

## Liability of The Holding Company For Unlawful Actions in Group Companies (Case Study of Supreme Court Decision Number 89 Pk/Pdt/2010 Concerning Violations of Distribution)

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### ABSTRACT

*Economic development in Indonesia has progressed significantly from year to year, so has the development of national companies either in the form of a single company, joint venture, or group company in the form of PT, CV and so on. The development referred by this research is the development of group companies consisting of holding companies and subsidiary companies where the leadership system of the group company is centralized so that it has the potential to arise an abuse of authority from the holding company, one of which is illegal acts arising from the legal relationship between the holding company and its subsidiary within the group company. This can be seen in the case decision of the Supreme Court of the Republic of Indonesia No.89 PK/Pdt/2010 between PT. Effem Food, Inc and PT. Effem Indonesia against PT. Smak Snak regarding violations of distribution activity. The purpose of this study was to determine the form of liability from the holding company to the subsidiary in the event of an illegal act in the group company based on the decision of the Supreme Court of the Republic of Indonesia No. 89 PK/Pdt/2010. Based on the Judge's assessment and consideration of the evidence of losses suffered by the plaintiff, namely PT. Smak Snak, against the bad faith of the defendants, namely PT. Effem Food, Inc. and PT. Effem Indonesia, causing the panel of judges to place joint liability on PT. Effem Food, Inc. and PT. Effem Indonesia for their illegal actions as the holding company against PT. Smak Snak as a subsidiary. This decision is a manifestation of the application of piercing the corporate veil to the holding company and its subsidiary due to the ownership of PT. Effem Food, Inc. over 90% shares of PT. Effem Indonesia, regarding to this case, PT. Effem Food, Inc. acting as the holding company of PT. Effem Indonesia which exercises to control over the operational activities of its subsidiary. This research is a normative research with a conceptual and statutory approach.*

**Keywords:** *Group Companies; Unlawful Acts; Piercing the Corporate Veil*

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### INTRODUCTION

Since the development of the national economy around 1967, the growth and enhancement of business entities in the form of group companies has increased in number. The existence of group companies in Indonesian business activities are shown by large-scale companies that are no longer run through the form of a single company yet using the concept of group company.<sup>1</sup>In fact, the total income of the top ten group companies in Indonesia reached 9.27% of Indonesia's GDP in 2010. However, along with the circumstances of business following with its various problems, then it cannot be separated from the issues related to the existence

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<sup>1</sup> Sulistiowati. (2011). "Limited Liability dalam Limited Liability pada Konstruksi Perusahaan Kelompok Piramida.". Jurnal Mimbar Hukum FH-UGM, 23(2)

of group companies. These matters can lead to cases in court involving the holding company and its subsidiary, especially in terms of liability for disputes over illegal acts.

Commonly, business that run by the company growth widely so that the company itself needs to be divided according to each business classifications. Each divided business will become an independent incorporated company yet still have the same ownership with centralized control to a certain extent. This company is commonly referred as a holding company in a group company.<sup>2</sup>

Group companies whose members are companies that have been in the form of limited liability companies, each of them has a director who is in charge of managing the company based on its own articles of association. The holding company surely will intervene their subsidiary in various matters including in the financial or financial sector. This oftenly causing chaos since the subsidiary experience financial difficulties and even leading to bankruptcy. Although from the point of view of economic activity, the group companies are one unit, but from a juridical perspective, each company member of the group has its own characteristics in the sense that each company that joins a group company is an independent legal entity. If one of the subsidiary obtain credit from a creditor, then juridical attachment to the holding company may arise because as a shareholder they also responsible for repaying the loan or debt from that creditor.

There is an independent legal relationship between the holding company and their subsidiary. The juridical recognition of the holding company as one of the legal entity of the company to their subsidiary causes both between the holding company and their subsidiary has right to take legal actions on their own. Yet by the practices, whole control given by the holding company over their subsidiary are managed as an economic unit. The control of holding company over the subsidiary in the construction of a group company creates a duality for the subsidiary, namely as an independent legal entity and a business entity subject to the control of the holding company.<sup>3</sup>

The company surely has an owner, and the owner automatically become the shareholder of the company. Shareholder is a person or legal entity that legally owns one or more shares in a company. A company is only responsible to its shareholders, and should work for their benefit. Shareholders rights must be protected and shareholders must be able to exercise their rights through adequate procedures that have been established by the company. Shareholder rights can influence the operations of the company by concentrating on important basic issues, such as the selection of members of the board of directors and commissioners or approval of unusual transactions and other basic issues.<sup>4</sup> In a incorporated company, it is common for

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<sup>2</sup> Emmy Simanjuntak. (1997). *Seri Hukum Dagang: Perusahaan kelompok (group company/concern)*. Yogyakarta :Universitas Gajah Mada, p. 5

<sup>3</sup> Sulistiowati. (2013). *Tanggung Jawab Hukum Pada Perusahaan Grup Di Indonesia*. Jakarta: Erlangga, p. 40

<sup>4</sup> Adrian Sutedi. (2015). *Buku Pintar Hukum Perseroan Terbatas*. Jakarta: Raih Asa Sukses, p. 150

overlapping interests to result in many legal problems, as is often the case with go public companies in Indonesia today, namely the problem of illegal acts committed by the holding company to the subsidiary.

Abuse of power which done by the holding company to its subsidiary is one of unlawful acts that oftenly occur in the concept of group companies. Holding company tends to do this kind of powersince they have control over the subsidiary whereas on the other hand the subsidiary itself is an independent company. On this circumstances, it is referred to the occurrence of abuse of power against the subsidiary by the holding company. According to article 1365 of *BurgerlijkWetboek*, what is meant by an act of violating the law is an act that is against the law committed by someone who because of his fault has caused harm to another person.<sup>5</sup>

In the case of this illegal act, one thing that should become a consideration is how the judge's determining whether case that occurs in a group company is an act against the law or not. On the similar cases like this, the judgment will determine whether the violation committed by the holding company against the subsidiary is an act against the law. To determine this case, the judge surely should take the elements of an illegal act into account to determine a decision in court.

The elements of legal action that known in Article 1365 of *BurgerlijkWetboek* are an act that fulfill the elements below:

1. Against the law;
2. Fault which done by the perpetrator;
3. Loss for the victim; and
4. There is any causal relationship between the act and the loss.

Whereas as known by law, there are three categories of acts against the law, namely:<sup>6</sup>

- a. Acts against the law because of deliberate action;
- b. Actions against the law without elements of misconduct or negligence; and
- c. Actions against the law due to negligence.

Refers to these matters, we will examine which ones are the juridical basis that will be used by the judge as a foundation in determining illegal acts, especially legal actions that occur within group companies in Indonesia and the responsibilities of companies that commit acts against the law.

The shareholders who have control over the company have many opportunities to violate their boundaries. Their interventions cannot be justified in the management of the company, it should be addressed by wider transparency, management accountability, and especially compensation determined by the court. In the event that the shareholder performs the actions

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<sup>5</sup> Munir Fuady. (2017). *PerbuatanMelawanHukum*. Bandung: Citra Aditya Bakti, p. 3

<sup>6</sup> *Ibid*, p. 10

referred to in Article 3 Paragraph (2) of the Incorporated Company Law, all engagements carried out by the company with third parties are the personal liability of the relevant shareholder.

This means that the fulfillment of the agreement can be submitted to the relevant shareholder. It is also suitable to the public shareholders who feel that they have been harmed, for example since they have been harmed by the price of their shares that has fallen as a result of the actions refers in Article 3 Paragraph (2). They can also file a lawsuit for the losses suffered from the major shareholders. The main shareholder cannot escape from their liability to pay compensation by taking refuge in the principles of separate legal personality of a company.<sup>7</sup>

One of the examples of a case of unlawful acts in a group company is in the lawsuit case on the Supreme Court Decision Number 89PK/Pdt/2010. This is a judicial reviewcase of the Supreme Court Decision No. 900K/Pdt/2008 between PT. Effem Food, Inc and PT. Effem Indonesia against PT. SmakSnak. The court decision places joint liability for the holding and subsidiary companies for illegal acts committed by PT. Effem Food, Inc. and PT.Effem Indonesia in a distribution agreement dated April 20, 1998 between PT. SmakSnak and PT. Effem Food, Inc.

The Supreme Court's decision based on Supreme Court Decision No. 900 K/Pdt/2008has rejected the appeal which has permanent legal force, and based on the Supreme Court Decision No. 89 PK/PDT/2010 rejected the request for judicial review. This is reinforced by the evidence of losses suffered by the plaintiff, in this case PT. SmakSnak, so that the defendant, in this case PT. Effem Food, Inc. and PT Effem Indonesia, has committed an illegal act between the holding company and its subsidiary, so that it becomes the basis for the granting of the lawsuit against the law of PT Effem Food, Inc. and PT Effem Indonesia.<sup>8</sup>

The Supreme Court decision provides the fact that the legal relationship between the holding company with their subsidiarywhich isincludes as a member of the group company.If this decision not held in accordance with the regulations, namely the Law on Limited Companies Number 40 of 2007, it can lead to arbitrariness leading to acts against law. This kind of cases of unlawful acts which are the result of arbitrary actions are interesting enough to be studied and understood deeper.

The actual purpose is to achieve justice in group companies in Indonesia, especially in the case of illegal acts that oftenly carried out by the controlling party or the majority (holding company) for their own interests and disadvantage non-controlling parties or minorities (subsidiary), which is become juridical basis of referencefor the judge in determining the illegal act committed by the holding company. Based on this background, the problem raised which then interesting to analyzeis related to the regulations established by the subsidiary, whether the regulations established by the subsidiary can be categorized as illegal acts (case

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<sup>7</sup> *Ibid*, p. 161

<sup>8</sup> Sulistiowati. (2013). *Op. Cit*, p.138

study of the Supreme Court Decision Number 89 PK/Pdt/2010) or not? Then what is the form of liability of the holding company to its subsidiary if there is an unlawful act on it?

## METHOD

This of research is in the form of normative legal research with data collection techniques through library research obtained from various sources such as books, journals, scientific papers and so on, as well as using statutory and conceptual approaches with techniques prescriptive analysis.

## ANALYSIS AND DISCUSSION

### **Holding Company Proven to Have Committed Illegal Acts (Article 1365 of *Burgerlijk Wetboek*) Against Subsidiary (Decision of the Supreme Court of the Republic of Indonesia Number 89 PK/Pdt/2010)**

Provisions for acts against the law have been regulated in Article 1365 and Article 1366 of the *Burgerlijk Wetboek*, in particular to the provisions regarding claims for compensation due to illegal acts. However, both of these articles are not explaining the real definition of an act against the law. Article 1365 of *Burgerlijk Wetboek* states that “every act violating the law, which brings harm to other people, obliges the person who, due to his wrongdoing, publishes the loss, to compensate for the loss”. Refers to this Article, the elements of acts against the law can be drawn as follows:

1. There is an act against the law;
2. There is a mistake;
3. There is a causal relationship between loss and action;
4. There are downsides.

Meanwhile, Article 1366 of *Burgerlijk Wetboek* states that everyone is responsible not only for losses caused by negligence or carelessness. A different scope of understanding is contained on this article which states that a person is not only responsible for losses caused by his own actions, but also for losses caused by his actions which are their liability, or due to the actions of his dependents, or caused by goods under his control.<sup>9</sup>

The element of loss from an act against the law is the logical basis-to emerge the liability for the perpetrator. If the perpetrator is proven to have committed acts against the law, the perpetrator can be burdened with a liability. Likewise, contractual liability arise from the existence of obligations since there are obligations in the contractual relationship. However, new legal responsibilities were born when the contractual obligations are not fulfilled. The existence of an illegal act from a party is one of the causes for someone who has suffered losses

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<sup>9</sup> *Ibid*, p.134

to demand liability. Another cause is the inability of a party to perform based on a contractual legal relationship. If a person commits an act that is detrimental to the rights of another person, for that act the person concerned can be subject to certain legal obligations.

The legal obligation between the holding company and its subsidiary is formed because of the special relationship between both of them. The relationship arises on both of them mostly through share ownership, leadership, or contracts<sup>10</sup>, so that the holding company as the majority holder of authority acts as the central leader who controls and coordinating all members of the group company based on the same goals and the same structure.<sup>11</sup> The majority authority held by the holding company does not necessarily give the holding company any freedom to act out of control because everything has been regulated in legislation, including in *BurgerlijkWetboek* and in Law Number 40 of 2007 Concerning Limited Companies. Therefore, every member of the company, either the holding company or the subsidiary, has rights and responsibilities that have been recognized by law.

In case to protect minority shareholders, in this case the subsidiary, in order with the holding company, it is possible to take actions that result in losses for minority shareholders. For them, it is necessary to provide legal protection, which in this case is done by applying the piercing corporate veil theory, namely by holding liability from the company, namely the holding company. For example, if there is a transfer of profits earned by a subsidiary to a holding company or to another subsidiary.

The imposition of liability on group companies is a form of legal protection for third party subsidiary, liability in this group company requires the fulfillment of the causality of any illegal acts proven to cause harm to others or an element of negligence on the fulfillment of an achievement in an agreement. However, it is realistic that the group company business which is constructed by the relationship between the holding company and the subsidiary cannot be separated from the motive of cooperation between two or more independent legal entities. For this reason, every act that causes harm to other people, obliges someone who made a mistake to compensate for the causality in the form of negligence or violation of the law, as well as the incidence of losses borne by other people.<sup>12</sup>

Regarding the liability of group companies lies in the liability of the holding company for the interests of the third-party subsidiary who suffer losses due to the lack of independence of the subsidiary to carry out the holding company's instructions. The crucial issue is determining the fact that the degree of control of the holding company over the subsidiary has resulted in the independence of the subsidiary to carry out the instructions of the holding company. This

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<sup>10</sup> Simanjuntak. (1994). *Perusahaan Kelompok*. Sementara itu, Eisenberg menyatakan bahwa keterkaitan antara induk dan anak perusahaan dalam perusahaan grup lebih disebabkan oleh adanya kepemilikan saham dibandingkan dengan afiliasi dari kontrak maupun keterikatannya kepemimpinan (Eisenberg, 1993, *Corporate Groups in America, The Law Relating to Corporate Groups*, p.1)

<sup>11</sup> Blumberg. (2005). "*The Transformation of Modern Corporation Law: The Law of Corporate Groups*", *The Connecticut Review*, p. 1

<sup>12</sup> *Ibid*, p. 125

is related to the domination of the holding company over the management of the subsidiary, which causes the subsidiary to only become an instrument of the holding company. This condition causes the subsidiary's third-party consisting of minority shareholders, creditors, and employees of the subsidiary to have a vulnerability to opportunistic attitudes and neglect by the holding company. The construction of a group company can affect the third-party subsidiary companies in two ways, namely: the construction of a group company that is less transparent due to unclear allocations among group member assets; and construction group companies authorize the holding company to regulate transactions and determine the value of transactions that are distributed among the subsidiary.

In the case of illegal acts in a lawsuit against group companies, the Supreme Court Decision Number 89 PK/Pdt/2010 was shown. This case is a case of juridical review of the Supreme Court Decision Number 900K/Pdt/2008 between PT.Effem Food, Inc. and PT.Effem Indonesia against PT.SmakSnak, indicating that there was an illegal act. The court decision places joint liability for the holding and subsidiary companies for illegal acts committed by PT.Effem Food, Inc. and PT.Effem Indonesia in a distribution agreement dated April 20th, 1998, between PT.SmakSnak and PT.Effem Food, Inc. By its decision, the Supreme Court has rejected the appeal by Supreme Court Decision Number 900 K/Pdt/2008 which has permanent legal force, and rejected the request for reconsideration by Supreme Court Decision Number 89 PK/Pdt/2010. This Supreme Court ruling strengthens the court rulings at the previous level, namely the South Jakarta District Court and PT. DKI Jakarta. The panel of judges at the South Jakarta District Court stated that PT.Effem Food, Inc. as first defendant and PT.Effem Indonesia as second defendant have been proven legally to have committed illegal acts. South Jakarta District Court sentenced PT.Effem Food, Inc. and PT.Effem Indonesia to pay compensation to PT.SmakSnak jointly and severally.

At the appeal level, the Jakarta High Court by the Decision Number 331/Pdt/2007/PT-DKI dated September, 19th 2007, upheld the decision of the South Jakarta District Court dated February, 14th 2007, Number 923/Pdt.G/2005/PN.jak.Sel. in the context of liability in group companies. Analysis of the case in the Supreme Court Decision Number 89PK/Pdt/2010 is limited to liability in group companies. The legal analysis of the imposition of liability on group companies emphasizes three things as follows:

- a. The existence of a relationship between the holding and the subsidiary which allows the holding company to exercise control over the subsidiary in order to support the interests of the group company as an economic unit;
- b. An element of loss incurred by a third party from the group company; and
- c. Caused by an illegal act or so called wanprestasi.

The decision of the Supreme Court of the Republic of Indonesia shows that the panel of judges has jointly assigned liability to PT. Effem Food, Inc. and PT. Effem Indonesia for the

illegal acts committed by first defendant and second defendant against PT. SmakSnak as the plaintiffs. This decision is a manifestation of the application of piercing the corporate veil to the holding company and its subsidiary due to the ownership of PT. Effem Food, Inc. over 90% shares of PT. Effem Indonesia. In this case, PT. Effem Food, Inc. acts as the holding company of PT. Effem Indonesia which carries out control over the operational activities of the subsidiary which began with the establishment of a confectionery processing factory in Indonesia by PT. Effem Food, Inc. by the reason for the establishment of PT. Effem Indonesia is so that some products can be produced in Indonesia so that production costs become more economical which results in the price of some products being more competitive and more acceptable to the Indonesian people.

Evidence of illegal action which is conducted by PT. Effem Food, Inc. and PT. Effem Indonesia to PT. Smak Snak is shown by the following elements:<sup>13</sup>

- 1) PT. Effem Food, Inc. has appointed PT. Effem Indonesia to market products in Indonesia without prior notification and/or approval of PT. Smak Snak;
- 2) Unilaterally, narrowing the distribution area of products from all of Indonesia to only South Jakarta, Bogor, and Bali;
- 3) Sales revenue or also known as commission or sales margin is also deducted unilaterally by PT. Effem Food, Inc. and PT. Effem Indonesia;
- 4) PT. Smak Snak as the sole distributor was asked to become a distributor under a multi-distributor system;
- 5) In May 2003, PT. Effem Indonesia sent notifications to several customers asking customers to register products on behalf of PT. Effem Indonesia, so that PT. Effem Indonesia could send goods directly to customers. In the news, PT. Effem Indonesia also stated that the request to these customers was a follow-up to the agreement between PT. Effem Indonesia and PT. Sma kSnak. In fact the statement of PT. Effem Indonesia is clearly misleading the customers, because PT. Sma kSnak has never given approval to PT. Effem Indonesia;
- 6) PT. Effem Indonesia without the approval of PT. Smak Snak has also sent notifications to several customers stating that starting April 1st, 2004, the distribution of products for the Jakarta, Bogor, Tangerang, and Bekasi area which is usually carried out by the plaintiff will be distributed by PT. Effem Indonesia;
- 7) To slowly turning PT. SmakSnak into passive, PT. Effem Indonesia even stopped the procurement of products and several large-scale customers who contributed significant revenue to significant revenue to the plaintiff's income (key accounts). Carrefour, Makro, Hero Supermarket, Matahari, Indo Group, and Alfa Group, which are usually managed by PT. Smak Snak, were transferred forcibly, unilaterally and without PT. Smak Snak's approval to PT. Effem Indonesia and ultimately managed directly by PT. Effem Indonesia.

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<sup>13</sup> Putusan Mahkamah Agung RI Nomor 89 PK/PDT/2010

The the consideration of the decision of the panel of judges above shows that the legal actions of PT. Effem Food, Inc. and PT. Effem Indonesia is a form of bad faith, violation of the rights of the plaintiff and contrary to the legal obligations of the defendant so it is surely causing losses to PT. Smak Snak. Evidence of damages to the plaintiff from acts against the law of the holding company and subsidiary can be the basis for the granting of the lawsuit against the law by PT. Effem Food, Inc. and PT. Effem Indonesia.<sup>14</sup>

The existence of the holding company as the majority shareholder of the subsidiary gives the advantage of the right to vote in the RUPS which gives the power to exercise control over the running of the subsidiary. In addition, the holding company has the intensive and power to make strategic decisions and make management changes in support of group company interests. Therefore, the juridical boundaries that separate the holding company and subsidiary companies in the construction of group companies are blurred.

### **Responsibilities of the Holding Company go Their Subsidiary**

Subsidiary is a company whose shares are controlled by another company, generally more than 50%. The 'another' company is further known as the holding company. The holding company and its subsidiary do not have to be located in the same area, or manage the same business. In fact, it is very possible that both of them compete in a healthy manner. In this case, the holding company as the controller has the right to control the running of their subsidiary. These controls can be in the form of managerial, supervision, coordination, and control of business activities.

The holding company's ownership of a certain amounts of shares on their subsidiary gives the holding company authority to act as the central leader controlling the subsidiary. However, this becomes a problem if the form of the subsidiary is not a legal entity, namely the limited partnership since in the contents of Article 84 Paragraph (2) Letter b of Law Number 40 of 2007 Regarding Limited Companies, have not contained the regulation of the legal relationship between the holding company in the form of an entity to a subsidiary that is not a legal entity.

The relationship between the holding company and the subsidiary through the ownership of the holding shares in the subsidiary, concurrent positions of the board of directors or the board of commissioners of the holding and subsidiary companies, or control contracts are the main factors for the emerges of the authority to control the subsidiary or make the holding company the central management of the group company. Thus, not a few of the holding company abuse this authority in order to fulfill their personal goals since the interests of the holding company over the interests of the subsidiary.

This case is as shown from the illegal actions committed by PT. Effem Food, Inc and PT. Effem Indonesia as the defendant against PT. Smak Snak as the plaintiff, which shows that PT.

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<sup>14</sup> *Ibid*, p. 138

Effem Food, Inc and PT. Effem Indonesia have bad intention to its subsidiary. This situation is strengthened by the evidence of losses suffered by PT. Smak Snak so that PT. Effem Food, Inc. and PT. Effem Indonesia was proven to have committed an illegal act between the holding company and its subsidiary so that it was used as the basis for the granting of the lawsuit against the law of PT.Effem Food, Inc. and PT. Effem Indonesia as described in the Supreme Court Decision Number 89 PK/Pdt/2010.

The liability of a company that is not a legal entity, for example a company in the form of a firm, a sole proprietorship, so there is no separate asset which is the property of the company. Everything that exists is the property of the owner of the company. Therefore, legally speaking, the liability is not separated between the liability of the company and the personal liability of the company owner.

If an activity is carried out by or on behalf of a company (which is not a legal entity), and there is a loss for the third-party, the third-party can ask the company owner to be legally responsible, including asking that the owner's property be confiscated and auctioned off. This is a consequence of legal provisions which state that all of a person's assets are borne by his debts. As stated in Article 1331 of *BurgerlijkWetboek*.

The liability of a company that is in the form of a legal entity such as incorporated company, cooperative, etc., in principle, the property is separate from the property of its founder or owner. Therefore, liability is also separated from the personal property of the company owner in the form of a legal entity. This means that the personal property of the company owner or shareholder cannot be confiscated or sued for the liability of the company. This is a generally accepted principle under normal circumstances. In the science of law, there are various theories about a legal entity which causes its separate existence from its members or shareholders with various juridical consequences of the separation. These theories about legal entities have an interrelation with the recognition of the existence of the piercing the corporate veil theory. This means that the stronger the legal entity theory, the less recognition it has for the piercing the corporate veil theory, and vice versa.<sup>15</sup>

The principle of liability based on fault is a principle which fairly general applicable in civil law, especially in Articles 1365, 1366, and 1367 of the *BurgerlijkWetboek*. In general, this principle of liability can be accepted because it is fair for the person who made a mistake to compensate for the loss for the victim. In other words, it would be unfair for an innocent person to compensate for the harm suffered by others. The case that needs to be explained in this principle is the definition of the subject of the wrongdoer which in the legal doctrine is known as the principle of vicarious liability and corporate liability.<sup>16</sup>

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<sup>15</sup> Munir fuady. (2014). *Doktrin- Doktrin Modern dalam Corporate Law dan Eksistensinya Dalam Hukum Indonesia*. Bandung: PT.Citra Aditya Bakti, p. 2-3

<sup>16</sup> Celina Tri Siwi Kristiyanti. (2008). *Hukum Perlindungan Konsumen*. Jakarta: PT. Sinar Grafika, p. 92

Criminal liability relates to criminal liability of a corporation or other social organization, with respect to criminal acts committed by its management or employees. There are several very basic main problems, namely with regard to the special position of a corporation or company. Special position of a corporation or incorporated company is a legal person whose existence is not a human or natural person, therefore, cannot act and possess awareness of will. Their awareness and actions are only through his directors or employees. Another main problem is that if the law does not allow or cover criminal liability from reaching the company for illegal acts committed by the board of directors or their officials, it means that the law opens the door and opportunities as wide as possible for the board of directors and company officials to use the company as the vehicle for committing crimes, the widespread crime that is committed.

Not only is it *mala in se* but has expanded to include various aspects of life that require criminal regulations that are *malum prohibitum* in nature, in order to create order that can guarantee public safety, a concept that is deemed to be able to bridge it is necessary, namely the criminal liability of corporations or limited liability companies (corporate criminal liability). The scope of the company's liability for functional actions, one theory says that the actions and awareness of corporate functionaries are identical to the actions and awareness of the company.

Therefore, all functionaries are the brains and hands of the company. Yet, a question arises is, which company functionaries are considered identical to be the brains and hands of the corporation, whether every official or employee in the company has a position and capacity as brains and hands? If this is the case, it means that all acts committed therefore every criminal act committed by any official at any level directly involves the company's criminal liability. Such application is irrational, the realistic and proportional legal standards must be enforced so that its application does not lead to difficulties in the company's existence.<sup>17</sup> Liability for illegal acts of the company based on Article 1365 of *BurgerlijkWetboek* other than contractual liability that was arise from the agreement in accordance with Article 1313 *juncto* Article 1320 of the *BurgerlijkWetboek*. There is another civil liability arising from illegal actions by the company, based on the company's fictional theory as a legal entity.

Several forms of actions by the holding company that may cause losses to third-parties in the subsidiary include:<sup>18</sup>

- (1) Losses caused by under capitalization or insufficient capital of the subsidiary;
- (2) Holding company takes advantage of a portion of the subsidiary's debt to finance the operational activities of another subsidiary without the knowledge of the subsidiary's creditors;
- (3) Holding company transfers a portion of the assets of an almost bankrupt subsidiary to another subsidiary, without the knowledge of the minority shareholders or creditors of the

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<sup>17</sup> M. Yahya Harahap. (2009). *Hukum Perseroan Terbatas*. Jakarta: Sinar Grafika, p. 142-147

<sup>18</sup> *Ibid*, p.165

nearly bankrupt subsidiary. If the subsidiary eventually goes bankrupt, ownership of part of the asset has been transferred to another subsidiary. This results in minority shareholders and creditors experiencing losses due to difficulties in claiming assets transferred to other subsidiary;

- (4) Holding company collects capital and non-capital assets aimed at supporting decisions and executing corporate debt obligations.

There is an occurrence of domination without liability carried out by the holding company towards its subsidiary. In this case there is control exercised by the holding of the subsidiary. The holding company as the subsidiary's shareholder controls the subsidiary by exercising the function of voting rights in the subsidiary's RUPS, or by appointing members of the subsidiary's board of directors or commissioners. The exercise of the voting rights of the holding company is aimed at achieving the investment function in the subsidiary.

According to researchers, the provisions of Article 1365 of *Burgerlijk Wetboek* can be applied *mutatis mutandis* to the relationship between holding company and subsidiary in group companies. The holding company as the central leader of the group company has the authority to control and coordinate the business activities of the subsidiary in order to fulfill the collective objectives of the group company as an economic unit. The management of the subsidiary is more shown to support the economic interests of the holding company or group company which has implications for the subsidiary's economic independence.

The economic dependence of this subsidiary should be the reason for the emerge of the holding company's liability for the inability of the subsidiary to settle its responsibilities to third parties. This relationship between a person and their dependents is analogous to the relationship between the holding company and its subsidiary in the construction of a group company. By this, the holding company as the central leader who controls and coordinates the group company should be responsible for the loss of third-party subsidiary who are proven to carry out the holding company's instructions.

Thus, the use of company law as a regulatory framework for the relationship between the holding company and subsidiary in the group company creates complexity, particularly in relation to the imposition of responsibilities in pyramid group companies. The problem with the imposition of liability on group companies is caused by the use of the concept of control of the holding company over the subsidiary into the company's legal domain. In order to answer the above problems, the researcher proposes an approach of tension in group companies between the economic plural form and economic unity.

## CONCLUSION

The holding company is proven to have committed an illegal act based on Article 1365 of *Burgerlijk Wetboek* against the subsidiary. One of the basic examples for the consideration of

the decision of the panel of judges shows that the legal actions of PT. Effem Food, Inc. and PT. Effem Indonesia is a form of bad faith, violation of the rights of the plaintiff and contrary to the legal obligations of the defendant, causing losses to PT. Smak Snak. Evidence of damages to the plaintiff from acts against the law of the holding company and subsidiary can be the basis for the granting of the lawsuit against the law of PT. Effem Food, Inc. and PT. Effem Indonesia.

Forms of liability which should be done by the holding company regarding to the subsidiary's legal actions after applying the concept of piercing the corporate veil is compensation. The compensation charged to the holding company after the implementation of piercing the corporate veil against the legal actions of the holding company is determined in terms of the principle of liability, where liability is based on error, or based on absolute liability. The compensation made by holding company on the subsidiary can be fulfilled after going through the principle of liability above, it can be concluded that the compensation is punitive compensation. Punitive compensation is a large amount of compensation in excess of the actual amount of loss. The amount of compensation is intended as a punishment for the perpetrator, in this case the holding company that has committed an illegal act against the subsidiary.

## SUGGESTION

Due to several factors both juridically and economical, the form of law that regulates group companies in Indonesia provides a space for the holding company to commit abuse of power. One of the consequences of this is the occurrence of illegal acts such as that between the holding company PT. Effem Food, Inc., PT. Effem Indonesia, and PT. Smak Snak as the subsidiary. Illegal acts often occur within group companies since the major authority lies on the holding company as well as due to the legal relationship created between the holding company and subsidiary company, raising rights and responsibilities borne by both parties. Therefore, Law Number 40 of 2007 Concerning Limited Companies should be perfected again in its legal construction so that judges who have the duty to decide cases of illegal acts have better legal considerations so that judges decisions can contain more specific matters regarding group companies in Indonesia.

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