



The Role of Mandatory Tender Offers in Protecting Minority Shareholders in Public Companies

Maximilian Feivel¹, Lastuti Abubakar².

¹Legal Studies Program, Faculty of Law, Padjadjaran University, Indonesia, maximilianfeivel0902@gmail.com.

²Legal Studies Program, Faculty of Law, Padjadjaran University, Indonesia, lastuti.abubakar@unpad.ac.id.

Corresponding Author: maximilianfeivel0902@gmail.com¹

Abstract: The presence of minority shareholders in the ownership structure of listed companies often places them in a vulnerable position, especially in the event of a corporate takeover. To address this risk, Indonesian capital market law introduces the mandatory tender offer provision as stipulated in POJK No. 9/POJK.04/2018, which requires the new controlling party to purchase shares owned by other shareholders at a fair price. This research aims to legally evaluate the effectiveness of the mandatory tender offer as an instrument of legal protection for minority shareholders. The approach used is normative juridical with library research, examining primary legal materials such as relevant laws and regulations, as well as secondary legal materials in the form of books, scientific journals, and relevant articles. Based on the results of this study, it was found that the mandatory tender offer serves a protective purpose; however, the existing provisions still face challenges in terms of implementation, price transparency, and access to information for minority shareholders. Recommendations include strengthening supervisory mechanisms, updating regulations, and integrating the principles of fairness and accountability into public company governance.

Keyword: Legal Protection, Minority Shareholders, Mandatory Tender Offer.

INTRODUCTION

Indonesia's capital market has grown rapidly in recent decades, providing a variety of opportunities for investors to participate in the country's economic growth. However, despite the potential benefits, minority shareholders are often in a more vulnerable position when a takeover of a listed company occurs (Pujiyanti et al., 2018). In this context, the protection of minority shareholders' rights becomes a very important issue, as minority shareholders often do not have equal control with majority shareholders, especially in strategic decisions that impact the value and existence of the company (Ary Suta, 2000).

To address this challenge, one of the legal instruments introduced is the mandatory tender offer, which is regulated in Financial Services Authority Regulation No. 9/POJK.04/2018 on Takeovers of Public Companies ("POJK 9/2018"). Mandatory tender offer

requires the party that obtains control of the company to make an offer to purchase shares to other investors at a fair and reasonable price. The main objective is to provide an opportunity for minority shareholders to exit their ownership at a fair market price, so that minority shareholders are not forced to remain in a company whose control has passed to a different party (Rusli, 2018).

However, to provide effective protection, how does capital market law regulate mandatory tender offer instruments? Are the existing provisions sufficient to accommodate the protection of minority shareholders based on the OECD Principles of Corporate Governance 2023? Therefore, this study will systematically describe the provisions regarding mandatory tender offer in POJK 9/2018, starting from the definition, legal requirements, implementation process, to price setting, to assess the extent to which this regulation is able to guarantee the rights of minority shareholders in the takeover process of public companies.

METHOD

This research uses a normative juridical approach, which focuses on analyzing the applicable legal norms, both in the form of legislation and legal doctrine. The main focus of this approach is on examining written law as a basis for evaluating the effectiveness of a legal instrument in providing protection. The data collection method is carried out through library research, by examining primary legal materials such as relevant laws and regulations, as well as secondary legal materials in the form of books, scientific journals, and relevant articles.

This approach aims to obtain a comprehensive understanding of the legal principles underlying certain arrangements. The data collected was analyzed qualitatively, using legal interpretation techniques to assess the consistency, adequacy, and effectiveness of norms in achieving legal protection objectives. The results of this analysis are used to formulate normative recommendations towards strengthening regulations and principles of fair and accountable governance.

RESULTS AND DISCUSSION

Regulation of Mandatory Tender Offer as in Indonesian Capital Market Regulation, Especially in POJK 9/2018

A public company is an issuer that has made a public offering of equity securities or a public company. The mandatory tender offer instrument is applied to public companies when there is a takeover of a public company, either directly or indirectly, which results in a change in controllers (Wicaksono, 2021). Based on Article 1 (6) POJK 9/2018, a mandatory tender offer is an offer to purchase the remaining shares of a public company that must be made by the New Controller. From the definition of mandatory tender offer, there are keywords that need to be known as well, namely “New Controller Shareholder”. Based on Article 1 (4) POJK 9/2018, a controller is a party that either directly or indirectly:

- a. owns shares of the Public Listed Company in excess of 50% (fifty percent) of all shares with voting rights that have been fully paid up; or
- b. has the ability to determine, either directly or indirectly, by any means the management and/or policies of the Public Listed Company.

From this definition, it can be concluded that the “New Controller” is a party that takes over a public company by owning more than 50% of the shares of the public company with fully paid voting rights or because it has the ability to determine, either directly or indirectly, in any way the management and/or policies of the public company.

After a takeover, the new controller must announce the event no later than one business day after the takeover is conducted. This announcement must be submitted to the Financial Services Authority (OJK) and published in at least one daily newspaper in Indonesian language with national circulation or through the Stock Exchange website. In addition, based on Article

7 (1) b POJK 9/2018, the new controller is also required to conduct a mandatory tender offer except for certain shares, namely:

- a. shares owned by shareholders who have entered into an acquisition transaction with the new Controller;
- b. shares owned by other parties that have received offers with the same terms and conditions from the new Controller;
- c. shares owned by other parties who simultaneously make a mandatory tender offer or voluntary tender offer for the shares of the same public company;
- d. shares owned by the Major Shareholder; and
- e. shares owned by other controllers of the listed company.

The acquisition must contain minimum information such as the number of shares acquired, the names of the shareholders (if the acquisition is conducted outside the Stock Exchange), the price per share, the total acquisition value, and the total share ownership. In addition, the identity of the new Controller must also be included including name, address, telephone number, electronic mail, as well as business information, business structure, composition of the management and supervisory board, and capital structure if in the form of a business entity. Additional information that must also be submitted includes the purpose of control, a statement if the new controller is an organized group, the identity of the beneficiary if it is not a direct party, affiliation with a public company (if any), and approval from the competent authority if required.

The implementation of a mandatory tender offer begins with the document submission process. According to Article 12 of POJK 9/2018, the new controller is required to submit documents to the Financial Services Authority (OJK) which include a letter of introduction, the text of the mandatory tender offer information disclosure announcement, and other supporting documents. The documents must also be submitted to the public company being taken over.

The submission is made no later than 2 working days after the takeover announcement. The text of the announcement must contain information regarding the background of the Acquisition, the shares to be purchased, the new Controller, the Public Company being acquired, contracts or activities that have a material effect, the terms and conditions of the Mandatory Tender Offer, capital market supporting institutions involved, and other important information. Furthermore, the Financial Services Authority requests changes or additional information on the Mandatory Tender Offer document for the purpose of review or disclosure to the public.

The new Controller is required to submit changes or additional information no later than 5 working days after receipt of the request from the OJK. The new Controller is also required to announce information disclosure in the context of the Mandatory Tender Offer no later than 2 business days after receipt of a letter from the OJK stating that the new Controller can announce information disclosure. The announcement is made through a daily newspaper with national circulation or the Stock Exchange website.

Based on Article 14 of POJK 9/2018, the new controller is obliged to carry out a Mandatory Tender Offer for 30 days starting 1 day after the announcement of information disclosure. Mandatory Tender Offer transactions must be completed by means of delivery of money no later than 12 days after the offer period ends. After that, the shareholders of the public company who will sell their shares in the framework of the tender offer must deliver the shares to the custodian appointed by the new controller. Furthermore, based on Article 8 POJK 9/2018, the new controller may appoint another party to carry out the mandatory tender offer on its behalf. This appointed party must be an entity whose shares are more than 50% owned by the new controller, either directly or indirectly. The party must carry out all procedures in accordance with applicable Financial Services Authority regulations.

Based on Article 16 POJK 9/2018, the new controller must submit a report on the results of the mandatory tender offer to the Financial Services Authority no later than 5 working days

after the completion of the transaction. The report must contain information regarding the number of shares that must be purchased, the implementation period, the transaction completion date, the list of shareholders who sold their shares, the number of shares that have been purchased, and the composition of share ownership before and after the mandatory tender offer.

The share purchase price in the mandatory tender offer is determined under the following conditions:

- a. If the Acquisition is conducted directly over shares listed and traded on the Stock Exchange, the purchase price of the shares shall be at least the average price of the highest daily trading price on the Stock Exchange within the last 90 days prior to the announcement of the Acquisition.
- b. If the Acquisition is conducted directly over shares that are not listed and not traded on the Stock Exchange, the purchase price of the shares is at the lowest at the fair price determined by an appraiser registered with the Financial Services Authority.
- c. If the Acquisition is conducted indirectly over shares that are listed and traded on the Stock Exchange, the purchase price of the shares is at the lowest at the average price of the highest daily trading price on the Stock Exchange within the last 90 days prior to the announcement of the Acquisition.
- d. If the Acquisition is conducted indirectly over shares that are not listed and not traded on the Stock Exchange, the purchase price of the shares is at least equal to the fair price determined by an appraiser registered with the Financial Services Authority.

Mandatory Tender Offer as an Instrument of Legal Protection for Minority Shareholders in the Takeover Process of Public Companies.

One of the fundamental principles in the OECD Principles of Corporate Governance (“OECD”) is the equal treatment of all shareholders, including minority shareholders. In Principle II entitled “The Rights and Equitable Treatment of Shareholders and Key Ownership Functions”, the OECD emphasizes that corporate governance systems should ensure that all shareholders, regardless of ownership, have the same basic rights, and are protected from adverse actions, especially by those who have control over the company. These rights include the right to timely and accurate access to important information, the right to a fair share of the company's results, and the right to sell their shares on unfavorable terms in the event of a change of control, such as a takeover of a public company (G20/OECD, 2023).

The main objectives of the protection of minority shareholders through the mandatory tender offer instrument are to maintain the principles of fairness and equality in the takeover of public companies, ensure transparency of information related to changes in control, provide a fair exit mechanism for investors who do not want to be under new control, and prevent abuse of control by new controlling shareholders. One form of protection from the mandatory tender offer instrument is to provide an opportunity for minority shareholders to sell their shares to the new controlling party. This is very important because:

- a. A takeover of a listed company may change its strategy, business direction or even financial structure which may not necessarily be approved by minority shareholders;
- b. Without a mandatory tender offer instrument, minority shareholders will be trapped in a company with policies that are not in line with investment expectations; and
- c. Can be used as an exit opportunity to prevent minority shareholders from losses due to uncontrollable changes.

Therefore, the mandatory tender offer is a bridge so that minority shareholders do not become victims of the new controlling shareholders' decisions that are not agreed upon (Artauli, 2022). Furthermore, based on POJK 9/2018, it has determined the share purchase price in the framework of the mandatory tender offer process, namely:

- a. If the Acquisition is conducted directly over shares listed and traded on the Stock Exchange, the purchase price of the shares shall be at least the average price of the highest daily trading

- price on the Stock Exchange within the last 90 days prior to the announcement of the Acquisition.
- b. If the Acquisition is conducted directly over shares that are not listed and not traded on the Stock Exchange, the purchase price of the shares is at the lowest at the fair price determined by an appraiser registered with the Financial Services Authority.
 - c. If the Acquisition is conducted indirectly over shares that are listed and traded on the Stock Exchange, the purchase price of the shares is at the lowest at the average price of the highest daily trading price on the Stock Exchange within the last 90 days prior to the announcement of the Acquisition.
 - d. If the Acquisition is conducted indirectly over shares that are not listed and not traded on the Stock Exchange, the purchase price of the shares is at least equal to the fair price determined by an appraiser registered with the Financial Services Authority.

A fair price is a share value that is determined fairly and objectively, reflects market conditions and does not disadvantage any party, especially minority shareholders. In the mandatory tender offer provision, the fair price principle becomes a key element to ensure that all shareholders regardless of their bargaining position get a fair opportunity to exit share ownership in the event of a change in control of the company. From this provision, we can also know that there is legal certainty for minority shareholders of public companies when there is a change of control of a public company (G20/OECD, 2023).

Furthermore, in the context of capital markets and corporate governance, transparency and information disclosure means providing complete, accurate, timely and easily accessible information to all shareholders, especially minority shareholders. It is enforced so that minority shareholders can make investment decisions rationally and based on adequate information (G20/OECD, 2023). This is OECD Principle IV, a crucial element in the implementation of a mandatory tender offer.

The regulation requires the new controller to publicly disclose its identity, the purpose of the takeover, future business plans, the price of shares offered, and the mechanism for implementing the mandatory tender offer. POJK 9/2018 contains provisions regarding transparency and information disclosure related to mandatory tender offers. The new controlling party conducting the mandatory tender offer must disclose important information. Minority shareholders have the right to know who will control the company, including its legal and business background.

This is very important to anticipate conflicts of interest, negative reputation or violations of the law. Minority shareholders must also know the intention of the new controller to take over the public company (whether the company will be delisted, merged, restructured, and so on). This will affect the decision of minority shareholders to release their shares or stay put.

Transparency and disclosure of information means providing information for minority shareholders to make informed decisions. Minority shareholders are generally not involved in takeover negotiations, so they can only rely on public information. Without clear transparency, minority shareholders may sell their shares in ignorance of the correct information and be unaware of the risks or planned changes in the company's direction.

Therefore, disclosure ensures that access to information is not only owned by institutional shareholders (institutional investors) but also by minority shareholders. Furthermore, when the mandatory tender offer process is not transparent, there is room for insider trading to manipulate prices, and misuse of non-public information (Rivelino, Reyhan, et al, 2023). This is detrimental to small investors who do not have such access.

With formal announcements and open transparency, all market participants have equal access to information, thereby enhancing market integrity, preventing trading based on insider information and maintaining share price stability. In addition, with transparency the new controlling party cannot hide its strategic intentions and must take responsibility for the

business plan promised at the outset. This indirectly creates reputational and legal pressure for the controlling party to act in the interests of all shareholders.

CONCLUSION

Based on the analysis and discussion above, there are several steps that can be taken to strengthen the implementation of mandatory tender offer as an instrument of legal protection for minority shareholders in the process of taking public companies in Indonesia. First, the principles of transparency and information disclosure in OECD Principle IV must be further strengthened in MTO regulations.

Although POJK 9/2018 requires the new controller to disclose the identity and purpose of the takeover, more comprehensive and timely information disclosure should be made to ensure that minority shareholders can make rational and informed decisions. In the regulation of POJK 9/2018, Article 12 (4) letter h (1) stipulates that the text of the announcement of the mandatory tender offer information disclosure contains “additional information necessary so that the information disclosure in the context of the mandatory tender offer is not misleading”. The provision should be clarified such as the company's long-term plan after the takeover, potential restructuring, and new policies to be implemented, need to be disclosed in a more transparent manner. This is in accordance with OECD Principle IV which requires companies to disclose information accurately, timely and easily accessible to all shareholders, so that they can make informed decisions.

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