

THE LEGAL CONSEQUENCES OF A COOPERATION AGREEMENT DUE TO MERGER

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Abstract

Cooperation agreement is a bond between one party and another party to bind themselves in doing or not doing something in particular. Basically, the agreement creates rights and obligations by the parties and is regulated in the Civil Code. Companies when running their business often carry out corporate actions aimed as a way to survive and to increase company profits, one of which is by merging the company. Mergers are often used apart from the relatively low cost, the methods and mechanisms that are carried out are simpler so that they become more efficient. Research methods used in writing this paper is a normative juridical method. Often problem arise in mergers are doubts and uncertainties in determining the legal consequences of an agreement, including cooperation agreement with third parties that were made prior to the merger. The legal consequence of a merger is the company's assets and liabilities are transferred directly without going through a liquidation process. If during the merger, one of the companies is still bound by a cooperation agreement with a third party, then the rights and obligations contained in the cooperation agreement are transferred by law without needed a deed of transfer to delivered these rights and obligations.

Keywords: Cooperation Agreement; Dissolution of Limited Liability Company; Merger

A. Introduction

There are many firms of companies that can be established in Indonesia, but businessman preferred a limited liability company (LLC) because of the forms itself as a legal entity. Since the Indonesian Omnibus Law validated, the establishment of a limited liability company become easier due to no minimum amount of capital. Simplicity on these establishment based on government expectations to improve the country's economy sector by improving ease of doing business index score. On the other side, this simplicity creates business competition among company, therefore to conquer some business sector or even just to survive within a competition, the director of a company often doing deals with other company directors. Deals can be done by contracting with another parties, giving rise to an engagement between

the parties, also this engagement creates rights and obligations for the parties. One of the deals is cooperation agreement. In the implementation of the cooperation agreement, it usually contains a period of time for the implementation of the cooperation agreement.

In some cases, before the end of the term of the cooperation agreement, the company takes a corporate action (merger). However, the problem occurs when the company that enters into the cooperation agreement wants to take corporate action and what are the legal consequences of the corporate action on the cooperation agreement that is still in effect. The purpose of writing this research is to explain the legal consequences of the merging companies and also the legal consequences of the cooperation agreement that is bound when the company is merged.

The research methodology that used in this article is normative juridical methods which done by doing research through library materials or secondary materials only.¹ The method of analysis is carried out through the study of primary, secondary and tertiary legal materials, in form of documents, applicable laws, and regulations that are presented descriptively and assessing whether their application is in accordance with normative provisions.

B. Discussion

B.1. Company as a legal entity

Legal entities are also in the Civil Code which according to article 1654 is defined as all legitimate associations such as people, having power, carrying out civil actions, without prejudice to general regulations where such power has been changed, restricted or subject to certain events. Based on this understanding, there is no doubt that the position of a legal entity is a legal subject, because a legal entity is an independent institution, has rights and obligations, and can act before the law.

There are three (3) types of recognized legal entities, namely: 1) Legal entity held by the Government; 2) Legal entity recognized by the Government; and 3) Legal entity with civil

¹ Henni Muchtar, "Analisis Yuridis Normatif Sinkronisasi Peraturan Daerah Dengan Hak Asasi Manusia," *Jurnal Humanus*, no. 1 (2015): 84, <http://dx.doi.org/10.24036/jh.v14i1.5405>.

construction. Legal entity as a legal subject that based on the law or doctrine that made by the jurist, hence the legal entity is often called by artificial person, which has rights and obligations that recognize by law.² LLC as a legal entity that could conducting a business activity as a company itself. LLC as a legal entity is regulated on Law Number 40 Year 2007 concerning LLC (LLC Law), stipulated on Article 1 paragraph 1 which said:

“Limited Liability Company, hereinafter referred to as a company, is a legal entity which is capital partnership, established based on an agreement, conducting business activities with authorized capital which is entirely divided into shares and fulfills the requirements stipulated in this law and its implementing regulations”.

Since the company was established based on an agreement, this shows that the company consists of more than one (1) shareholders. Based on the explanation above, LLC as a legal entity can enter into an agreement according to the characteristics of a legal subject.

B.2. Cooperation agreement

Cooperation agreement are not regulated on the Indonesian Civil Code, but the basic principle of cooperation agreement is the same with a usual agreement. The general regulation of an agreement is regulated in Indonesian Civil Code that stipulated on article 1313 which said: “An agreement is an act which a person or more engage his/herself to another person or more”. Agreement is an occasion in with a person is pledge to with another person or which a two person or more promise each other to do something.³ Agreement or contract is a writing that contain agreement of the parties, terms and conditions, and serves as evidence of the existence of the obligations.⁴

There are processes of achieving an agreement or contract between LLC’s which are pre contractual that has offer and acceptance, contractual that has a confirmation between the

² J. Satrio, *Hukum Pribadi* (Bandung: Citra Aditya Bakti, 1999), 13.

³ R. Subekti, *Hukum Perjanjian* (Jakarta: Intermasa, 2008), 2.

⁴ Budi Kusumohamidjojo, *Dasar-Dasar Merancang Kontrak* (Jakarta: Grasindo, 1998), 6.

parties, and lastly post contractual which means the implementations if the agreements.⁵ Negotiation happened in pre contractual phase that allow both parties. Negotiation is an interaction process on which 2 (two) person or more involved together to gain the best result, even though initially they have different goals, try to use argument and persuasion, work out their differences to reach a solution that they can accept together.⁶

The negotiation that occurred on pre contractual phase is to define the content and the clause of the agreement. Everyone or every party has a freedom of contract, which means everyone is free to enter or made into any agreement, whether the agreement has been regulated by law or not yet regulated. If both parties are come to an agreement, therefore they have consequences against what is agreed. The consequences are based on the implementation of article 1338 Indonesian Civil Code which stated that: “All agreement made legally binds and valid as law for those who make them”. Everyone or every party has a freedom of contract, which means everyone is free to enter or made into any agreement, whether the agreement has been regulated by law or not yet regulated, as long as not violated the law, public order and decency. If the contract is contrary to law, public order, and morality, the contract is null and void.⁷

In the development of the legal science doctrine, it is known that there are three elements in the Agreement, where these elements are described as follows:⁸

- a. The *essentialia* element is an element that must exist in an agreement, because if this element is not present, the agreement does not exist.
- b. The *naturalia* element is an element that has been regulated in law, so that if it is not regulated by the parties in the agreement, then the law regulates it.

⁵ Salim HS, *Hukum Kontrak: Teori dan Teknik Penyusunan Kontrak* (Mataram: Direktorat Jenderal Pendidikan Tinggi Mataram, 2002), 26.

⁶ Joni Emirzon, *Alternatif Penyelesaian Sengketa di Luar Pengadilan (Negosiasi, Mediasi, Konsultasi, dan Arbitrase)* (Jakarta: Gramedia Pustaka Utama, 2001), 45

⁷ Ghansam Anand, “Prinsip Kebebasan Berkontrak,” *Jurnal Yuridika*, no. 2 (2011): 96, <https://doi.org/10.20473/ydk.v26i2.265>.

⁸ Hananto Prasetyo, “Pembaharuan Hukum Perjanjian Sportentertainment Berbasis Nilai Keadilan,” *Jurnal Pembaharuan Hukum*, no. 1 (2017): 67, <http://dx.doi.org/10.26532/jph.v4i1.1645>.

- c. The *accidentalialia* elements are elements that will exist or bind the parties if the parties make an agreement.

Cooperation agreement as an agreement that has a legal term that if these terms are not fulfilled then the agreement are null and void or can be canceled and it depends on the objective and subjective requirements, that stipulated on article 1320 Indonesian Civil Code that must have: “(1) An agreement that binds him/her, (2) The ability to make an engagement, (3) Has a certain subject, (4) Based on a reason that is not forbidden.” Any LLC as a legal entity could make any agreement to another LLC, even with the government as long as in accordance with the legal terms.

Cooperation agreements have different characteristics compared to ordinary or common agreements, where common agreements are generally an agreement to give something to other party, meanwhile in cooperation agreement, the parties agree to do something and/or to give something to each other with the same goal. In other words, the cooperation agreement is very possible to include in its clause the rights and obligations of the parties who agreed to give something to each other which can be categorized as receivable or debts, rights can be in the form of receivables while obligations can be in the form of debts.

B.3. Merger

Company merger is the merging of one or several business entities so that form an economic point of view they form a single entity.⁹ The merge is a form of two or more business entities that are relatively balanced in strength, so that a combination occurs which is a mutual reinforcing vessel. Merger refers to the combination of two or more business entities into one larger organization.¹⁰ Merger and Acquisition are not the same terminologies which has the main objective is to work with other companies that can be more beneficial as compared to

⁹ H. Zaeni Asyhadie, *Hukum Bisnis: Prinsip dan Pelaksanaanya di Indonesia* (Jakarta: Raja Grafindo Persada, 2012), 134.

¹⁰ Asauten Samuila. “The Effects of Mergers and Acquisitions on The Performance of Commercial Banks in Nigeria: Evidence from United Bank for Africa (UBA),” *International Journal of Education and Research*, no. 4 (2015): 98.

work alone in a market.¹¹ It also stipulated on Article 1 paragraph 9 of LLC Law. Merger supposedly done to improve the company performance, efficiency, acquiring new markets or customers that owned by the company as the object of the merger, invest in excess and unused company finance, reduce or hinder competition and maintain business continuity.¹² However, is not necessarily an advantage for profit, because in fact in the United States mergers by company managers who want to enlarge their “territory” make more leverage for shareholders, and various empirical studies have shown that many large companies those who do the merger actually make the stock price negative.¹³

Merger are divided into three which are horizontal (merge between competitors), vertical (merge between suppliers and customers) and conglomerate (diversification in terms of expanding business line). Horizontal merger is a merger between two or more companies which conduct business on the same business sectors, Vertical merger is basically scaled up the business by conducting a relationship from producer to supplier, and lastly conglomerate merger is a combination between two or more companies that have no business relationship one another.¹⁴

In merger, there is 2 (two) LLC as a subject of doing merger, one of them as the target, and the other as the LLC that will take over. LLC that takes over continues to use its name and identity, on the other side, the legal status of the mergers target is ended by law. Merger as a legal action must concern and taking account regarding the interest of the company, minority shareholders, company employees, creditors, and other business partner. These are a cumulative requirement that means of every violation of the requirements will result in not being able to perform merging actions.¹⁵ Minority shareholders who disagree with the merger

¹¹ Muhammad Faizan Malik, *et.al.* “Mergers and Acquisitions: A Conceptual Review,” *International Journal of Accounting and Financial Reporting*, no. 2 (2014): 521, <https://doi.org/10.5296/ijafnr.v4i2.6623>.

¹² Abdul R. Saliman, *Hukum Bisnis untuk Perusahaan* (Jakarta: Kencana Prenada Media Group, 2005), 108.

¹³ Daniel A. Crane, “Rethinking Merger Efficiency,” *Michigan Law Review* no. 3 (2011): 375.

¹⁴ Atika Sunarto and Muhammad Ali Adnan, “Legal Aspects of Merging Limited Liability Companies in Copmany Law by Merger,” *Legal Brief* no. 1 (2019): 51-2.

¹⁵ Yahya Harahap, *Hukum Perseroan Terbatas* (Jakarta: Sinar Grafika, 2016), 486.

action can only use its right to be purchased at a fair price (appraisal rights), but it does not hinder the process of implementing the merger.¹⁶

The first step in a merger is to draw up a merger plan. The merger plan is prepared by the directors who will conduct and accept the merger. After completion of drafting, the proposed merger is submitted to the Board of Commissioners for approval. The proposed merger can be submitted to the General Meeting of Shareholders for approval after the Board of Commissioners of each company gives approval. The Board of Directors of the Company that will conduct the merger must announce the draft summary in at least 1 (one) newspaper and announce in writing to the employees of the company that will conduct the merger at the latest 30 (thirty) days prior to the summons for the GMS. The company's directors must submit the announcement of the results of the merger in 1 (one) or more newspapers within a period of no later than 30 (thirty) days from the effective date of the merger.

The government establish the Government Regulation Number 57 Year 2010 concerning Merger or Consolidation of Business Entities and Acquisition of Company Shares Which Can Result in Monopolistic Practices and Unfair Business Competition, that hopefully will give the legal certainty for business actors, especially in conducting merger activities. To prevent any monopolistic practices the government as stipulated on Article 29 of Law Number 5 Year 1999 issues the implementing regulations of Business Competition Supervisory Commission (KPPU). KPPU prohibit anti-competitive merger actions.¹⁷ KPPU has the authority to prevent merger transactions that may result in monopoly and unfair business competition. This can be done through an assessment of the analytical report submitted by the company in the merger consultation. The assessment carried out by KPPU in the consultation process is an initial assessment.

¹⁶ Muhammad Rizki, Ramziati, and Hamdani, "Perlindungan Hukum Terhadap Pemegang Saham Minoritas Dari Penggabungan Perusahaan (Merger) Pada Perseroan Terbatas di Indonesia," *Jurnal Ilmiah Mahasiswa Fakultas Hukum*, no. 2 (2021): 44. <https://doi.org/10.29103/jimfh.v4i2.4225>.

¹⁷ Shiau, *et.al.*, "Asean Developments in Merger Control," *Journal of European Competition Law & Practice*, no. 3 (2014): 150, <https://doi-org.eres.qnl.qa/10.1093/jeclap/lpt074>.

However, it is possible for KPPU to conduct a thorough assessment and ask for information from the business actors and other parties in the assessment process.¹⁸ As a comparison, the same mechanism also occurs in the United State Law specifically with the Department of Justice and Federal Trade Commission. If a merger satisfied the requirements, the parties must report the merger to the agencies and abide by a waiting period before consummating it.¹⁹ In addition, if the scale of merger is globally affected the economic, states usually conduct a merger review in conjunction with others due to raises of antitrust concern for federal antitrust enforcers.²⁰

LLC used to merge with similar companies to improve efficiency and better production capabilities. Merger of similar companies will reduce production costs, both direct production costs and raw materials. Merger of types aims to achieve transaction cost economies. Meanwhile, merger with companies that are at the resource level, both raw material resources and other resources, is called resources-driven theory. Meanwhile, merging with companies that are buyers or those who own a market, aims to achieve more efficient distribution costs in the value chain, called market-driven theory.²¹ Before doing merger, both parties often use Law Firms that has expertise in corporate matters for doing the Legal Due Diligence (LDD).

LDD is used as a way to obtain objective data from LLC regarding their business transactions. LDD consists of researching, confirming, and finding the legal aspect of the target by the latest articles of association, capital structure and shareholders, directors, commissioners and GMS, licensing, registration, ownership, insurance, employment, payment, financing and credit, financial reports, court cases documents, and agreements with third parties. After the item of documents above are checked-list, the lawyer will be giving the legal opinion based on the documents above. Agreement with third parties was one of many aspects in LDD. A

¹⁸ Preeti Kartika Putri, Paramita Prananingtyas, dan Siti Mahmudah, “Analisa Yuridis Pengawasan KPPU Atas Tindakan Merger Yang Dilakukan Oleh Perusahaan Pertambangan Di Indonesia,” *Diponegoro Law Journal*, no. 2 (2019): 1390-1.

¹⁹ Menesh S. Patel, “Merger Breakups,” *Wisconsin Law Review*, no. 5 (2020): 982.

²⁰ Robert L. Hubbard and Sandra Roberto, “State Merger Enforcement,” *Sedona Conference Journal* no. 1 (2005): 3,

²¹ Irina V, *et al.*, “Resources-based Theory in Marketing,” *Journal of the Academy of Marketing Science* no. 1 (2013): 2-3, <https://doi-org.eres.qnl.qa/10.1007/s11747-013-0336-7>.

confidentiality agreement is usually needed to protect the party (the target) due to presenting confidential information to other side by proposes its form of confidentiality agreement.²²

Carries out a merger between companies should take into account the interests of the company, minority shareholders, company employees, creditors, other business partners, the community, as well as healthy business competition. The problem occur on some occasion was there was any agreement by the target of the merger with third parties and the agreement ends in a next year after the merger was done. What would happen with the agreements?

As a comparative studies, according to Romanian Law as a general rule, contractual rights and obligations belonging to the company which will be forwarded to dissolve are transmitted to the absorbent or the newly created company.²³ It is also happen the same with the effect of merger or consolidation of domestic and foreign corporation in United States, that merger or consolidation shall be effective, and the new or surviving corporation shall be vested with all the rights, privileges, immunities, and power of old corporations, and subject to all their liabilities and duties.²⁴

B.4. Dissolution of LLC

The dissolution of LLC is based on the termination and bankruptcy, but the legal entity status of LLC could be ended by law if there are any corporate action such as Merger and Consolidation. According to LLC Law, stipulated on Article 122 paragraph (1) said, “Merger and Consolidation result in the Company which combines or merge ends by law”. Also, in paragraph (2) stated that, “The termination of the company as referred to in paragraph (1) occurs without prior liquidation.”

²² Byron F. Egan, “Asset Acquisitions: Assuming and Avoiding Liabilities,” *Penn State Law Review* no. 3 (2012): 930.

²³ Christina Cojocaru, “On the Dissolution of The Limited Liability Company. Disagreement of the Shareholder,” *Judicial Tribune Journal* no. 3 (2018): 713.

²⁴ Michael V. Withrow, “Fundamental Corporate Changes: Amendments to Articles, Merger and Consolidation, Asset Sales and Dissolution,” *Kentucky Law Journal* no. 1 (1972): 238-9.

According to article 142 it stated that the dissolution of LLC as a legal entity based on termination and bankruptcy (liquidation). The dissolution of LLC occurred by:²⁵ a) Based on the General Meeting of Shareholder (GMS); b) Based on the period of establishment that stipulated in the articles of association has expired; c) Based on court order; d) Based on the revocation of bankruptcy by commercial court that has permanent legal force (*inkracht van gewijsde*) the wealth of bankruptcy is not sufficient to pay the bankruptcy fees; e) Based on bankrupt declaration and in state of insolvency as stated in the Law on Bankruptcy and Suspension of Debt Payment Obligations; or f) Due to revocation of the company's business license, thus requiring the company to conduct liquidation in accordance with the provisions of the regulations.

The dissolution of LLC shall follow by liquidation that could be done by a liquidator or curator, and in the meantime the company could not do any law-based conduct, except by doing any liquidation process. The dissolution of a company does not directly make a company losing their legal entity status, but the legal entity status ends if the completion of liquidations process and the liability of the liquidators are accepted by the GMS or the court.²⁶ LLC is a form of business that has unlimited life span (eternal), and also could be based on the period of establishment that stipulated in the articles of association has expired. The dissolution of Company occurs due to law if the period of establishment of the Company stipulated in the articles of association ends and within a period of no later than 30 (thirty) of the Company's establishment ends, the GMS shall determine the appointment of a liquidator.²⁷

The implementation of a merger without prior liquidation, the following provisions apply:²⁸

- a. All assets and liabilities of the disbanded company are legally transferred to the merging company;

²⁵ Article 142, *LLC Law*.

²⁶ Gatot Supramono, *Hukum Perseroan Terbatas*, (Jakarta: Djambatan, 2009), 304.

²⁷ Article 145 paragraph (1), *LLC Law*.

²⁸ Safarni Husain, "The Merger of Limited Company Without Prior Liquidation According to the Undang-Undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas," *Risalah Hukum*, no. 1 (2011): 124.

- b. All liabilities of the disbanded company are legally transferred to the merging company;
- c. Shareholders of the disbanded company legally become shareholders of the company conducting the merger, unless the shareholders do not agree with the merger;
- d. Although it is not liquidated, there are still administrative settlements that must be carried out for the disbanded company.

It can be said that the company that has merged, its legal entity status ends by law without any liquidation, unless the GMS is agree to conduct dissolution by liquidation. The dissolution is valid at the time the dissolution is validated and acknowledged by the Ministry of Law and Human Rights.

B.5. Assets and liabilities

Article 122 paragraph (3) of LLC Law mentioned that:

- a. Assets and liabilities of the merging or consolidating companies are transferred by law to the companies that receive the merger or the companies resulting from consolidation;
- b. The shareholders of the companies that are merging or consolidating by law become shareholders of the companies that receive the merger or the companies resulting from the consolidation; and
- c. The merging or consolidating companies are terminated by law as from the date of the merger or consolidation takes effect.

There is no legal definition of asset and liabilities in LLC Law. According to International Accounting Standards Board (IASB), an asset is a present economic resource controlled by the entity as a result of past events. An economic resource is a right that has the potential to produce economic benefits.²⁹ The right is divided into two aspects, namely:³⁰

- a. Rights that correspond to an obligation of another party. For instance: right to receive cash; to receive goods or services; to exchange economic resources with another party on

²⁹ Conceptual Framework on Financial Reporting IFRS, <https://www.ifrs.org/content/dam/ifrs/publications/pdf-standards/english/2021/issued/part-a/conceptual-framework-for-financial-reporting.pdf>, accessed on June 16, 2022.

³⁰ *Ibid.*

favorable terms; to benefit from an obligation of another party to transfer an economic resource.

- b. Rights that do not correspond to an obligation of another party. For instance: rights over physical objects such as property, plant, and equipment or inventories; right to use intellectual property.

Many rights are established by contract, legislation or agreements. Liabilities also are established by contract, legislation or agreements. The first criterion for a liability is that the entity has an obligation. Obligation is a duty or responsibility that entity has no practical ability to avoid. An obligation is always owed to another party. Indonesia already ratified IFRS and implement it upon *Pernyataan Standar Akuntansi Keuangan* (PSAK). The Indonesian Institute of Accountants (IAI) as the highest authority has decided to fully adopt the IFRS basis, by facilitating understanding of financial statements by using SAK which is known internationally, increasing the global investment area through transparency and also lowering the cost of capital.³¹

B.6. The legal consequences of the cooperation agreement due to merger

According to the explanation above, the merger that done occurs without liquidation means that all assets and liabilities that owned by the mergers target legally move into the company that take over the merger, and the status of legal entity for the mergers target are ended by law. Can a cooperation agreement be interpreted as assets or liabilities?

There is no legal definitive that explain the criterion of assets and liabilities in Indonesia. However, any cooperation agreement or even any common agreement that made by a company always has it rights and obligations, and according to the IFRS which already ratified and implemented in Indonesia upon PSAK assets and liabilities are always attached to the agreement as a unit which conducted in the rights and obligations of both parties. Indeed, a cooperation agreement can be interpreted as assets or liabilities, and to distinguish, it depends

³¹ Bobby Wirawan and Agus Hermawan, "Perkembangan International Financial Reporting Standard (IFRS) dan Penerapannya di Indonesia," *Finance and Accounting Journal*, no. 1 (2012): 16.

on the rights and obligations that were stated in the cooperation agreement. For instances, if a merging company have rights to pay some amount of money with third, then it will be considered as assets, and vice versa.

In other words, it can be interpreted that a cooperation agreement that were previously attached to the merging company, as long as they have not been resolved or terminated before the merger or the merger process is currently effective, are now attached to the limited liability company that accepts the merger without any liquidation.

C. Conclusion

Although there is no explicit definition on assets and liabilities that transferred by law due to merger from the LLC Law, a cooperation agreement or any common agreement can be categorized as assets or liabilities depending on the content of the agreement. A cooperation agreement or any common agreement is still valid even if the subject of the party are changes due to a merger as long as they have not been resolved or terminated before the merger (still in the process of merger). The cooperation agreement will be binding to the new legal entity of the company which has been born after the merger without any liquidation. But to prevent any civil lawsuit from the previous cooperation agreement with the third parties, it is better to make a new agreement based on the differences subject of the party on the agreement.

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