

Legal Protection of Indonesian Capital Markets for Investors from Suspension Sanctions against Issuers

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Abstract:

Indonesia's suspension regulations are poorly enforced, and there is no maximum time limit for sanctions decisions. The regulations cannot guarantee that suspended issuers will improve their performance and earn stable income. Dividends and capital gains is not obtainable for several years and has no effect. Suspended publishers often experience delays in communicating information to the public, so they can obtain information from the company.

Keywords: shares, suspension, investor, legal protection, issuer

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Introduction

Public Offering in Indonesia Stock Exchange have to give an information openness to the public. This information openness which is done by the issuer related to the accounting information which is a financial report which consists of balance sheet, profit and loss calculation, cash flow report, and some record of the financial report. Whereas the non-accounting information consists of some information other than financial report such as underwriter, auditor independent, legal consultant, share offering value, the offered share percentage, the company's age and other information.ⁱ

Through this information openness, investors as the owner of the company will react to every issue related to the company information he has received.ⁱⁱ

The increasing profit on the company with a high level of debt will be profitable for

the debt holders, which means that it will raise a return from his investment to the company's shares.ⁱⁱⁱ Otherwise,

there will happen some loss which is caused by some things, one of them is the poor performance of the fundamental issuer which then significantly influences the business sustainability, for examples when the issuer gains some loss for some years successively, certainly it will give some impact to the return received by the financiers, in this case the dividend which is received by the financiers will be even reach zero level.^{iv} It can be called as business risk. Business Risk is a risk of the reduced of company's ability in gaining some profit, thus on its turn it will also decrease the company's ability in paying the interest and dividend.^v

The bad impact of those risks are, which are accommodated in the policy of temporary termination of stocks trading in

the capital market (suspension), as an effort in cooling down a certain issuer share, and a protection for the investors. Share suspension is a temporary termination of shares trading in the Stock Exchange. This share termination can happen throughout the market, including Regular Market, Cash Market, and Negotiation Market or only in the Regular Market or cash market. If suspension happens, the issuer can not either sell or purchase his shares, likewise the investors, except in the negotiation market, but in general, the society are less interested to buy some shares in the negotiation market, especially when the concerned issuer is experiencing suspension.

Based on the Circular Letter Number SE-008/BEJ/08-2004 on the Temporary Termination of Stocks Trading (Suspension) of the Recorder Company, it is arranged the reasons why the suspension is administered, including: the disclaimer accounting audit, is undergoing bankruptcy process in the court, and the presence of transaction pattern which is done unnaturally. In the Regulation Number 1-1 on the Delisting and the Relisting of Shares in Stock Exchange, the Regulation of BEJ Number Kep-308/BEJ/07-2004 on the Delisting and the Relisting of Shares in the Stock Exchange. In one of keIII.3.1.2., which states that the Stock Exchange removes the share listing of the Listed Company in accordance to the provision of this Regulation if the Listed Company is experiencing at least one of the following conditions: The Shares of the Listed Company as the result of the suspension in the Regular Market and Cash Market, are only marketed in the Negotiation Market, at least the last 24 (twenty four) months. In practice, there are some listed companies who are experiencing suspension more than 24 months, and are not delisted by the Indonesia Stock Exchange where it shows an ambiguity in the application of regulation by the Indonesia Stock

Exchange itself. The example is PT. Leo Investment (ITTG) Company.

The ITTG Shares suspension is imposed on May 1, 2013, in accordance to what is listed on the suspension announcement in the Indonesia Stock Exchange which states that by Pointing to the Interim Financial Statement of PT. Leo Investment Tbk. (Company) per March 31, 2013 which is delivered to the Stock Exchange on April 30, 2013, where in this Financial Statement the Company does not get any business income, PT. Bursa Efek Jakarta decides to carry out a temporary termination the stocks trading of PT. Leo Investment Tbk. (ITTG) throughout the Market which begins on the Session 1 trading, Wednesday, May 1, 2013.^{vi}

Law will become effective if the purpose of its existence and application is able to prevent any undesirable deeds, is able to eliminate the chaos. An effective law generally can make something which is planned realized. If there is a darkness it will be a correction if there is a requirement to administer or apply the law in a different new atmosphere, law will be capable to solve it (Salim and Nurbani, 2013; 303), then the effectiveness of suspension regulation will become a polemic whether it has been appropriate to the time period which is fully submitted to the BEI.

The other problem related to the company governance or good corporate governance during getting suspension, where one of the main topics in the company governance is related to accountability and mandate responsibility issues, especially the implementation of the guidelines and mechanisms in order to ensure the good attitude and to protect the shares holder's interests^{vii}, whereas in this issuer still gains a suspension which is caused by the bad company's management related to the implementation of these principles, thus it is inappropriate to insure a protection for some parties, that is the investor party who are not able to sell or purchase some shares

from the related companies. This lack of protection to the investors is quite interested to be reviewed further more.

Method

The type of research in this legal research is a type of research which is often used, that is normative research. This research is prescriptive in nature. The prescription has to arise as the result of the study which has been carried out, but the given prescription should be coherent to the legal basis ideas which originate from morals.^{viii} The writer studies some legal sources which are corresponding to the constitution or other regulations which are related to this research. The data used in this research are secondary data, including Act Number 8 of 1995 on the Capital Market, Act Number 21 of 2011 on the Financial Services Authority, Act Number 40 of 2007 on Incorporated Companies, PJOK Number: 2/POJK.04/2013 on the Repurchasing of Shares which is issued by the Issuer and the Public Companies and the Decision of the Chairman of Bapepam-LK Number: Kep-431/BL/2012 on the Delivery of Annual Report of the Issuer or the Public Companies on the Corporate's Social Responsibility. It also consists of some journals and other supporting reference books.

Discussion

In the United States of America, regulation which regulates and monitors the trading activities in the Stock Exchange, which also serves as the Self-Regulatory Organization entitled Securities and Exchange Commission (SEC), where in one of its Articles states, "if in its opinion the public interest and the protection of investors so require, the Commission is authorized by order – summarily to suspend trading in any security (other than an exempted security) for a period not exceeding 10 business days". Section 12 (k) of the Securities Exchanges Act of 1934."

Not much different from the stocks trading regulation in the Australian Securities Exchange which is the primary stock exchange in Australia, it is owned by the Australian Securities Exchange Ltd, or ASX Limited which determines the time period of shares suspension sanctions determination which is written in the ASX regulation which is covered in the ASX Listing Rules Guidance Note 16, that is:

"Under Operating Rule Procedure 3301, therefore, the longest a trading halt can last is effectively two full trading days. It may in fact be less than two full trading days if the trading halt is put in place part-way through a trading day. For example, if the trading halt is put in place at any time before the close of trading on ASX on a Monday, the maximum period it can operate will be up to the commencement of trading on the following Wednesday (assuming the Monday, Tuesday, and Wednesday are all trading days), regardless of whether it was put in place before trading started, or while trading was under way, on the Monday. In certain exceptional circumstances, ASX may consider a request by an entity to grant a 'back-to-back' trading halt. This would have the effect of extending a trading halt from a maximum of two trading days to a maximum of four trading days.

A research which is addressed by the exchange in some countries, including the stocks exchange owned by Australia and the United States, that is ASX and SEC by RecepBildik, shows the purpose of shares suspension from the two exchange as the Self Regulatory Organization are the follows^{ix}, "The stated purpose of trading halts is to allow investors an opportunity to react to new information and to facilitate the orderly emergence of a new equilibrium price. It aims to ensure that all investors have fair access to market information when material information comes to the market or any drastic change occurs."

The purpose of suspension in accordance to the above explanation is giving a rest for all investor in order that the investors get some new information which may give influence to the shares selling price, thus after that the company recovers its situation and it is created a new shares selling price then the investors have a rights to process the market information, either in order to sell or maintain or purchase them. Whereas in the regulation of the Indonesia Stocks Exchange, the authority in suspending the shares, including the time period of this suspension is a form of Exchange protection for the investors with a purposes that they will not experience excessive losses, where eliminating the purpose of shares suspension itself when the investors even can not process their own funds for some years. The existence of authority for the Exchange to administrate this regulation is based on the presence of obligation which is promulgated by UUPM to the exchange in order to achieve its aim that is to carry out such a trading in the stock exchange which is regular, reasonable, and efficient. The aim of this kind of establishment of the Stock Exchange on the next level is for the achievement of legal protection for the financier society's interest.^x

A new legal rationale should be expressed in a point of view which sees its harmony and sustainability with the already establish legal principles and cultural principles. This opinion is in accordance to Von Savigny's opinion that law should appear in accordance to the cultural assumption and most of the legal development pattern which generally has been accepted.^{xi}

The occurrence of shares suspension is one of the risks of investing in capital market by the investors, but it also can become a preventive effort in preventing a massive loss. The essence of temporary termination of stocks trading for the investors is^{xii} :

A trading suspension (also known as trading halt) represents a temporary interruption in official trading of an individual stock on stock exchanges. Authorities usually adopt this regulatory measure to provide investors extra time to evaluate newly released information about a specific company. It is especially used when there may have been a breach of confidence in relation to inside information or market manipulation, in which case companies are required to disclose additional information. Therefore, trading suspensions are said to be a crucial regulatory and supervisory measure in order to maintain a fair and orderly market in which all investors should have simultaneous access on a timely basis to the information they require to take their investment decisions (FESCO, 2001).[”]

Suspension creates some opportunities for investors to process some new information on a certain company after getting a suspension sanction that is shares price adjustment by stabilizing the company's condition from the cause of the set of suspension. When this suspension is revoked the investors can immediately process the information they have received, if the suspension has a prolonged time period, the investors do not get their rights to process the effect of information he has invested. Thus, the aims of this suspension is to prevent the occurrence of the delay of important information which has been gotten to the investors on a certain company, thus an on time and trustable information is very important for investors. Investors are also parties who are always active collecting various kinds of information and use it to understand the price of shares in secondary market; this collected information is information which contains material facts. Incomplete, inaccurate, and non-up to date information will give a misleading analysis material, thus it will make a mistake in drawing investment decision from the investors.^{xiii}

It can be found the meaning of Independent Shares Holders, in the Decision of the Chairman of Bapepam and LK number: Kep-412/BL/2009, Regulation Number IX.E.1: Affiliation Transaction and Certain Transaction Conflict of Interest, the First Number letter f: Independent Shares Holder is a shares holder who does not have Conflict of Interest related to a certain Transaction and/ or not an affiliation from the member of the board of directors, the member of Commissaries Board or primary shares holders who has Conflict of Interest upon a certain Transaction. The definition of Investor according to Indonesia Dictionary is money or capital maker; someone who invests his money in a business with a purpose to get some profit. Investor is also individual or legal entity who uses his funds to do a certain investment action.^{xiv} Based on this definition, it can be concluded that investor is an independent holder of minority shares, where the capital he invests is in small amount, thus he does not have an authority to organize his company's management, and thus there is not any conflict of interest of transaction against them.

Different with the controller shares holder who is not a part of investors, based on the Regulation of Bapepam-LK, it can be found a definition of controller shares holder in the Joint Decision of the Ministry of Finance of Republic of Indonesia and the Governor of Bank of Indonesia on the Implementation of General Bank Recapitulation Program Number 53/KMK.017/1999, Article 1 (7) that is: Controller Shares Holder is a party who has 25% or more of shares from the amount of shares which is issued and has voting rights on the General Bank, except he can prove that he does not make any controlling, an/ or a party who owns less than 25% from the issued shares and has voting rights in the General Bank but he can be proven that he has made any controlling.

The controller shares holder is able to make a control and management upon the company and does not represent the definition of investors, because in general, investors may get their shares ownership through capital market mechanism and do not participate in controlling the company directly and are not the member of company's founder, thus it can be said that they are general society who invest in capital market. Thus, the shares holders or investors who are the supporting subjects of Indonesia Capital market are required to receive legal protection.

Legal protection which is given to investors has background the many amount of risks which is warranted in trading the stocks exchange, one of the risks is shares suspension in a relative long time period, which is basically made for legal protection for the investors and other stakeholders, but there is not a specification of time period of suspension sanctions determination and further arrangement on the suspension sanction. Thus, in the capital market itself, there has been a legal protection for the investors which regulates through two ways, including:

1. Preventive Legal Protection

Preventive legal protection is a protection which is given by the authorized institution with an aim to prevent before the violence happens. This legal protection has an aim that the investors can study the potency of a company in order to be able to achieve his interest that is to get some profit from the dividend or capital gain, and in this case, it can be manifested through:

Disclosure principle, Disclosure means giving some data which are useful for the needing parties. In the financial statement, disclosure means that the financial statement should give sufficient information and explanation about the activities result of a business unit. The disclosed information should be useful and

not be confusing the users of the financial statement in helping the making of economy decision which is carried out by the issuer through the Prospectus.^{xv} Disclosure principle is a principle which is very needed by investors in order to reassuring themselves to get correct and complete information.^{xvi} Generally, the administration of disclosure in capital market is carried out in 3 (three) stages, including primary market level, secondary market level, and timely disclosure. the implementation of openness has been begun at the time the general offering is carried out (primary market level), which is preceded by an emission registration statement to Bapepam by enclosing all important documents which is required in the Decision of the Chairman of Bapepam-LK Number KEP-42/PM/2000 on the Changes of Regulation Number IX.C.1 on the Guidance of the Form and Content of Registration Statement for the General Offering.

Disclosure principle through the reporting mechanism for Issuer is a kind of obligation. In the explanation of Article 81 UUPM, clearly it is explained on the function of the Issuer or Public Company reporting and it is such an incorrect effectiveness of monitoring about the Material Facts and the Party who knows or duly knows this issue is required to be responsible upon the loss incurred as the result of the intended actions.

The issuer whose Registration Statement has become effective or the Public Company is required to: (a) submit a report periodically to the Bapepam and announce this report to the public; and (b) submit a report to the Bapepam and announce it to public about the material event which can affect the Stock price at least at the end of the second work day after the event happens.

Legal protection in the Act Number 8 of 1995 on the Capital Market is given to the shares holders, including:

- a. In article 68 UUPM on the accountant's obligation to submit a report which is confidential about the finding of certain facts.
- b. In article 80 UUPM, some parties who are involved in the general offering have a responsibility, either personally or collectively upon the loss which emerges as the result of accommodating incorrect information on the material facts or even not accommodating the material facts.
- c. In article 71 UUPM, investors are required to read the prospectus before they sell or purchase the offered stocks.

By the existing implementation of disclosure principle, either in the regulation of OJK or Indonesia Stock Exchange and in UUPM, the investors and the potential investors are encouraged to make some investment according to their own analysis on such issuer by some information which has to be provided from the related issuer as a kind of responsibility, thus by the existing facts which is informed, the investors can make the best decision.

2. Repressive Legal Protection

a. Legal Protection through Disclosure Principle

Disclosure principle when the concerned issuer gets a suspension, because as the listed company, issuer has to fulfill his obligations to implement a periodical report as explained above. Similar to the Decision of the Directors of PT BEI Number: Kep-306/BEJ/07-2004 Regulation Number I-E on the Obligations to Deliver Information, in one of its provision, that is:

II.13. The obligation to deliver information as well mentioned in this regulation still applies although the shares of the Listed Company get a Suspension Sanction.

It also functions as a form of monitoring either from BEI or OJK and also investors to the company's performance, whether during getting a suspension, the issuer is still carrying out its obligations in accordance to the applicable regulation.

b. Protection through RUPS

General Meeting of Shares Holders which is usually called with RUPS is a Public Company's body, who has an authority which is not given to the Directors or Commissaries Board as well mentioned in the Act on Incorporated Company and/ or the articles of association of the Public Company. RUPS is carried out by a direct meeting of the shares holders in the domicile of the Incorporate Company or at the Incorporate Company runs its business, which is still in Republic of Indonesia territory. Or by electronic media equipment, which enables all the participants of RUPS see and hear directly and participate in the RUPS. RUPS should be carried out in accordance to the company's interest and by regarding the articles of association and the legislation and also with sufficient preparation, thus it can make legal decision.

c. Legal Protection by OJK

Besides in the Capital Market Act, Legal Protection is also given by OJK as the supervisor of financial services sector in Indonesia. In the Act of Republic of Indonesia Number 21 of 2011, it is stated in Article 1 the definition of consumers that is some parties who place their funds and/ or make use of some services which are provided in the Financial Services Institution such as the customers in the banking, the financiers in the Capital Market, the policy holders in the Insurance, and the participants of the Pension Funds, based on the legislation in the financial service sector. Thus the protection scope given by OJK as the financial service institution in Indonesia belongs to the capital market. In the terms of suspension sanction, issuer is not

capable to apply good corporate governance principle, thus OJK can give protection that is through POJK Number 21/POJK.04/2015 on the Application of Public Company Governance Guidance POJK Number: 1/POJK.07/2013 on the Financial Service Consumers Protection.

d. Legal Protection by the Indonesia Stocks Exchange

Shares suspension is a kind of protection from the exchange to either the issuer or investors in order that the investors do not get excessive loss, but if the suspension does not produce good results, then the exchange can delist the issuer recording, in accordance to the Decision of Directors of PT. BEJ, Kep-308/BEJ/07-2004, Regulation Number 1-1 on the Shares Delisting and the Relisting in the Exchange. In this provision, it is stated that if the listed company has suspended more than 24 (twenty four) months, it may apply delisting. In a study, RecepBildik states, "trading halts are associated with a temporary increase in volatility and trade activity in the post-halt period as new information is incorporated into prices within a certain period of time after reinstatement. Then these figures drop to pre-halt levels after some time"^{xvii}.

Based on the above argumentation, the trading halt is only temporary, after the new information and condition from either the issuer or other party is processed in some period, the shares price will be adjusted to the previous price. If the issuer can not adjust to go back to the previous condition, it is valued incapable. It is the time the BEI has the authority to maintain or to delist the listed company. By the existing delisting, it can put into effect the shares purchasing from the market mechanism which is traded in the negotiation market although there is possibility that the company has not necessarily been able to carry out the repurchasing but there has been the provision that is in POJK Number: 2/POJK.04/2013 on the Share

Repurchasing which is Published by the Issuer or Public Company in a significantly fluctuated Market Condition.

e. Legal Protection by Act Number 40 of 2007 on Incorporated Company

Legal protection which is given by UUPT is the investors' rights to sue upon the issuer's negligence in running his company's management so that the issuer can not fulfill his obligations to the investors, but getting a suspension, the following is some articles of UUPT which can give protection to the investors.^{xviii}

The holders of minority shares as the subject of law have a right to sue the Directors of Commissaries, if the Directors and Commissaries have done a mistake or negligence which injures the holders of minority shares through the District Court. This right of the minority shares holders is called Personal Right. This right is regulated in Act Number 40 of 2007 on Incorporated Company (UUPT) Article 61 (1).

Protection for the minority shares holders, derivative right is the authority of minority shares holders to sue the directors or commissaries based on or on behalf of the company. Eighteen minority shares holders have the right to defend the Corporation' interest through the authority of judicial institution by proving the existing mistake or negligence of the directors and commissaries. In Article Number 40 year 2007 on Incorporated Company there are two kinds of derivative right for the shares holders, which is stated in Article 97 (6). For the minority shares holder is examination right. Examination right (EnqueteRecht) or questionnaire right is a right which is given to the minority shares holders to propose an examination application to the corporation through the court, in a condition where there is a notion that there are some deceptions or something which is hidden by the directors, commissaries or the majority shares holders (Chatarrmarasjid, 2012:

324). EnqueteRecht of the minority shares holders in Act Number 40 Year 2007 on the Incorporate Company (UUPT) in article 138 (3).

Conclusion

Investor can get legal protection in the case of suspension sanction determination, that is through preventive protection which includes the openness of the issuer's financial report through the prospectus and annual report, interim financial report, incidental report, and public exposure and some articles in the Capital Market Act which requires an openness, then repressive protection is implemented by the presence of sanction from OJK to the issuer's negligence in implementing good corporate governance principle which has become a reason for the worse company management so that the issuer' suspension still has not been alienated yet. Then the protection from the Indonesia Stock Exchange is delisting the suspended issuer in a relative long period, with a poor company's management. Furthermore, from UUPT the investors also can sue based on their right that is through the Personal Right, Derivative Right, Enchequete Right and Appraisal Right. In order that the legal protection can be maximum, a Regulation of Indonesia Stock Exchange should be made on the time period that in determining the suspension sanction there should be the maximum time period of its determination listed for the issuer and be required to carry out Public Exposure in order that the investors can find out the company's condition before getting the suspension. Besides that BEI and OJK need to significantly identify which companies are decent in doing some recording in the stock exchange from the rules that have been set, and if the companies do not fulfill these qualification, then the exchange needs to be more selectively in giving permission to the company recording in the exchange and in doing suspension or delisting.

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