

Analisis konsep nominee shareholders dalam perusahaan penanaman modal asing di Indonesia (studi perjanjian-perjanjian antara EDH dengan ABC PTE LTD) = Analysis of the nominee shareholders concept in foreign investment company in indonesia studies agreements between EDH and ABC PTE LTD / Shinta

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Abstrak

Konsep nominee diakui keberadaannya di negara-negara bertradisi hukum Common Law seperti di Singapura, nominee shareholders dan nominee director diperbolehkan berdasarkan undang-undang trustee dan undang-undang perusahaan Singapura. Sementara di negara-negara bertradisi hukum Civil Law seperti di Indonesia tidak mengakui keberadaan nominee. Bahkan di Indonesia, diatur secara tegas larangan nominee shareholders dan akibatnya adalah perjanjian batal demi hukum sebagaimana diatur dalam Pasal 33 ayat 1 dan ayat 2 Undang-Undang Penanaman Modal. Larangan ini tidak terlepas dari tujuan ekonomi nasional yaitu melindungi pengusaha lokal agar sektor-sektor ekonomi tidak dikuasai dan/atau dieksploitasi oleh pihak asing.

Adanya pembatasan bidang usaha yang tertutup bagi pihak asing dan bidang usaha yang terbuka dengan batasan kepemilikan saham bagi pihak asing sebagaimana diatur dalam Peraturan Presiden nomor 44 Tahun 2016 dan persyaratan paling sedikit perseroan terbatas didirikan oleh 2 (dua) orang sebagaimana diatur dalam Pasal 7 Undang-Undang Perseroan Terbatas, menyebabkan pihak-pihak tidak dapat menguasai atau memiliki perusahaan sepenuhnya. Hal tersebut mendorong penggunaan nominee shareholders di Indonesia, baik dengan mengadakan perjanjian nominee secara langsung maupun secara tidak langsung untuk menyasati larangan nominee shareholders.

*Nominee concept is recognized in Common Law countries such as Singapore, nominee shareholders and nominee directors are allowed under the Trustee Act and Company Act of Singapore. While, in Civil Law countries such as Indonesia does not recognize nominee concept. In addition, Indonesia prohibit nominee shareholders and consequently the agreement is null and void as stipulated in Article 33 paragraph 1 and paragraph 2 of the Investment Act. This prohibition cannot be separated from the nation's economic purpose which is protecting local entrepreneurs so that economy sectors are not controlled and / or exploited by foreign investor.*

The restrictions on business sectors, whether totally closed or limited share ownership for foreign investor as stipulated in Presidential Regulation number 44 Year 2016, as well as the requirement of at least two (2) people in creating a limited liability company as stipulated in Article 7 of Law Limited Liability company, causes a party to not able to fully own the company. It encourages the use of nominee shareholders in Indonesia, either by entering a nominee agreement, directly or indirectly to circumvent the prohibition of nominee shareholders.