

Separation of Bumn Losses Affects the Legal Liability of the Board of Directors

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Abstract: *The separation between state-owned enterprises' (BUMN) business losses and state financial losses constitutes a crucial issue in Indonesian corporate law. Historically, losses incurred by BUMN were often equated with state losses, creating legal uncertainty and exposing directors to potential criminal liability under the Anti-Corruption Law (UU Tipikor). This research employs a normative legal method with a library research approach to analyze the juridical implications of distinguishing corporate losses from state losses and its impact on directors' legal accountability. The findings highlight that the latest BUMN Law (Law No. 1 of 2025) explicitly positions BUMN as private legal entities in the form of limited liability companies, thus clarifying that business losses should primarily be regarded as corporate losses. Consequently, directors' responsibilities must be assessed based on corporate governance principles fiduciary duty, duty of care, and the business judgment rule rather than automatically through criminal sanctions. Furthermore, notaries play a pivotal role in documenting directors' decisions through authentic deeds, serving as preventive instruments to ensure legal certainty, distinguish lawful business risks from unlawful acts, and protect directors from disproportionate criminalization. The separation of BUMN and state losses ultimately strengthens corporate accountability, fosters a healthier investment climate, and enhances the legitimacy of notarial practice in supporting professional corporate governance in Indonesia.*

Keywords: *BUMN; Corporate Loss; Legal Liability; Notary; State Loss*

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INTRODUCTION

BUMN, in essence, are business entities whose ownership lies with the state. However, in conducting their business activities, BUMN remain subject to the framework of corporate law applicable to private companies in general. This is particularly evident in the provisions of the Company Law, which serves as the primary normative foundation for regulating corporate governance. Within this framework, the board of directors as the

management organ holds a highly strategic and vital position, as they are directly responsible for the company's operations and managerial decision-making. Such responsibility is grounded in fundamental principles of corporate law, such as the principle of fiduciary duty, which emphasizes trust and loyalty to the company's interests; the principle of duty of care; and the business judgment rule, which grants directors autonomy in making business decisions

without repressive interference, provided these are carried out rationally and in good faith.¹

Nevertheless, the operational realities faced by BUMN are often complex, particularly because their identity as state-owned entities introduces dimensions that differentiate them from purely private corporations. When a BUMN suffers losses in its business activities, a serious legal issue arises, as such losses are frequently interpreted as losses to the state's finances. This interpretation creates uncertainty in accountability, especially when linked to potential criminal sanctions. The tension between the regime of corporate law and the regime of special criminal law, particularly the Anti-Corruption Law (UU Tipikor), illustrates a substantive paradigmatic conflict. On one hand, corporate law recognizes that every business decision carries inherent risks and that not every failure constitutes a violation; on the other hand, the criminal law approach often evaluates outcomes alone, disregarding the professionalism of the decision-making process.²

BUMN occupies a unique position in the Indonesian legal system. On the one hand, BUMN is a private legal entity in the form of a limited liability company, subject to Law No. 40 of 2007 on Limited Liability Companies, with the board of directors as its main organ responsible for managing business activities based on the principles of fiduciary duty, duty of care, and the doctrine of the business judgment rule.³ On the other hand,

since BUMN's capital is sourced from state finances, its losses are often interpreted as state financial losses.⁴ This dual interpretation raises a serious problem in the context of the legal liability of directors, particularly because every business loss has the potential to be classified as state loss, exposing directors to the criminal law regime, especially under the Anti-Corruption Law.

The issue becomes even more complex when linked to the role of notaries. As public officials, notaries have a strategic function in ensuring legal certainty, authenticity, and legal protection in every legal act carried out by BUMN directors, such as the drafting of credit agreements, cooperation contracts, or other legal actions directly related to company assets and finances. Notaries not only serve as drafters of authentic deeds but also as legal safeguards to ensure that every business decision of BUMN directors is clearly and lawfully documented, thereby distinguishing between losses arising from normal business risks and losses resulting from unlawful acts or criminal offenses.⁵

Accordingly, a study on the separation between BUMN losses and state financial losses is crucial not only to provide legal certainty for directors in carrying out their managerial functions but also to emphasize the role of notaries in ensuring that every business decision recorded in deeds has strong legal legitimacy. Such separation will guarantee that directors' liability is placed proportionally and will prevent excessive

¹ Desak Made Setyarini, Ni Luh Made Mahendrawati, And Desak Gde Dwi Arini. "Pertanggungjawaban Direksi Perseroan Terbatas Yang Melakukan Perbuatan Melawan Hukum ." *Jurnal Analogi Hukum* 1, No. 1 (2020)

² Marshanda Hana A.P, And Adam Maulana Yusup. "Pertanggungjawaban Direksi Atas Kerugian Yang Dialami Perseroan Berdasarkan UUPT Dan Prinsip Umum Perusahaan." *JURNAL ILMU HUKUM DAN TATA NEGARA* 2 (1), 2024

³ Setyarini, Ni Putu, et al. "Business Judgment Rule dalam Pertanggungjawaban Direksi BUMN." *Jurnal Hukum dan Pembangunan* 5 no. 2 (2020): 356–372.

⁴ Mulhadi. *Hukum Perseroan Terbatas*. Jakarta: RajaGrafindo Persada, 2018.

⁵ Habib Adjie. *Hukum Notaris Indonesia: Tafsir Tematik terhadap UUJN*. Bandung: Refika Aditama, 2008.

criminalization that may hinder business innovation and the professional management of BUMN.⁶

BUMN are, in essence, business entities whose ownership lies with the state, yet their business operations are governed by the framework of corporate law applicable to private companies. This is particularly evident in the Limited Liability Company Law (Law No. 40 of 2007), which provides the normative foundation for corporate governance.⁷ Within this framework, the board of directors, as the company's management organ, bears strategic responsibility for decision-making, guided by the principles of fiduciary duty, duty of care, and the business judgment rule.⁸

However, in practice, the position of BUMN is complicated by its dual identity. On the one hand, BUMN are structured as limited liability companies, which implies that business risks and losses are to be assessed within corporate governance mechanisms. On the other hand, since their capital is sourced from separated state assets, business losses are frequently interpreted as state financial losses. This interpretation has been reinforced by the definition of "state losses" in the State Finance Law (Law No. 17 of 2003), which is often applied broadly by law enforcement agencies and oversight institutions. For example, both the Attorney General's Office and the Audit Board of the Republic of Indonesia (BPK) have historically treated corporate losses of

BUMN as equivalent to state losses, thus forming the basis for corruption indictments under the Anti-Corruption Law (UU Tipikor).⁹

This duality creates a paradigmatic tension: the Company Law (UUPT) functions as *lex generalis* in recognizing that not every business risk or failure constitutes a violation, while the Anti-Corruption Law operates as *lex specialis* by criminalizing conduct that causes loss to state finances.¹⁰ The conflict becomes particularly evident when prosecutors equate business misjudgments with unlawful acts, disregarding the protection afforded to directors under the business judgment rule. In this context, the latest BUMN Law seeks to resolve the tension by explicitly separating BUMN losses from state losses, thereby ensuring that directors' liability is placed proportionally within the framework of corporate law rather than automatically under criminal law.¹¹

METHOD

This research applies a normative legal research method with a library research approach. The focus of the study is to analyze legal concepts and theories found in legal literature, such as books and scholarly journals, particularly concerning the separation of BUMN losses and state financial losses, and its influence on the legal liability of BUMN directors.

⁶ Lathifah Hanim. "Peran Notaris dalam Memberikan Kepastian ukum terhadap Akta Perjanjian Bisnis." *Jurnal Akta* 4, no. 2 (2017): 210–222.

⁷ Mulhadi. *Hukum Perseroan Terbatas*. Jakarta: RajaGrafindo Persada, 2018, 47.

⁸ Abiyyu Paras Syakir, and Sodikin. "Penerapan Prinsip Fiduciary Duty Untuk Mewujudkan Good Corporate Governance Dalam Perseroan Terbatas." *Journal Of Contemporary Law Studies* 2, no. 2 (2025).

⁹ Siska Ambarwati, "The Loss of State-Owned Enterprise (BUMN) As Not State Loss in Separation

Principle Perspective", *Jurnal Pembaharuan Hukum*, 9 No.1, (2022), 116

¹⁰ Bayu Novendra & Aulia Mutiara Syifa, Miskonsepsi Pembebanan Tanggung Jawab kepada Direksi Badan Usaha Milik Negara dalam Jerat Tindak Pidana Korupsi", *Sasi*, Volume 26 No. 4 October-December 2020, page. 458-473.

¹¹ Marshanda Hana A.P., and Adam Maulana Yusup. "Pertanggungjawaban Direksi Atas Kerugian Yang Dialami Perseroan Berdasarkan UUPT Dan Prinsip Umum Perusahaan." *Jurnal Ilmu Hukum dan Tata Negara* 2, no. 1 (2024).

ANALYSIS AND DISCUSSION

Impact of Separating BUMN Losses and State Losses on the Legal Liability of Directors through Perspective of the Latest BumN Law

The conceptual separation between BUMN losses and state losses is a crucial issue in corporate law practice in Indonesia. Historically, losses incurred by BUMN in conducting business activities have often been interpreted as state losses, considering that part or all of BUMN's capital originates from state assets that have been separated¹². This interpretation frequently creates tension between the corporate law regime and the criminal law regime, particularly when such losses are used as the basis to prosecute directors with criminal liability under the Corruption Crime Act.¹³

From the perspective of the latest BUMN Law, there is a normative effort to clarify the position of BUMN as private legal entities subject to corporate governance mechanisms and principles as regulated under the Limited Liability Company Law. This carries an important implication: losses arising from BUMN business activities should primarily be regarded as corporate losses, not automatically as state losses. Consequently, directors' responsibilities should be framed within corporate law, based on the principles of fiduciary duty, duty of care, and the business judgment rule doctrine, rather than solely through a criminal law approach.¹⁴

This understanding provides proportional protection for directors in

making business decisions. Every managerial decision inherently carries risks, and business failures cannot always be equated with unlawful acts. The separation of BUMN losses from state losses reinforces the principle that directors can only be held legally accountable if there is clear evidence of actions taken in bad faith, gross negligence, or violations of the articles of association and statutory provisions. Therefore, directors retain the freedom to perform their managerial functions independently without excessive fear of criminalization over every business loss.

From a notarial perspective, this separation also has implications for the practice of deed-making. Notaries play a crucial role in ensuring that every business decision of BUMN directors is documented authentically and in accordance with the law. Notarial deeds serve as key instruments to distinguish whether a transaction has been conducted according to proper legal procedures or if there are indications of abuse of authority that may have criminal implications.¹⁵ Thus, the role of the notary is not merely administrative but also preventive, safeguarding the legal legitimacy of every action taken by BUMN directors.

Therefore, the separation of BUMN losses from state losses under the latest BUMN Law directly impacts the legal accountability patterns of directors. This separation ensures that directors' responsibilities are proportionally placed within the corporate law regime, while the criminal law regime is applied only when

¹² Mochammad Abizar Yusro, Ali Ismail Shaleh, And Hari Sutra Disemadi. "Perlindungan Hukum Keputusan Bisnis Direksi BUMN Melalui Business Judgement Rule Doctrine ." *JURNAL JURISPRUDENCE*, 10 (1), 2020

¹³ Sayit Bandung Bondowoso, Dian Afrilia, "Pertanggungjawaban Direksi BUMN Terhadap Kerugian Negara Berdasarkan Regulasi Pemerintahan

Sektor Perusahaan Dan Pidana" *Jurnal Lex Stricta*, 4(1), 2025.

¹⁴ *Ibid*

¹⁵ Abiyyu Paras Syakir, And Sodikin. "Penerapan Prinsip Fiduciary Duty Untuk Mewujudkan Good Corporate Governance Dalam Perseroan Terbatas." *Journal Of Contemporary Law Studies* 2(2), 2025

there is an element of abuse of authority or corruption. It also provides legal certainty, strengthens the investment climate, and protects the integrity of notaries as guardians of the authenticity of legal acts in the corporate world.¹⁶

The enactment of Law Number 1 of 2025 on the Third Amendment to Law Number 19 of 2003 concerning BUMN marks a significant milestone in the reform of corporate law in Indonesia, particularly in regulating the position, role, and responsibilities of BUMN. One fundamental aspect emphasized in this latest regulation is the clear separation between BUMN losses and state losses. Article 4B of the latest BUMN Law stipulates that BUMN losses are not automatically considered state losses but are first regarded as corporate losses. This reflects the strengthening of the paradigm that BUMN, although their capital comes from separated state assets, operate as private legal entities in the form of limited liability companies, and their accountability mechanisms are subject to corporate law. Thus, not all business losses of BUMN can be interpreted as state losses with criminal implications.

Furthermore, Article 9G stipulates that BUMN directors are not state officials but organs of the company executing managerial functions with the principles of fiduciary duty, duty of care, and the business judgment rule.¹⁷ This regulation provides legal clarity that

directors' responsibilities must be placed within the framework of company law, not automatically under state administrative law or corruption criminal law. With this provision, the risk of criminalization of directors for every business loss can be minimized, thereby fostering a healthier managerial climate and encouraging more courageous business decision-making.¹⁸

The juridical implications of this regulation are significant. Directors no longer automatically face accusations of harming state finances whenever a BUMN incurs business losses; rather, their actions are first tested against principles of prudence, good faith, and compliance with the company's articles of association.¹⁹ If these principles are met, directors are protected by the business judgment rule doctrine. Conversely, if there is evidence of abuse of authority, conflicts of interest, or unlawful acts, only then can the criminal law regime be applied.

From a notarial perspective, this clarity reinforces the notary's role as the party ensuring that every legal act of BUMN directors whether business agreements, capital restructuring, or strategic partnerships is executed in the form of an authentic deed that provides legal certainty. Notarial deeds become evidence distinguishing between transactions conducted according to legal procedures and transactions that potentially violate statutory provisions.²⁰ Consequently, the latest BUMN Law not only strengthens the

¹⁶ Arif Hartanto. "Akibat Hukum Kerugian Keuangan Negara Di Dana Pensiun BumN" *Jurnal Nalar Keadilan* 2 (1), 2022.

¹⁷ Desak Made Setyarini, Ni Luh Made Mahendrawati, And Desak Gde Dwi Arini. "Pertanggungjawaban Direksi Perseroan Terbatas Yang Melakukan Perbuatan Melawan Hukum ." *Jurnal Analogi Hukum* 1 (1), 2020

¹⁸ Mochammad Abizar Yusro, Ali Ismail Shaleh, And Hari Sutra Disemadi. "Perlindungan Hukum Keputusan Bisnis Direksi BUMN Melalui Business Judgement

Rule Doctrine ." *JURNAL JURISPRUDENCE* 10 (1), 2020

¹⁹ Desty Sari Wardani. "Perlindungan Direksi Terhadap Keputusan Bisnis Perlindungan Direksi Terhadap Keputusan Bisnis Melalui Penerapan Prinsip Business Judgement Rules Melalui Penerapan Prinsip Business Judgement Rules Di Amerika Serikat, Jepang, Dan Indonesia Di Amerika Serikat, Jepang, Dan Indonesia." *Jurnal Program Magister Hukum FHUI*, 2 (3) , 2023

²⁰ Mahmud Isyac Kurnia Sandy, Madiasa Ablisar, Mahmud Mulyadi, And Mahmud Siregar. "Kepastian Hukum Penerapan Undang-Undang Tipikor Dalam

position of directors but also clarifies the role of notaries in creating accountability and legitimacy for every legal action taken by BUMN.²¹

Role of Notaries in Ensuring the Legitimacy and Accountability of BumN Director's Actions

In corporate law practice, the separation between BUMN losses and state losses not only affects the legal responsibility of directors but also emphasizes the crucial role of notaries in ensuring the legitimacy of every legal action taken by BUMN. Notaries act as the parties who document directors' decisions and transactions in the form of authentic deeds, ensuring that each action can be legally proven and complies with proper legal procedures.²²

The importance of notaries' role can be observed in several aspects: first, notarial deeds serve as evidence that directors' decisions are made in accordance with corporate governance principles, including fiduciary duty, duty of care, and the business judgment rule, as stipulated in the latest BUMN Law (Law No. 1 of 2025 on the Third Amendment to Law No. 19 of 2003). Second, these deeds can distinguish between legally valid transactions and actions that potentially violate statutory provisions or indicate abuse of authority, in line with the Notary Law (Law No. 2 of 2014). Third, the role of notaries is preventive; through authentic documentation, the risk of criminalization of directors for business losses can be minimized, consistent with the separation of BUMN and state losses

under the latest BUMN Law. With the enactment of the latest BUMN Law, notarial deeds have become a crucial instrument for creating legal certainty and accountability.

All managerial decisions of BUMN including strategic partnerships, capital restructuring, and business decisions must be properly documented through notaries. This not only protects directors from disproportionate criminal allegations but also strengthens the position of notaries as guardians of the authenticity of legal actions in the corporate world.²³

In the author's view, the role of notaries in this context is both strategic and fundamental. Notaries do not merely serve as administrative recorders but also as a preventive mechanism that protects directors from premature criminal allegations and upholds corporate accountability. Thus, the integration of the BUMN Law and notarial practices establishes governance that is transparent, accountable, and professional, while reinforcing legal certainty for all parties involved.

The analysis demonstrates that the separation of BUMN losses from state losses strengthens directors' protection under the business judgment rule, ensuring that managerial decisions taken in good faith and with due care cannot automatically be criminalized. However, a further normative question arises: to what extent can the latest BUMN Law (Law No. 1 of 2025) be regarded as *lex specialis* that overrides the broader definition of "state losses" in the State Finance Law (Law No. 17 of 2003).²⁴

Menjerat Pelanggar Prinsip Kehati-Hatian." *Journal Of Law And Contemporary Issues* 3 (2), 2024

²¹ Rizal Choirul Ramadhan, Kedudukan Hukum Badan Usaha Milik Negara Sebagai Anak Perusahaan Dalam Perusahaan Holding Induk, *Media Iuris*, Volume 4 No. 1 February 2021, page. 88-89

²² Muhammad Yusuf. "Batasan Makna Tentang Itikad Baik Direksi Terhadap Perseroan Terbatas." *Jurnal Mutiara Hukum* 3 (2), 2020

²³ Ahmad Yani & Gunawan Widjaja, *Seri Hukum Bisnis Perseroan Terbatas*, Raja Grafindo Persada, Jakarta, 2008,

²⁴ D.Y. Witanto, *Dimensi Kerugian Negara Dalam Hubungan Kontraktual (Suatu Tinjauan Terhadap*

From a doctrinal perspective, the principle of *lex specialis derogat legi generali* dictates that a specific law prevails over a general one. The BUMN Law explicitly regulates the corporate governance of state-owned enterprises and clarifies in Article 4B that BUMN losses are to be treated first and foremost as corporate losses, not automatically as state losses. This specific provision directly addresses the ambiguity that has long arisen from the State Finance Law's broad definition of state losses.²⁵ Accordingly, in the context of BUMN, the BUMN Law should function as *lex specialis*, limiting the application of the State Finance Law whenever the issue concerns business losses incurred in ordinary corporate operations.²⁶

Such an interpretation is consistent with the protective rationale of the business judgment rule.²⁷ Directors of BUMN cannot be held personally or criminally liable for losses that result from legitimate business risks, provided their actions are consistent with fiduciary duty, duty of care, and good faith.²⁸ Only when there is evidence of bad faith, abuse of authority, or unlawful acts should the definition of state losses under the Anti-Corruption Law be triggered. In this sense, the BUMN Law operates not only as a corporate statute but also as a safeguard that recalibrates the boundary between corporate accountability and criminal liability.²⁹

CONCLUSION

The separation of BUMN losses from state

losses under Law No. 1 of 2025 affirms that BUMN are private legal entities with public ownership. This recognition ensures that corporate losses cannot automatically be equated with state losses, thereby protecting directors from disproportionate criminalization. Directors' accountability must be tested within the framework of corporate governance principles: fiduciary duty, duty of care, and the business judgment rule while the notary plays a preventive role by documenting business decisions authentically to distinguish legitimate corporate risks from unlawful conduct.

However, potential disharmony remains with the State Finance Law and the Anti-Corruption Law (UU Tipikor), particularly concerning the broad interpretation of "state losses" by law enforcement and oversight bodies. To prevent conflicting applications of law, harmonization is required through either revision of the State Finance Law and UU Tipikor or the issuance of clearer implementing regulations. Such reform would ensure normative coherence, strengthen corporate governance in BUMN, and strike a fair balance between directors' legal protection and their accountability to the public interest.

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²⁵ Darus, M. Luthfan Hadi. *Hukum Notariat dan Tanggung Jawab Jabatan Notaris*. Yogyakarta: UII Press, 2017.

²⁶ Indra Surya dan Ivan Yustiavandana. *Good Corporate Governance: Kajian BUMN dan Perbankan di Indonesia*. Jakarta: Kencana Prenada Media Group, 2006

²⁷ Afida Ainur Rokfa, et. all, Kedudukan Hukum Kekayaan BUMN Persero dalam Pelaksanaan Sita Umum Akibat Kepailitan, *Jurnal Ilmu Kenotariatan*, Volume 1 No.1 February 2020, page.37

²⁸ Munir Fuady, *Hukum Perusahaan*, Citra Aditya Bakti, Bandung, 2008.

²⁹ Ni Luh Putu Sri Astiti. "Implikasi Yuridis Pemisahan Kekayaan Negara pada BUMN terhadap Status Kerugian Negara." *Jurnal Rechtsvinding* 9, no. 2 (2020): 201–220.

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