

## Business Activity of Foundation

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### Abstract

What is considered by a law body as a business is an activity to achieve the predetermined objective to produce earning or profit. Such activity is not only confined to corporation but also Foundation. Indeed, Foundation Act (UUY) has made law values of business to be functional to support the achievement of purpose and objective of Foundation. The purpose and objective of Foundation are closely related to social, religiosity and humanity interests. Both purpose and objective are achieved through social charity activities. The essence and characteristic of Foundation, therefore, are social activities in the social, religiosity and humanity interests. The philosophy behind social activity of Foundation is the values of collectivity and kinship to develop sense of care toward socioeconomic problems in the communities. Business activity has several functions. First is to support social activity of Foundation to achieve its purpose and objective, and second is to increase and empower Foundation's ability to achieve the purpose. The self-support standing of Foundation is also important such that it will be independent with less dependence on other's empathy. Business activity is implemented by establishing business organization which is managed by Foundation, or by participating into certain business organization. Such participation is made in two ways. One is by establishing business organization with other parties and second is by buying the stock of company.

**Keywords:** social activity and business activity of Foundation

### 1. Introduction

Business is an activity to mobilize effort, mind or body to achieve the goal or to obtain profit, either by individual or business organization, or either through law body or through non-law body.<sup>5</sup> The business activity of Foundation as a law body represents a chance given by the State to support the achievement of Foundation's purpose and objective, to increase the ability, and to facilitate Foundation toward its self-support standing in gaining its social support and purpose in social, religiosity and humanity interests. However, Act No.28/2004 about Amendment of Act No.16/2001 about Foundation (hereafter called as UUY) expects that business activity of Foundation to support the achievement of purpose and objective of profit (or the maximization of profit) must always under proper limit such that business activity conducted by Foundation will always based on purpose and objective of Foundation. The limitation of Foundation's business activity is a distinctive marker distinguishing Foundation from corporation. Despite this limit, breakthrough in business activity is still possible. The initiation of breakthrough may be easier if Foundation is not focusing upon having its own business activity, but only participating into business organization with good prospect.

Before the effect of UUY, Foundation lives and grows based on habits, practices in the communities, and jurisprudence of Supreme Court. The early live of Foundation derives from the separated asset of the Founder, but the next life stage depends on the donor with aids and donations. The donor may contribute to Foundation based on religiosity motif or social interest. Therefore, there is no law certainty that Foundation can do business activity, or even it can be concluded that Foundation does not conduct business activity. Foundation is usually non-profit or social. In other words, business activity to look for profit seems prohibited by Foundation. In reality, Foundation is used as business organization, meaning that Foundation does business activity, and it is a deviation against the law. In relative with business activity of Foundation, Suharto asserts that "the confusion and complexity of law practice in Indonesia has reached the saturated point because law practice has considered Foundation as business area and therefore, it is possible that Foundation can be the arena of corruption. It is not surprising if Foundation has lost its genuine characters of social, religiosity and humanity activities".<sup>6</sup> Foundation is often used as the source of profit such that recent Foundation is not genuinely social but maximizing earning or profit for the Founder by the veil of social and humanity interests.<sup>7</sup> Anwar Borahima adds

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<sup>5</sup> W.J.S. Poerwadarminta, *Indonesian Dictionary* (Balai Pustaka, Printed XI, Jakarta; 1987), page 1136.

<sup>6</sup> Suharto, *Dissecting Foundation Conflict toward Prestigious Law Construction* (Cakrawala Media, Yogyakarta: 2009), page 187.

<sup>7</sup> L. Boedi Wahyono and Suyud Margono, *Foundation Law between Caricative Function or Commercial Function* (Novindo (Novindo Pustaka Mandiri, Jakarta: 2001), page 2.

adds that “other motif behind Foundation is that certain peoples want to do something commercial and use Foundation as the hidden mask. Foundation may be small in the beginning but it may grow as business kingdom with scope extending from education, health throughout other fields”.<sup>1</sup> Prohibition against Foundation from doing business activity has actually been validated by before UUY. Sources of this validation are as follows: (1) General Explanation of UUY (Act No.16/2001) has stated “.....behind the status of law body given to Foundation, which is not only functioned as the organization for social, religiosity and humanity activities but is also sometimes designed to enrich the asset of Founder, Manager, and Supervisor. It means that Foundation is concentrated upon social activity, not business activity; (2) Paul S Baut as the chair of special committee for RUUY expresses that, “House of Representative prohibits Foundation from doing business activity, but there is something important for the wellbeing of Foundation itself. The Founder may not in certain producing income perpetually, and there is not assurance that peoples are willing to contribute voluntarily”<sup>2</sup>; (3) According to Mulya Lubis, the source of funding for Foundation is not merely coming from business, but Foundation is not allowed to take donation from national entrepreneurs, including conglomerate<sup>3</sup>; and (4) Chatamarrasjid admits that planning for profit is not consistent to social and humanity interests.<sup>4</sup>

After the effect of UUY, Foundation has law base and law certainty for doing business activity, but it is confined to the social, religiosity and humanity interests. Historically, business activity of Foundation is described as follows: (1) In Holland, there is a polemic behind the arrangement of “*Wet op stichtingen*”. Some opinions insist that *stichting* must be non profit, but at last, Foundation is allowed to do the business for profit<sup>5</sup>; (2) Foundation can do business activity but in limited scope of interest as stated by UUY of Indonesia; and (3) Business activity of Foundation must not be restrained. According to Ibrahim Assegaf and Eryanto Nugroho, business activity of Foundation shall not be constrained because it does not violate the purpose and objective of Foundation. Foundation can function in other sector, including business, that may differ from purpose and objective, as long as Foundation does not neglect the philanthropy, and the business may be good for the survival of Foundation.<sup>6</sup> To achieve its purpose and objective, Foundation can do business activity as stated in Section 3 Verse 1 UUY by two ways, which are: (1) Establishing business organization; and (2) Participating into business organization. There is no consensus yet about establishing Foundation. Experts are still in debate about the management of business organization and the limitation of Foundation’s business activity. The question related to the management of business organization established by Foundation is whether the management is directly under Foundation or separated from Foundation. The question related to the limitation is how far Foundation’s business activity shall be limited. If Foundation participates into certain business organization, the question may be how far the participation is or how many capital shall be included. If a business organization shall be changed, what steps must be taken to develop Foundation’s business activity.

## 2. Method of Research

Research type is normative. It is a research which examines law principles, law norms, concrete law regulations, and law systems.<sup>7</sup> Normative system is talking about principles, norms, rules, laws and regulations, adjudications, and doctrines (tenets).<sup>8</sup> Normative system which is manifested into laws and regulations and adjudications represents positive law, and it may be found by searching for general characters of concrete regulations.<sup>9</sup> Normative law approach is used to analyze the substance of law as one component of law such that it will not disregard analytical-normative method which stands on laws and regulations as law materials. The analysis is conducted to compare between the activity and the essence of Foundation as the organization with purpose and objective of social interest, and Foundation as the organization with business activity which means that purpose and objective are always profit. Law materials used in this research are primary, secondary and tertiary. Primary law materials are obtained by taking inventory from laws and regulations of business activity, especially those regulating the founding of law body and its participation, such as: National Constitution; Act No.16/2001 about Foundation as amended by Act No.28/2004 about Amendment of Act No.16/2001 about Foundation; Government Regulation No.2/2013 about Amendment of Government Regulation No.43/2008 about The

<sup>1</sup> Anwar Borahima, *The Standing of Foundation in Indonesia* (Kencana Prenada Media Group, Jakarta: 2010), page 21.

<sup>2</sup> Paul S. Baut, quoted in Anwar Borahima, *Ibid*, page 136.

<sup>3</sup> *Ibid*.

<sup>4</sup> Chatamarrasjid, *Social Objective of Foundation and Profit-Oriented Business Activity* (Citra Aditya Bakti, Bandung: 2000), page 11.

<sup>5</sup> Rudhi Prasetya, *Foundation in Theory and Practice* (Sinar Grafika, Jakarta: 2012), page 61.

<sup>6</sup> Ibrahim Assegaf and Eryanto Nugroho, *Narrow Interpretation of Accountability and Business Aspect of Foundation*, in Law Journal, Jentera, entitled *Law and Foundation* (Study Center of Law and Policy of Indonesia, 2<sup>nd</sup> Edition, Jakarta, 2003), page 49.

<sup>7</sup> Sudikno Mertokusumo, *Law Invention* (Liberty, Yogyakarta : 2009), page 29.

<sup>8</sup> Mukti Fajar et al, *Dualism of Normative Law and Empirical Law Researches* (Pustaka Pelajar, Yogyakarta, 2010), page 34.

<sup>9</sup> Sudikno Mertokusumo, *Acquainting with Law* (Liberty, Yogyakarta: 2006), page 119-120.

Implementation of Foundation Act; and Government Regulation No.63/2008 about The Implementation of Foundation Act. Secondary law materials are law materials to support the explanation of primary law materials, such as the opinion of law experts (law doctrines); books of law literatures; Essay of Draft of Foundation Act; Dissertations; and Law Journals. Tertiary law materials include Law Dictionary and Indonesian Dictionary. Several approaches are used such as *statute approach*, *analytical and conceptual approach*, and *historical approach*. All are used to review the prevailed law of Foundation.

All law materials that are obtained from literatures are then analyzed in qualitative-descriptive way to develop arguments based on deductive reasoning logic. Through qualitative-descriptive method, the author attempts to present, to illustrate and to connect all materials that are relevant to this research in systematic and accurate way, and therefore, the answer of problems (questions) can be given.

### 3. Result and Discussion

Foundation Act has provided juridical consequence to the law standing of Foundation as law body. It means that Foundation is a law subject just like human who can support the right and duty, develop itself as institution with self-owned asset separated from the asset of Founder or Foundation organs, and can defend its right and duty before the Court. However, the right of law body is not similar to the right of human. It is because the right of law body is confined to what is given by the statutes of organization. Physically, a law body may not be allowed to interfere with the cases related to family dispute and inheritance. According to Ali Rido, Foundation as law body can be seen from its distinctive characters or substances, separated asset, solitaire objective, solitaire interest and regular organization.<sup>1</sup> Based on the law of custom and jurisprudence, a body can be called as law body if it meets material and formal requirements.<sup>2</sup> Material requirement means that the body shall have asset separation, an objective and an organization. Formal requirement is often shown by the authentic certificate. According to UUY, Foundation is law body consisting part of asset of the Founder which must be separated from initial asset, and the body is designed for certain objectives related to the social, religiosity and humanity interests, and the presence is enforced by Notary Certificate and written in Indonesian language.<sup>3</sup> To obtain status as law body, a process is needed as required by Section 11 UUY, which is the approval from the government, hereby through The Minister of Law and Human Right (Menkumham). The Founder of Foundation submits the proposal of approval to the Minister through the Notary because Notary is the maker of incorporation article. The incorporation article of Foundation must contain several items such as: (1) Statutes of Organization and (2) other remarks if considered necessary (at least informing about the Founder, Manager, date of birth, and nationality). Therefore, law body cannot be separated from the asset that is used to achieve purpose and objective of social interest. The existence of Foundation as law body is a factual demand to secure the objective of Foundation and to give law certainty to the presence of Foundation. The objective of Foundation as stated in Section 1 Verse (1) UUY is about social, religiosity and humanity interests. Section 14 Verse 2b states that “this objective is achieved by conducting activity that is oriented toward predetermined purpose and objective.” The activity may vary such as establishing nursing home, establishing orphanage, providing scholarship, giving donation to survivors of natural disaster. All these activities are social in nature. What means by social in nature is that those activities are aimed for generosity and mutual help.<sup>4</sup> Helping people who needs help is social nature.<sup>5</sup> All social activities are not expecting favor. The separated asset of Foundation which derives from the Founder and that from donors may be not adequate or be less sustainable to finance the activities to achieve purpose and objective of social interest. Therefore, the supporting device is needed to achieve this purpose and objective of social interest, and this device is business activity as stated in Section 3 Verse 1, Section 7 Verse 1, and Section 8 Verse UUY. Section 3 Verse 1 determines that Foundation can do business activity by establishing business organization and by participating into a business organization. The establishment of business organization is explained strictly in Section 7 Verse 1 UUY through statement that Foundation can establish business organization which the activity still conforms with purpose and objective of Foundation. Section 8 UUY asserts that “business activity of business organization required in Section 7 Verse 1 must be consistent to purpose and objective of Foundation, and may not contravene general orderliness, morality or any prevailed laws and regulations.

Two ways of business activity will be explained as follows. *First* is about business activity of Foundation by establishing business organization. There is a debate about business organization established by Foundation. One side concurs that business organization must be separated from Foundation and the

<sup>1</sup> Ali Rido, *Law Body and The Standing of Limited Law Body, Association, Cooperative, Foundation and Waqaf* (Alumni, Second Publishing, Bandung: 1986), page 52-45.

<sup>2</sup> Anwar Borahima, quoting Lisman Iskandar in *The Aspect of Foundation Law based on Positive Law of Indonesia*, *Yuridika Magazine* No.5 & 6, Year XII, 1994, page 24, *Op. Cit.*, page 25.

<sup>3</sup> Section 1 jo Section 9 UUY.

<sup>4</sup> Chatamarrasjid, *Op. Cit.*, page 22.

<sup>5</sup> Anwar Borahima, *Op. Cit.*, page 98-99.

management shall be given to the business organization other than Foundation. Other side argues that business organization cannot be separated but must be in unity with Foundation, and the management will be directly under Foundation. The proponent of separation between the established business organization and Foundation is Boedi Untung and Suyud Margono. Both have said that Foundation can establish business organization or participate into business organization. Business organization is a form of activity to obtain profit, and the arrangement can be in form of PT, CV and Firma.<sup>1</sup> Suharto adds that Foundation must still have social character, and therefore, UUY does not give possibility to Foundation to do commercial work, especially directly looking for income/profit (doing business activity).<sup>2</sup> Rudhy Prasetya signalizes that it is not considered as taboo for Foundation to have business activity for profit as long as the business is not managed in self-owned way by Foundation, but Foundation establishes PT to manage its business activity.<sup>3</sup> Other opinion declares that business organization established by Foundation is not separated, but stay in unity with Foundation and the management is directly remaining in the hand of Foundation. It is described by Rudhi Prasetya by saying that business activity of Foundation such as establishing Hospital and College. Both organizations are managed by Director and Rector. Both principals are only Activity Implementer. The employees of Hospital are indeed the employees of Foundation. All assets of Hospital such as buildings, equipments, inventories, and finances are belonged to Foundation, not Hospital, because Hospital is not the subject of law.<sup>4</sup> Business organization established by Foundation can be law body or non-law body. The non-law body is by juridical not separated from Foundation, and business activity is conducted by Implementer of Activity appointed by Board to do the tasks of Foundation as stated in Section 35 Verse 3 UUY. Indeed, Section 35 Verse 3 has said that while implementing the tasks of Foundation, the Board can appoint Activity Implementer. Business organization with non-law body status cannot be stand alone or separated from Foundation. In contrast, law body (in form of PT or Cooperative) cannot be in unity with Foundation. Moreover, Foundation also cannot establish business organization with law body status without the presence of others because the precondition of establishing PT or Cooperative, for instance, must involve at least two parties (Section 7 Verse 1 Act No.40/2007 about Limited Cooperation). The establishment of Cooperative requires the minimal attendance of twenty parties (Section 6 Verse 1 Act No.25/1992 about Cooperative). The establishment of business organization with law body status is usually a form of business organization through which the purpose and objective of Foundation is achieved by participating into other business organization as regulated by Section 7 Verse 2 UUY.

Business activity of business organization established and managed by Foundation must be consistent to the purpose and objective of Foundation as stated in Section 7 Verse 1 and Section 8 UUY. The explanation of Section 7 Verse 1 is “quite clear”, while the explanation of Section 8 states that business activity of Foundation’s business organization has wide scope, including realms of human right, art, sport, consumer protection, education, life environment, health and knowledge. However, the explanation of these Sections does not give clear description about what is meant by Section 7 Verse 1 and Section 8 about the business activity of business organization established by Foundation that conforms to the purpose and objective of Foundation.

The meaning of business activity that conforms to purpose and objective of Foundation may be that business activity must be consistent to each interest that represents purpose and objective of Foundation. For example, if purpose and objective of Foundation is social, then business activity must be social in nature. If purpose and objective is for religiosity, then business activity is religiosity. If purpose and objective is about humanity, then business activity shall be humanity. The inconsistency is only evident if business activity is incompatible to purpose and objective of Foundation.

In pursuance of Section 8 UUY, the conformance between business activity of business organization and Foundation’s purpose and objective can be understood as that Foundation is not allowed to have business activity outside social, religiosity and humanity interests, such as in trade, industry and politic. The description of conformance based Section 8 UUY can be illustrated as follows. For instance, if purpose and objective of Foundation is social, the related activity may be building orphanage, building elder nursing house, or organizing events related to orphans and elders. The conformance of Foundation’s purpose and objective and business activity is not limited on social interest. Related to religiosity, Foundation can build prayer house or even religious-based hospital. The author attempts to explain this description further: (1) Section 8 UUY only gives the blended scope without having strict grouping. The question arises then, that is, what business conforms to social, religiosity and humanity interests; and (2) if the principle of utility shall be considered, the chance of each interest to become a business is not similar. The chance of religiosity and humanity interests to become a business is smaller than social interest. But, the demand of business to be helped or supported of each interest is similarly strong. For instance, building hospital is social interest, while helping disaster survivors is humanity

<sup>1</sup> L. Boedi Untung & Suyud Margono, *Op.Cit*, page 9.

<sup>2</sup> Suharto, *Op.Cit*, page 68-69.

<sup>3</sup> Rudhi Prasetya, *Op.Cit*, page 62.

<sup>4</sup> *Ibid*, page 18-19.

interest. There is no utility gained from the prohibition against an activity to help or to support other interest but still within the scope of social, religiosity and humanity interests. The indirect utility obtained from someone skill at certain interest may be helpful to afford the interest beyond the skill level, and it is then possible to attain wider level of Foundation's purpose and objective. For example, a doctor may be kind or show good deed in religiosity and humanity interests by building Foundation for those interests. A business activity to support this purpose and objective, especially in relative with doctor profession, is certainly the activity of hospital because the doctor always knows about the subtleties of the hospital. If the doctor shall become the Counselor, it will be the professionalism of the doctor to give necessary inputs to the Board and the Activity Implementer.

*Secondly*, it is about Foundation's business activity which is conducted by participating into business organization. The participation into business organization (Section 3 Verse 1 and Section 7 Verse 7 UUY) is explained as follows. Foundation can enclose its capital into other business organization that is established by Foundation with other parties (separated form Foundation), or Foundation can invest into business organization that already exists. The scope of Foundation's business activity is limited (Section 1 Verse 1, Section 7 Verse 1 and Section 8). Foundation's business activity must conform to Foundation's purpose and objective. It means that Foundation is allowed to do business activity only if the business activity remains under the scope of social, religiosity and humanity interests. Pros and contras are standing between the limit. Actually, the participation of Foundation outside Foundation's purpose and objective has been opened widely, and one way to show this participation is through participation into various forms of business organization. Foundation can enclose its capital into business organization of law body such as PT and Cooperative, or into that of non-law body such as CV and Firm. However, business activity of business organization which accepts the enclosure of Foundation has not been regulated by the mandate of conformance to Foundation's purpose and objective. It is not sure whether such business activity is compatible to what expected by Activity Implementer of Foundation. The explanation of laws (through Section 7 and Section 8) is quite clear. Foundation can enclose the capital into business activity outside social, religiosity and humanity interests but by conditions that the business activity is already prospective and the enclosure is maximally twenty five percents from all assets of Foundation. To ensure that the company is prospective is not easy. The enclosure can be done by participating into other business organization. Foundation can do this by establishing a business organization with other parties. Establishing PT is essentially a form of enclosure or participation. Foundation can also buy stocks other existing PT. Stock purchase is always underlined by the expectation of profit by which Foundation's purpose and objective can be achieved. Stock purchase can be done in some arrangements: (1) the purchase of stock that has been released or will be released by PT based on direct mandate from stockholder; (2) the purchase of stock that has been released or will be released by Director Board of PT (Section 125 UUPT); and (3) the purchase of stock from Public Company through capital market. Stock purchase in capital market or stock exchange is advantageous for the security because capital market is always transparent. The custody from Capital Investment Agency also helps to ensure the transparency. The actor of capital market must inform the stock in proper way with material fact conforming to laws and regulations. The expected information is very important to facilitate the decision of stock purchase. Capital Market Controlling Agency (Bapepam) is charged with responsibilities to foster, to arrange and to supervise the daily activities of capital market. Bapepam may be preventive by giving arrangement, guidance and direction. The Agency is also repressive in its supervision, especially when it must do checkup, conduct investigation and charge for sanction (Section 3 Act No.8/1995 about Capital Market). It is concluded that Foundation can do business activity with direct management under Foundation if Foundation meets the following conditions: (1) Establishing business organization of non-law body which is then managed by Activity Implementer; and (2) Enclosing the capital into business organization that is established with other parties and/or buying the stock of other existing company.

Some reasons are stood behind the opinion of the author: (1) Section 3 Verse 1 and Section 7 Verse 1 UUY have mentioned that Foundation can do business activity if Foundation itself manages this business. The interpretation of "establishing business organization" shall not remove or eliminate the allowance given by previous words; (2) Section 1 Verse 1 UUY determines that Foundation is law body, meaning that Foundation can do law action directly, including law action to organize business activity that is implemented then by Activity Implementer; (3) Explanation of Section 26 Verse 2 Letter e is about the outcomes of Foundation's business activity such as dividend, bank saving interest, building rent and business return. Dividend is what is gained from the enclosure, while business return is what is gained from Foundation's business activity; (4) Foundation cannot alone establish PT, but must involve other parties as required in Section 7 Act No.40/2007 about PT, stating that PT must be established by two parties or more with Notary Certificate. Indeed, the establishment of PT with other parties represents a form of enclosure or participation; (5) Business organization established alone by Foundation is business organization but without law body. Business organization of non-law body cannot be separated in juridical manner from Foundation or cannot be standalone; (6) Section 8 UUY declares that business activity of business organization established by Foundation must conform to Foundation's purpose and objective. It is also required by Section 7 Verse 1 UUY. Foundation's purpose and objective as

determined in Section 7 Verse 1 UUY is concerning with social, religiosity and humanity interests. Stipulations of Section 7 and 8 are only implemented if business organization is by juridical remaining within Foundation's organizational structure and under direct control of Foundation. Business organization of PT where Foundation encloses the capital within it may be hardly to implement both Sections because other parties are also the stockholders who are also constrained by PT regulations; (7) Based on Act No.44/2008 about Hospital, especially Section 20 Verse 1, it is mentioned that pursuant to the management, Hospital is divided into Public Hospital and Private Hospital. Section 20 Verse 2 explains that Public Hospital in Verse 1 can be run under the management of Government, Local Government, and Non-Profit Law Body. By this section, it is clearly shown that Foundation can manage the Hospital as its own business organization without being required to establish other law body, such as PT; (8) Section 39 Verse 1 of Community Organization Act has declared that community organization of law body can establish business organization to meet the demand and wellbeing of organization. Verse 2 is illustrating about business organization as already stated in Verse 1 but giving more concentration on statutes and bylaws; (8) The explanation of Section 3 Verse 1 UUY has stated that stipulation of this verse aims to determine that Foundation cannot be the umbrella of business organization, and Foundation does not conduct business activity but only implements business activity through business organization established by Foundation or through business organization where Foundation encloses the asset. In essence, there is a separation for business organization established by Foundation, but the separation is only technical and administrative because by juridical, the separated organization is still the member of Foundation.

The next discussion is about the establishment of business organization by Foundation as required by Section 7 Verse 1 and the participation of Foundation as stated in Section 7 Verse 2 UUY. Furthermore, Section 7 Verse 3 UUY is about the prohibition against Counselor, Manager, and Supervisor of Foundation from having double position in Director Board or Managerial Board, or in Commissioner or Supervisory Board of business organization regulated in Verse 1 and Verse 2 of Section 7 UUY. This section prohibits any Foundation organs from having double position in the business organization either established by Foundation or business organization where Foundation encloses the capital. The prohibition against Foundation organs from having double position in the business organization where Foundation encloses the capital is possibly correct and logical. Two reasons are behind the prohibition against Foundation organ, which are (1) to protect Foundation from abusive or fraudulent practices of Foundation organs; and (2) if possible, business organization shall be outside of Foundation. The double position in the business organization established by Foundation still needs further explanation. The explanation of Section 7 Verse 3 UUY is quite clear.

Business organization established by Foundation may be non-law body and therefore, the activity is implemented by Activity Implementer who is appointed by Foundation. The prohibition against double position is regulated by UUY, and the member of Counselor cannot also stand in the posts of Manager and Supervisor, and therefore, the counselor is also disallowed to have double position with Activity Implementer (Section 29 UUY). Supervisor is prohibited from being Counselor or Manager at same time, and thus also disallowed from being Activity Implementer at same period (Section 40 Verse 4 UUY). Manager cannot also simultaneously work in the position of Counselor or Supervisor (Section 31 Verse 3 UUY). In business organization established and managed by Foundation, there is no position for Director and for member of Commissioner Board. The offered position is Manager or Activity Implementer. It seems that the prohibition against double position is not logical or must be very illogical because it can be interpreted as Manager is prohibited from being Manager. The authority of Foundation organs is that Counselor, Manager and Supervisor is legally given allowance to foster, to manage and to supervise business organization inside Foundation.

Prohibition against double position is made possible in business organization established by Foundation or in business organization of law body which is separated from Foundation but Foundation still encloses capital within it. Business organization that is established by Foundation and given law body status is still possible witnessing the fact that the position of Director Board, Manager (not the manager of Foundation), Commissioner Board, and Supervisor (not the supervisor of Foundation) cannot be doubled by Foundation organs as intended by Section 7 Verse 3 UUY. It is not possible that these positions will exist in the organization that technically and by juridical manner under the control of Foundation, and because business activity of Foundation remains within environment of Activity Implementer. In other words, business organization established by Foundation and without law body status is not possibly remaining outside Foundation or separated by juridical manner from Foundation. The prohibition against double position in the business organization established by Foundation as intended by Section 7 Verse 1 UUY is already reasonable because business organization established by Foundation is usually which the essence is enclosure because it is separated from Foundation.

Business organization established by Foundation either with law body and non-law body is regulated by Section 7 and Section 8 UUY. Business organization must be conform to Foundation's purpose and objective and shall not contravene with general orderliness, morality and laws and regulations. For non-law body, the stipulation does not contain law problem. In business organization of law body established by Foundation, such as PT, there is contiguity with other laws and regulations. Therefore, business activity of PT shall not be

restrained only to social, religiosity and humanity interests. The establishment of PT must involve at least two parties with similar interest or with expectation to have business activity outside the interests. The implementation of Section 7 and Section 8 about the limitation of business activity is meant that business activity of business organization established by Foundation with other parties cannot be conducted. It is important to note that the establishment of business organization and the enclosure within other business organization are activities to support the achievement of Foundation's purpose and objective, or also called as business activity. Such business activity has been stated within Foundation Bylaw as different from the activity to achieve purpose and objective, such that it is clear that the return of business activity can be used to support the achievement of Foundation's purpose and objective.

The effort to support Foundation's business activity, to be reliable in business world, is business restructuring which involves merger between Foundation with other parties, and acquisition (takeover) by Foundation against a company. But a simple development step for Foundation is stock purchase. Purchasing the stocks can be as simple in such way that a company can be acquired. In other words, Foundation must hold several stocks from several companies which may then develop or improve the asset of Foundation.

Merger is combining two companies or more into a unity and it also means that a company allows itself to be absorbed into other company. One company stay alive without changing the identity, but other company is collapsing and liquidated. Section 1 Verse 1 UPPT has defined merger as law action conducted by one limited company or more to join with other limited company although it leads to the consequence that the asset and liability of the limited company which joins the merger shall be transferred before the law to the receiving company and then law status of the joining company will come to end before the law. The merger is usually done by law body companies, such as PT and Cooperative. The merger itself can be operated among similar kind law body such as between PT and PT or between Cooperative and Cooperative. It is also evident between similar kind of business activity such as between banking companies or between trading companies. The merger is regulated by UUY at Chapter XIX, from Section 57 to Section 61 but Section 58 and Section 60 have been revised. Section 57 Verse 1 UUY expresses that the merger of Foundations can be done with one Foundation or some Foundations. The joining Foundations will disband leaving only one alive that is Foundation that receives the merging. The consideration to disband Foundation is as following: (1) Foundation cannot implement business activity without support from other Foundation; (2) the joining Foundation and the receiving Foundation have similar activity; and (3) the joining Foundation is never doing something harmful to statutes and general orderliness. The most prominent consideration behind Foundation merger is that Foundation cannot activate its own business activity without the support of other Foundation. The failed Foundation may initially have its finance supported by fixed donor. The fixed donor then experiences economic problems and stops their donation to Foundation. This troubling Foundation is then looking for other Foundation for help by joining into it. In other case, a Foundation still has asset but this asset is not benefiting because there is no significant business activity.

The merger of Foundations can be announced by Manager to Counselor because the authority of merger remains in the hand of Counselor. Merging Foundations must be initiated with the assembly of Counselor, which is attended by minimally 3/4 members of Counselor. The decision is made by the agreement of minimally 3/4 members of Counselor. The plan of merger must be made by each Manager of Foundation, either by the joining Foundation and the receiving Foundation. The plan of merger must be settled within the article of merger and acknowledged by the Manager of each Foundation. The Manager of the resultant Foundation (after merger) must announce the result of merger in the daily newspaper in Indonesian language at least 30 days after the date of merger. The draft of article of merger is then verified into article of merger made by the Notary. The draft of article of merger and the draft of the change of Foundation statutes, especially for the receiving Foundation, if the change is considered, must be submitted to the Minister for acknowledgement or verification. The plan for merging Foundations must comprise of: (1) Name of Foundations and the address of Foundations in the merger; (2) Reason of merger from each Foundation; (3) Summary of financial statement of the merging Foundations; (4) Main activity of Foundations and any changes during the current book year; (5) Problems occurred during current book year which is described in detail; (6) The resolution of status of the daily implementer, the activity implementer, and the employee of the merging Foundations; (8) The clarification about Name of Counselor, Manager and Supervisor; and (9) Plan for change of the statutes of the merging Foundations.

UUY only explains business restructuring of the merging Foundations, while acquisition is not clearly discussed in UUY. Foundation is impossible to be acquired because Foundation's capital is not divided into stocks. But, Foundation can acquire other company. It aligns with Section 3 Verse 1 UUY which provides authority for Foundation to do business activity by establishing business organization or participating (enclosing capital) into other business organization. If the enclosure is made in such way that majority stocks are held, it means an acquisition by Foundation. The arrangement of acquisition by Foundation against PT is allowed by UUY. The taking over of PT by purchasing majority stocks is allowed by law body, and thus, Foundation is included. Taking over by purchasing the stocks issued or released by PT either by the direction of limited

company or by the mandate of stockholders is allowed Section 125 UUPT. The acquisition by Foundation against other company must still conform to Section 7 Verse 2 UUY which states that the enclosure into various business organizations must be prospective, meaning that the acquired company shall be prospective. The enclosure of Foundation capital or the purchase of stock from PT or other business organization must not exceed 25 % of whole assets of Foundation. How is about the possibility of merger and consolidation of Foundations? The question is answered by firstly explaining about the merger. There are two models of the merging Foundations. First is that the merger is not followed by the change of statutes. Second is that the merger is followed by the change of statutes. The merger with the change of statutes is differentiated by two: (1) the change of statutes which do not need ministerial approval, but only by notification to minister; and (2) the change of statutes that needs ministerial approval.

In the merger without the change of statutes, manager of the receiving Foundation is required to inform the article of merger to Minister. The merger is considered as prevailed since the date of article of merger or the predetermined date.

In the merger with the change of statutes, there are two types, which are (1) the change of statutes which do not need ministerial approval, but only by notification to minister; and (2) the change of statutes that needs ministerial approval.

1. *The change of statutes which do not need ministerial approval, but only by notification to minister.* Despite the absence of ministerial approval, the change of statutes must itself be based on Counselor Assembly and be attended at least 2/3 Counselor members. The decision of Counselor is made by consensus. If the consensus is failed, the decision must be agreed at least by 2/3 the attended Counselor members. If the quorum of Counselor Assembly is deadlock, the second Counselor Assembly is planned. The required quorum in Second Counselor Assembly is more than 1/2 the attended Counselor members. The decision of Second Counselor Assembly is then considered as valid by the majority voting of the attended Counselor members.

2. *The change of statutes that needs ministerial approval.* The change of statutes concerning with the Name of the receiving Foundation and the activity of this Foundation must be approved by Minister. The change of other elements in statutes may be notified to Minister. The procedures and requirements of statutes approval, and also of notification, must be attended. Due to the requirement of ministerial approval for the Name of the receiving Foundation and the activity of this Foundation, it is required to submit statutes change to the Minister along with the article of merger that must also be approved by the Minister. The Manager of Foundation or the Notary as the authorized party which prepares the article of statutes change shall send the proposal of approval for statutes change, especially concerning with the Name of the receiving Foundation and the activity of this Foundation, to the Minister. The proposal is enclosed by: (a) the copy of article of statutes change of Foundation; (b) photocopy of tax number of Foundation which is validated by Notary; and (c) the receipt of cost deposit for approval and release of statutes change.

The merger of Foundations followed by statutes change concerning with the Name of the receiving Foundation and the activity of this Foundation, which needs ministerial approval, is essentially changing the identity of old Foundation which is replaced by new Foundation. Therefore, the merger is also meeting the substance of consolidation.

Merger with statutes change, but not about the Name of the receiving Foundation and the activity of this Foundation, can only be notified to Minister. The notification is done by the Manager of Foundation, especially the receiving Foundation, to be recorded into Foundation List and announced in TBRI. The notification must be enclosed by (a) the copy of article of statutes change of Foundation, (b) photocopy of Foundation's tax number validated by Notary; and (c) the receipt of cost deposit for approval and release of statutes change. The restructuring of Foundation by merger and consolidation to develop Foundation's business activity may not be proper one because Foundation is hardly planned such thing or because Foundation still depends on other Foundation. The proper external development for Foundation's business activity is through acquisition.

#### 4. Conclusion

Taking account the discussion above, it is concluded that Foundation does its business activity through the existence of law body, and this is done by establishing business organization and by participating into other business organization. Business organization established by Foundation can be law body or non-law body. The management of this business organization may be direct or indirect under Foundation. Normative fuzziness is found in Section 3 Verse 1, Section 7 (Verse 1, Verse 2, and Verse 3), and Section 8 UUY about business activity. The ambiguous explanation is found about the standing of business organization established by Foundation, the management of Foundation over the established business organization, the prohibition against double position by Foundation organs in the business organization established and managed by Foundation, or the meaning of business activity that must conform to Foundation's purpose and objective. The external development of Foundation's business activity can be done through acquisition.



## 5. Recommendation

- a. A revision may be needed to clarify the meaning of Section 3 Verse 1, Section 7 and Section 8 UUY such that different interpretation is avoided. Section 3 Verse 1 and Section 7 Verse 1 are explaining the status of business organization established by Foundation. Section 7 Verse 2 regulates the enclosure by Foundation into business organization established by Foundation with other parties. Section 7 Verse 3 prohibits double position for Foundation organs in the business organization established by Foundation. Section 8 comments about Section 7 Verse 1 but with additional statement that business activity must conform to Foundation's purpose and objective in relative with social, religiosity and humanity interests.
- b. The revision of Section 14 Verse 2 b is needed such that Foundation Statutes must contain two kinds of activities. One is activities to achieve Foundation's purpose and objective of social interest, while another is additional activities to achieve Foundation's purpose and objective through business activity.

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