

## *The Principle of Fiduciary Duty in Single-Member Limited Liability Company*

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### **Abstract**

*Limited Liability Company in Indonesia has a conceptual expansion since the Job Creation Law has enacted. There are two types of Limited Liability Company currently, capital partnership limited liability company and single-member limited liability company. One of the most significant changes to the concept of limited liability company is related to its organs. Single-member limited liability company consists of director who also serve as shareholder. The expansion concept raises questions regarding the application of fiduciary duty to single-member limited liability company. This research uses conceptual and statute approach. The conclusion from this research is that in single-member limited liability company, there is only director who also become shareholder, thus there is no supervisory function by the board of commissioner. Secondly, the director in single-member limited liability company still has the obligation to carry out the responsibilities with the principle of fiduciary duty.*

### **Abstrak**

*Perseroan Terbatas di Indonesia mengalami perluasan konsep sejak diundangkannya Undang-Undang Cipta Kerja. Perseroan Terbatas saat ini dibedakan menjadi perseroan persekutuan modal dan perseroan perorangan. Salah satu perubahan yang paling signifikan terhadap konsep Perseroan Terbatas ini adalah berkaitan dengan organ. Perseroan perorangan terdiri dari direktur yang juga menjadi pemegang saham. Adanya perluasan konsep Perseroan Terbatas memunculkan pertanyaan berkaitan dengan penerapan fiduciary duty pada perseroan perorangan. Penelitian ini menggunakan pendekatan konseptual dan undang-undang. Penelitian ini memiliki kesimpulan bahwa dalam perseroan perorangan hanya terdapat organ direksi yang juga merupakan pemegang saham, sehingga tidak ada fungsi pengawasan oleh dewan komisaris. Kedua, organ direksi pada Perseroan perorangan tetap memiliki kewajiban untuk menjalankan tanggung jawabnya dengan prinsip fiduciary duty.*

## INTRODUCTION

A Limited Liability Company is defined as a capital partnership established by agreement by its founders.<sup>1</sup> With an agreement, it is established by a minimum of two persons. In addition, a Limited Liability Company is also an association of capital issued and paid by shareholders fully.<sup>2</sup> The capital of the Limited Liability Company consists of shares.<sup>3</sup> The number of shares is the limit of shareholder liability.<sup>4</sup> This concept of a Limited Liability Company has been expanded. It can be divided into a capital partnership limited liability company and single-member limited liability company. This expansion arose after the enactment of Law Number 6 of 2023 ("Law 6/2023"), "Government Regulation Number 8 of 2021", and "Minister of Law and Human Rights Regulation Number 21 of 2021".

The single-member limited liability company is the result of the expansion of the concept of a Limited Liability Company which is no longer only interpreted as a business entity arising from a partnership of capital and agreements. A Limited Liability Company in the form of the single-member limited liability company can be established by only one person, so it does not require a notarial deed. The founder only needs to fill in the Statement of Establishment in Indonesian and then register it electronically to the "General Legal Administration of the Ministry of Law and Human Rights".

The form of single-member limited liability company has affected the organ system of Limited Liability Companies known in Indonesia. Prior to Law 6/2023, Limited Liability Companies in Indonesia were based on a two-tier board system. This system separated the functions of the director, commissioners and General Meeting of Shareholders (GMS). These organs perform two functions, namely management and supervision.<sup>5</sup> This is different from the organ system that applied

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<sup>1</sup> "Law Number 40 of 2007 on Limited-Liability Companies (State Gazette of The Republic of Indonesia of 2007 Number 106, Supplement to The State Gazette of Republic of Indonesia Number 4756)"

<sup>2</sup> Desak Putu Dewi Kasih, et.al, "Perseroan Perorangan Pasca UU Cipta Kerja: Perubahan Paradigma Perseroan Terbatas Sebagai Asosiasi Modal," *Arena Hukum*, Volume. 15, Number. 1, April 2022, p. 21.

<sup>3</sup> Wetria Fauzi, "Kajian Yuridis Konsep Perseroan Perseorangan sebagai Badan Hukum Perseroan Terbatas di Indonesia", *Unes Law Review*, Volume 5, Number 4, June 2023, p. 1774.

<sup>4</sup> *Ibid.*

<sup>5</sup> David Block and Anne-Marie Gerstner, "One-Tier vs. Two-Tier Board Structure: A Comparison Between the United States and Germany", *Comparative Corporate Governance and Financial Regulation*, vol. 1, 2016, p. 10.

to a single-member limited liability company. The organs in this type only consist of a director who is also a shareholder, without any commissioners.<sup>6</sup> This organizational arrangement resembles the one-tier board system of Limited Liability Company in the United States, which has no supervisory function.

The one tier board system is commonly used in countries with Anglo Saxon legal systems.<sup>7</sup> This system is adopted in the concept of a single-member limited liability company. The absence of commissioners raises the question of whether the principle of fiduciary duty can be implemented. Limited Liability Company organs have an obligation to run the company in good faith and based on the principle of fiduciary duty.<sup>8</sup> Ideally, the role of commissioners is needed to supervise the director and ensure that the director has carried out its duties based on the principle of fiduciary duty.

The organ that has a major role in implementing the principle of fiduciary duty is the director. The authority of director in carry out the management and representative functions is obtained from shareholders based on trust (fiduciary).<sup>9</sup> The principle of fiduciary duty requires that the directors of the company do not take personal advantage of the legal actions that they take. Because a Limited Liability Company is an entity that is different from its organs. The director acts for company, not for and on behalf of itself.

In practice, there is a high risk that the director will fail in its fiduciary duty. For example, it is not uncommon for directors to serve as director of two or more corporations at the same time. This dual position certainly creates a conflict of interest between one limited liability company and another. In theory, directors have an obligation to fulfil the principle of fiduciary duty, which is include the duty of loyalty and the duty of care. As the person who represent the company, it is

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<sup>6</sup> Putu Devi Yustisia Utami and Kadek Agus Sudiarawan, "Perseroan Perorangan pada Usaha Mikro dan Kecil: Kedudukan dan Tanggung Jawab Organ Perseroan", *Jurnal Magister Hukum Udayana*, vol. 10, number 4, December, 2021, p. 780.

<sup>7</sup> Agus Saptono, "Board-CEO Relationship (One Tier System-Anglo Saxon) Hubungan Dewan Komisaris-Dewan Direksi (Two Tier System Continental)", *Jurnal Akuntansi dan Sistem Teknologi Informasi*, Volume 10, Number 2, April 2014, p. 73.

<sup>8</sup> Hindarmojo Hinuri, 2002, *"The Essence of Good Corporate Governance; Konsep dan Implementasi pada Perusahaan Publik dan Korporasi Indonesia"*, Jakarta: Yayasan pendidikan Pasar Modal Indonesia & Sinergy Communication, p. 65.

<sup>9</sup> Siti Hapsah Isfardiyana, "Tanggung Jawab Direksi Perseroan Terbatas dalam Pelanggaran Fiduciary Duty", *Jurnal Ilmu Hukum*, vol. 2, Number 1, 2015, p. 173.

difficult for directors to balance the duty of loyalty and the duty of care in two different companies. The interests represented by the companies are different.

In the two-tier board system, it is very easy to ensure that the company's directors act with the principle of fiduciary duty. This is because there is a commissioner organ who has duty to supervise and give advice to the director.<sup>10</sup> The application of fiduciary duty in one tier board system is not as easy as the application in two-tier board system. In a single-member limited liability company that applies a one tier board system, there is only one organ, namely the director as well as the shareholder.<sup>11</sup> This causes the supervision carried out on the director is not maximized due to the absence of organs that carry out the supervisory function.

Ratio legis of the supervisory function by commissioners against directors is to protect the interests of the company as an independent entity.<sup>12</sup> The existence of the company is highly dependent on the director in carrying out their duties. The director has full power to run the company, outside and inside the court. The rights and freedoms possessed by the director to manage this limited liability company are given by the company based on trust responsibility (fiduciary duty). In this condition the role of the commissioner is needed to prevent conflicts of interest by director.

This research focuses on how the principle of fiduciary duty in single-member limited liability company because there is no commissioner organ that functions to supervise. The problems in this study include, first, how the differences the position and responsibilities of the organs in capital partnership limited liability companies and single-member limited liability company. The results of the analysis of the first problem formulation are used to be the basis for analysing the second problem formulation, how the principle of fiduciary duty in single-member limited liability company.

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<sup>10</sup> “Law Number 40 of 2007 on Limited-Liability Companies (State Gazette of The Republic of Indonesia of 2007 Number 106, Supplement to The State Gazette of Republic of Indonesia Number 4756).”

<sup>11</sup> Government Regulation Number 8/2021 on “the Company's Authorized Capital and Registration of Establishment, Amendment and Dissolution of Companies that Meet the Criteria for Micro and Small Enterprises (State Gazette of The Republic of Indonesia of 2021 Number 18, Supplement to The State Gazette of Republic of Indonesia Number 6620)”

<sup>12</sup> Prawira Kamila, *et. al.*, “Pelanggaran Prinsip *Fiduciary Duty* oleh Direksi yang Rangkap Jabatan”, *Locus Journal of Academic Literature Review*, vol. 2, Number 3, March 2023, p. 262.

Several previous studies have discussed about the single-member limited liability company. Nofarid Darianto in his research discusses the position of single-member limited liability company organs in micro and small enterprises.<sup>13</sup> The research focuses only on organs without discussing the principle of fiduciary duty, so it is different from the scope of this research. Then there is the research conducted by Desak Putu Dewi Kasih, which also discusses individual companies. In her research, Desak Putu Dewi Kasih explains the importance of single-member limited liability company for micro and small companies and about the expansion of the concept of limited liability company.<sup>14</sup> That research also did not mention the principle of fiduciary duty in the single-member limited liability company.

## **RESEARCH METHOD**

This article is the normative research with a conceptual and statute approach. The conceptual approach rests on the views and doctrines of various experts who have developed in legal science.<sup>15</sup> Normative research is research that analyzes secondary data.<sup>16</sup> The secondary data used in this article are Law 6/2023, Government Regulation 8/2021, Minister of Law and Human Rights Regulation 21/2021, books related to the topic of this article, and articles from other parties' research.

Research in the form of description is the nature of research applied in this study. The research object is described according to the findings in detail, systematically, and thoroughly.<sup>17</sup> Conclusions are drawn using deduction or syllogism thinking. This way of thinking is done by starting from the principles of existing science (major premise), after which it is associated with the facts found (minor premise) to draw a conclusion.<sup>18</sup>

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<sup>13</sup> Nofarid Darianto, "Kedudukan Organ Perseroan Perorangan pada Usaha Mikro dan Kecil berdasarkan Undang-Undang Cipta Kerja", *Jurnal Education and Development*, vol. 11, Number 1, 2023, p. 225-229.

<sup>14</sup> Desak Putu Dewi Kasih, et.al, *op.cit.*, p. 20-37.

<sup>15</sup> Peter M. Marzuki, 2017, "*Penelitian Hukum Edisi Revisi*", Jakarta: Penerbit Kencana", p. 135.

<sup>16</sup> Soerjono Soekanto and Sri Mamudji, 2015, "*Penelitian Hukum Normatif Suatu Tinjauan Singkat*", Jakarta: Raja Grafindo, p. 13.

<sup>17</sup> Mukti F. Nur Dewata and Yulianto A., 2010, "*Dualisme Penelitian Hukum Normatif dan Empiris*", Yogyakarta: Penerbit Pustaka Pelajar, p. 183.

<sup>18</sup> *Ibid.*, 89.

## **RESULT AND DISCUSSION**

### **A. Comparison of the Position and Responsibility of Organs**

*Naamloze* Vennootschap, also known as Limited Liability Company, was initially regulated in the Commercial Code (KUHD). KUHD is a special regulation (lex specialist) of the Civil Code (KUHPerdara). The KUHD regulates company law which is a special provision related to the law of obligation arising in the field of Limited Liability Companies.<sup>19</sup> That obligation is an obligation arising from an agreement. The arrangement in the KUHD shows that since the beginning, a Limited Liability Company has been projected as a legal entity that established based on an agreement. This applied until the issuance of Law No. 40 of 2007 ("Law 40/2007").

A Limited Liability Company has elements including, among others, a regular organization in which there is a management; has separate assets; has a purpose; bears rights and obligations; performs legal acts.<sup>20</sup> That elements show that a Limited Liability Company is an independent entity separate from its founders and management. A Limited Liability Company as an independent legal subject requires an organ to represent it in order to perform legal acts.

The organs of a Limited Liability Company which is a capital partnership limited liability company according to Law 40/2007 consist of the GMS, the director and the commissioner. In Law 40/2007, the position of the GMS is no longer the highest organ of a capital partnership limited liability company as in the classical view. The view on the organs of a capital partnership limited liability company has changed to a modern view or institutional view which causes the position of the organs of a capital partnership limited liability company to no longer be tiered. Currently, the position of the GMS with director and commissioner is the same and equal. The relationship between the three is not a vertical relationship, but a horizontal relationship. The difference is the function and authority. Each organ is given different authority and is not given to other organs.

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<sup>19</sup> Yahya Harahap, 2017, "*Hukum Perseroan Terbatas*", Jakarta: Sinar Grafika, p. 22.

<sup>20</sup> Mulhadi, 2017, "*Hukum Perusahaan: Bentuk-Bentuk Badan Usaha di Indonesia*", Yogyakarta: PT RajaGrafindo Persada, p. 99.

The GMS consists of shareholders who are the owners and have the right to control the management carried out by the director.<sup>21</sup> In the GMS forum, shareholders have the right to get information from the directors and commissioners regarding the condition of the company. In addition, the GMS has considerable control over the existence of the company. There are circumstances in which the director must seek GMS approval in taking certain actions.<sup>22</sup>

Article 102 of Law 40/2007 regulates the actions that fall under *beschikkingsdaad*. *Beschikkingdaad*, according to Purwosutjipto, is an act of control that results in changes that are not specific.<sup>23</sup> The director has an obligation to obtain prior approval from the GMS if it is going to transfer the company's assets, then make the company's assets as collateral, or file a bankruptcy petition to the commercial court.

The director also has discretion in managing a Limited Liability Company by taking actions without the need for GMS approval or known as *Beheer*. *Beheer* is an act that is commonly done or included in the act of management.<sup>24</sup> The director only needs to act in the interests of the company with the limits set by the statute and the articles of association. The authority of *beheer* causes the company to be very dependent on the director. This has the consequence that the director is personally liable for the losses of the capital partnership limited liability company if do not carry out the duties in good faith and must full of responsibility.

The authority of the director, which is so influential on the condition of the capital partnership limited liability company, causes the need for supervision. The organ that functions to supervise and advise the director is the commissioner. Every management carried out by the director is subject to supervision. The commissioners supervise and advise solely for the benefit of the capital partnership limited liability company, not for the benefit of the shareholders.

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<sup>21</sup> Yahya Harahap, *loc.cit.*

<sup>22</sup> Binoto Nadapdap, 2022, "*Pemegang Saham, dan Rapat Umum Pemegang Saham, antara Teks dan Konteks*", Jakarta: Jala Permata Aksara, p. 5.

<sup>23</sup> "Constitutional Court Decision Number 1/PUU/XVI/2018 regarding the Review of Law Number 24 of 2004 concerning Indonesia Deposit Insurance Corporation, 23 Juli 2018."

<sup>24</sup> "Constitutional Court Decision Number 1/PUU/XVI/2018 regarding the Review of Law Number 24 of 2004 concerning Indonesia Deposit Insurance Corporation, 23 Juli 2018."

In conducting supervision, commissioners make preventive and repressive efforts. Preventive efforts are made when the board of commissioners takes action to prevent unwanted things. For example, commissioners ensure that director has obtained approval from the GMS when taking *beschikkingsdaad* action. Not only that, but the commissioners can also ask the directors to show the preparatory documents relating to the *beschikkingsdaad* action, then examine and provide input. This action taken by the commissioners is the role of the commissioners in preventing the capital partnership limited liability company from suffering losses.

In contrast to preventive efforts, repressive efforts are carried out by the commissioners to test that the actions taken by the directors are actions that do not harm the company, cannot conflict with the law or the articles that bind association. For example, the commissioners summon the director to ask for an explanation of the actions that has been taken or to examine reports. In carrying out this preventive and repressive supervisory and advisory function, the commissioners are also obliged to implement the principles of prudence and good faith. If the commissioners are proven to be negligent in carrying out its duties, the commissioners can also be held personally liable for the losses incurred by the limited liability company.

The existence of different division of authority as described shows that a capital partnership limited liability company is a regular organization consisting of organs with their respective functions. The capital partnership limited liability company in Indonesia is based on the two-tier board system. This system is adopted from the existing system in the Netherlands based on the principle of concordation. The two-tier board system clearly separates the functions of the GMS, the commissioners and the director. The executive function of a Limited Liability Company is held by the director, while supervision is carried out by the commissioners.

The supervisory function performed by the commissioners to the director do not mean that the commissioners are above the director. In the two-tier board system adopted in Indonesia, it only emphasizes the separation of functions between the commissioners and the director. Different functions attached to different organs are expected to provide transparency and achieve company performance that does not

deviate from the articles of association.<sup>25</sup> The director, which is also an agent of shareholders, is rationally very likely to take actions that benefit shareholders. Therefore, a check and balance system is needed to realize good corporate governance.<sup>26</sup>

As previously described, the concept extension of a Limited Liability Company after the enactment of Law 6/2023 jo. Government Regulation 8/2021 changes the order of organs in a company for micro and small enterprises. In a company that meets these certain criteria, known as a single-member limited liability company, there can only be one shareholder. If there is more than one shareholder, the status of the legal entity changes to a capital partnership limited liability company.

As a single-member limited liability company is one type of Limited Liability Company, it is still necessary to have an organ to represent it in performing legal acts. Law 6/2023 does not change the provisions regarding the organs of a Limited Liability Company. The non-amendment of this provision shows that the Limited Liability Company Law does not explicitly distinguish between the organs of a capital partnership limited liability company and a single-member limited liability company. Nevertheless, there are inconsistencies in regulation and practice. In Article 109 Number 5 of Law 6/2023 jo. Article 7 of Government Regulation No. 8/2021 stipulates that in the process of establishing a single-member limited liability company, a requirement is required in the form of the submission of a statement of establishment that include the description of the identity of the "founders as well as director and shareholder". This provision can be interpreted that the organ of a single-member limited liability company consists of directors who are also shareholders. There is no regulation requiring a single-member limited liability company to have commissioners.

Minister of Law and Human Rights Regulation 21/2021 specifically regulates capital partnership limited liability companies and single-member limited liability companies. In this regulation, there is no article that mentions the authority of

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<sup>25</sup> Nyi Mas Gianti Bingah Erbiana, "Efektivitas Peran Dewan Komisaris dalam Mencegah Adanya Skandal Korporasi: Study Kasus PT Merpati Nusantara Airlines", *Jurnal Hukum De'rechtsstaat*, Volume 4, Number 1, March 2018, p.3.

<sup>26</sup> Sentosa Sembiring, 2013, "*Hukum Perusahaan tentang Perseroan Terbatas*", Bandung: CV Nuansa Aulia, p. 220.

commissioners in single-member companies. Commissioners are only regulated on matters relating to capital partnership limited liability companies. Article 8 of Minister of Law and Human Rights Regulation 21/2021 regulates the provisions for changing the data of a capital partnership limited liability company in detail, including changes to the names and positions of members of the director and/or commissioners. This is different from the regulation on single-member limited liability companies which does not mention the provisions for changes in the names and positions of its organs. Article 15 Minister of Law and Human Rights Regulation 21/2021 only stipulates that the statement of establishment can be amended by filling data in the electronic statement of amendment form. Then the Minister issues a certificate of Statement of Amendment electronically.

This is also the case in practice, which does not require a commissioner as an organ of a single-member limited liability company. In the General Administration of Law (AHU) system, business owners are equated with director who are shareholder.<sup>27</sup> The presence of a director is mandatory in the process of establishing a single-member limited liability company. The identity and data of the director need to be filled in when establishing on the AHU website. It is different with commissioners, who are not required to be an organ in a single-member limited liability company when conducting the establishment process on the AHU website. A person can establish a single-member limited liability company without a commissioner when filling in the statement of establishment on the AHU website.

The absence of provisions regarding the position and authority of commissioners in Law 6/2023 and its implementing regulations shows that a single-member limited liability company can be established without commissioners as in a capital partnership limited liability company. The existence of the commissioners in a capital partnership limited liability company is categorically imperative.<sup>28</sup> The founders cannot establish a capital partnership limited liability company if the commissioners is not mentioned in the deed of establishment. The three organs of the capital partnership limited liability company, including the director,

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<sup>27</sup> “Ditjen AHU, Panduan Aplikasi Pendaftaran Perseroan Perorangan, [https://panduan.ahu.go.id/lib/exe/fetch.php?media=user\\_guide\\_pendirian\\_ptp.pdf](https://panduan.ahu.go.id/lib/exe/fetch.php?media=user_guide_pendirian_ptp.pdf), on 3 February 2023”

<sup>28</sup> Binoto Nadapdap, *op.cit*, p.8.

commissioners, and GMS, must be determined from the outset of the establishment, and included in the deed of establishment as a condition for the legalization of the legal entity.

In addition to the absence of the commissioners, the GMS is also not an imperative organ in a single-member limited liability company. It is not specifically regulated regarding the quorum for the GMS to be held or the quorum for GMS resolutions in a single-member limited liability company. This is not regulated considering that the shareholder in a single-member limited liability company only one person and the shareholder also hold concurrent positions as director.<sup>29</sup> The legal entity status of a single-member limited liability company changes to a capital partnership limited liability company if the shareholder more than one person. If there are legal acts that require the approval of a GMS, such as changes to the declaration of establishment and dissolution, they can be carried out after a resolution of the shareholder of the single-member limited liability company. The resolution of the shareholder has the same legal force as the GMS.<sup>30</sup>

The only organ of the single-member limited liability company that has a significant role since the establishment process is the director who is also a shareholder.<sup>31</sup> The founder as a director of a single-member limited liability company has the role to carry out the management of the single-member limited liability company in accordance with the aims and objectives of the Company and to prepare financial statements. Then the founder as a shareholder has the role to make decisions that relate to the amendment of the statement of establishment and the dissolution of the single-member limited liability company.<sup>32</sup>

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<sup>29</sup> “Government Regulation Number 8/2021 on the Company's Authorized Capital and Registration of Establishment, Amendment and Dissolution of Companies that Meet the Criteria for Micro and Small Enterprises (State Gazette of The Republic of Indonesia of 2021 Number 18, Supplement to The State Gazette of Republic of Indonesia Number 6620)”

<sup>30</sup> “Government Regulation Number 8/2021 on the Company's Authorized Capital and Registration of Establishment, Amendment and Dissolution of Companies that Meet the Criteria for Micro and Small Enterprises (State Gazette of The Republic of Indonesia of 2021 Number 18, Supplement to The State Gazette of Republic of Indonesia Number 6620)”

<sup>31</sup> Moody Rizky Syailendra Putra and Hanz Bryan Joeliant, “Kedudukan Organ Perseroan Perorangan pada Usaha Mikro Kecil dan Menengah Pasca Berlakunya Undang-Undang Nomor 6 Tahun 2023”, *Jurnal Unes Law Review*, Volume 6, Number 2, December 2023, p. 5111.

<sup>32</sup> “Law Number 6 of 2023 on the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation into Law (State Gazette of The Republic of Indonesia of 2022 Number 238, Supplement to the State Gazette of The Republic of Indonesia Number 6841)”

Founder who is both director and shareholder, and the absence of the commissioners in a single-member limited liability company show that the system adopted by the organs of a single-member limited liability company resembles a one-tier board system. Such a system is commonly used in Anglo Saxon countries.<sup>33</sup> In the field of corporate law of Anglo Saxon countries, there is no commissioners.<sup>34</sup> The recognized organs only consist of the board of directors and the GMS.<sup>35</sup> The board of directors is a combination of the role of the commissioner (supervisory) and the role of the director (executive).<sup>36</sup>

The board of directors consists of the Chief Executive Officer (CEO) who is responsible for managing the operations.<sup>37</sup> In addition, the board also consists of the Chairman or non-executive directors who are responsible for providing oversight.<sup>38</sup> In the one-tier board system, there is better coordination between management and supervision because the communication easy.<sup>39</sup> On the other side, this position can lead to the central of power in the hands of a few people which weakens checks and balances.<sup>40</sup>

The existence of differences in the organs of a single-member limited liability company and a capital partnership shows that the regulation on limited liability companies in Law 6/2023, which amends Law 40/2007, is no longer relevant. Law 6/2023 does not distinguish between the organs of a limited liability company, whereas in the implementing regulations and in practice, as described above, a single-member limited liability company has different organs from a limited liability company with a capital partnership.

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<sup>33</sup> Jodi Ghozali and Nizi Kusuma Wardani, "Kajian Yuridis Pendirian Perseroan Terbatas Pasca Berlakunya Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja", *Jurnal Commerce Law*, Volume 3, Number 1, June 2023, p. 262.

<sup>34</sup> *Ibid.*

<sup>35</sup> Yahya Harahap, 2017, *op.cit.*, p. 343.

<sup>36</sup> Devi Atikawati, Reka Dewantara and Dyah Aju Wisnuwardhani, "One-Tier System Juridical Analysis in Single-Member Company in Indonesia", *Budapest International Research and Critics Institute-Journal*, Volume 5, Number 2, May 2022, p. 10297

<sup>37</sup> Yahya Harahap, 2017, *op.cit.*, p. 343.

<sup>38</sup> *Ibid.*

<sup>39</sup> Afriasnyah Tanjung, "Strengthening Business Sustainability: One-Tier Board System For Micro-Small Business Enterprises Resailnce After The Enacment Of Law Number 06 Of 2023 About Cipta Kerja", *Marketgram Jurnal*, Volume 01, Number 04, 2023, p. 731.

<sup>40</sup> *Ibid.*

## **B. The Principle of Fiduciary Duty in Single-Member Limited Liability Company**

In a Limited Liability Company, the director has the function to perform *beheer* and *beschikkingsdaad* actions. The actions carried out by the director are considered for the benefit of the company. Every transaction carried out by the director is certainly not an asset or ownership of the director but belongs to the company. In this case, the director has the duty to carry out fiduciary duty. The director has great trust to manage the company in accordance with the articles of association and laws and regulations, so that the director must have high good faith.<sup>41</sup>

The doctrine of fiduciary duty, which originated from the Common Law legal system, teaches the existence of a fiduciary relationship or a reciprocal relationship that creates dependence between the director and the company. The director is very dependent on the company because the director never exists without the company.<sup>42</sup> The Company is also very dependent on the director as the organ of the company that has been entrusted with management. The director is the only organ authorized to act for and on behalf of the company. The entire management of the company's assets and operations is highly dependent on the director. The fiduciary relationship is based on trust.

The director, which is an organ of trust, becomes a trustee and agent for the company.<sup>43</sup> The legal consequences of director as trustee for the company is that the director must carry out the duty of loyalty and good faith. As trustee, director who use his powers must have loyalty to the company. The interests raised by the director are the best interests of the company, not for personal interests or the interests of third parties.<sup>44</sup> In addition to being a trustee, the director is also an agent of the company whose role is to encourage the company to achieve its goals based

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<sup>41</sup> Munir Fuady, 2014, "*Doktrin-Doktrin Modern dalam Corporate Law dan Eksistensinya dalam Hukum Indonesia*", Bandung: PT Citra Aditya Bakti, p. 30.

<sup>42</sup> Fred B.G. Tumbuan, 2002, "*Tanggung Jawab Direksi dan Komisaris serta Kedudukan RUPS Perseroan Terbatas menurut Undang-Undang Nomor 1 Tahun 1995*", Jakarta: FH-UI, p. 6.

<sup>43</sup> Paul L. Davies, 1997, *Gower's Principles of Modern Company Law*, London: Sweet Maxwell, p. 601.

<sup>44</sup> Yafet Yosafet Wilben Rissy, "Analisis Yuridis Terkini terhadap Kewajiban Berhati-hati (*Duty of Care*) dan Fidusia Direktur di Inggris, Amerika, Kanada dan Indonesia", *Mimbar Hukum*, Volume 34, Number 2, 2022, p. 654.

on the duty of care and skill. The director has an obligation to manage the company's assets and provide benefits for the company.<sup>45</sup>

When looking at the provisions regarding Law 40/2007, it appears that the Law has adopted the doctrine of fiduciary duty. Article 92 paragraph (1) stipulates that the director in carrying out management must be in accordance with the aims and objectives of the company. Then in Article 97 paragraph (2), stated that the director must manage the company in good faith and with full responsibility. Furthermore, Article 99 paragraph (1) states that director is not authorized to represent the company if the directors have a conflict of interest.

Based on the provisions in Law 40/2007 as described, it appears that the director needs to do several things as a manifestation of implementing fiduciary duty. Director in conducting management cannot be based on personal interests or the other interest. In addition, director also cannot take advantage of his position to obtain personal gain. Director is also not allowed to use the company's assets for personal interests. In a *contrario*, director in *beheer* and *beschikking* must fulfil the elements of good faith, proper of purpose, responsibility and does not have conflict of interest.<sup>46</sup>

The principle of fiduciary duty needs to be ensured that it has been implemented by the director. The implementation of fiduciary duty is ensured through the existence of a supervisory function. The organ that has the role to perform the supervisory function is the commissioners. Article 114 of Law 40/2007 states that the commissioners are responsible for the supervision of the company and providing advice to the director. The commissioners really need to carry out the supervisory function independently. Independent means that the commissioners are not only a rubberstamp of the director but is active in providing consideration and criticism of the strategic policies of the director.<sup>47</sup> Supervision carried out by commissioners refers to the aims and objectives of the company, not to the interests of organs or shareholders because a Limited Liability Company is a separate entity.

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<sup>45</sup> *Ibid.*

<sup>46</sup> Ridwan Khairandy, 2009, "*Perseroan Terbatas Doktrin, Peraturan Perundang-Undangan dan Yurisprudensi*", Yogyakarta: Total Media Yogyakarta, p. 208.

<sup>47</sup> Claudia Brigita Kills, "Tanggung Jawab Dewas Komisaris PT dalam melaksanakan Pengawasan terhadap Direksi menurut Undang-Undang Nomor 40 Tahun 2007", *Jurnal Lex Privatum*, Volume 3, Number 3, July 2015, p. 64

As the only organ that has a supervisory function, the commissioners have a big role so that the company can run according to its goals and objectives. The application of the principle of fiduciary duty can encourage the realization of good corporate governance.<sup>48</sup> This principle can be easily applied to a company system that separates the organs of the director and the commissioners. The hope is that the supervision provided is independent supervision. The benefit when this principle is used is that the company can minimize acts of abuse of authority by the director. This principle is very easy to apply to a Limited Liability Company with a two-tier board system, namely a capital partnership limited liability company.

The arrangement of organs in a single-member limited liability company shows that the system adopted by the organs of a single-member limited liability company resembles the one-tier board system. Both the single-member limited liability company and the one-tier board system do not have a supervisory board. The difference is that in the one-tier board system, the supervisory function is imposed on the board of directors. On the board of directors there are non-executive directors whose role is to supervise. This is different in the case of a single-member limited liability company which only consists of one director who performs the management function. The director also acts as a shareholder.

The board of directors in the form of non-executive director in a one-tier board system is often described as having two broad mandates: an advisory mandate and an oversight mandate.<sup>49</sup> The two mandates consist of several responsibilities including (1) supervising and evaluating the board; (2) providing direction for the company; (3) establishing a system of good corporate governance, (4) regulating the company and its relationship with the CEO; (5) upholding fiduciary duty; (6) and control functions.<sup>50</sup>

The existence of non-executive directors as part of the board of directors in the one tier board system means that companies with this system can still carry out supervisory functions easily. The thing that distinguishes the two-tier board system

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<sup>48</sup> Erwin Harinurdin dan Karin Amelia Safitri, "Tata Kelola Perusahaan Tercatat di Indonesia", *Jurnal Vokasi Indonesia*, Volume 10, Number 1, June 2023, p. 49.

<sup>49</sup> David Block dan Anne-Marie Gerstner, "One-Tier vs. Two-Tier Board Structure: A Comparison Between the United States and Germany", *Comparative Corporate Governance and Financial Regulation*, Volume 1, 2016, hlm. 10.

<sup>50</sup> *Ibid.* hlm. 11.

is the organ. If in the two-tier board system, the supervisory function is carried out by the commissioners, then in the one tier board system it is carried out by the board of directors.

If the one tier board system is associated with the organ system of a single-member limited liability company, there are similar, but it cannot be said necessarily that a single-member limited liability company is a one tier board system. In a one tier board system there is no separation of the organs of the board of directors and commissioners, but there is a separation of functions. When compared with the organ system of a single-member limited liability company, it can be seen that in a single-member limited liability company there is only a single organ, namely the director who doubles as a shareholder.

The function of the director in a single-member limited liability company according to Article 109 Number 5 of Law 6/2023 is to carry out management according to appropriate policies in accordance with the mandate of the law and the company's statement of establishment. The director also has the responsibility of making financial reports in order to realize good corporate governance.<sup>51</sup> “The report is submitted to the minister electronically no later than 6 (six) months after the end of the period”. If a single-member limited liability company does not submit the financial report, it is subject to administrative sanctions.

Based on Article 116 jo. Article 117 of Law 40/2007, the commissioners are obliged to give approval or assistance to the director to carry out a legal action. This function applies to capital partnership limited liability companies that have an organ of commissioners but does not apply to single-member limited liability companies. When referring to the provisions in Law 6/2023, Law 40/2007, Government Regulation 8/2021, and Minister of Law and Human Rights Regulation 21/2021, there is not a single provision that regulates that a single-member limited liability company must have a commissioner organ. Therefore, there is no organ that can ensure whether the director is practicing the principle of fiduciary duty.

For example, based on the company profile obtained from the Directorate General of AHU, PT Responsibility Groove System is a single-member limited

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<sup>51</sup> “Law Number 6 of 2023 on the Stipulation of Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation into Law (State Gazette of The Republic of Indonesia of 2022 Number 238, Supplement to the State Gazette of The Republic of Indonesia Number 6841)”

liability company established on April 25, 2024. The body of this company is only one person who serves as a director. There is no commissioner or other shareholder. This shows that in practice, the existence of commissioner in a single-member limited liability company is not mandatory.

The obligation to apply fiduciary duty arose after the enactment of the limited liability company law in 1995. Previously, when limited liability company was still regulated under KUHD, Limited Liability Company was not required to have a commissioner for supervisory functions. Every legal action taken by the director is the responsibility of the director.<sup>52</sup> If the company suffers losses because of the director's violation of the provisions of the Articles of Association, the director is personally liable.<sup>53</sup>

These provisions were reinstated by Law 6/2023, which amended Law 40/2007. Single-member limited liability is not required to be supervised by the commissioners. The director is not supervised by any other body in the exercise of its fiduciary duties. However, the consequences of any management carried out by the director have not changed after the promulgation of Law 6/2023. Article 97 of Law 40/2007 stipulates that the director of single-member limited liability company is personally liable for any loss suffered by individual companies. This liability may be imposed if the director does not act in good faith and prudence in the performance of their duties.

## **CONCLUSION**

The conclusions of this study are as follows: first, the corporate structure of the capital partnership limited liability company has not changed after the promulgation of Law 6/2023. The capital partnership limited liability company still uses a two-tier board system whose organs consist of the director, the Commissioner and the GMS. This system of organs strictly distinguishes between management and supervisory functions. In contrast to single-member limited liability company, although there are inconsistencies between Law 20/2007 and Law 6/2023 jo. Government Regulation 8/2021 and in practice, the results of the

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<sup>52</sup> Indonesian Commercial Code

<sup>53</sup> *Ibid*

research show that in single-member limited liability company there is only director who is also shareholder, so there is no supervisory function of the commissioner. Second, the director in single-member limited liability company still has the obligation to perform its duties with the principle of fiduciary duty. The difference is that the director of the single-member limited liability company is not supervised by the commissioners. However, the director is still responsible for the losses of the single-member limited liability company if the director does not apply the principle of the third fiduciary duty to manage.

## **RECCOMENDATION**

First, this study recommends to the legislator to make changes to Law 40/2007 especially about the organs of limited liability companies. This is because the current type of limited liability company is not only a limited liability company in the form of a capital partnership limited liability company, but there are also single-member limited liability company. Secondly, this study recommends that each director of the company should continue to perform his duties in accordance with the principle of fiduciary duty, even if there is no supervision by other bodies.

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