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Legal Analysis on the Valuation of A Company's Shares Nominal Value

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Abstract

The existence of a Company as a legal entity with a commercial purpose in a state holds an important role in developing the national economy. Such existence must be supported with a comprehensive regulatory framework that able to ensure legal certainty of every legal action relating to a Company. The prevailing regulations relevant to a Company includes, among others, the valuation of a Company's shares, which hold a significant role either to the Company itself, the shareholders, and other third parties, especially in investing into or doing a business activity. Therefore, this research is drafted to discuss the legal aspects in valuation of a Company's shares in Indonesia. This research used a descriptive method with a qualitative approach.

Keywords: *Business law; Capital; Company; Investment; Law; Shares; Valuation.*

A. Introduction

Law No. 40 of 2007 on Limited Liability Companies, as amended by Law No. 11 of 2020 on Job Creation (Companies Law) is the prevailing law in Indonesia relating to the Limited Liability Company (Company) as a legal entity. The existence of a Company in the society serves as one of the cores in economic development in the society in which the existence of a regulatory framework that regulates a Company holds an important role to ensure certainty and sustainability of the economic development in Indonesia.

Every Company is established to conduct a business activity, i.e. an activity in any business sector that serve a purpose to obtain profit (H. Zaeni Asyhadie, et.al., 2018). Hence, for a Company to achieve its purposes in starting and/or conduct its business activities, it requires a capital sourced from its founders. Article 1 number 1 of the Companies Law defines a Company as a legal entity who is an association of capital, established pursuant to an agreement, conducting business activity with an authorized capital divided into shares or a personal Legal Entity that fulfils the criteria of Micro and Small-Scale Business as governed under the relevant regulation. Based on such definition, a Company who is established with the purpose of conducting a business activity shall firstly be given a capital by its founders. The Company's capital derived from it's founders are divided into shares owned by each of the founders as shareholders of the Company.

Hence, the capital of a Company is a basic necessity of the Company to conduct its business and eventually gained profit from its business after a certain period of time. The existence of such necessity is also guaranteed by the Companies Law as to whether requires the Company to firstly obtain a capital in order to start its business activity. Furthermore, it is also possible that the Company in the future may require additional capital from its founders and/or shareholders. Such necessity is also guaranteed by the Companies Law, whereas Article 33 paragraph (3) of the Companies Law regulates that any further issuance of shares to increase the Company's issued and paid-up capital must also be made in full by the founders and/or the shareholders.

A Company is established by one or more parties (which may a person or a legal entity) on a contractual basis, in which the main purpose is to gain profit from the Company's business activity. The shared purpose/interest of the Company's founders to gain profit from the Company's business may be legally obtained via a dividend distribution made by the Company to the shareholders in accordance to the prevailing laws and regulations in proportion with each of the shareholding of the Company's shareholders.

A Company may be deemed to have obtained profits if it has been able to record a net profit from its business conduct for an ongoing financial year and such net profit must be a positive profit balance (saldo laba yang positif). Furthermore, Article 70 paragraph (1) of the Companies Law regulates that the Company's net profit may be distributed to the shareholders as dividend, except otherwise agreed by the General Meeting of Shareholders. However, Article 70 paragraph (3) of the Companies Law also regulates that in the event the Company's net profit in an ongoing financial year is not sufficient to cover the accumulative lost sustained by the Company in the previous financial year, the Company is prohibited from distributing dividend to its shareholders.

A Company may be deemed to have obtained profits if it has been able to record a net profit from its business conduct for an ongoing financial year and such net profit must be a positive profit balance (saldo laba yang positif). Furthermore, Article 70 paragraph (1) of the Companies Law regulates that the Company's net profit may be distributed to the shareholders as dividend, except otherwise agreed by the General Meeting of Shareholders. However, Article 70 paragraph (3) of the Companies Law also regulates that in the event the Company's net profit in an ongoing financial year is not sufficient to cover the accumulative lost sustained by the Company in the previous financial year, the Company is prohibited from distributing dividend to its shareholders.

On the other hand, profits gain by the Company from its business activity also serves as one of the aspects that affect the enterprise value of the Company and therefore indirectly affecting the actual value of the Company's shares. Therefore, the Company's shares nominal value stated in its Articles of Association does not reflect the factual value of the Company's shares owned by the shareholders after the business activity has commenced.

The Companies Law as the prevailing regulation in Indonesia does not govern further on the procedures to determine the actual value of the Company's shares after it has started its business activity for a certain period of time. However, the valuation of the factual value of the Company's shares are common in practice, especially in the event of any corporate transactions that involves the Company's shares as the object of the relevant transaction.

In a proposed acquisition transaction of a Company who is a subsidiary of a public company in Indonesia, such transaction is made by reference to the Companies

Law and the capital market laws in Indonesia. The prevailing Indonesian capital market regulatory framework specifically regulates the procedure in the valuation of the factual value of a Company's business, which includes the valuation of such Company's factual shares value. The valuation was carried out by an independent third party who is capable to conduct such valuation under the prevailing laws.

In respect of the aforementioned, the writer is interested in conducting research on the procedures in valuation of a Company's shares under Indonesian laws. The purpose of this research is to determine the legal certainty provided to the stakeholders in respect of a Company's shares valuation, especially towards a non-listed Company in Indonesia.

B. Literature review

Pursuant to Article 1 number 1 of the Companies Law, a Company is defined as a legal entity who is an association of capital, established pursuant to an agreement, conducting business activity with an authorized capital divided into shares or a personal Legal Entity that fulfils the criteria of Micro and Small-Scale Business as governed under the relevant regulation. The emphasizing that a Company is an association of capital theoretically reflects that a Company does not emphasize the private nature of the shareholders within the Company (Ridwan Khairandy, 2009). A Company as an association of capital contains an understanding that such Company is established based on the common interest of several parties to collect a certain amount of capital and conduct a business activity profitable to such parties.

A Company requires an initial capital deriving from its shareholders as the founders, which are separated from the personal asset of the shareholders (Ridwan Khairandy, 2009). Such initial capital derived from the personal assets of each of the shareholders became the asset of the Company and therefore separated from each of the shareholders' personal assets (Ridwan Khairandy, 2009). Article 7 paragraph (2) of the Companies Law emphasize that upon the establishment of a Company, each of the Company's founders are under the obligation to take the Company's shares. Therefore, this provision ensures that upon establishment, the Company has secured its initial capital required to start its business activity.
A capital structure of Company comprises of an authorized capital, and issued and paid-up capital (H. Zaeny Asyhadie, et.al., 2018). The Companies Law does not provide any definitions on authorized capital as well as issued and paid-up capital. Gunawan Widjaja provides a definition of authorized capital as a maximum capital of a Company (Gunawan Widjaja, 2008). Furthermore, Rudhi Prasetya provides a definition of authorized capital as a maximum capital of the Company due to the consensus of the Company's founders on the agreed amount of the authorized capital which is further recorded in the Company's Articles of Association (Rudy Prasetya, 2011). Therefore, the nominal value of the Company's authorized capital as stated in the Company's Articles of Association caused the inability of the Company to issue any shares that in aggregate exceeds such value of the Company's authorized capital stated in its Articles of Association (Rudy Prasetya, 2011).

Gunawan Widjaja further defines issued capital as the Company's capital which has been agreed to be injected into the Company by the founders (prior to the Company's establishment) or by the shareholders (as an addition to the existing amount) (Gunawan Widjaja, 2008). On the other hand, paid-up capital is the Company's capital which are subscribed by the founders (prior to establishment) or the shareholders (as an addition to the existing amount) injected by the founders or the shareholders to the Company (Gunawan Widjaja, 2008).

The provision under Article 31 paragraph (1) of the Companies Law regulates that a Company's authorized capital comprises of the entire shares' nominal value. Gunawan Widjaja explained that shares are proof that capital injection has been made by the shareholders of the Company (Gunawan Widjaja, 2008). Such definition is in line with the provisions under Article 48 paragraph (1) of the Companies Law which states that the Company's shares shall be issued under the name of its owner and such owner shall be given a proper proof of ownership for such shares subscribed. Furthermore, each of the Company's share shall have a nominal value, in which such value is subject to the consensus of the founders or the shareholders of the Company (Gunawan Widjaja, 2008). The nominal value of each share if multiplied by the amount of the Company's shares issued must be equal to the total amount of the Company's authorized capital agreed by the founders or the shareholders of the Company as reflected in the Company's Articles of Association.

Article 7 paragraph (2) of the Companies Law requires that each of the founders to subscribe a portion of the shares issued by the Company upon its establishment. By reference to the foregoing, such provisions under the prevailing regulation cause a legal implication whereby upon an establishment of a Company, the founders of the Company are under the legal obligation to pay a certain amount to the Company in return for the shares issued by the Company to them, which number of shares are issued in proportion with each of the founders' capital injection to the Company. The aggregate amount of the shares subscribed by the founders or the shareholders, if multiplied with the nominal value of the shares shall be equal to the total amount of the Company's issued and paid-up capital (Gunawan Widjaja, 2008).

Prior to the enactment of Law No. 11 of 2020 on Job Creation (Job Creation Law), the provision under Article 32 paragraph (1) of the Companies Law requires that a Company shall at least have a minimum of IDR50,000,000 as an authorized capital. However, the Job Creation Law amend such provision insofar as providing an exception to the legally required minimum authorized capital for any Company that fulfils the criteria of Micro and Small-Scale Business. It is further regulated under Article 3 paragraph (2) of Government Regulation No. 8 of 2021 on the Authorized Capital of a Company, Registration, Establishment, Amendment and Liquidation of A Company That Fulfils the Criteria of Micro and Small-Scale Business (GR No. 8/2021) that the minimum required authorized capital of a micro or small-scale Company may be determined pursuant to the consensus of the Company's founders.

In injecting capital to a Company, the founders or the shareholders of the Company must comply with the provisions under Article 33 paragraph (1) juncto paragraph (3) of the Companies Law, whereby the issued and paid-up capital of the Company must be paid in full with the minimum amount equal to 25% of the Company's authorized capital. Similar obligations are also applicable to micro or small-scale Company's as governed under Article 4 paragraph (1) of GR No. 8/2021.
Each of the paid-up capital from the founders and/or shareholders which are made in full shall be evidenced by the issuance of a number of shares in proportion with the

amount paid by each of the shareholders to the Company. Hence, a share is a concrete form of the Company's capital, issued under the name of the relevant shareholder as the legal owner and possess a nominal value stated in Rupiah (Gunawan Widjaja, 2008). Pursuant to Article 51 of the Companies Law, a share ownership is a legitimate proof of ownership of a shareholder for such shares owned. Article 52 paragraph (1) of the Companies Law further regulates that such shares owned by the shareholders provide rights to its owner to (a) attend and cast a vote in the General Meeting of Shareholders; (b) receive dividend payment and the margin from liquidation process; and (c) exercise other rights conveyed by the Companies Law.

In consideration of the foregoing, the capital structure of a Company that includes authorized capital and issued and paid-up capital have an important role since the establishment of the Company so that it may start its business activity. The nominal value of the Company's authorized capital is the maximum cap for the Company to increase its issued and paid-up capital, while the Company's issued and paid-up capital serves as a basis to the founders or the shareholders as well as the Company itself to manage its capital to support its business activity.

A Company may start to record its profit after conducting its business for a certain period of time. The Company's ability to gain profit from its business reflects the Company's profitability. By referring to the Company's profit, if such Company is able to increase its profits, it shall indicate that the Company possess a good performance so that it increases the Company's enterprise value as well as its factual shares nominal value (Gede Rudangga & Sudiarta, 2016). Therefore, the profitability of a Company is a ratio of the management effectiveness based on the return made from sales and investment (Hermuningsih, 2013).

The net profit gained by a Company may be utilized by the Company for any purposes, provided that the Company shall firstly comply with certain requirements under the Companies Law. The provisions under Article 71 paragraph (1) of the Companies Law requires that the utilization of the Company's net profit must be determined by the General Meeting of Shareholders. The definition of net profit is governed under Article 70 paragraph (1) of the Companies Law, whereby net profit is defined as the profit of the ongoing financial year after being deducted with tax obligation. Hence, the Company may only be able to determine the utilization of its profit after being deducted with its tax obligation and approved by the shareholders. In determining the such utilization of net profit, Article 70 paragraph (1) of the Companies Law requires the Company to save a certain amount from such net profit as reserves, provided that the Company records a positive profit balance. The explanatory section of Article 70 paragraph (2) of the Companies Law further provides that a positive profit balance means the net profit of the Company from the ongoing financial year that cover the accumulated loss of the Company in the previous financial year, if any.

In reference to the above, the Company's obligation to make reserve from its net profit shall only become legally mandatory if it has recorded positive profit balance. Once become mandatory, the Company shall make a minimum reserve equal to 20% of the Company's issued and paid-up capital. The Company's obligation to have such reserve is meant to anticipate any possibility where the Company may sustain losses in the future. Further, Article 70 paragraph (3) of the Companies Law also requires that such reserve made by the Company may not be distributed as dividend to the shareholders.

The explanatory section of Article 70 paragraph (3) of the Companies Law further regulates that the portion of the net profit which are not included in the Company's mandatory reserve may be utilized by the Company for business expansion, dividend distribution, social purposes and other purposes. In the event where the General Meeting of Shareholders approve the utilization of the Company's net profit for dividend payment, Article 71 paragraph (3) of the Companies Law requires that such dividend payment may only be made if the Company records a positive profit balance. Such limitation is further regulated in the explanatory of Article 71 paragraph (3) of the Companies Law whereby if the Company's net profit is not able to cover the Company's accumulate loss in the previous financial year, therefore the Company may not make dividend payment to the shareholders due to the negative profit balance.

In respect of the abovementioned, the Company's capability to gain positive profit balance is one of the aspects in determining the profitability of the Company. Profitability is the Company's capability to obtain profit in a certain period of time (Hermuningsih, 2013). Profitability is one of the financial aspects which may be evaluated to obtain the enterprise value of a Company. A Company's enterprise value is closely related with the Price to Book Value ("PBV") ratio, which serves as the basic indicator of a Company's shares. The high profitability rate of a Company affects various aspects, either in terms of the Company's capability to give commercial benefit to its shareholders via dividend distribution as well as contributing to the increment of the Company's enterprise value. By increasing the Company's enterprise value, the factual nominal value of the Company's shares shall also be increased.

The increase on the Company's factual nominal share value which took place in concordance with the increase of the Company's enterprise value however caused a discrepancy against the share's nominal value as stated in the Company's Articles of Association. Such event is caused due to the provisions under Article 49 paragraph (1) of the Companies Law which requires that all shares issued by the Company must be nominated in a certain amount of money and in Rupiah as the official currency of Indonesia. Furthermore, Article 15 paragraph (1) of the Companies Law also requires the Company's Articles of Association to reflect among others, the number of shares, shares classifications, the rights embedded to the shares and the nominal value of the shares.

According to Ridwan Khairandy, there are two drawbacks where the Companies Law implement the Company's share nominal value concept (Ridwan Khairandy, 2009). Firstly, the financial report which is drafted based on the general accounting principle refers to the share nominal value (Ridwan Khairandy, 2009). On the other hand, the profit gained or the loss sustained by the Company from its business conduct affect the value of the Company and therefore the nominal value of the Company's shares as recorded are no longer equal to the factual nominal value of the relevant shares (Ridwan Khairandy, 2009). Secondly, the shares nominal value recorded in the Articles of Association shall not be able to reflect the factual value of the shares in case of any dividend distribution to be made by the Company to the shareholders (Ridwan Khairandy, 2009).

The provisions under Companies Law does not specifically regulate the procedure in evaluating the Company's shares nominal value so that the factual value may be determined. In practice, the factual value of a Company's shares is also regarded as the fair value of the Company's shares. Under the current Companies Law, the provision on the evaluation of the fair value of a Company's shares are limited in nature. Firstly, the determination of a fair value is found in the event a capital injection is made by the Company's shareholders by any forms other than money. The determination of such fair value shall be made by reference to the market price or by the valuation of an independent appraiser. Secondly, the obligation to obtain fair value of the Company's shares is also found in relation to the protection of minority shareholders' rights, specifically whereby one or more shareholders representing the minority ownership in the Company disapprove the Company's action which are deemed adverse either to the shareholders or the Company. Such adverse actions include (i) amendment to the Articles of Association, (b) transfer/encumbrance of more than 50% of the Company's total net assets, or (c) in the event of merger, consolidation, acquisition or spin-off. By reference to Article 34 paragraph (2) of the Companies Law, it should be possible for the Company to carry out a valuation on the fair value of its shares after the Company has conducted its business for a certain period of time.

C. Research Methods

In preparing this research, the writer uses a descriptive analysis method with a qualitative approach. In this research, the writer intends to discuss whether the provisions under the current regulatory framework in Indonesia provides sufficient legal certainty to the stakeholders in case of the evaluation of the factual / fair value of a Company's shares in Indonesia. In preparing this research, the writer uses primary and secondary data as scientific sources.

D. Results and Discussion

1. Definition of Shares and Ownership of Shares

The Companies Law does not specifically regulate the definition of a Company's share. However, Ridwan Khairandy explained that the following defition of a Company's share is generally accepted (Ridwan Khairandy, 2009): "the interest of the shareholder in the company measured by a sum of money, for the purposes of liability in the first place and interest in the second place, but also consisting of a series mutual covenant entered into by all the shareholders".

The above definition of a Company's share provides several elements which generally regarded to be the important factors of a Company's share, either to the shareholders or the Company itself. Firstly, a Company's share is the reflection of the liability as well as the interests of the shareholders in the Company which are valued in money.

The liability of the Company's shareholders is determined by the aggregate shares nominal value so that it can be determined each of the amount of the capital that must be paid in full by each shareholder to the Company. Such liability also determines that the liability of each shareholder is limited to the share ownership of the respective shareholder. Furthermore, the shareholders' interests are closely related to the separation of entities between the shareholders and the Company. The shares owned by each of the shareholders do not represent the total assets owned by the Company. The right owned by the shareholder is not the right to own and control the capital assets operated by the Company, but rather as the right to receive part of the profit gained by the management of the Company's asset (Ridwan Khairandy, 2009).

Secondly, the element under the above definition of the Company's share includes the existence of a mutual covenant between the shareholders on certain terms and conditions. Such mutual covenants are the reflection of the shareholders' common interest from a commercial perspective that drives the shareholders to establish a Company or to own shares in a Company. Such reflection of mutual covenant must be stated in the Company's Articles of Association.

Referring to Article 52 paragraph (2) of the Companies Law, a party may only be regarded as a shareholder and legally rightful owner of the share after such shares is registered in the share registrar under the relevant shareholder's name. Pursuant to Article 50 paragraph (1) of the Companies Law, the Board of Directors of the Company is under the obligation to, among others, manage the Company's shares registrar which shall at least include the information on the shareholders and their respective shares ownership in the Company, including but not limited to any information on any shares pledge or fiducia guarantee over such shares.

Article 51 of the Companies Law further regulate that in addition to the share register, the Articles of Association of the Company may govern provision which provides additional proof of shares ownership to the Company's shareholders. In practice, it is common to find that a Company's Articles of Association regulate that a shareholder shall be issued a share certificate which reflects all the information relevant to the shares' ownership in the Company.

Each share subscribe by a shareholder grants a right to the owner to, among other, attend and cast a vote in a General Meeting of Shareholder, receive dividend payment and the asset margin from liquidation process, and to exercise other rights granted by the prevailing laws and regulations. However, it should be noted that Article 52 paragraph (2) of the Companies Law regulates that the shareholder may exercise its rights only after the ownership has been recorded in the shares' registrar. Additionally, Article 52 paragraph (4) of the Companies Law states that the right granted by each share to the owner may not be divided.

The nature of a Company's shares that grants several rights to the shareholders in accordance to Article 52 of the Companies Law provides a basis that shares are also regarded as a movable object. Such basis is also emphasized under Article 60 paragraph (1) of the Companies Law, whereby a Company's share is a movable object and grants rights as governed under Article 52 of the Companies Law to its owner. Such nature a Company's share thereby gives a flexibility to its owner to transfer the ownership of the shares to other third party without causing any hindrance to the Company's activity. The Companies Law provides that the procedure in shares transfer from a shareholder to another third party may be further governed in the Company's Articles of Association, provided that such procedure must be made in accordance to the prevailing laws and regulations. Furthermore, Article 60 paragraph (2) of the Companies Law also acknowledge that a Company's shares is deemed as a movable object, in which such shares may be encumbered with guarantees, either in the form of shares pledge or via fiducia.

2. Nominal Value of a Company's Share

As governed under Article 31 paragraph (1) of the Companies Law, the Company's authorized capital comprises of the aggregate amount of the share nominal value. Therefore, the capital structure of a Company which are pre-determined in its Articles of Association is calculated against the shares issued by the Company to its founders or its shareholders. Ridwan Khairandy explained that a Company's share is a right on a portion of the Company's assets (Ridwan Khairandy, 2009). Such explanation provides a basis that a Company's share reflects only a portion, not all of the Company's asset, which shall be determined in proportion with the shares' ownership of each shareholder in the Company. According to Gunawan Widjaja, each of the share gives the shareholder the smallest portion of right in the Company (Gunawan Widjaja, 2008).

In reference to the aforementioned, the ownership of a Company's shares also serves as the legal proof that a shareholder has made payment in full to the Company. According to Gunawan Widjaja, shares are the legal proof that a shareholder has made payment in full for its ownership portion in the Company's paid-up capital (Gunawan Widjaja, 2008). The number of the shares subscribed by the shareholders, if multiplied by the nominal value of the share must be equal to the nominal value of the Company's issued and paid-up capital as stated in the Company's Articles of Association. Such definition refers to the provisions under the Companies Law that regulates the ownership aspects on the Company's shares. The obligation of the Company's founders or shareholders to make payment in full as the fulfilment of capital injection to the Company indirectly related to the requirement that each share that represent the Company's authorized capital shall be provided with a nominal value in Rupiah as the official currency in Indonesia. However, Article 49 paragraph (3) of the Companies Law provides an exemption that an issuance of a Company's shares without nominal value is legally possible by referring to the prevailing Indonesian capital market regulations.

Gunawan Widjaja further elaborate an explanation that the nominal value of a Company's share is the value of each share in the Company, which value may vary depending on the consensus of the Company's founders or shareholders (Gunawan Widjaja, 2008). As explained above, such definition is limited by the provision under Article 49 paragraph (2) of the Companies Law whereby the issuance of a Company's share without a nominal value is not legally permitted, except where such issuance is made in accordance with the prevailing Indonesian capital market regulations.

Theoretically, there is no fundamental difference between a Company's share that bears nominal value and a share without nominal value (Ridwan Khairandy, 2009). If a share nominal value is erased and it is stated that such share is an integral part, therefore it is regarded as a share without a nominal value (Ridwan Khairandy, 2009). Such share without a nominal value appears from the effort to separate a Company's share from a relation to a certain price (Ridwan Khairandy, 2009). Such concept of share without nominal value is aimed to eliminate any uncertainty that may appear from the discrepancy between a nominal value, book value as well as the market value of a Company's share (Ridwan Khairandy, 2009). Additionally, such concept is also used in relation to any issues relating to the determination of a Company's authorized capital, and issued and paid-up capital.

The obligation to include a share nominal value under the Companies Law had caused the inability to factually reflect the fair value of a Company's shares after the Company started its business activity for a certain period of time. A company in conducting its business may experience an imbalance between its actual asset value against its nominal share value. Such imbalance is caused either due to the profit gained by the Company or the loss sustained by the Company during its course of business activity. Ridwan Khairandy explained that an imbalance may be caused by a material loss sustained by the Company so that the actual value of the Company's asset is smaller than the Company's shares nominal value (Ridwan Khairandy, 2009). On the other hand, such imbalance may also occur where the Company is able to gain profit so that the actual value of the Company's asset becomes larger than its shares nominal value.

In reference to the above, such imbalance between the Company's actual asset value against the shares nominal value may be measured by evaluating the profitability rate of the Company. The results of a Company's business activities which are determined from the total net profit gained by the Company shall determine the profitability rate of the Company for a certain period of time. According to Mardiyati (2012), the profitability rate has a significant positive impact to the Company's enterprise value (Rahayu & Sari, 2018). Therefore, the profitability rate of a Company shall also determine the Company's enterprise value as well as the fair value of the Company's shares.

3. Valuation of a Company's Shares

As explained above, the implementation of the concept by inserting a nominal value onto a Company's shares under the Companies Law had caused certain legal issues in the event where discrepancy appears between the nominal value of the Company's shares in its Articles of Association no longer reflects to its book value and/or market value. Such discrepancy appears mainly due to the operations of the Company which may give the Company profits or losses for a certain period of time since it started business activities.

Additionally, the provisions under the Companies Law does not provide a comprehensive regulatory framework in imposing mandatory obligation as well as the procedure in conducting a valuation to determine the factual nominal value of the Company's shares. The current regulatory framework only provides mandatory obligation to determine a fair value of the Company's share in the event of capital injection in forms other than money and in the interest of protecting the minority shareholders of the Company.

Under Article 34 paragraph (2) of the Companies Law, the valuation of the Company's share fair value shall be determined by referring to the market value. However, if there is no market value to be referred to, therefore the fair value of the Company's shares shall be determined by valuation carried out by an independent appraiser.

On the other hand, the fair value of the Company's shares is highly dependent on the Company's profitability rate. Under the Companies Law, any information or explanation on the Company's business may only be provided via the Company's annual report which shall include, among others, the Company's financial report. Pursuant to Article 69 paragraph (1) of the Companies Law, the annual report and financial report of a Company must be approved by the General Meeting of Shareholders. Furthermore, it is also regulated that the Company's financial report must reflect the actual condition of the Company, including the liability, capital structure, and the business results of the Company.

In general, the Companies Law does not require that the financial report of the Company to be audited by an independent public accountant, except to companies that are required by law to undergo such financial audit. Therefore, there remains a legal risk whereby a financial report of Company is not subject to the mandatory obligation to be audited by an independent public accountant. Such uncertainty will further affect the legal certainty on the valuation of the Company's shares fair value.

In practice, the valuation of the fair value of the Company's shares is commonly made in an acquisition transaction by a public Company whereby the shares of a Company are the object of the transaction. Article 1 number 7 of the Companies Law defines a Public Company is a Company who conducted an initial public offering in accordance with the prevailing capital market regulations. Therefore, the legal basis where a valuation of fair value of a Company's share may be found under the current capital market regulations in Indonesia.

In this research, the discussion on the valuation of a Company's shares fair value may be referred to a proposed transaction by PT Provident Agro Tbk. (PALM) in transferring 115,498 of its shares in PT Mutiara Agam (a subsidiary company of PALM, hereinafter referred to as MAG). The proposed transaction has been made public by PALM in its Disclosure of Information to the Shareholders dated 1 October 2021(http://www.provident-agro.com/annual/049-OJK-KI_Transaksi_Material.pdf).

Based on such Disclosure of Information, PALM, PT Saratoga Sentra Business (SSB) and PT Provident Capital Indonesia (PCI) as the shareholders of MAG have entered into a Conditional Sale and Purchase Agreement with PT Global Indo Bersaudara, PT Duta Agro Makmur, dan PT Lambang Jaya Agro, in relation to the proposed disposal of 115,498 shares of MAG owned by PALM. Under its Articles of Association, it is stated that MAG's share shall bear the nominal value of Rp.1,000,000 per shares, whereas 115,498 of shares are owned by PALM, and the remaining 2 shares are each owned by SSB and PCI. In aggregate, the total issued and paid-up capital of MAG pursuant to its Articles of Association are equal to Rp.115,500,000,000. Additionally, MAG is the subsidiary company of PALM that has been established since 1982 and conduct business in the palm oil plantation sector.

By reference to the Companies Law, PALM is deemed as a Public Limited Liability Company, whose shares are listed and traded in the Indonesian Stock Exchange. Therefore, PALM is bound to comply with the prevailing capital market regulations in Indonesia. In general, the prevailing Indonesian capital market regulations are found under Law No. 8 of 1995 on Capital Market (Capital Market Law). Pursuant to the Capital Market Law, a Public Company shall be bound by the information disclosure principle which requires such Public Company to inform the public in a proper time all of the Material Information on its business or securities which may affect the investors' decision on its Securities or the Securities' price. The Capital Market Law further define Material Information as an important and relevant information or fact on a certain event or fact which may affect the Securities price in the Stock Exchange and/or among others, the investors' decision.

Further to the abovementioned, the Financial Services Authority (Otoritas Jasa Keuangan, hereinafter referred to as OJK) as the capital market regulator enacted the Financial Services Authority Regulation No. 17/POJK.04/2020 on Material Transaction and Change of Business (POJK 17/2020). The POJK 17/2020 specifically governed the procedure which must be complied by Public Companies in Indonesia in the event of a proposed Material Transaction involving the relevant Public Company. Pursuant to Article 1 number 1 of POJK 17/2020, a Material Transaction is defined as any transaction entered into by a Public Company or its controlled company which fulfils the materiality threshold as governed under POJK 17/2020.

Based on the Disclosure of Information made by PALM, the proposed transfer of 115,498 shares of MAG owned by PALM fulfils the materiality threshold as governed under Article 1 number 1 of POJK 17/2020, whereby such transaction shall be carried out by PALM as a Public Limited Liability Company.

Pursuant to Article 3 paragraph (2) of POJK 17/2020, a transaction is categorized as a Material Transaction if such transaction is, among others, the disposal of a company which, among others, amounts to 20% or more than the total business income of the Public Company. Based on the Disclosure of Information made by PALM, the disposal of 115,498 MAG shares owned by PALM exceeds 20% of PALM's total business income. Therefore, the proposed transaction by PALM fulfils the materiality threshold as governed under POJK 17/2020.

Article 6 paragraph (1)a of POJK 17/2020 further regulates the obligation which must be fulfilled by the Public Company who will execute the Material Transaction. Based on such provision, the Public Company is under the obligation to, among others obtain a fair value of the object of the Material Transaction and/or the fairness of the transaction. Based on the aforementioned, prior to the closing of the transaction, the proposed disposal of 115,498 of MAG shares owned by PALM must obtain a fair value of the shares price from an independent appraiser as appointed by PALM.

Referring to the Disclosure of Information made by PALM, the appointed Appraiser has conducted valuation on the 115,498 MAG shares owned by PALM. Such number of shares are equal to 99,998% of the total issued and paid-up capital of MAG. The valuation of MAG shares by the Appraiser are carried out to disclose the market value of MAG shares, being the object of the proposal transaction as disclosed in the Disclosure of Information. The valuation of such shares was made by using Discounted Cash Flow Methods and Net Asset Adjustment Method against MAG shares. Based on the valuation, the Appraiser stated that the market value of 115,498 MAG shares owned by PALM as of 28 September 2021 are Rp.403,830,000,000.

Based on such valuation, it is found that the there is a significant margin between market value of MAG shares as compared to the nominal amount of the 115,498 MAG shares held by PALM. Under MAG's Articles of Association, the aggregate nominal value of 115,498 MAG shares held by PALM is equal to Rp.115,498,000,000, provided that the nominal value of each MAG share is Rp.1,000,000 per share, as stated in MAG's Articles of Association. On the other hand, based on the valuation as of 28 September 2021, the market value of 115,498 MAG shares is equal to Rp.403,830,000,000. By dividing such total market value of 115,498 market shares against the number of MAG shares owned by PALM, the market value of each MAG share is equal to approximately Rp.3,496,424 per share. Therefore, it is found that there is a margin between the market value of MAG shares against the nominal value of MAG share by approximately Rp.2,496,424 per share. By considering the abovementioned, it may be concluded that the Companies Law has not provided a comprehensive regulatory framework on the valuation of a Company's share to obtain a fair value of such share, except in the event where a transaction involving a Public Company which triggers the obligation to obtain fair valuation of the shares value as regulated under the prevailing Indonesian capital market regulations.

E. Conclusion

The prevailing provisions in the Companies Law has yet to provide a comprehensive regulatory framework in the valuation of a Company's shares fair value, especially in the event which does not involve Public Companies. The adoption of shares with nominal value in the Companies Law also contributes to the issue of legal uncertainty, mainly due to the discrepancy that may appear between the share nominal value against the market value as well as the book value of the Company's shares. Interested parties may only be given legal certainty in the event where a proposed transaction that involves a Company's shares as the object of the transaction which is carried out by a Public Company, being the seller or the purchaser of such Company's shares. In such case, the applicable regulatory framework to ensure that the fair value of a Company's shares is obtained are by complying to the provisions under the Companies Law as well as the prevailing Indonesian capital market regulations.

References

Books

Asyhadie, H. Zaeni, Sutrisno, Budi. Pokok-Pokok Hukum Dagang. Depok: RajaGrafindo Persada, 2018.

Khairandy, Ridwan. Perseroan Terbatas: Doktrin, Peraturan Perundang-undangan, dan Yurisprudensi. Jogjakarta: Kreasi Total Media Yogyakarta, 2009.

Prasetya, Rudhi. Perseroan Terbatas: Teori dan Praktik. Jakarta: Sinar Grafika, 2011.

Widjaja, Gunawan. 150 Tanya Jawab Tentang Perseroan Terbatas, Jakarta: ForumSahabat, 2008.

Journals

I Gusti Ngurah Gede Rudangga, Gede Merta Sudiarta, "Pengaruh Ukuran Perusahaan, Leverage, dan Profitabilitas Terhadap Nilai Perusahaan", E-Jurnal Manajemen Universitas Udayana 05, No.7: 4400

Maryati Rahayu, Bida Sari, "Faktor-Faktor Yang Mempengaruhi Nilai Perusahaan", IKRAITH-HUMANIORA 02, No.1:70

Sri Hermuningsih, "Pengaruh Profitabilitas, Growth Opportunity, Struktur Modal Terhadap Nilai Perusahaan Pada Perusahaan Publik di Indonesia", Buletin Ekonomi Moneter dan Perbankan 16, No.2:128

Regulations

Republik Indonesia, 1995. Undang-Undang No. 8 Tahun 1995 tentang Pasar Modal. Jakarta: Kementerian Sekretaris Negara Republik Indonesia.

Republik Indonesia, 2007. Undang-Undang Nomor 40 Tahun 2007 tentang Perseroan Terbatas. Jakarta: Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia.

Republik Indonesia, 2020. Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja. Jakarta: Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia.

Republik Indonesia, 2021. Peraturan Pemerintah No. 8 Tahun 2021 tentang Modal Dasar Perseroan, Pendaftaran, Pendirian, Perubahan dan Likuidasi Perseroan Yang Memenuhi Kriteria Usaha Mikro dan Kecil.

Republik Indonesia, 2020. Peraturan Otoritas Jasa Keuangan No. 17/POJK.04/2020 tentang Transaksi Material dan Perubahan Kegiatan Usaha. Jakarta: Kementerian Hukum dan Hak Asasi Manusia Republik Indonesia.

Internet

http://www.provident-agro.com/annual/049-OJK-KI_Transaksi_Material.pdf