THE URGENCY OF APPLYING THE PRINCIPLES OF FULL AND FAIRNESS DISCLOSURE FOR COMPANIES ENGAGING IN BACK DOOR LISTING THROUGH MERGER SCHEMES

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Abstract-- Business activities in the capital market are conducted through the Initial Public Offering (IPO) process, where the sale of shares is facilitated by the Indonesia Stock Exchange (IDX). Juridically, the implementation of capital market activities through IPOs has been rigorously regulated. However, the regulatory mechanism is complex. Hence, companies often seek alternatives to enter the capital market and become public companies without undergoing the IPO process, utilizing the Back Door Listing (BDL) scheme. The BDL scheme streamlines capital market activities, especially for corporate actions like mergers, by circumventing the intricate IPO process. However, the BDL practice, particularly with a merger scheme, lacks a comprehensive legal framework and is only implicitly regulated in the explanation of Article 9 of the Financial Services Authority Regulation Number 9/POJK.04/2018 concerning the Takeover of Public Companies. Despite the absence of explicit regulations, this practice is widely employed by companies engaged in capital market activities, especially public companies. The unregulated nature of BDL in Indonesia has led to its misuse by companies seeking listing, posing potential risks such as fraud, market manipulation, insider trading, and dissemination of misleading information in the capital market. The research methods employed include normative law with a regulatory approach, conceptual approach, case approach, comparative approach, and reform-oriented research. The results demonstrate that the implementation of BDL practices, particularly in the form of mergers, must adhere to the principles of full and fair disclosure. By applying these principles, legal protection, legal certainty, and efficiency can be afforded to companies practicing BDL in Indonesia.
Keywords—*Initial Public Offering, Full and Fair Disclosure, Back Door Listing, Merger*

INTRODUCTION

Indonesia, as a developing country, possesses a considerable level of capital markets, boasting 852 stocks and 164 bonds (IDX, 2023). The presence of the capital market plays an essential role in assisting businesses. Capital market activities are primarily executed through the Initial Public Offering (IPO) process, representing the first significant stage in a company's evolution (Shao, 2017). Following the IPO process, the subsequent stage for a company is listing, involving the sale of shares through the Indonesia Stock Exchange (IDX). Essentially, capital market activities are undertaken not only to control the market but also to secure margins and foster productivity. Juridically, the implementation provisions of the IPO are intricate due to the dense requirements that must be fulfilled at each stage. In practice, many companies target capital market activities to facilitate their business operations.

In its development, there is another practice resembling an IPO, known as Back Door Listing (BDL). This process is more concise as it bypasses the IPO and IDX. BDL serves as a strategy for companies to engage in capital market activities without undergoing the IPO process. However, the implementation of BDL is currently not regulated in the laws and regulations of Indonesia, despite being implicitly mentioned in the Explanation of Article 9 of the Financial Services Authority Regulation Number 9/POJK.04/2018 concerning the Acquisition of Public Companies. This can be interpreted as a BDL practice with an acquisition scheme. In reality, several countries, especially corporations, have adopted BDL practices, often through a merger scheme. Examples include China, the United States, Australia, and the United Kingdom. The relative ease of implementing BDL practices is attributed to the process not requiring as many requirements as the IPO system (Shao, 2017). Although the implementation of BDL practices is not regulated in Indonesia, some companies, in practice, still opt for the BDL route to list on the stock exchange. For instance, PT Air Asia

Indonesia (AAID) underwent BDL through a merger process with PT Rimau Multi Putra PratamaTbk. Despite encountering ups and downs, including reaching the suspension stage, PT Air Asia Indonesia (AAID) pursued this strategy.

Not only PT Air Asia Indonesia (AAID) practices BDL, but another company, namely PT Hanson International Tbk (MYRX), also engages in BDL practices. However, the implementation of BDL by PT Hanson International Tbk (MYRX) resulted in losses for investors. Investors of PT Hanson International Tbk (MYRX) faced suspension by the IDX following a letter from Hanson International dated January 15, 2020 (Number 006/HI-MYPD/I/2020), explaining the default on the company's individual loans (Perwitasari, 2020). The losses incurred by investors can be attributed to the absence of comprehensive arrangements related to the implementation of BDL practices. Consequently, at a practical level, the implementation of BDL practices is often misused by companies to generate profits. Moreover, the lack of regulation of BDL practices creates a loophole for companies to conceal internal issues when seeking listings (Brama & Rahmawati, 2019). In fact, the absence of BDL regulations in Indonesia has the potential to give rise to crimes within the capital market, including market manipulation, insider trading, and dissemination of misleading information (Lubis & Susanto, 2019).

Further, the practice of BDL with the merger scheme is tied to decisions made by the company. Besides that, the merger scheme is determined through the General Meeting of Shareholders (GMS), as stipulated in Article 26 of Law No. 40/2007 on Limited Liability Companies (UUPT). Any decision made by a company with a merger scheme, requiring approval in the GMS, indirectly indicates that the implementation of BDL practices is subject to the provisions in the UUPT. The subjection of BDL practices with merger schemes to the UUPT implies that BDL practices must also adhere to the Full and Fulness Disclosure Principle (Nasaruddin, 2004). However, considering the subjection of BDL practices with merger schemes to the provisions of the UUPT raises legal problems. These legal issues stem from closed companies that do not undergo the stock exchange registration process. In fact, such registration is mandatory for companies intending to conduct a listing to provide essential information as a manifestation of the Full Disclosure Principle(Barus et al., 2022).

The principle of openness involves the disclosure of detailed company documents concerning financial data, management, and other aspects, ensuring widespread awareness among the general public. The purpose of the Disclosure Principle is to communicate information related to securities issued by relevant companies to the public. Juridically, the regulation of information disclosure has been established in Article 1, number 24 of Law Number 8 of 1995 concerning the Capital Market. This emphasizes the obligation for issuers, public companies, and other parties to inform the general public about all fundamental matters related to each business activity conducted by the company. The existence of these provisions serves as legal protection for investors and all industry participants in the capital market sector. However, these provisions have undergone changes following the enactment of Law Number 2023 on the Development and Strengthening of the Banking System (PPSK Law).

The changes in the provisions of UUPM following the enactment of UUPPSK are evident in Article 1, number 24 of the PPSK Law, which essentially underscores the obligation to disclose information exclusively to the issuer. However, companies intending to pursue BDL practices with merger schemes are not classified as issuers. The absence of regulations stipulating the obligation for such companies to engage in information disclosure results in a legal vacuum. Information disclosure for companies planning BDL practices is crucial, particularly for prospective investors. Moreover, Full and Fair Disclosure constitutes the foundation of the capital market (Figa & Tag, 1990). Hence, it is crucial for the Indonesian authorities to implement guidelines that oversee the implementation of Full and Fair Disclosure by corporations that plan to engage in BDL practices through merger schemes in Indonesia, in compliance with the existing laws and regulations.

1. METHODOLOGY

This study employs a diverse research approach to comprehensively examine the subject matter. The research design includes normative law with a regulatory approach, conceptual exploration, analysis of legal cases, comparative assessment across jurisdictions, and reform-oriented research. The normative approach involves an examination of existing legal norms, while the conceptual approach establishes a theoretical foundation. Legal cases are analyzed to glean practical insights, and a comparative approach

explores different legal systems. The study also integrates reform-oriented research to propose improvements based on identified gaps. Data collection involves scrutinizing legal documents, academic literature, and real-world cases.

2. RESULTS AND DISCUSSION

Implementation of Full Disclosure Principles for BDL Companies Through Merger Schemes

In practice, Back Door Listing (BDL) in Indonesia has been undertaken by several companies, one notable example being PT Air Asia Indonesia (AAID), which employed BDL through a merger process with PT Rimau Multi Putra PratamaTbk (RMPP) (Sandria, 2022). PT Rimau Multi Putra PratamaTbk (RMPP) is a publicly listed company on the Indonesia Stock Exchange (IDX). PT Air Asia Indonesia (AAID) acquired PT Rimau Multi Putra PratamaTbk (RMPP) through the BDL scheme to secure a listing on the IDX. Subsequently, PT Rimau Multi Putra PratamaTbk (RMPP) changed its name on the IDX to PT Air Asia Indonesia (AAID). Another instance of BDL practices through merger schemes can be observed in the case of PT Hutchison 3 Indonesia, which attempted a merger with PT IndosatTbk(Ooredoo, 2021). On September 16, 2021, the board of commissioners of each participating company approved BDL practices through the merger scheme, a decision reaffirmed on December 20, 2021. The outcomes of BDL practices by these companies exhibit variations. For instance, PT Hutchison 3 Indonesia and Indosat emerged as one of the largest telecommunications service providers in Indonesia, while BWPT witnessed a continuous increase in share value since its entry into the capital market.

On a legal level, BDL is not explicitly regulated by Indonesian positive law, unlike Initial Public Offerings (IPOs). Nevertheless, some laws and regulations implicitly indicate the inclusion of BDL. For example, Article 84 of the Capital Market Law stipulates that issuers conducting mergers, consolidations, or takeovers of other companies must fulfill transparency, fairness, and reporting requirements as stipulated by BAPEPAM and applicable laws and regulations. Similarly, with the Company Law as amended by Article 109 of the Job Creation Perppu, articles related to company takeovers can be associated as part of the BDL regulations. For example, Article 1, point 11 of the Company Law as amended by the Job Creation Perppu defines takeover as a legal action taken by a legal entity or individual to take over the shares of a company, resulting in the transfer of control over the company. Occasionally, BDL arrangements can be found in implementing regulations of the law, such as BAPEPAM-LK Regulation Number IX.H.1 regarding the Takeover of Public Companies.

The absence of clear regulations regarding companies conducting Back Door Listing (BDL) with a merger scheme raises legal issues. The legal problem stems from the lack of specific requirements that must be met, unlike companies conducting Initial Public Offerings (IPOs). This situation is paradoxical because BDL is not subject to the principle of Full Disclosure, which is the oldest principle in capital market law and, philosophically, must accompany the company listing process (Nasaruddin, 2004). However, to protect investors, the moral obligation contained in the Full Disclosure Principle is essential.

As a result, some cases indicate that BDL is often used as an excuse to conceal the internal problems of companies aiming to list (Ayyubi, 2021). This is evident in the case of PT Sekawan Inti Pratama (SIAP), which was eventually delisted or exited from the capital market and became involved in the Asabri corruption case(Ayyubi, 2021). The unregulated nature of BDL practices makes the shares of BDL companies highly vulnerable to existing capital market crimes, such as fraud, market manipulation, insider trading, and false information (Lubis & Susanto, 2019). The Jiwasraya investment case in BDL companies serves as an example of how the shares of BDL companies are highly vulnerable to investor losses. Additionally, because there is no legal umbrella that clearly regulates BDL, the concept of corporate mergers does not pay attention to Good Corporate Governance (GCG) principles. The proper implementation of GCG principles can only be realized if the company's organs consistently comply with all existing regulations, starting from laws and regulations, company regulations, articles of association, and are carried out with great care (Chimonas et al., 2011).

Back Door Listing (BDL) practices are often perceived negatively by the public due to their perceived unfairness and lack of transparency. BDL is considered an alternative for companies with lower quality attributes, such as low capital, small business scale, unprofitability, and a lack of "attractive investment" qualities. Notably, there is currently no specific regulation governing BDL, and this absence means that

relevant agencies lack data on how many companies in Indonesia have undertaken this action. Consequently, information on BDL actions is very limited.

In contrast to Initial Public Offerings (IPOs), which have clearer procedures, the BDL process is considered quite risky. Companies seeking to conduct an IPO must adhere to the Full Disclosure principle in addition to meeting established listing requirements. The Full Disclosure principle requires issuers, public companies, and other parties to promptly inform the public about all Material Information related to their business or securities that may influence investors' decisions on the securities or their prices (Article 1 Point 7 of Law Number 8 of 1995 concerning Capital Markets). Companies planning an IPO begin by submitting a registration statement to the Financial Services Authority (OJK). This statement outlines the details of the IPO process, ensuring that the company provides OJK with all necessary information for assessing the IPO. Alongside the registration statement, the issuer's responsibility to ensure transparency in the IPO process is reflected in the prospectus, which must be made available to the public.

The Full Disclosure principle serves as the primary guideline for providing clear and precise information to stakeholders related to company management. The purpose of information disclosure is to enable investors to make informed decisions about the risks and benefits of their investments. The Full Disclosure principle is crucial because investors need to be fully informed about the issuer and its securities. One method through which investors gain insight into the performance of the issuer they are considering is the provision of a prospectus by the company conducting the Initial Public Offering (IPO). Prospectuses are documents that communicate material facts—important information about events, occurrences, or situations that could impact the price of securities on the exchange or the decisions of prospective investors, investors, or other parties with a special interest in such information (Singhvi & Desai, 1971). In cases where vital information that should be disclosed in the prospectus is not presented thoroughly or contains errors resulting in losses to investors, the issuer is held liable for those losses (Fung et al., 2007).

The Full Disclosure Principle is not only essential for investors but also holds significance for the stock exchange as it functions as a securities trading manager and contributes to the formation of an effective market. Moreover, it plays a crucial role in protecting investors. Once the IPO is completed, the company can list its issued securities on the stock exchange and become a listed company. However, if the prospectus has previously stated to the public that the listing will occur, the listing of the securities must be executed. Therefore, even though Back Door Listing (BDL) practices are not explicitly regulated by laws and regulations and are not mandatory for corporations, their adherence to the Full Disclosure principle is necessary to protect investors (Ningsih, 2022). Apart from protecting investors, BDL practices that comply with the Full Disclosure Principle can also provide equal opportunities to other issuers or prospective issuers aiming to list (Ningsih, 2022). This is because, in addition to protecting investors, BDL practices can create an equitable playing field for those seeking to list.

Economic Analysis of Law as a Basis for Companies Conducting BDL through Merger Schemes / Full and Fair Disclosure Principles as a Form of Legal Protection for the Implementation of BDL Merger Schemes

In practice, numerous companies in Indonesia engage in Back Door Listing (BDL). Essentially, the execution of a takeover of a public company, a crucial aspect of BDL, is intended to enable the acquiring company to derive profits from a business that has already been listed on the stock exchange. Therefore, the facilitation of profit acquisition through BDL must inherently protect relevant parties, particularly shareholders and potential investors. According to Article 126, paragraph (1) of the Company Law (UU PT), and Article 4, paragraph (1) of Government Regulation Number 27 of 1998 on Merger, Consolidation, and Acquisition of Limited Liability Companies, the conditions for executing a takeover of a public company must consider the interests of various parties. These include the company, minority shareholders, employees, creditors, other business partners, as well as the public and the promotion of fair competition during operations.

However, in the actual practice of takeovers involving publicly listed companies, there tends to be an unfair treatment by majority shareholders and the company's management towards minority shareholders. This is evident in the inadequate provisions safeguarding the rights of minority shareholders, the existence of moral hazard characteristics, and the vulnerable position of minority shareholders (Wilamarta, 2002). Consequently, the limitations imposed on minority shareholders lead to injustices in terms of corporate

information disclosure. Meanwhile, majority shareholders wield significant control over the company, particularly in managing General Meetings of Shareholders (GMS). The power of majority shareholders results in dominance in decision-making. In the context of BDL implementation, it is clear that the "Majority Rule, Minority Protection" principle is not fully realized. In fact, the responsibility to safeguard minority shareholders is a manifestation of Good Corporate Governance (GCG) principles and the "Rule of Majority, Minority Protection" principle. One aspect of this protection is evident in the BDL procedure, where the implementation of the GMS ensures that minority shareholders receive legal protection through the GMS mechanism.

Furthermore, the practice of Back Door Listing (BDL) as a new phenomenon certainly lacks adequate legal protection for minority shareholders, resulting in numerous loopholes for the violation of their rights. The implementation of a Rights Issue leads to a decrease in the shareholding percentage of minority shareholders, making information on the rationale behind the implementation of the Rights Issue crucial due to its impact. During the Limited Public Offering at the General Meeting of Shareholders (GMS), there was no information disclosed about the reason for implementing the Limited Public Offering as a method to transform a closed company into a controller in a public company. This lack of disclosure can be interpreted as the public company not fully fulfilling its responsibilities in providing legal protection to minority shareholders.

The actions of a public company causing losses to minority shareholders due to the non-fulfillment of their rights in the implementation of BDL can be categorized as a tort (referred to as PMH). Tort liability is present to protect one's rights. Indeed, the implementation of BDL should offer legal protection, especially to potential investors, through the application of the Full and Fair Disclosure Principle. This principle functions as a preventive measure to legally protect potential investors by providing information that aids in deciding how the company will act concerning its shares. Through the application of the Full and Fair Disclosure Principle, investors can make informed decisions on shares, serving as both a preventive and essential legal protection in the capital market. Additionally, preventive legal protection also applies to companies conducting BDL by disclosing information properly and not against the interests of the company.

Furthermore, the ratio of companies using Back Door Listing (BDL) needs to be reviewed from the perspective of the economic analysis of law. This is necessary because economic analysis has started to be applied to interpret and examine the law. The basic concepts in economic analysis of law are divided into four parts, namely effectiveness evaluation; externality evaluation; utility function, rationality, and economic impact of law; and the behavioral economics approach (Isyunanda, 2022). In relation to the BDL practice of merger schemes, it can be reviewed with Economic Analysis of Law ex post, which is based on facts/reality that have occurred. The use of this review is to provide justification and development of das sein analysis by examining whether a policy product is properly complied with or not.

The reasons for companies to practice BDL with a merger scheme are as follows. First, the efficiency review. Efficiency review in Economic Analysis Of Law means that law is a tool to achieve economic efficiency (IEP, n.d.). The company's ratio in conducting BDL practices with merger schemes is analyzed in the efficiency review section by examining applicable norms and laws. Therefore, it can provide an answer as to whether a regulatory product is properly complied with or not. Second, the externality review. The review of externalities or the internalization of external factors can be interpreted as the allocation of existing resources to achieve efficiency (Pigou, 1920). This review is important to include the calculation of the costs of gains and losses from an event (Calabresi, 1970).

Third, the utility, rationality, and consequence functions of law. In this case, the law is seen as a tool to achieve high welfare and satisfaction values. Humans are viewed as rational individuals, tending to choose the utility function with the most positive impact, profit, and the best results compared to other alternatives (Cooter & Ulen, 2012). The human tendency to be rational and seek maximum profit brings the Economic Analysis Of Law review to economic consequences as the basis for decision-making. Therefore, decisions made by humans must be related or have strong consequences within the legal framework. Economic decisions that have a legal impact must thus come with fines/sanctions or incentives. Fourth, the behavioral economics approach, where humans are seen as creatures that react to various legal rules (Jolls et al., 1997).

Furthermore, the economic analysis of law approach to Back Door Listing (BDL) practices with the BDL

merger scheme results in corporations that have undergone listings and corporations intending to enter the Initial Public Offering (IPO) through BDL practices in the form of mergers becoming better, with no parties being harmed (Isyunanda, 2022). Thus, the practice of BDL with a merger scheme is one of the efforts that has a solid basis for corporations undertaking BDL. Additionally, the utilization of BDL/reverse takeover corporate action can provide benefits for issuers and private corporations in the form of reorganization, specifically related to building a business framework. The goal is to dominate the market on the stock exchange and restructure, particularly by addressing the financial challenges existing in issuers and companies (Santoso, 2016).

CONCLUSION

Becoming a public company in Indonesia necessitates undergoing an Initial Public Offering (IPO) to list and trade shares on the capital market. However, the implementation of IPOs in Indonesia is intricate and harbors potential risks for companies engaging in public offerings. An alternative approach is to opt for Back Door Listing (BDL) with a merger scheme. Nevertheless, the unregulated nature of BDL practices with merger schemes in Indonesia presents challenges.

According to Article 1, number 24 of the Capital Market Law, there exists an obligation for issuers and companies intending to undertake BDL practices to disclose information. However, following the enactment of UUPPSK, this provision no longer includes the obligation for companies to disclose information. Consequently, a legal vacuum surrounds the implementation of BDL practices with merger schemes in Indonesia. Therefore, it is crucial for the government to incorporate the Full and Fairness Disclosure Principle into the existing laws and regulations. This step will ensure that the implementation of BDL practices with merger schemes in Indonesia offers concrete legal protection to all individuals, especially investors. The execution of the Full and Fairness Disclosure Principle should align with the principles of Good Corporate Governance (GCG) as mandated by the law.

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