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Analysis of Government Policies in Structuring State Owned Corporation Through the Formation of Holding Companies

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ABSTRACT
The legality of establishing a BUMN holding company is only based on Government Regulation Number 72 of 2016 concerning Procedures for Equity Participation and Administration of State Capital in BUMN and Limited Liability Company, as an amendment to Government Regulation Number 44 of 2005 has not been fully comply with the principle of coherence with the above regulations namely Law Number 17 of 2003 concerning State Finance, Law Number 19 of 2003 concerning BUMN and Law Number 40 of 2007 concerning Limited Liability Companies. The purpose of this study is to find a concept of regulation and supervision the government on SOEs related to holding companies This research is normative with a statute approach and a conceptual approach. The results in this study are the need for legal reconstruction in BUMN where a law is needed that is central to regulate holding companies in Indonesia, where this law was born to provide related guidelines a mechanism for the formation, selection of the type of holding, and governance of State-Owned Enterprises in the form of Holding Company. The form of supervision on the implementation of BUMN holding in the future can be an integrated monitoring pattern is applied. In this supervision, 3 parties must be involved in a coordinated manner, namely the Parent Company Commissioner, the Supreme Audit Agency (BPK), and the Ministry of SOEs
Keywords: *Policy Analysis, BUMN, Holding Company*

1. Introduction

One of the government's efforts in improving the country's economy is the establishment of State-Owned Enterprises (BUMN). To exercise this control, the state through the government then establishes a State-Owned Enterprise, which was originally known as a state company, which is tasked with carrying out the control (Ibrahim, 1997). In general, the state has a business entity that is owned by the state. Generally, the state has such business entities and is engaged in business fields which are categorized as including in the field of service delivery and public interest or "Public Service" and "Public utilities". This is based on the reason that there is a production branch or business field which is considered vital or strategic for the state and controls the livelihood of many people so that it cannot simply be left to the private sector to control and administer it. Therefore, the state needs to have its agency to manage state assets (Ilmar, 2004).

BUMN is regulated in Law No. 19 of 2003 concerning State-Owned Enterprises. As of today, there are 147 BUMN companies and only 13 BUMNs that can provide dividends to the state, it was recorded that in 2019 the dividend contribution to the state was only 63 trillion, this figure shows that BUMNs have not been able to make a major contribution to improving the country's economy in the sense that the function of BUMN has not been able to say to be achieved. Erik Tohir as the Minister of SOEs admitted that in 2020 due to the pandemic, the performance of SOEs decreased by 90%, this means that SOEs canceled paying 40 trillion dividends to the state based on the target in 2020. It is projected that only 25% of the target in 2020 (Lumanauw, 2020).

Under these circumstances, SOEs must be able to reconstruct the system they have, one of which is by holding a holding company to avoid the use of the budget. Munir Fuady explained that a holding company is a company that aims to own shares in one or more other companies or regulate one or more other companies (Munir, 2008). Meanwhile, according to Komaruddin, a holding company is a business entity established to control most of the shares of the business entity that it will influence (Komaruddin, 2004). In a limited liability company in Indonesia,

the concept is known as the operating holding company concept because in this concept the parent company still has business activities in addition to owning shares in its subsidiaries. In addition, there is a division of holding companies based on their nature, namely vertical business groups, horizontal business groups, and combined business groups. There are other divisions of holding companies including the division based on the holding's involvement in the business in terms of decision making, and equity involvement (Sulistiowati, 2010).

Juridical independence and economic independence of subsidiaries are not mutually exclusive between plural forms legally or economic unity, in practice juridical aspects and business realities can encourage opportunistic actions of the parent company to abuse the construction of group companies, among others, the parent company externalizing high-risk businesses to subsidiaries company, thus the parent company is not responsible for the legal actions of the subsidiary. On the other hand, the subsidiary that carries out the instructions is burdened with legal responsibility for the impact of losses from such business activities.

Thus, it is rare for a holding company which is a holding company to be held accountable, because Law No. 40 of 2007 concerning Limited Liability Companies (UUPT) has not been specifically regulated. Therefore, it is necessary to understand and examine in terms of legal construction what is used to ensnare the legal actions of subsidiaries which are certainly related to the holding company in committing crimes or violations of corporate law in Indonesia.

The legality of establishing a holding company for BUMN is only based on Government Regulation Number 72 of 2016 concerning Procedures for Equity Participation and Administration of State Capital in State-Owned Enterprises and Limited Liability Companies, as an amendment to Government Regulation Number 44 of 2005 does not fully comply with the principle of coherence with the previous regulations above, namely Law Number 17 of 2003 concerning State Finance, Law Number 19 of 2003 concerning BUMN and Law Number 40 of 2007 concerning Limited Liability Companies. Therefore, the legal issue in this paper is the existence of contradictory and contradictory provisions with the above regulations and the existence of a legal vacuum related to government regulations in supervising State-Owned Enterprises in the form of holding companies.

2. Methodology

This research uses normative legal research that uses a statute approach and a conceptual approach (Marzuki, 2009). The types of legal materials used consist of primary legal materials and secondary legal materials, namely legal materials that provide further explanation of primary legal materials including books, existing research results, journals, and other scientific works that are relevant to the object of study. Tertiary legal materials, namely legal materials that provide instructions and explanations of secondary legal materials such as legal dictionaries and encyclopedias. The collection of legal materials is carried out by taking an inventory of related positive laws and conducting library searches in the form of legal writings published in the form of books, existing research results, journals from legal scholars, and other scientific works .

3. Result and Discussion

3.1 The Ideal Concept of Structuring Holding Company in State-Owned Enterprises

The legal rules used by the Government in establishing a holding company for BUMN are Government Regulation No. 72 of 2016 concerning Amendments to Government Regulation no. 44 of 2005 concerning Procedures for State Capital Participation and Administration in State-Owned Enterprises and Limited Liability Companies. Then regarding the position of subsidiaries, it still refers to Law No. 40 of 2007 concerning Limited Liability Companies. Therefore, in this paper, the author will examine from two perspectives the arrangement of holding companies in Indonesia based on two sources of existing regulations.

First, Law Number 40 of 2007 concerning Limited Liability Companies recognizes three forms of share ownership and control that can lead to the existence of a holding company, namely by merger, acquisition, and spin-off. Law Number 40 of 2007 concerning Limited Liability Companies defines incorporation as (Negara Kesatuan Republik Indonesia, 2007): A legal action carried out by one or more companies to merge with another existing company which results in the assets and liabilities of the merging companies being transferred by law to the company that accepts the merger and subsequently the legal entity status of the merging company ends by law.

With the understanding of the merger above, it can be concluded the following things (Harahap, 2009):

a. Merger is a merger of two or more companies into one company

b. Companies that merge become terminated or dissolved by law

Meanwhile, takeover (acquisition) is defined by Law Number 40 of 2007 concerning Limited Liability Companies as a legal action carried out by a legal entity or company person to take over the shares of the company which results in the transfer of control over the company. A spin-off is also one way to get share ownership in a company (Prasetya, 2007). The definition of a spin-off based on Law Number 40 of 2007 concerning Limited Liability Companies is separation is a legal action carried out by a company to separate its business which results in the legal transfer of all assets and liabilities of the company to 2 (two) or more companies or part of the company's assets and liabilities are legally transferred to 1 (one) company or more.

Law Number 40 of 2007 concerning Limited Liability Companies concerning two types of separation, namely pure separation and impure separation. The definition of pure separation and impure separation is (Negara Kesatuan Republik Indonesia, 2007):

a. The pure separation as referred to in paragraph (1) letter a causes all assets and liabilities of the company to be transferred by law.

b. (Two) other companies or more that receive the transfer and the company that makes the separation of business ends by law.

Law Number 40 of 2007 concerning Limited Liability Companies have regulated the permissibility of individuals or legal entities to own shares in other companies, namely employing mergers, acquisitions, and spin-offs. In addition to these rules, there is a prohibition on cross-holding ownership as stipulated in Article 36 of Law Number 40 of 2007. However, along with the development of holding companies, these rules are no longer able to accommodate and provide clear limits on the powers of the parent company to subsidiaries.

Second, Before the issuance of PP Number 72 of 2016 concerning procedures for the participation and administration of State Capital in State-Owned Enterprises and Limited Liability Companies, there was no legal regulation regarding the formation of holdings in Indonesia. parent company. The use of the word holding was only discovered in Government Regulation No. 72 of 2016, previously in Indonesia there was also no known investment holding, namely the parent company only invested in shares of the subsidiary, without carrying out supporting activities or carrying out parent operational activities. The parent company's business activities will usually determine the type of business that the parent company must fulfill. The issuance of PP Number 72 of 2016 which is now commonly referred to as PP holding is because the previous government regulation, namely PP Number 44 of 2005 concerning procedures for the participation and administration of State Capital in State-Owned Enterprises and Limited Liability Companies, is considered insufficient to regulate the initiation of the formation of sectoral holdings. in Indonesia.

In PP No. 72 of 2016 several articles have been amended and added related to the participation of state capital in the implementation of the SOE restructuring process, namely (Peraturan Pemerintah, 2016):

1) The provisions of item 8 article 1 are changed to The administration is a series of administrative activities for state participation in SOEs and Limited Liability Companies.

2) In the provisions of paragraphs (2) and (3) there is a change where the source of state capital participation comes from the state budget of revenues and expenditures, were again from projects financed by the state budget (APBN) from state-owned shares in state-owned enterprises or limited liability companies.

3) Between article 2 and article 3, 1 (one) article is inserted, namely article 2A. State-owned shares in BUMN or Limited Liability Companies are essentially state assets that have been separated from the state revenue and expenditure budget so that the transfer of shares intended to be used as participation in BUMN or limited liability companies is not carried out through the revenue and expenditure budget mechanism (Peraturan Pemerintah, 2016).

This government regulation Number 72 of 2016 is only an amendment to several articles and government regulations Number 44 of 2005 concerning Procedures for Participation and Administration of State-Owned Capital

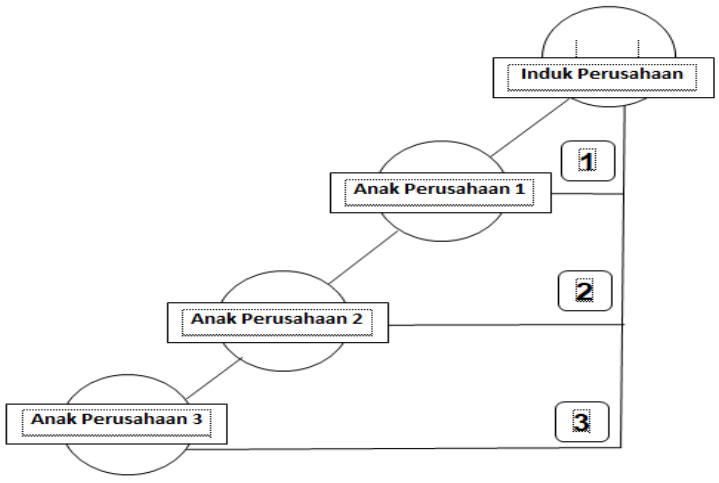
in State-Owned Enterprises and Limited Liability Companies in which the government regulation does not yet regulate the concrete mechanism regarding the formation of holding companies.

Based on the explanation regarding the two regulations governing holding companies in Indonesia, the author considers the legal rules used by the government so far are still partial by issuing Government Regulations for each establishment of BUMN holding companies in various industrial fields. In Government Regulation No. 72 of 2016 concerning amendments to Government Regulation No. 44 of 2005 concerning Procedures for State Capital Participation and Administration in State-Owned Enterprises and Limited Liability Companies, some forms deviate from the above legal rules.

One that is considered contradictory is regarding the position of the parent company and the subsidiary. The linkage between the parent and the subsidiary gives the parent company the authority to act as the central leader in the group company. The parent company in the holding company sets the collective goals of the companies in the group. The position of the parent company as a shareholder of the subsidiary's subsidiary and the central leadership of the holding company shows that the parent company has a different economic role from the individual shareholder in a limited liability company so that the parent company also gets protection in the form of limited liability for the burdens borne by the subsidiary. Therefore, the position of the parent company as the shareholder of the subsidiary and the central leadership of the group company is not the reason for the abolition of the limited liability of the parent company as the shareholder of the subsidiary.

To avoid misuse of the legal entity of a limited liability company by shareholders, Article 3 paragraph (2) of the Company Law regulates the abolition of limited liability from shareholders for the limited liability of shareholders for the legal responsibility of a company or known as piercing the corporate veil. Following the establishment of UUPT as a regulatory framework for a single company. Article 3 paragraph (2) of the Company Law stipulates that the emergence of piercing the corporate veil on the shareholders of the company is caused by unlawful acts, bad faith, or losses to the company.

In a pyramid ownership structure, the parent company has more than one layer of subsidiaries or is multi-tiered. Problems related to the application of the legal principle of limited liability from the parent company to pyramid group companies are related to the increasingly limited responsibility of the controlling shareholder or the parent company for unlawful acts committed by subsidiaries. The application of the principle of limited liability to the controlling shareholder or the parent company can cause problems with the application of limited liability in the limited liability of the parent company against unlawful acts committed by subsidiaries that are in the second layer or more.



Picture 1. The degrees of limited liability of the parent company

As shown in the picture above, the following are the degrees of limited liability of the parent company (Prasetya, 2007):

1. The parent company has limited liability from unlawful acts committed by the subsidiary.

2. The parent company has limited liability in limited liability from unlawful acts committed by the subsidiary or second-tier subsidiary.
3. The parent company has limited liability in limited liability from unlawful acts committed by the company's great-grandchildren or third-tier subsidiaries.

Holding a company in the form of a pyramid can encourage the emergence of an opportunistic attitude from the controlling shareholder or the parent company to externalize risk to subsidiaries that are at the bottom layer. On the other hand, a legally holding company as a plural form in the juridical sense gives authority to members of group companies that are independent legal entities to carry out legal actions, so that the responsibility of the parent company is limited to its position as a shareholder of the subsidiary.

Reconstruction of the BUMN Law is the most strategic step, considering that the rules for the formation of holding companies are currently only limited to Government Regulation No. 72 of 2016 concerning amendments to Government Regulation No. 44 of 2005 concerning Procedures for State Capital Participation and Administration in State-Owned Enterprises. and the Company, then with the issuance of several new government regulations if there is a company that will become a holding company. This of course leads to a waste of regulations. Each holding group will be regulated by government regulation, completely irrelevant to the government's plan to implement a super holding in 2021.

As for the super holding plan in 2021, there should be an improvement in the mechanisms and regulations related to holding first, seeing the phenomenon that occurs there are still some confusions in the implementation of BUMN holding. There is still disharmony or incompatibility of several regulations governing holding in Indonesia. Therefore, the implementation of Super Holding should be equipped with relevant and non-contradictory holding legal regulations.

3.2 Form of Government Supervision on State-Owned Enterprises in the form of Holding Company

a) Supervision of BUMN Internal Institutions

1) Forms of Supervision of the Board of Directors : Article 5 paragraph (3) of the SOE Law states that the board of directors as an organ of SOEs tasked with managing is subject to all applicable regulations and still adheres to the application of good corporate governance principles which include Transparency, Independence, Accountability, and Fairness (Wilamarta, 2002).

2) Form of Supervision by the Commissioner: Like corporations in general, SOEs have internal supervisory organs and provide advice to the Board of Directors in carrying out SOE management activities, both regarding SOEs and SOE businesses, namely the Commissioner for state-owned enterprises and the Supervisory Board for state-owned enterprises. The Commissioners and the Supervisory Board are fully responsible for the supervision of SOEs for the interests and objectives of SOEs. In carrying out these duties, the Commissioners and the Supervisory Board must comply with the articles of association of SOEs and the provisions of laws and regulations and must implement the principles of professionalism, efficiency, transparency, independence, accountability, responsibility, and fairness (Riswandi, 2008). BUMN also has an audit committee that must be formed by the commissioner and the supervisory board whose function is to assist the commissioner and the supervisory board in carrying out their duties.

b) Forms of Government Supervision of SOEs (BUMN)

1) Forms of Supervision of the Ministry of SOEs : The Ministry of SOEs is an extension of the government to manage the SOE sector. The Minister of SOEs in carrying out his duties has several roles, one of which has the authority to appoint and evaluate members of the board of commissioners/supervisory board and may also terminate members of the board of commissioners/supervisory board who do not have integrity in carrying out their duties.

2) The form of DPR's supervision of SOEs : Article 20A paragraph (1) of the 1945 Constitution of the Republic of Indonesia can be interpreted that the DPR has a role in supervising SOEs in the form of indirect supervision. Government actions attached to SOEs can be seen from the perspective of state financial management, as regulated in the State Finance Law and the State Treasury Law. Article 4 paragraphs (1) and (2) of the BUMN Law stipulate that BUMN capital comes from separated state assets. Another government action that can be used as an object of supervision by the DPR is the establishment of legal regulations regarding BUMN in

general and the lines of government policy regarding BUMN and its implementation. The controlling function carried out by the DPR is the same as described in the previous paragraph and in the Constitutional Court's Decision No. 12/PUU- XVI/2018 and the Constitutional Court Decision No. 14/PUU-XVI/2018. Thus, what was decided by the Constitutional Court was based on the correct one. The DPR's supervisory function is still needed, but it is placed on matters relating to government action in the management of BUMN in the sense that it cannot supervise directly.

3) Forms of BPK Supervision of SOEs : The supervision carried out by the BPK was confirmed by the Constitutional Court in Decision Number 62/PUU-XI/2013. Based on Article 71 paragraph (2) of the BUMN Law, it is clear that BPK has the authority to conduct audits of BUMN under the provisions of the legislation. The audit is subject to the BPK Law and Law Number 15 of 2004 concerning Audits of the Management of State Financial Responsibilities. Under Article 3 paragraph (1) of Law no. 15 of 2006, examination of state financial management and responsibility, as referred to in Article 2 of the State Finance Law, which also includes state assets separated in BUMN. However, what is the limit of BPK's examination of BUMN, considering that BUMN, especially state-owned enterprises, is half private legal entities that are bound by the principles of managing limited liability companies. Looking at Article 6 paragraph (3) of the BPK Law, BPK audits include financial audits, performance audits, and audits with specific objectives. SOEs should not be subject to examinations based on the examination and management of state financial responsibilities in government agencies, but the provisions of the laws and regulations concerning limited liability companies, as stated by Judge Harjono in the dissenting opinion of the Constitutional Court Decision Number 6 2/PUU-XI/2013.

If the Constitutional Court's decision on the object in question is analyzed in Law No. 17 of 2003 and Law No. 15 of 2006 concerning the Financial Audit Board (UU BPK), there is the phrase "including separated assets in the state/regional companies" in Article 2 letter g Law no. 17 of 2003, which is fully regulated, "state finances as referred to in Article 1 number 1, include: ....(g) state assets/regional assets managed by themselves or by other parties in the form of money, securities, receivables, goods, as well as other rights that can be valued in money, including assets separated from state/regional companies": Article 2 letter i of Law no. 17 of 2003 which regulates "state finances as referred to in Article 1 number 1, including (i) assets of other parties obtained by using facilities provided by the government".

The disparity, disharmony, and inconsistency of the BPK's authority in carrying out its duties and functions based on Article 23 paragraph (1) and Article 23E paragraph (1) of the 1945 Constitution with the BPK Law that extends to SOEs, can result in any business loss arising in BUMN being classified as as a state loss. The risk of business losses will always be inherent in every BUMN business activity. Such regulations have created legal uncertainty and eliminated legal guarantees for SOEs in managing and administering SOEs to realize the greatest prosperity of the people in achieving the goals of the state.

c) The concept of Government Supervision of State-Owned Enterprises in the form of Holding Companies

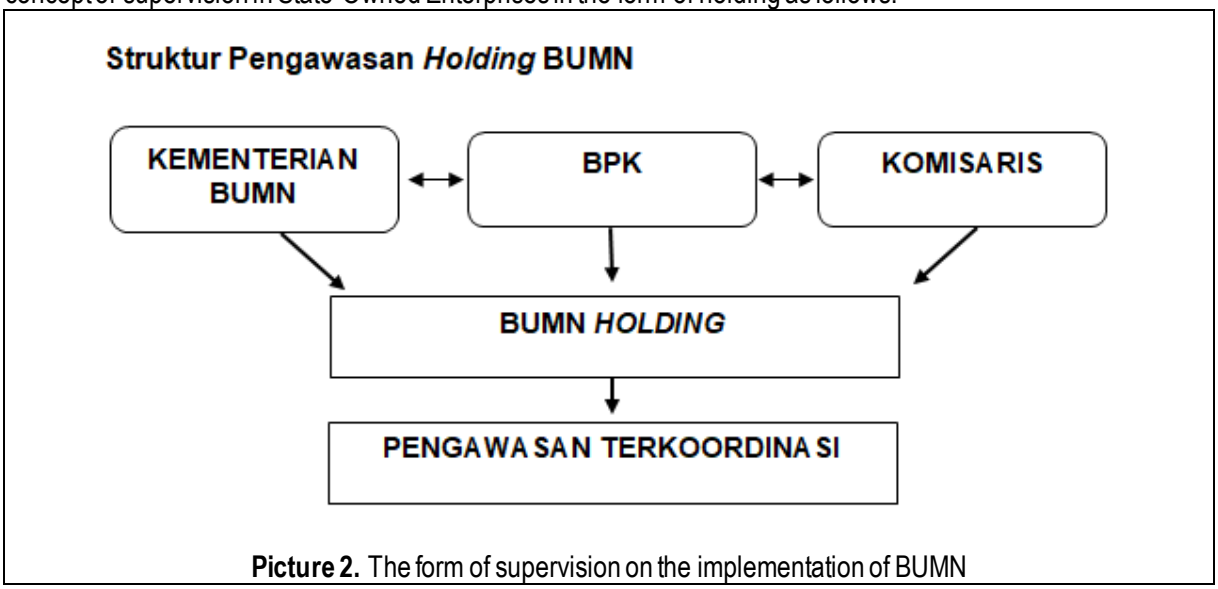
As described in the first issue, related to the second discussion regarding the position of BUMN in the form of Holding and the role of government oversight of BUMN companies, it can be seen that the full supervision is in the BUMN's internal institutions, namely the ministers, commissioners, directors and other audit bodies. While the government agency DPR only supervises indirectly, the DPR in carrying out its supervisory function is only limited to discussing the APBN for BUMN and also related to political functions in the manufacture/reconstruction of legal products that regulate State-Owned Enterprises or Limited Liability Companies, in this case, the DPR has no authority. supervise SOEs in carrying out their functions. Furthermore, the BPK itself in carrying out its supervisory function is still based on Law No. 17 of 2003 concerning the authority of the BPK in supervising (examining) State Finances contained in other agencies.

If state assets in the form of state-owned shares in SOEs as referred to in Article 2 paragraph (2) letter d are used as state capital participation in other SOEs so that most of the shares are owned by other SOEs, then the SOEs become subsidiaries of SOEs provided that the state is obliged to own shares. with the privileges stipulated in the articles of association

What is meant by special rights regulated in the articles of association are, among others, the right to approve:

1) Appointment of members of the board of directors and commissioners
2) Amendment to articles of association
3) Changes in share ownership structure. Merger, consolidation, separation, and dissolution and takeover of companies by other companies.

Paragraph (2) is sufficient to prove that the loss of the function of the DPR as a whole does not eliminate the function of government control over a subsidiary of a BUMN in the form of a holding, coupled with the consolidated financial statements of the holding company. To prevent the release of the subsidiary in the case of the alleged privatization by the state of BUMN in Article 6, it is stated that the ownership of most of the shares is still owned by the BUMN which is used as the holding. Based on the discussion above, the author can explain the concept of supervision in State-Owned Enterprises in the form of holding as follows:



Picture 2. The form of supervision on the implementation of BUMN

The form of supervision on the implementation of BUMN holding in the future can be applied to an integrated supervision pattern. This integrated supervision includes the authority of each institution or agency to be integrated and coordinated in conducting supervision. In this supervision, 3 parties must be involved in a coordinated manner, namely the Commissioner of the Parent Company, the Supreme Audit Agency (BPK), and the Ministry of SOEs.

4. Conclusion

The law of holding companies in Indonesia is still contradictory where the formation of holdings is only limited to Government Regulation Number 72 of 2016 concerning Procedures for State Capital Participation and Administration in State-Owned Enterprises and Limited Liability Companies, Law Number 19 of 2003 concerning BUMN and Law Law Number 17 of 2003 concerning State Finance. Incoherence arising from 2 (two) or more regulations for the same legal object will eventually lead to different interpretations in the application of the law. Therefore, there is a need for a legal reconstruction of SOEs where a central law is needed to regulate holding companies in Indonesia, where this law was born to provide guidelines regarding the mechanism for the formation, selection of holding types, and governance in Owned Enterprises. The state is in the form of a holding company.

The form of supervision on the implementation of BUMN holding in the future can be applied to an integrated supervision pattern. This integrated supervision includes the authority of each institution or agency to be integrated and coordinated in conducting supervision. In this supervision, 3 parties must be involved in a coordinated manner, namely the Parent Company Commissioner, the Supreme Audit Agency (BPK), and the Ministry of SOEs. This is aimed at managing BUMN holdings that are more oriented towards the progress and development of the national economy.

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