdt.P/2016/PN.Jkt.Sel dated 08 March 2016, then all statements, wills, or other letters

if the letter contains misleading (misleading) or is a nominee arrangement, the letter and deed are declared null and void so they cannot be used to carry out any legal action. So in this case it is not possible to transfer all shares and assets of PT. Aldevco. In this Decree, the government (authority) should be able to act by applicable law by not entering into a name-borrowing agreement (Nominee Arrangement) in any form.

IV. CONCLUSION

A nominee shareholder is a person (nominee) appointed/representing share ownership interests for and on behalf of the beneficiary (beneficiary). In determining the legal relationship between nominee shareholders, an engagement is carried out through a nominee arrangement, which is an agreement made between the nominee and the beneficiary that provides space for the nominee to act for and on behalf of the beneficiary and by the instructions and direction of the beneficiary because the beneficiary/trustee structure is a product of English common law which is not recognized in civil law countries, including under the Indonesian legal system.

In the context of share ownership in a corporation (limited liability company), the party who is formally registered as a shareholder is the nominee, while the party who controls and is the beneficiary is called the beneficiary. In the investment sector in Indonesia, the status quo is that the practice of nominee arrangement for share ownership is a prohibited act, based on Article 33 paragraph (1) of the PM Law and Article 48 paragraph (1) of the PT Law. Because it is regulated in law, based on Article 1320 in conjunction with Article 1337 BW, all nominee share ownership arrangements in an investment activity in Indonesia are currently designated as agreements that can be null and void by law.

BIBLIOGRAPHY

1. Book

Bryan A. Gardner, "Black's Law Dictionary", 7th ed., St. Paul, Minnesota: West Group, 1999.

David Kairupan, *Aspek Hukum Penanaman Modal Asing Di Indonesia*, (Jakarta: Kencana), 2013

Graham Gooch and Micheal Williams, *Dictionary of Law Enforcement*, Oxford, 2007.

Ida Bagus Rachmadi Supancana, *Kerangka Hukum dan Kebijakan Investasi Langsung di Indonesia*, (Jakarta: Ghalia Indonesia), 2006.

Mulhadi, *Hukum Perusahaan Bentuk-Bentuk Badan Usaha di Indonesia*, Ghalia, Indonesia, 2010.

Syahrijal Syakur, *Urgensi Pengaturan Nominee Agreement Dalam Rangka Pencegahan Tindak Pidana Pencucian Uang*, (Jakarta: PPATK), 2020.

Zaeni Asyhadie , *Hukum Bisnis*, PT. Raja Grafindo Persada, Jakarta, 2006.

2. Journal

Gunawan Widjaja, "Nominee Shareholders Dalam Perspektif UUPT Baru dan UU Penanaman Modal Baru Serta Permasalahannya Dalam Praktik",

dalam Jurnal Hukum dan Pasar Modal Volume III Edisi 4 Agustus- Desember 2018.

Lucky Suryo Wicaksono, "Kepastian Hukum Nominee Agreement Kepemilikan Saham Perseroan terbatas", Jurnal Hukum Ius Qua Iustum, Vol.23 No.1, Januari 2016.

Muh. Afdal Yanuar, "Tinjauan Hukum Terhadap Nominee Agreement Kepemilikan Saham Pada Penanaman Modal Asing Berbentuk Perusahaan Joint Venture", Majalah Hukum Nasional Volume 51 Nomor 1 Tahun 2021.

3. Constitution

Law on Capital Investment, Law no. 25 of 2007, LN No. 101 of 2007, TLN No. 4724.

Law on Limited Liability Companies, Law no. 40 of 2007, LN No. 106 of 2007, TLN No. 4756.

4. Website

JDIH Glossary, BPK RI, accessed 15 May 2023,**https://peraturan.bpk.go.id/Home/Glosarium?huruf=N&page=2**

Received : 22-05-2023 *Revised : 20-02-2024* *Accepted : 10-03-2024*