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Submission date: 04-Oct-2022 11:44AM (UTC+0700)

Submission ID: 1916168942

File name: Responsibilities_Due_to_Securities_Delisting_on_the_Exchange.pdf (585.58K)

Word count: 5624

Character count: 30285



Issuer Responsibilities Due to Securities Delisting on the Exchange

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<http://dx.doi.org/10.18415/ijmmu.v7i11.2101>

Abstract

Delisting is the removal of securities from the list of securities listed on the exchange so that these securities cannot be traded on the exchange. This occurs when the shares listed on the exchange have decreased the criteria so that they do not meet the listing requirements, thus the shares can be excluded from the listing on the exchange. Research on the liability of issuers due to delisting of securities on the stock exchange is normative. This research is designed to examine the responsibilities of issuers to investors due to delisting in the capital market. The results show that the issuer's responsibility to delisted investors, namely, the issuer has a role to buy back shares, the IDX has a role to buy shares owned by investors in accordance with Article 37 of the Company Law, the IDX has a role to create an orderly market and OJK has a role to defend law for investors who have suffered losses in accordance with Article 30 of the OJK Law and Article 111 of the UUPM. Both OJK and the stock exchange must supervise and examine the reasons for delisting and regulating their accountability after delisting in the Indonesian capital market.

Keywords: Responsibility; Delisting; Exchange

Introduction

Law Number 8 of 1995 concerning the Capital Market (hereinafter abbreviated as UUPM) clearly regulates the rules of the game before and after a company conducts a public offering (going public). There is one thing that is very crucial but not regulated in this UUPM, namely related to how issuers that have gone public but wish to return to be a closed company (go private).

Several provisions issued by the Indonesia Stock Exchange (formerly the Jakarta Stock Exchange) and the Financial Services Authority/OJK (formerly the Capital Market and Financial Institution Supervisory Agency/BAPEPAM-LK) which basically state that if the issuer or public company wants to return to the company closed or go private, then the issuer must first make a tender offer for the ownership of public shares at a price above the market price but still within the fair price of shares set by an independent appraiser or even above it. Before making a tender offer, it is preceded by submitting the information contained in a circular to shareholders, where the OJK conducts a review of the adequacy of information disclosure in circular letters in terms of transparency, accounting and legal aspects.

Delisting of shares is one of the problems faced by capital markets everywhere, including Indonesia. In this regard, what must be considered is that the public company conducting delisting must apply the principle of transparency. Openness is an obligation for every company that has sold its shares through the capital market. Article 1 number 25 UUPM clearly states that the principle of openness is a general guideline which requires issuers, public companies and other parties subject to this law (UUPM) to inform the public in a timely manner all material information about their business or effects which may be influences the investor's decision on the said securities and or the price of the said securities. That is why M. Irsan Nasarudin and Indra Surya mentioned openness means that issuers are required to disclose information about their business conditions, including financial conditions, legal aspects of assets, legal issues faced by companies and management.

This study focuses on the aspects of the issuer's responsibility to investors due to the delisting of shares on the stock exchange.

Literature Review

1. Responsible

In the English dictionary, the word responsibility has three meanings, namely responsibility, liability and accountability. According to the Merriam-Webster Dictionary, responsibility is defined as "... the quality or state of being responsible as moral, legal, or mental accountability," and liability is interpreted as "... the quality or state of being liable." Dictionary of Legal Terms Fockema Andrea, defines responsibility or *aansprakelijk* which means responsibility according to law for an error or result of an act. The ELIPS Economic Law Dictionary, defines liability as liability according to law that arises as a result of an act or legal event. Black's Law Dictionary, defines liability as a condition of being responsible for a possible or actual loss, penalty, evil expense or burden; condition which creates a duty to perform act immediately or in the future.¹

Based on the description above, the word responsibility in English is interpreted in three terms, namely liability, responsibility and accountability. The three terms by Philipus M. Hadjon stated that liability means responsibility in a juridical context and is related to the court, responsibility means responsibility in a political context and accountability means responsibility in a moral context. Liability was born from the principle of a rule of law, responsibility was born from the principle of democracy and accountability was born from good governance of the United Nations.² The same thing was also stated by K. Martono³ by stating that liability as responsibility in the meaning of civil law, responsibility means responsibility in the sense of public law, and accountability is related to responsibility in the sense of finance or trust, for example accountants must be accountable for their accounting reports.

According to Shidarta, the meaning of liability includes, among others, various terms such as contractual liability, strict liability, liability based on fault, absolute liability, tortious liability, and so on which lead to legal responsibility. To distinguish it from responsibility which is defined as responsibility, and there are a number of groups that have interpreted liability with accountability.⁴ Regarding the term of liability, Moegni Djojodirdjo stated that the terms of accountability and liability or liability are used side by side in the same meaning without prioritizing one another.⁵ In connection with the use of the term

¹Eduardus Bayo Sili, Prinsip Perlindungan Hukum Investor Obligasi, *Ringkasan Disertasi*, Program Doktor Ilmu Hukum, Fakultas Hukum Universitas Airlangga, Surabaya, 2015, p. 13.

²Philipus Mandiri Hadjon, Material for Master's Degree in Government Law Concentration March 19, 2009.

³K. Martono, *Kamus Hukum dan Regulasi Penerbangan*, RajaGrafindo Persada, Jakarta, 2007, h. 306-307

⁴Shidarta, Akar Permasalahan Kontroversi Seputar Tanggung Jawab Sosial Perusahaan, *Jurnal Legislasi Indonesia*, Volume 6 No. 2 June 2009, h. 240-241.

⁵Soetojo Prawirohamidjojo and Martalena Pohan, *Onrechtmatige Daad*, Djumali, Surabaya, 1979, h. 56.

responsibility with liability, Thomas Morawetz⁶ writes “I am choosing to treat legal responsibility and legal liability as referring to the same notion,” but he admits that the two terms can only be distinguished in criminal law. Peter Mahmud Marzuki defines liability (*aansprakelijkheid*/liability) as a specific form of responsibility.⁷

2. Delisting on the Stock Exchange

Investing in stocks in the capital market has a high risk (high risk) when compared to investing in bonds. This high-risk condition should not be tolerated on the grounds that it is a class in business. For this reason, the law must provide juridical guarantees to investors in the capital market, for example in relation to protection regarding the liquidity of companies listed on the stock exchange.

⁵ Delisting is the removal of securities from the list of securities listed on the exchange so that these securities cannot be traded on the exchange. This occurs when the shares listed on the exchange have decreased the criteria so that they do not meet the listing requirements, thus the shares can be excluded from the listing on the exchange.

Before describing the problem of delisting, it is better to first understand what going public and listing are. Going public is the activity of offering shares or other securities carried out by an issuer to sell shares or securities to the public based on the procedures regulated by the Capital Market Law and its implementing regulations. It can be understood that this public offering is a package with listing. Listing is the inclusion of a security in a list of securities listed on an exchange so that it can be traded on an exchange.⁸

²⁷ After a company's registration statement is declared effective by the Financial Services Authority (OJK), the company can list its shares on the Indonesia Stock Exchange. This means that companies that were previously closed become open with the going public process. As a public company, the company is certainly facing a new arena, namely the arena of openness and other consequences.

Why does delisting occur? First, delisting is carried out by force (forced delisting). This occurs because it is forcibly carried out by the stock exchange authority because the issuer fails to meet the listing criteria and requirements set by the exchange authority in accordance with the applicable regulations. Second, voluntary delisting, in which the issuer submits a request to leave the stock exchange based on internal reasons.

If the issuer voluntarily delisted (voluntary delisting), the issuer must meet several requirements, namely: (a) Submission of applications for delisting can be made after the shares have been listed for at least 5 (five) years; (b) The delisting plan has been approved by the GMS; (c) The Listed Company or other appointed party is obliged to purchase shares from shareholders who do not agree to the delisting plan.

The condition of the company/issuer that will be delisted by the stock exchange authority, if the issuer/company experiences one of the following conditions: (a) The survival of the company is not guaranteed or does not show an adequate recovery; (b) Shares that are suspended on the regular market and cash market, and have only been traded in the negotiation market for at least the last 24 months.

⁶Thomas Morawetz, *The Philosophy of Law, An Introduction*, Macmillan Publishing Co., Inc., New York, 1980, h. 202.

⁷Peter Mahmud Marzuki I, *Op. Cit.*, h. 258.

⁸ Rule Number I-I Decree of the Board of Directors of P.T. Jakarta Stock Exchange No. Kep./308/BEJ/07-2004 concerning Delisting and Relisting of Shares on the Exchange.

As a Self-Regulatory Organization (SRO), the Indonesia Stock Exchange is obliged to make rules and supervise its members. The regulations issued are intended to regulate exchange activities. Before being merged into PT Bursa Efek Indonesia, PT Bursa Efek Jakarta through its Board of Directors Decree No. Kep/308/BEJ/07-2004 concerning Delisting and Relisting of Shares on the Exchange. This provision is intended to protect the interests of investors and the public. The provision further states that:

- a. In order to protect the public interest and in the context of conducting an orderly, fair and efficient securities trading, the exchange has the authority to:
 - 1) Removing the listing of certain securities on the exchange;
 - 2) Approve or reject the request for re-registration including its placement on the registration board by considering the factors that caused delisting.
- b. In making decisions related to delisting and relisting, the stock exchange asks the Listing Committee to provide an opinion.
- c. If the Listed Company's Shares are delisted, then all types of shares of the Listed Company are also deleted from the list of securities listed on the stock exchange.
- d. In the framework of making a decision on the delisting of securities registration of approval or rejection of the application for re-listing of securities and placing it on the main board or development board as referred to in this regulation, the stock exchange conducts a review of the statements and documents submitted by the listed company or the prospective listed company, or other information obtained by the exchange by not only considering the formal aspects, but also considering the substance of the requirements and opinions of the Securities Listing Committee.⁹

Method

1. Approach Method

¹² The approach used in this research is the statute approach and the conceptual approach, which is an approach in legal research that emphasizes the search for norms contained in statutory provisions. A conceptual approach, which is an approach that departs from the views and doctrines that develop in legal science. Thus, researchers will find ideas that give birth to legal notions, legal concepts, and legal principles that are relevant to the legal issues at hand. Understanding of these views and doctrines is the basis for researchers in building a legal argument in solving the issues at hand.

2. Sources and Types of Legal Materials

¹ The legal materials used in this research are primary and secondary legal materials. Primary legal materials are legal materials that are authoritative in nature, meaning they have authority. Primary legal materials consist of legislation, official records or minutes in the making of legislation and judges' decisions. Meanwhile, secondary legal materials are in the form of all legal publications which are not official documents. Publications on law include text books, legal dictionaries, legal journals, and commentaries on court decisions. In investigating existing legal materials, the researcher also conducted tracing to the OJK, the Indonesia Stock Exchange in Jakarta and HKHPM in Jakarta.

⁹ Rule Number I-I concerning Delisting and Relisting of Shares on the Exchange.

3. Legal Material Collection and Analysis Techniques

Legal materials, both primary and secondary obtained will be inventoried and identified for further use in analyzing problems related to this research study. It is hoped that the inventory and identification of legal sources will facilitate the flow of this research. After the sources of legal materials have been inventoried and identified, then all existing sources of legal materials are systematized. This systematization process is also applied to theories, concepts, doctrines and other reference materials.

The series of stages of inventory, identification and systematization is intended to facilitate research on problems. The next series of stages is to conduct analysis using deductive reasoning accompanied by descriptive descriptions that are analytical in nature.

Results and Discussion

1. Issuer Responsibilities to Investors Due to the Delisting of Shares from the Exchange

Issuers that are delisted will return to their status as a closed company. Thus, the responsibilities also change. The responsibility is the responsibility of a private company. After the issuer completes all procedures and ends with reporting to the OJK, the company is no longer obliged to undertake reporting and disclosure obligations as referred to in the laws and regulations in the capital market.

As a company, there is an obligation to submit an annual report to the GMS within a maximum period of 6 (six) months after the company's financial year ends. The annual report must contain at least:¹⁰

1. Financial report consisting of at least the balance sheet at the end of the previous financial year in comparison with the previous financial year, profit and loss statement from the relevant financial year, cash flow statement and changes in equity, as well as notes on the financial report;
2. Reports on the company's activities;
3. Report on the implementation of social and environmental responsibility;
4. Details of problems arising during the financial year which affect the company's business activities;
5. Reports on supervisory duties that have been carried out by the board of commissioners during the previous financial year;
6. Names of members of the board of directors and members of the board of commissioners;
7. Salaries and allowances for members of the board of directors and salaries or honorarium and allowances for members of the company's board of commissioners for the previous year.

The financial statements as referred to above are prepared based on financial accounting standards.¹¹ The balance sheet and income statement for the fiscal year concerned must be audited and must be submitted to the minister.¹² One other thing that needs to be considered in the process of going private is how to determine the boundaries that a company has become a closed company. Law No.8 of 1995 concerning the Capital Market provides a definition of issuers and public companies, but the law

¹⁰ Article 66 paragraph (2) of Law 40 of 2007 on Limited Liability Companies.

¹¹ Article 66 paragraph (3) of Law Number 40 of 2007 concerning Limited Liability Companies.

¹² Article 66 paragraph (4) of Law number 40 of 2007 concerning Limited Liability Companies.

does not provide a clear definition of a closed company or a public company. Limitations regarding a closed company or a public company are needed to determine when the obligations of a company as a public company will end.¹³ Therefore, it is hoped that in the future the government as a regulator can complement and improve the Capital Market Law in order to protect all parties involved in the capital market.

2. Legal Protection for Post-Delisting Investors

The creation of legal certainty is reflected in the formation of the Capital Market Law with the aim of protecting the interests of investors in the capital market from fraudulent practices and capital market crimes. This is because investors are weak in their position to accept all risks that can cause losses from the value of their investment positions in the capital market.¹⁴ Legal certainty will create an orderly, fair and competitive market, while still providing maximum protection to investors who place their funds in the capital market.¹⁵

Legal certainty is obtained by having a legal basis to stand on. In the capital market sector, the legal basis for which is Law Number 8 of 1995 concerning Capital Market in the preamble to the Capital Market Law letter c, it is stated that in order for the Capital Market to develop, a strong legal basis is required to further ensure legal certainty of parties carry out Capital Market activities and protect the interests of the investor community from harmful practices. So, what is protected here is the interests of the investors who invest in the capital market. This is important because the invested capital belongs to these investors, so it must be accountable to them. The objective of this investor to make an investment is to get capital gains, although it is possible to have lost capital. So, efforts must be made to protect the interests of these investors. Then the question arises who should protect the interests of this investor community? This legal protection is carried out by the OJK, the stock exchange and the issuer itself.

In general, the Capital Market Law regulates the authority and duties of the OJK as a supervisory agency, regulatory agency and supervisory agency. Meanwhile, the implementation of the OJK's authority as a supervisory agency can be carried out by:

- a. Preventive, namely in the form of rules, guidelines, guidance and direction;
- b. Repressive, namely in the form of examination, investigation and application of sanctions.¹⁶

OJK has the authority to freeze or cancel the listing of a stock on the stock exchange or to stop certain exchange or securities transactions for a certain period in order to protect the interests of investors. In addition, OJK is also authorized to take the necessary measures to prevent public losses as a result of violations of provisions in the Capital Market sector.¹⁷ The two powers above are used as a legal basis for OJK to suspend or delist issuers or public companies that violate capital market regulations. This is done to protect the public, especially investors. OJK issued regulations relating to the go private process, namely BAPEPAM Regulation No. IX.F.1 concerning Conflicts of Interest.

For OJK, the main thing to pay attention to in going private is the protection of public shareholders. Therefore, to go private, the party purchasing the shares must make a tender offer. The

¹³ Boby W. Hemawan & I Made B. Tirthayatra, *op.cit.*, p.5.

¹⁴ Indra Safitri, *Transparansi Independensi Pengawasan Kejahatan Pasar Modal*, Jakarta: Global Book & Publication Book Division, p.6.

¹⁵ *Ibid.*, p 16.

¹⁶ Williana Halim, "Keterbukaan Emiten dalam Melakukan Delisting", Universitas Sumatra Utara, 2010, p.137.

¹⁷ Article 5 letter n Law Number 8 Year 1995 concerning Capital Market.

protection obtained through the provisions of the tender offer is in terms of the share price and the existence of an equal opportunity for all public shareholders to sell their shares.¹⁸

As in other corporate actions, OJK's attention in going private lies in protecting the interests of public shareholders. In the go private process, in addition to trying to ensure that there is no information being hidden by the company, OJK also requires the approval of independent shareholders and the carrying out of tender offers for shares owned by public shareholders.¹⁹

Indeed, the provision of going private in the capital market has not been clearly regulated. However, the OJK has determined regulatory guidelines related to the implementation of go private. Some were taken from the existing provisions added with changes to accommodate aspects of protection for public investors.²⁰

Companies that are delisting or going private are required by the OJK to hold a General Meeting of Independent Shareholders, where it must be carried out by companies that go private to protect the interests of public or minority shareholders.²¹ In addition, investor protection can also be done in the event of a conflict of interest. Article 82 of the Capital Market Law states that the OJK requires issuers or public companies to obtain the approval of a majority of independent shareholders if the issuer or public company carries out a transaction in which the economic interests of the issuer or public company conflict with the personal economic interests of the director, commissioner or holder. shares of an issuer or public company in question. The explanation of Article 82 states that in order to protect the interests of minority shareholders from the possibility of unfair price fixing for transactions carried out by issuers due to a conflict of interest between the personal directors, commissioners, or major shareholders, OJK may require the issuer to first obtain majority approval from independent shareholders.

A transaction with a conflict of interest is defined as if a transaction secured by a director, commissioner, major shareholder, or an affiliated party of the director, commissioner or major shareholder has a conflict of interest, the transaction must first be approved by the independent shareholders, or their representatives who are authorized to do so in the GMS as regulated in BAPEPAM Rule No.IX.E.1. Approval regarding this matter must be confirmed in the form of a notary deed. Even though by definition the conflict of interest is not included in going private, OJK based on the decision of the Chairman of BAPEPAM to companies that are going to go private are obliged to fulfill some of these provisions, among others, by requiring an independent general meeting of shareholders. Go private approval by independent shareholders in the GMS is important, considering that if the approval of independent shareholders is not obtained, the next steps whether it is a tender offer, delisting on the stock exchange and amending the articles of association are no longer useful. So, the legal aspect of obtaining independent shareholder approval is the first step in planning to go private compared to others.

This is not enough to provide legal protection to public shareholders who at the time of the tender offer did not want to sell their shares or because they voted against them at an independent GMS. Protection of the public interest is not only regulated in the Indonesia Stock Exchange (BEI). IDX Regulation Number 1-1 concerning Provisions for the Delisting and Relisting of Shares states that in order to protect the public interest and in order to carry out an orderly, fair and efficient securities trading, the stock exchange is authorized to:

¹⁸ Williana Halim, *op.cit.*, p. 138.

¹⁹ Bobby W. Hernawan dan I Made B. Tirthayatra, *op.cit.*, p.1.

²⁰ Williana Halim, *op.cit.*, p. 138.

²¹ *Ibid.*, p.138.

- a) To delete the listing of certain securities on the exchange.
- b) Approve or reject the request for re-registration including its placement on the registration board by considering the factors that cause delisting.²²

The obstacle for the OJK in defending the public interest has not reached the last public shareholders, because as a closed company the company is no longer subject to capital market regulations.²³

Directors and commissioners of issuers or public companies are also obliged to protect shareholders, especially minority shareholders. This is because in practice there is often unfair treatment by majority shareholders and company management towards minority shareholders. There are three factors that cause this unfair treatment, namely:²⁴

- a) Lack of provisions in laws and regulations that protect the rights of minority shareholders. In fact, even though these provisions exist, they are still not enough. This is evident from the frequency of minority shareholders whose interests have been harmed by majority shareholders who have bad intentions in implementing the Company Law. In addition, the existence of the authority given by the Company Law to the General Meeting of Shareholders (GMS) organ to determine company policies, does not explicitly regulate the obligation of active participation for minority shareholders to submit their opinion, as a result the majority shareholder is so dominant and can easily ignore minority shareholder rights.
- b) Attitudes and behavior of majority shareholders. Directors or commissioners who have moral hazard character. This attitude factor can ultimately result in losses to the Limited Liability Company.
- c) The position of minority shareholders is due to lack of capital, knowledge, skills and abilities to manage a limited liability company, so that minority shareholders are powerless in facing the attitudes and behavior of the majority shareholder who have good faith.

In a circular sent to shareholders, a sentence is printed in bold so that it immediately attracts the attention of the reader, namely the directors and board of commissioners of the company, individually or collectively, are fully responsible for the accuracy and completeness of the information disclosed in the circular. This, and after conducting careful research, confirms that to the best of their knowledge and belief, no other important and related facts have not been disclosed or omitted so that the information provided in this circular letter is untrue or misleading.²⁵

In the author's analysis, the sentence above would be useless if the company's directors and commissioners did not want to share their knowledge of information related to the company's prospects. Where the information is usually owned by the controlling shareholder or major shareholders or may also be owned by the board of directors and commissioners. Meanwhile, the OJK itself has tried to conduct a review of the aspects of transparency, accounting and law to provide more disclosure of information for shareholders in the context of legal protection for public shareholders.

In this regard, shareholders are required to read the circular so that later they are not harmed by incomplete information, including the company's prospects in making decisions on plans to go private. So

²² II.I. Rule Number I-I concerning Delisting and Relisting of Shares on the Exchange.

²³ Williana Halim, *op.cit.*, p.141.

²⁴ Mishardi Wilamarta, *Hak Pemegang Saham Minoritas dalam Rangka Good Corporate Governance*, Cet.1, (Jakarta: Program Pascasarjana, Fakultas Hukum Universitas Indonesia Press, 2002), p.88-89

²⁵ *Ibid*

in this case investors must be more observant in determining their decisions, even though the circular also states that if in doubt about any aspect of this circular or regarding the actions to be taken, you must consult your securities trader representative or other registered securities company representative, investment manager, legal advisor, accountant or other professional advisor.²⁶

Because OJK does not provide a statement letter of effectiveness or adequacy of the information conveyed in a circular letter, it causes shareholders to explore and seek disclosure of information that might be shared with them. According to I Putu Gede Ari Suta, there are several procedures that must be considered in allowing a company to go private while still referring to the protection of the people, namely:²⁷

- a) To protect the public, the go private process must go through strict procedures. Open documents and information must be conveyed to the public. The analogy of a tender offer (tender offer) can be used as a reference before the go private regulation is issued by the OJK.
- b) OJK must ensure that no information is hidden by the company. This is done to prevent insider trading that is detrimental to the community.
- c) The issuer's promises during the IPO, rights issues and other offerings must be reviewed so that they do not contradict the go-private process itself.
- d) The detailed process including the procedure for stock valuation, the appointment of an agent (representative) for the issuer, the period for returning the shares and others must be clear.
- e) Considering that going public is a permanent capital formation, the act of going private must also be assumed as a permanent capital deficiency. Thus, if it has been decided to go private and then want to go public again in the near future and carried out by the same party, it should be watched out for and can be considered as an act that misleads the market (criminal).

Conclusion and Recommendation

1. Conclusion

The issuer's responsibility for delisted investors is that the issuer has an obligation / role to repurchase shares. The IDX has a role to buy shares owned by investors in accordance with Article 37 of the Company Law. The IDX has a role in creating an orderly market and OJK has a role in legal defense for investors who have suffered losses in accordance with Article 30 of the OJK Law and Article 111 of the Capital Market Law.

The OJK and the IDX must supervise and examine the reasons for delisting and regulating their accountability after delisting in the Indonesian capital market.

2. Recommendation

There is a need for better regulations regarding delisting actions that occur in the capital market. The problem of delisting is only regulated in Rule Number 1-1 regarding delisting and relisting of shares on the stock exchange. This shows that delisting is not as important as listing because it is only regulated in the form of Bapepam regulations, while the issue of listing which is part of a public offering is fully

²⁶ *Ibid.*, p.116.

²⁷ I Putu Gede Arya Suta, *op.cit.*, p. 161-162.

regulated in the Capital Market Law. As it is known, both listing and delisting are closely related to the operation of a capital market. So a fair arrangement is suggested.

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