

# Legal Dynamics of Board of Directors Authority Post - Appointment: An Analysis of Indonesian Corporate Law

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**Abstract:** *This study examines the legal criteria and processes involved in the empowerment of the Board of Directors in Indonesian Limited Liability Companies, focusing on the procedural aspects post - appointment by the General Meeting of Shareholders. It highlights the regulatory framework governing the authority of the Board of Directors and the role of the Ministry of Law and Human Rights in legitimizing this authority. The research employs a Regulatory Review Methodology and a Normative Juridical approach, analyse the Limited Liability Company Law to elucidate when a Board members authority to legally represent the company commences. The findings emphasize the necessity of a registration receipt from the Ministry for legal representation, thus contributing to a clearer understanding of corporate governance in Indonesia. The purpose of this article is to analyse the legal processes and requirements that validate the authority of the Board of Directors in Indonesian Limited Liability Companies post their appointment, with a specific focus on the role of the Ministry of Law and Human Rights. This article is significant as it provides a comprehensive legal analysis of the authority vested in the Board of Directors of Indonesian Limited Liability Companies, highlighting the critical role of the Ministry of Law and Human Rights in legitimizing this authority, which is vital for corporate governance and legal compliance.*

**Keywords:** Board of Directors, appointment, represent, authority, Ministry of Law and Human Rights

## 1. Background

In accordance with the Limited Liability Company's Act, the Limited Liability Company organ consists of 3 elements, namely the Board of Directors, the Board of Commissioners and the General Meeting of Shareholders<sup>1</sup>. The Limited Liability Company organ obtains authority granted to it based on the Law, the Company's Articles of Association and the resolutions of the General Meeting of Shareholders. It has been determined that the Company's organ in the form of the Board of Directors is authorized to manage the Company's operations with the aim of achieving the aims and objectives of the Company, in accordance with the authority stated in the Articles of Association<sup>2</sup>. The Board of Commissioners is tasked with supervising the performance of the Board of Directors based on the work plan<sup>3</sup>. The General Meeting of Shareholders has authority that has not been determined in the Company's Articles of Association while still referring to the Law on Limited Liability

Companies and other laws and regulations<sup>4</sup>. In its operations, the term of office of the Board of Directors, Commissioners is determined based on the resolution of the General Meeting of Shareholders which appoints and/or dismisses members of the Board of Directors and/or Commissioners. In the General Meeting of Shareholders, both Annual and Extraordinary, one of the decisions is to appoint Members of the Board of Directors and / or Commissioners,

By appointing someone to a position, it raises questions that require explanation such as:

- Name of Position given
- Extent of authority
- And the crucial thing is when the authority / authority begins to be owned by the person concerned.

The determination of the position name can be clearly seen in the resolution of the General Meeting of Shareholders held by the Shareholders. The resolution of the General Meeting of Shareholders will state the name of the position that has been regulated in the Articles of Association. The General Meeting of Shareholders will not mention the name of a position that is not in the Articles of Association, unless the General Meeting of Shareholders is intended to change the contents of the provisions in the Articles of Association. The extent of the Position Authority will also be clearly stated in the resolution of the General Meeting of Shareholders clearly and completely. The resolution of the

<sup>1</sup>Law no. 40 of 2007 concerning Limited Liability Companies, Article 1 In this law, what is meant by: 2. The Company's organs are the General Meeting of Shareholders, Board of Directors, and Board of Commissioners.

<sup>2</sup>Law number 40 of 2007 concerning Limited Liability Companies article 1 paragraph 5. The Board of Directors is an organ of the Company that is authorized and fully responsible for the management of the Company for the benefit of the Company, in accordance with the aims and objectives of the Company and represents the Company, both inside and outside the court in accordance with the provisions of the articles of association

<sup>3</sup> Law number 40 of 2007 concerning Limited Liability Companies article 1 paragraph 6. The Board of Commissioners is the Company's organ in charge of conducting general and/or special supervision in accordance with the articles of association and providing advice to the Board of Directors.

<sup>4</sup>Law number 40 of 2007 concerning Limited Liability Companies article 1 paragraph 4. The General Meeting of Shareholders, hereinafter referred to as the GMS, is an organ of the Company that has authority not granted to the Board of Directors or the Board of Commissioners within the limits specified in this law and/or the articles of association.

General Meeting of Shareholders will detail the matters intended as the authority possessed by the position. Thus, the office holder will clearly know the duties and authorities he has. The thing to remember again is about when the position will effectively have an authority stated in the Company's Articles of Association. In the General Meeting of Shareholders, it will usually be stated when the authority will begin and end. Clearly, it is mentioned if it starts with a *starting point* such as:

- Since the closing of the General Meeting of Shareholders
- From a certain date

Traditionally, office holders will start their new positions since the closing of the General Meeting of Shareholders. With this habit, the stakeholders will immediately make execution decisions related to company operations. The decision is usually marked by a signature on the document containing the executive decision of the Company. These decisions can be operational in nature, and vice versa can also be strategic in nature, such as buying/selling large amounts of assets, filing/eliminating large loans, mergers or acquisitions, or changing/terminating partnership agreements. These legal acts require a decision from the Company's Management with a separate process, either regulated by the Articles of Association or even determined by the Laws and Regulations. In making these decisions, the basis of authority required by office holders becomes a crucial/important condition. The Company's decision is only considered valid if it is made by the Incumbent who legally represents the Company.

In some decisions, it is stated that when the term of office applies is to mention it in the decision such as the sentence ". . . . . effective from the closing of the Meeting of Shareholders in the year xxxx until the closing of the General Meeting of Shareholders in the following year xxxx. . . .". And some decisions mention certain dates in certain sentences ". . . . . effective from the date xx of the xxx (month) year xxxx, to the date xx of the xxx (month) year xxxx, or based on the decision of the General Meeting of Shareholders that precedes. "

With this mention, the member of Board (Directors/ Commissioners) are as if they are considered to have legally held the position, in accordance with the conditions stated in the General Meeting of Shareholders' decision. Thus, the member of Board (Directors/ Commissioners) are immediately considered to have the legitimacy to take actions for and on behalf of the Company. All actions of the Company that require a decision from the Incumbent will usually be initiated after the conditions that are prerequisites for the implementation of the decision are exceeded. As an initial illustration, if the resolution of the General Meeting of Shareholders mentions a certain date, then starting from that date, the Incumbent will begin the authority possessed by the Position. The Holder will begin to use all the authority possessed by the position in the daily activities of the Company's operations. Thus, if the decision of the General Meeting of Shareholders only mentions an event such as "closing of the General Meeting of Shareholders", then after the occurrence is exceeded, the Incumbent will

automatically be able to exercise the authority possessed by the Position.

### Question

When does exactly, a member of the Board of Directors have the legal standing to represent a Limited Liability Company?

## 2. Discussion

The issue of when exactly a Director gains authority to represent the Company can be seen in the General Meeting of Shareholders Resolution which states in detail. In the General Meeting of Shareholders Resolution on the appointment of Director, it will state when the term of office as Director begins. The resolution of the General Meeting of Shareholders containing the appointment of members of the Board of Directors will be made in a Notarial Deed<sup>5</sup> and then by a Notary, the document will be continued for processing to the Ministry of Law and Human Rights. The results of the administrative process to the Ministry of Law and Human Rights will issue four types of documents, namely<sup>6</sup>:

- 1) Decree of Confirmation, given for the act of standing
- 2) Decree of Amendment of Articles of Association, given for changes in name, domicile, business field and authorized capital.
- 3) Letter of Acceptance of Notification of Changes in Company Data, given for requests for changes in shareholders, directors/board of commissioners, and
- 4) Letter of Acceptance of Notification of Changes to the Articles of Association, given for other applications for changes to the Articles of Association, including changes in the deposited capital.

In the four documents resulting from the process to the Ministry of Law and Human Rights after analysis, there are similarities and differences with each other.

The similarities are:

- 1) the parties involved are the Ministry of Law and Human Rights as the competent party, the Notary as the party that makes the Notarial Deed
- 2) proof of receipt of notification/consent is the publication of documents from Ministry of Law and Human Rights

The differences are:

- 1) Approval is for changes in the Company's name and/or place of residence; the aims and objectives and business activities of the Company; the period of establishment of the Company; the amount of authorized capital; reduction of issued and paid - up capital; The status of a closed Company becomes a Public Company or vice versa, while the rest is in the form of Notification.<sup>7</sup>

<sup>5</sup>Law no. 40 of 2007 article 21 paragraph (5) Amendments to the articles of association that are not contained in the deed of minutes of meeting made by a notary must be stated in the notarial deed no later than 30 (thirty) days from the date of the resolution of the GMS.

<sup>6</sup>UU no 40 tahun 2007 pasal 21 ayat (1) jo ayat (3)

<sup>7</sup>Act no 40 years 2007 article 21 sub (1), (2), (3)

- 2) Notifications tend to be shorter, whereas Approvals require a longer duration

Regarding the administrative process submitted to the Ministry of Law and Human Rights, of course, it requires a certain period of time before the requested documents will be issued. The issuance of documents by the Ministry of Law and Human Rights will require a certain duration, or a certain administrative process, which is required as long as the application is processed by the Ministry of Law and Human Rights. By following the existing and applicable administrative flow, it can be estimated that there is a "time lag" between the entry of the application and the issuance of the Letter of Acceptance of Notification of Changes in the Company's Data. The existence of this "time lag" has the potential to be a question from external parties who will cooperate with the Company, regarding the clarity of when exactly (a certain date or even time) the authority of a newly appointed member of the Board of Directors has been valid according to law. In the event that there is a "time lag" that exceeds the deadline for processing the application, it creates a situation where the member of the Board of Directors, even though he has been appointed at the General Meeting of Shareholders, but it is known that the Director has not been recorded in the Company's Register, whether the Director can represent the Company. This situation is potentially questionable, due to the appointment of the Director, has not obtained a Letter of Acceptance of Notification of Changes in the Company's Data. Without evidence in the form of a Letter of Receipt of Notification of Changes in Company Data, *external* parties who will cooperate, may be doubtful or question the authority of the Director. This doubt is related to the absence of the Letter of Acceptance of Notification of Changes in Company Data, which is evidence if the Ministry of Law and Human Rights has provided proof of receipt in accordance with applicable regulations. This situation is understandable, if then there are parties who question the validity of the agreement that has been made by the Director. Because, if the party who has signed the agreement, turns out not to have sufficient or legal authority, then the party who gets the right under the agreement, potentially loses his rights. Loss of such rights, in addition to potentially causing financial or financial losses, also has the potential to cause compliance with due diligence requirements for prospective Providers before entering into a cooperation or purchase process by a Company. Also, if later, it turns out that the financial loss is so large that it affects and disrupts the Company's financial condition, then the loss has the potential to make the Company default which has the potential to make bankruptcy or bankruptcy occur.

With regard to the legal "competence" required to be considered authorized to represent the Company, it is in line with the understanding in article 1 paragraph 5 of Law no 40 of 2007 which states as follows:

The Board of Directors is an organ of the Company that is authorized and fully responsible for the management of the Company for the benefit of the Company, in accordance with the aims and objectives of the Company and represents the Company, both inside and outside the court in accordance with the provisions of the articles of association.

In the provisions of the Law, because it is clearly stated that the Board of Directors is an organ of the Company authorized to represent the Company, it is necessary to know when a Director has the authority to act on behalf of the Company in a capable state. If at the time of carrying out legal actions on behalf of the Company, it turns out that the relevant Director is not legally competent, then can the relevant action be considered to have represented the Company? Whether the Company, in the future, will recognize and accept that the actions concerned are actions carried out by parties representing the Company based on the authority they already have appropriately.

In general, competence is regulated in the Civil Code in article 1330 which reads: Everyone is capable of making engagements, unless he is declared by law incompetent.

With the explanation in the article, a person is declared incompetent if the law declares the person concerned incompetent. In this matter, it will be an issue when the office holder appointed at the General Meeting of Shareholders legally has authority that is recognized and not prohibited by law. Based on the understanding according to the Limited Liability Company Law, article 94 reads:

#### Article 94

- 1) Members of the Board of Directors shall be appointed by the General Meeting of Shareholders.
- 2) For the first time, the appointment of members of the Board of Directors is carried out by the founder in the deed of establishment as referred to in Article 8 paragraph (2) point b.
- 3) Members of the Board of Directors shall be appointed for a certain period of time and may be reappointed.
- 4) The articles of association regulate the procedures for appointment, replacement, and dismissal of members of the Board of Directors and may also regulate the procedures for nominating members of the Board of Directors.
- 5) The resolution of the General Meeting of Shareholders regarding the appointment, replacement, and dismissal of members of the Board of Directors shall also determine the effective date of such appointment, replacement, and dismissal.
- 6) In the event that the General Meeting of Shareholders does not stipulate the effective date of appointment, replacement, and dismissal of members of the Board of Directors, the appointment, replacement, and dismissal of members of the Board of Directors shall take effect from the closing of the General Meeting of Shareholders.
- 7) In the event of appointment, replacement, and dismissal of members of the Board of Directors, the Board of Directors must notify changes in members of the Board of Directors to the Minister to be recorded in the register of the Company within a period of no later than 30 (thirty) days from the date of the resolution of the General Meeting of Shareholders.
- 8) In the event that the notification referred to in sub - article (7) has not been made, the Minister rejects any application submitted or notification submitted to the Minister by the Board of Directors that has not been recorded in the register of the Company.

- 9) The notification referred to in sub - article (8) does not include notification given by the new Board of Directors of his/her own appointment.

From the understanding of the article, the authority of the new members of the Board of Directors will take effect after the notification / approval from the Minister is issued<sup>8</sup>. Thus, a member of the Board of Directors who has just been appointed by the General Meeting of Shareholders or in the Deed of Establishment, does it automatically have the authority to act out on behalf of the Company in binding with other parties? The authority of a person to represent the Company has been regulated in article 98 of the Limited Liability Company Law which states as follows:

#### Article 98

- 1) The Board of Directors represents the Company both in and out of court. In the event that the members of the Board of Directors consist of more than 1 (one) person, the authorized to represent the Company is each member of the Board of Directors, unless otherwise specified in the articles of association
- 2) The authority of the Board of Directors to represent the Company as referred to in paragraph (1) is unlimited and unconditional, unless otherwise stipulated in this law, articles of association, or resolutions of the General Meeting of Shareholders.
- 3) The decision of the RUPS as referred to in paragraph (3) shall not be contrary to the provisions of this Law and/or the estimation of the policy of the Order.

Authority to act, is an action related to the event of carrying out legal actions with other legal subjects, therefore it is necessary to clearly regulate the authority to act. Article 1329 of the Civil Code says the following: "Every person is authorized to make an engagement, unless he is declared incompetent to do so. "

The act of making an agreement is the most common action carried out by all members of society (legal subjects), so the provisions of article 1329 of the Civil Code affirm that all persons (legal subjects) are basically capable of acting, unless the law specifies otherwise.

What is meant by the ability to act as a subject of law, that is, everything that, according to law, has rights and obligations so that it has the authority to act. In the context of the discussion regarding the commencement of the authority of the newly appointed member of the Board of Directors, the validity of the ability of the member of the Board of Directors as a bearer of rights as a Director (subject of law) starts from the moment he is appointed and ends when he quits for any reason. According to the law, any person is considered capable of acting as a subject of law, unless by law it is declared incompetent under article 1329 of the Civil Code.

<sup>8</sup>Law no. 40 of 2007 article 94 paragraph (8) In the event that the notification referred to in paragraph (7) has not been made, the Minister rejects any application submitted or notification submitted to the Minister by the Board of Directors that has not been recorded in the Company's register.

A capable member of the Board of Directors because he has been appointed by the General Meeting of Shareholders, so he will have the rights and obligations as a member of the Board of Directors in the Company. The law explains that the "capable" criterion (*bekwaan*) is a general criterion associated with a person's self - condition, while the "authorized" (*bevoegd*) criterion is a specific criterion associated with a particular act or action. It is possible that a Legal Subject (a private person) is capable, but not necessarily authorized. But on the contrary, the Legal Subject (natural person) who is authorized, is definitely considered capable. A person as a Legal Subject will be considered capable if he is an adult (in the sense, he is 21 years of age or older) and he is of sound sense. Meanwhile, a person who is considered incompetent if he is not an adult (he is not yet 21 years old), or he is a person who is placed under guardianship (occurs due to mental disorders, boxers or spenders). A person's ability to act in law or to perform legal acts will be determined by whether or not a person has been, said to be an adult according to law. A person's maturity is a benchmark, to determine the person, capable of acting to do a legal act or not. If the maturity of the Legal Subject (natural person), refers to a state of immaturity of the Legal Subject according to law to be able to act within the law, which is determined by age restrictions. So, by following this line of thinking, a member of the Board of Directors, will be considered to have maturity according to law to be able to start carrying out a legal action, is after fulfilled of the provisions of article 98 paragraph 8 of the Limited Liability Company Law. With fulfilled of these provisions, such event become the evidence of the completion of the maturity requirements for a Legal Subject. The ability to act for Legal Subjects is the general authority to take legal action. After the members of the Board of Directors as Legal Subjects are declared to have legal authority, they are then given the authority to carry out their rights and obligations. Hewas given the ability to act to represent the Company. Related to Rights, there is the authority to receive, while related to obligations there is the authority to act (also called the authority to act). Legal authority is owned by all humans as legal subjects, while the authority to act can be influenced by several factors, such as age, status (married or not), status as heirs and others

Based on the provisions in article 94 paragraph 8 of the Limited Liability Company Law, can it be interpreted that all actions by members of the Board of Directors must wait for the issuance of a Notification Receipt from the Ministry of Law and Human Rights? The answer is YES. Thus, the next problem is to overcome the time gap related to the commencement of authority from the Board of Directors of the Company. This often creates difficulties for the Company in carrying out its daily operational activities. If the Company only has 1 Director, then problems related to the time lag between the Closing of the General Meeting of Shareholders and the issuance of the Letter of Receipt of Notification of Changes in Company Data will cause new problems, this is considering that the Company's operational activities must still be carried out smoothly and must not experience operational constraints related to the vacancy of authority. The vacancy must be overcome by taking actions in line with applicable regulations.

What about efforts to overcome the situation? There are several actions performed such as:

- 1) Postpone activities that require authority from members of the Board of Directors, until a Notification Receipt is obtained from the Ministry of Law and Human Rights
- 2) Process activities that require authority from the Director, before the replacement process is carried out in the General Meeting of Shareholders.
- 3) Accelerate the process of making Notarial Deed related to the General Meeting of Shareholders.
- 4) The Company determines the number of Directors more than 1 person, with different tenure maturities.
- 5) The new Board of Directors continued to carry out its activities, but after the Letter of Acceptance of Notification of Changes in Company Data, the Company immediately held a circular Extraordinary General Meeting of Shareholders (EGMS) which said it attributed all actions of the Board of Directors from the time they were appointed by the GMS until the EGMS was held.

According to the Author's analysis, the action to postpone is an action that makes the Company will experience operational smoothness. With this action, the Company has the potential to experience a decrease in revenue due to the postponement of the Company's activities, including the potential loss of revenue. The delay also raises questions for external parties who will cooperate with the Company related to the professionalism of the Company, considering that the cooperation that will be carried out is a series of processes that can be estimated in duration. With this delay, it can create an impression, if the Company is a party that does not prepare in detail, including not conducting a complete and comprehensive *Risk Assessment* in carrying out an activity. Actions to process early, also have the potential to cause losses for the Company. This happens, given the large potential for inaccuracy in the administrative process that is rushed due to chasing time. This action will also raise fundamental questions regarding the inadequate preparation process in executing a work plan of the Company. This action, will also cause a negative impression to the Company related to planning, implementing an activity carefully. Action to accelerate the preparation of Notarial Deed related to the General Meeting of Shareholders. This action is carried out by making preparations early, so that the administrative process of managing Notification to the Ministry of Law and Human Rights can be carried out immediately after the General Meeting of Shareholders is over. Thus, the faster the process of making the Deed, it is expected that the Notification Receipt document will also be quickly issued. The action to speed up this process is carried out by the Company, by making preparatory steps and coordination with the Notary as the Deed Maker. With the Coordination and Preparation with the Notary, the process of making Official Deed activities related to the General Meeting of Shareholders will be quickly made. With the completion of the Notary Deed, the Notary Party can process to the Ministry of Law and Human Rights immediately. Thus, the time lag between the closing of the General Meeting of Shareholders and the making of a Notary Deed is made as short as possible. Furthermore, the process of submitting a Receipt for Changes to the Register of Companies at the Ministry of

Law and Human Rights can begin immediately. The faster the process of making a Notarial Deed and submitting administration to the Company Register at the Ministry of Law and Human Rights, the sooner the members of the Board of Directors will have the legal authority to represent the Company. The act determines the number of Directors more than 1 (one) person, with different tenure maturities. This action provides flexibility to Directors who have not ended their term of office, to continue to carry out the Company's activities. This action is in accordance with the provisions in the Limited Liability Company Law article 98 paragraph 1, which confirms that each member of the Board of Directors is entitled to represent the Company. Thus, there will be no problem of a vacuum of authority, which is contained in article 94 paragraph 8 of the Limited Liability Company Law.

The choice of action to be taken to initiate the follow - up effect, related to the change of Board of Directors, depends largely on the wishes and preferences of the Shareholders and / or the Company concerned,

### 3. Conclusion

In conclusion, the authority of the Board of Directors in Indonesian Limited Liability Companies becomes legally valid post their appointment by the General Meeting of Shareholders only after the issuance of a Letter of Receipt of Notification of Changes in Company Data by the Ministry of Law and Human Rights. This highlights the crucial role of the Ministry in ensuring legal compliance and the legitimacy of corporate actions, thereby safeguarding the interests of stakeholders and maintaining corporate governance standards

### Reading List

- [1] Act
- [2] Indonesia Civil Code
- [3] Limited Liability Company Law No.40 year 2007
- [4] Article
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