

Public Listed Companies Takeovers Comparison Under Indonesian and Malaysian Law

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ABSTRACT

The current condition of business competition is getting tighter. This causes the company to compete to maintain its existence. One way to do that is by restructuring the company. Takeover is one type of corporate restructuring. Takeover is a legal action carried out by a legal entity or individual to take over company shares resulting in a transfer of control over the company. The purpose of this legal research is to increase knowledge in the field of public listed companies takeovers based on Indonesian and Malaysian Law which can be benefit to legal practitioners. This research is a normative legal research using statutory and comparative approach. The data used in this research is secondary data. The results of the study are a public listed company that undertakes a takeover in not only subject to the laws and regulations regarding limited liability companies, but also must comply with the provisions of the capital market laws and regulation. After the takeover process occurs, the expropriating party must carry out a mandatory tender offer process. There are differences in terms of public listed companies takeover process between Indonesian and Malaysian Law including the requirements to become a new controller, minority shareholder rights, and takeover's impact regulation on business competition.

Keywords : Indonesian Law, Malaysian Law, Takeover, Tender Offer, Public Listed Company.

1. INTRODUCTION

The business world has entered a period of freedom and openness at the end of the 20th century. There are no more distances or barriers that have limited all business activities, especially activities between regions and between countries. Significant changes in the business environment such as globalization, deregulation, technological advances, and market fragmentation have created very tight competition. Furthermore, as a result of increasingly stringent business competition conditions, a company that is threatened with not being able to compete can take various ways in an effort to save its business, one of which is by restructuring the company. Company restructuring is an act of structuring the value of all the company's business chain with the aim of creating competitiveness and competition (Herdiansyah, 2019). Company restructuring can be carried out with 3 (three) legal actions, namely takeover, merger, and consolidation. Based on Article 1 Number 11 of Law Number 40 of 2007 concerning Limited Liability Companies states that takeover is a legal action carried out by a legal entity or individual to take over company shares resulting in a transfer of control over the company. A takeover by the offeror will result in a transfer of control over the company (Wicaksono, 2021). By transferring control from the offeree to offeror, it doesn't result the company's existence dissolving or ending. The company that was

taken over exist, but control over the company transferred to the offeror. What is meant by control is power in the form to regulate the company's financial and operational policies, appoint and dismiss management, and obtain majority voting rights in board of directors meeting.

The acquirer company are usually large companies with strong capital, have extensive business operation, regular management, and are grouped into conglomerats, while companies acquired are relatively small companies (weak), difficult to develop, and unable to compete (Purwanto, 2014). These takeovers are usually aimed at getting cash flow fast, getting operational and administrative system in place, reducing the risk of business failure, saving time entering new business, and making the company bigger (Febrina, 2014). Take over can be carried out between in a group of companies or by a company that has offered its shares to the public through the stock exchange (go public) to a company that has not gone public or vice versa. All private companies have the opportunity to become public companies by offering and selling part of their shares to the public and listing their shares on the Indonesia Stock Exchange.

The existence of public listed company becomes very important to drive and direct development activities in the economic sector (Wulandari, 2021). In carrying out a takeover, a public listed company does not only comply with the provisions in the limited liability company law, but also must comply with the provisions in the capital market law, especially regarding the offering of shares. One of the provisions related to the takeover of public listed company in Indonesia namely financial services authority regulations number 9/POJK.04/2018 concerning Takeover of Public Companies, to be said to be the controller is the part that own more than 50% of the total shares or has the ability to define, manage and/or public listed company policies. As in Indonesia, Malaysia also has regulations regarding takeovers of public companies. One of which is in previous regulation, the new controller of a public company that took over was required at least 50% of the shares. However, with the Rules on Takeovers, Mergers, Compulsory Acquisition 2016, the controlling requirement in public listed companies takeover was removed. In this study, the author will discuss further about public listed companies takeover comparison under Indonesian and Malaysian Law

2. RESEARCH METHODS

In this legal research, the type of research used is normative juridical research. The type of data used in this research is secondary data. Secondary data consists of primary legal materials in the form of law and regulation related to the takeover of public listed companies according to Indonesian and Malaysian laws as well as secondary legal materials consisting of books and

journal. The data is collected by way of literature study. The data used in this research comes from library research,.

3. RESULTS AND DISCUSSIONS

Before discussing further about the comparison of public listed companies takeover under Indonesian and Malaysian Law, to support this research the author has conducted a review of previous research. The first research is Company Teakeover Process Based on Law No. 40 of 2007 concerning Limited Liability Companies by Rezmia Febrina. In that research, the authors only describe the general company takeover procedure. It does not provide details regarding the takeover of a public listed company which is also subject to capital market law. In addition, in that study it only focused on companies takeover regulation based on Indonesian Law, while in this study the author will conduct a legal comparison to Malaysian Law. The second research is Comparison of Company Takeover Laws According to Indonesian and United States of America Capital Market Law. In that study, the authors compare the regulation of companies takeover between Indonesia and United States of America, but the objects of this study are Indonesian and Malaysian Law.

1. Public Listed Companies Takeover under Indonesian Law

a. Legal Framework

- 1) Law Number 40 of 2007 concerning Limited Liability Companies as amended by law number 11 of 2020 concerning Job Creation;
- 2) Law Number 8 of 1995 concerning Capital Market;
- 3) Government Regulation Number 27 of 1998 concerning Merger, Consolidation, and Takeover of Limited Liability Companies;
- 4) Financial Cervices Authority Regulation Number 9/POJK.04/2018 concerning Takeover of Public Listed Companies.

b. Definition of Public Listed Company

Based on Article 1 Number 1 POJK Number 9/POJK.04/2018, public listed company is an issuer that has made a public offering of equity securities or a public company. In Indonesia, a public company is marked with a company name that ends with the term "Tbk" which is an abbreviation of the word open.

c. Definition of Takeover

Based on Article 1 Number 5 POJK Number 9/POJK.04/2018, public listed companies takeover is an action either directly or indirectly, resulting in a change in the controller. What is meant by controller is a party that either directly or indirectly:

- 1) Owns shares of more than 50% of all shares; or
 - 2) Has the ability to define, manage, and/or public listed company policies.
- d. Parties Involved in The Public Listed Company Takeover (Tarigan, 2016)
- 1) Financial Service Authority;
 - 2) Indonesia Stock Exchange;
 - 3) Ministry of Law and Human Rights;
 - 4) Commission for The Supervision of Business Competition;
 - 5) Investment Coordinating Board.
- e. Public Listed Companies Takeover Procedure
- 1) Based on Law Number 40 of 2007 Concerning Limited Liability Companies

Prior to taking over, referring to the Provisions of Article 126 Paragraph (1) of Law Number 40 of 2007, the takeover must take into account of interests of related parties, namely:

- a) Company, minority shareholders, company employees;
- b) Creditors and other business partners of the company;
- c) Society and healthy competition in doing business.

Based on Article 125 Paragraph (1), take over is carried out by taking over shares that have been issued and/or will be issued by the company through the company's director board or directly from the shareholders.

- a) Takeover through the company's director board

1. General meeting of shareholders decision

Based on Article 125 Paragraph (4), takeover carried out by legal entities in the form of corporations. Directors before carrying out legal actions of take over must be based on a general meeting of shareholders that meets the attendance quorum and provisions regarding the requirement for making general meeting of shareholders decisions as referred to in Article 89, namely at least $\frac{3}{4}$ of the total number of shares with voting rights present or represent at the general meeting of shareholders and decisions are valid if approved by at least $\frac{3}{4}$ of the number of votes cast, unless the articles of association determine the attendance quorum and/or larger general meeting of shareholder provision.

2. Notification to the directors of the company

According to Article 125 Paragraph (5), in the event that a takeover is carried out by the board of directors, the party that will takeover conveys its intention to carry out the takeover to the directors of the company to be taken over.



3. Arrangement of takeover plan

According to article 125 paragraph (6), the directors of the companies to be taken over with the approval of commissioners of each company prepare a takeover plan.

4. Summary of takeover plan

Based on Article 127 paragraph (2), the board of directors of the company must announce the summary of the draft in at least 1 (one) newspaper and announce in writing to the employees of the company who will carry out the takeover within a period of no later than 30 (thirty) days prior to the call for general meeting of shareholders.

5. Submission of creditor objections

Creditors can submit objections to the company within a period of no later than 14 (fourteen) days after the announcement regarding the takeover plan. If within that time period the creditor does not submit an objection, the creditor is deemed to have agreed to the takeover plan.

6. Drawing up of deed of take over before a notary

According to Article 128 paragraph (1), the take over plan that has been approved by the general meeting of shareholder is stated in the deed of takeover drawn up before a notary in the Indonesian language.

7. Announcement of takeover results

Based on Article 133 paragraph (2), the directors of the company whose shares were taken over are required to announce the results of the takeover in 1 (one) newspaper or more within a period of no later than 30 (thirty) days from the effective date of the takeover.

b) Direct takeover process form the shareholders

1. Negotiation and agreements

The way to takeover the shares issued and/or to be issued by the company through the shareholders is directly carried out through negotiaton and agreement between the parties who will takeover with the shareholders while taking into account the articles of association of the company being taken over concerning the transfer of rights to shares and agreement made by companies with other parties.

2. Announcement of planned agreement

Even though the takeover of shares is directly through the shareholders and does not prepare the takeover plan in advance, it must still announce the takeover agreement plan in 1 (one) newspaper and announce in writing to the employees of the company who will carry out the takeover within a period of no later than 30 (thirty) days to the summons for the general meeting of shareholders.

3. Submission of creditor objections
4. Drawing up of the deed of takeover before a notary

Because the takeover is carried out directly from the shareholders, the deed namely deed of transfer of rights over shares.

5. Notification to the Minister of Law and Human Rights
6. Announcement of takeover result.

- 2) Based on Financial Service Authority Regulation Number 9/POJK.04/2018 concerning Takeover of Public Listed Company

The following is the procedure for taking over a public listed company:

- a) Negotiation

Based on POJK Number 9/POJK.04/2018, the new controller candidate can announce negotiation on takeover plan. When making an announcement, at least it is announced via:

1. 1 (one) Indonesian language daily newspaper with national circulation; or
2. Stock exchange website.

- b) After the takeover occurs, the new controller must announce it in at least 1 (one) Indonesian daily newspaper with national circulation or the website of the stock exchange and inform the financial services authority regarding the takeover taking place no later than 1 (one) working day after the takeover takes place.

- c) Make a mandatory tender offer

A tender offer is an offer through the mass media to obtain equity securities by purchasing or exchanging them for other securities. Type of tender offer:

1. Mandatory tender offer

The mandatory tender offer is an offer that must be made by the new controller to buy the remaining shares of the public listed company.

- a. Submission of documents to financial service authority no later than 2 (two) working days after the announcement of the takeover (article 12).
- b. Announcement of mandatory tender offer information disclosure.



- c. Carry out the mandatory tender offer for 30 days after the announcement (article 13 letter a).
 - d. Complete mandatory tender offer transactions by handing over money (article 13 letter b).
 - e. Submit report on the result of mandatory tender offer to the financial service authority no later than 5 (five) working days after the end of transaction settlement (Article 16).
2. Voluntary tender offer

Voluntary tender offer is an offer made voluntarily by a party by purchasing or exchanging with other securities through the mass media to obtain equity securities issued by the target company.

2. Public Listed Companies Takeover under Malaysian Law

a. Legal Framework

- 1) The Companies Act 2016;
- 2) Capital Markets and Services Act 2007;
- 3) Malaysian Code on Take-Overs And Mergers 2016;
- 4) Rules on Take-Overs, Mergers, and Compulsory Acquisition 2016.

b. Definition of Public Listed Company

To differentiate between a public company and a private company, in Article 25 (1) the Companies Act 2016 stipulates that public company names must end with the word Berhad or Bhd for short. For private companies ending with the word Sendirian or abbreviated as Sdn. In Article 216 of the Capital Market and Services Act 2007 it is stated that what is meant by a company in relation to a company being taken over is a public company either listed or not listed on a stock exchange and any other entity as specified in the law. Based on Rules 108 Rules on Take-Overs, Mergers, and Compulsory Acquisition 2016 state that what is meant public company are:

- 1) An unlisted public company with more than 50 shareholders and net assets of RM 15 million or more;

In the Capital Markets and Services Act 2007, defines company to mean a public company whether or not it is listed on any stock exchange. Unlike the previous position, not all unlisted public company are subjected to this rule (Khan, 2016).

- 2) A business trust listed in Malaysia;
- 3) A real estate investment trust (REIT) listed in Malaysia.



c. Parties involved in public company takeover

- 1) Malaysia Securities Commission;
- 2) Bursa Malaysia Securities Berhad;
- 3) Companies Commission Of Malaysia;
- 4) Malaysian Central Bank.

d. Public Listed Companies Takeover Procedure

1) Initial Offer

Before an offer is made is made, the bidder will conduct a due dilligence investigation of the target company. This due diligence investigation will be limited to published information such as information submitted to Bursa Malaysia Securities Berhad in accordance with the listing requirements.

2) Offer (Notice)

a) The offeror submits an offer to the board of directors of the company to be acquired (offeree) before the offer is announced to the public. (Rules 9.01 Rules on Take-Overs, Mergers, and Compulsory Acquisition 2016)

b) The offeror that making an offer is required to announce the offer publicly or via press notification (Rules 9.10 (1)

The offeror must also send written notice to:

1. Directors or advisors appointed by the company;
2. Malaysian Securities Commission;
3. Bursa Malaysia Securities Berhad.

c) The board of directors of the company to be taken over within 24 (twenty four) hours of receipt written notification must: (Rules 9.19 (5)

1. Promptly announce receipt written notification;
2. Send a copy of written notification to all shareholders within 7 (seven) days of receipt of the notification.

3) Takeover offer

Delivery of bid documents by the offeror within 21 days from the date of the written notification (Rules 11.02)

4) Due diligence

Information disclosure plays a big role for investors (Zakaria, 2020). Part IV of The Capital Markets and Services Act requires that a share offering must be accompanied by sufficient disclosure of information to enable investors to make appropriate investment decision and enable parties who suffer losses resulting from

misleading statements and behavior from the issuer of shares to have a meand of obtaining compensation (Afriana, 2015).

5) Acceptance and agreement

The offeror announce the result of the offer before 09.00 am the market day. The offerror must make an announcement: (Rule 13)

- a) In accordance with record keeping requirements; or
- b) By press notification.

If the offeror fails to comply with any of the announcement requirements, acceptance of the offer may be withdrawn immediately.

6) Transfer of sale of shares

Afyer the shale share agreement and all company documents and resolutions have been prepared and signed, the transfer of the share sale will be made (Rule 14).

- a) If involving cash only, the offeror must pay cash consideration within 10 days; or
- b) Involving only securities or a combination of cash and securities, the offeror must post or credit within 14 days.

7) Tender Offer

After the takeover occurs, the new controller of the company must make a tender offer. There are 2 types of tender offers in Malaysia:

a) Voluntary tender offer

This is where an offer is made voluntarily and simultaneously to all target shareholders to acquire their shares in the target.

b) Mandatory tender offer

This occurs when the acquirer is entitled to exercise control or met certain takeover treshold.

Table1 .Differences in Public Listed Companies Takeover Under Indonesian and Malaysian Law

Difference	Indonesia	Malaysia
Requirement to be a controller	<ul style="list-style-type: none"> a. Owns shares of more that 50% of all shares; or b. Has the ability to define, manage, and/or public listed company policies 	<p>The bidders must make a mandatory tender offer when the bidder:</p> <ul style="list-style-type: none"> a. Acquire, hold, or exercise control over more that 33% or more of the target’s voting shares (or are entitled to do so)



		b. Have held between 33% and 50% of the target voting stock and the acquired more than 2% of the target's voting stock in a 6 months period.
Minority shareholders right	The acquirer cannot force minority shareholders to sell their shares.	According to Article 222 of Capital Markets and Services Act 2007, an acquirer can exercise the right to buy the remaining shares if it receives acceptance for a public offering not less than 90% of the shares of public company.
Control over business competition	In Indonesia, takeovers of public listed company must not cause monopoly or unfair business competition (Aspan, 2022). Furthermore, a certain takeover must be notified in written maximum 30 days from the date of takeover legally effective to the Business Competition Supervisory Commission	Business competition law does not have provisions regarding companies take over control. But in the Malaysian Competition Act 2010, it is prohibited to abuse business domination that prevents, limit, or interferes with competition.

4. CONCLUSION

Under Indonesian law, a controller is a party that owns more than 50% of the total shares or has the ability to determine, manager, and/or public company policies. Meanwhile, in Malaysia, the requirements is to acquire at least 33% of the target company's shares. In addition, under Indonesian law, the acquirer cannot force minority shareholders to sell their shares. Meanwhile, in Malaysian Law, this is allowed on condition that the controller has acquired a minimum of 90% of the shares.



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