

LEGAL ASPECTS OF MERGER STUDY ON PT BANK TABUNGAN PENSIUNAN NASIONAL TBK

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Abstract

Mergers and acquisitions have been the driving force of the world economy and have played an important role in the strategies of many companies. To create a healthy, strong, and competitive banking structure, several steps are needed to consolidate banking sector. To realize this vision, Financial Services Authority (OJK) encourages investors and the banking industry to consolidate, including through a merger, one of those is the Merger of BTPN and SMBCI. The purpose of this article is to examine legal aspects in the merger process and procedure as well as the main issues relating to the application of principles in the protection of employees and minority shareholders. The method used to address the problems in this article is normative legal research, which shows that the merger is a horizontal merger by applying the principles of fair dealing and appraisal rights and not forgetting to apply the principle of employee protection.

Keywords: *Acquisitions; Bank; Capital Market; Merger.*

A. Research Background

Economic globalization, in addition to providing severe challenges, opens broad opportunities in the framework of developing a country's economic capacity. Development, with three main pillars namely economic, social, and political is a large design that is complex and requires seriousness of handling. In every country the existence of the capital market is fundamental in economic development. The capital market, in addition to functioning as a means to collect and allocate public funds, also has an equally important role for the development of the business world which will further support overall economic development.

The capital market as an alternative funding for the development of the business world has a strategic role in the framework of implementing national development, also functions as an investment tool for investors who have excess funds. The development of the capital market in Indonesia is currently running very rapidly so that it is expected to be able to compete in a healthy manner and align with other capital markets in the world.² In addition, the capital market has an important role in the financial

Hukum Atas Insider Trading Sebagai Kejahatan Asal (*Predicate Crime*) Dalam Tindak Pidana Pencucian Uang", *Mercatoria*, Vol. 5 No. 2, 2012, p. 66.

² M. Irsan Nasarudin, dkk., 2014, *Aspek Hukum Pasar Modal Indonesia*, Kencana Prenadarmid Group, Jakarta, p. V.

sector, because the capital market offers new alternatives for businesses to obtain sources of business financing as well as adding new alternatives for investors to invest outside banking and other forms of investment.³ The capital market is part of the financial market.⁴ The capital market can be defined as a market that trades a variety of long-term financial instruments (securities), both in the form of debt and equity issued by private companies,⁵ an alternative means of raising funds for companies and as an investment vehicle for the public (investors), which includes securities trading transactions and public offerings from public companies (issuers) to the investor community.⁶

The growth of the capital market in Indonesia is very important related to national economic development so that in its development itself receives serious attention from the national government. The development of transaction activities in the stock exchange, which is addressed by an index, can be used as a measure for the overall economic condition of a country.⁷ This can be

seen from the formation and issuance of government policies in the form of regulations regarding the capital market. The government issued Law No. 8 of 1995 concerning Capital Markets, Government Regulation No. 45 of 1995 concerning the implementation of activities in the capital market, and Government Regulation No. 46 of 1995 concerning procedures for auditing in the capital market to support investment development in Indonesia.

Talking about the capital market is certainly inseparable from the Initial Public Offering (IPO), Right Issue, Tender Offer, Good Corporate Government (GCG), Corporate Social Responsibility (CSR), Conflict of Interest, Mergers, Acquisitions, Consolidation, related to the Professional Association of Legal Consultants Capital Market (HKHPM), Capital Market Fraud (Fraud), Market Manipulation, Insider Trading or Going Private and so on. In this article, we will only focus on Mergers related to capital markets, which we often refer to as "Merger".

In Article 1 number 9 of Law No. 40 of 2007 concerning Limited Liability Companies (Company Act), a Merger is a legal act carried out by one or more companies to merge with other existing Companies which results in the assets and liabilities of the merging company being transferred due to the law to the Company that received the merger and then the status of the Company's incorporated legal entity ends due to the

³ Suradiyanto, "Aspek Yuridis Pasar Modal Sebagai Sarana Pembiayaan Dan Pengembangan Perusahaan", *Yuriska Jurnal Ilmiah Hukum*, Vol. 10, No. 1, 2018, p. 22.

⁴ Parno, "Sistem Kerja dan Prinsip Pasar Modal Syariah", *Mazahib Jurnal Pemikiran Hukum Islam*, Vol. 12, No. 2, 2013, p. 125.

⁵ Tandi Pada Palayukan, dkk., "Analisis Terhadap Larangan Praktik Insider Trading Di Pasar Modal", *USU Law Journal*, Vol. 11, No. 2, 2013, p. 92.

⁶ Fisuda Alifa Mimiandra Radinda, dkk., "Praktik Insider Trading Sebagai Bentuk Pelanggaran Prinsip Keterbukaan Informasi Dalam Pasar Modal Di Indonesia", *Jurnal Cakrawala Hukum*, Vol. 11, No. 1, 2020, p. 42.

⁷ Hamud M Balfaz, 2012, *Hukum Pasar Modal Di Indonesia*, PT. Tata Nusa, Jakarta, p. 4.

law.⁸ In Article 1 number 2 POJK 74/2016, Business Combination is a legal act carried out by 1 (one) or more companies to merge with other existing companies which results in assets, liabilities, and equity of companies that merged to switch because of the law to companies that accept the merger and subsequently the legal status of the merging company ends due to law.⁹

Business actors as economic subjects always try to maximize profits in running their businesses (maximizing profit). Maximizing profits will be sought by business actors in various ways, and one of the ways that can be taken by businesses is the merger method.¹⁰ Profit maximization is expected to occur because in theory, a merger can create efficiency so that it can reduce the production costs of a merged company.¹¹

From the point of view of the types of company activities involved in a merger, there are several types of mergers, as follows:¹²

1. Horizontal Merger

Is a combination of one company with another company whose operations are still in the same line of business

⁸ Law No. 40 of 2007 regarding Limited Liability Companies (Republic of Indonesia State Gazette of 2007 Number 106), Article 1 number 9.

⁹ Regulation of the Financial Services Authority Number 74/Pojk.04/2016 regarding Business Combinations or Business Mergers of Open Companies (Supplement to the State Gazette of the Republic of Indonesia Number 5997), Article 1 number 2.

¹⁰ Andi Fahmi Lubis, dkk., 2017, *Hukum Persaingan Usaha Buku Teks Edisi Kedua*, KPPU, Jakarta, p. 266.

¹¹ Binoto Nadapdap, 2018, *Hukum Perseroan Terbatas Berdasarkan Undang-Undang No. 40 tahun 2007 Edisi Revisi*, Permata Aksara, Jakarta, p. 201.

¹² *Ibid.*, p. 209 -212.

and that merges to produce similar products.

2. Vertical Merger

Is a merger carried out by a company engaged in the same field or business but different in the level of operation.

3. Conglomerate Merger

Mergers are carried out by companies that do not have a relationship either vertically or horizontally.

4. Congenitive Merger¹³

Is a merger of 2 (two) or more companies whose business activities are of the same type or in the same industry, but do not produce the same product and there is no supplier relationship.

In this article we are going to describe the merger behavior at PT. Bank Tabungan Pensiunan Nasional Tbk ("BTPN") and PT. Bank Sumitomo Mitsui Indonesia ("SMBCI"). We need to know in advance about the two companies in which BTPN is a bank headquartered in Jakarta with branches in 263 cities in Indonesia. BTPN offers a variety of banking services through its six business units:¹⁴

1. BTPN Purna Bakti which focuses on pensioners and pre-pensioners segments;
2. BTPN Mitra Usaha Rakyat which serving small entrepreneur customers;

¹³ M. Yahya Harahap, 2016, *Hukum Perseroan Terbatas*, Sinar Grafika, Jakarta, p. 484.

¹⁴ BTPN, "Ringkasan Rancangan Penggabungan PT Bank Tabungan Pensiunan Nasional Tbk dan PT Bank Sumitomo Mitsui Indonesia", <https://www.btpn.com/pdf/merger/ringkasan-rancangan-merger-btpn-smbci.pdf>, accessed 10 Mei 2020.

3. BTPN Mitra Bisnis which focuses on the Informal Small and Medium Enterprises segment (i-SME);
4. BTPN Sinaya, focus on the growth of third-party funds from the middle and upper income segment of institutions and individuals;
5. BTPN Wow! that provides Smart Practice Services (Without Office Financial Services in the Framework of Inclusive Finance) which aims to open access to financial services for people who have not been served by the banking industry; and
6. Jenius, which is an application designed and developed to help answer the needs of urban customers who are more fluent in using smartphones.

SMBCI has positioned itself as a leading mixed bank with a major area in corporate banking services. Historically, SMBCI has focused on large-scale Japanese companies in Indonesia as its customers, but in recent years, SMBCI has sought to expand its business to Indonesian, SOE and Multinational Company.¹⁵ The Bank's Board of Directors and the Board of Commissioners and SMBCI found the draft Merger is the best option for all stakeholders. The Board of Directors and the Board of Commissioners of BTPN and SMBCI believe that now is the right and profitable time to implement

the Merger Plan. Indonesia's economic situation remains promising where the regulator provides support for the development of the banking sector in general. The Directors and Board of Commissioners of the two banks are of the opinion that the two banks are in a healthy condition and are ready to unite the strengths of both banks and operate more effectively as an entity to achieve benefits.

According to the background stated above, this article focuses on the description of the Merger in the perspective of the capital market law against PT. Bank Tabungan Pensiunan Nasional Tbk and PT. Bank Sumitomo Mitsui Indonesia. There are 3 (three) main points are going to be addressed. Firstly, the procedure for implementing the Merger, in the perspective of capital market law against BTPN and SMBCI. Secondly, the legal protection of minority shareholders in the implementation of the merger of BTPN and SMBCI. Thirdly, the employee rights protection in the implementation of the merger of BTPN and SMBCI. Furthermore, this article is expected to find a juridical approach related to Mergers, in the perspective of capital market law and its relationship with other positive laws that also govern the provisions of mergers.

B. Research Methods

This type of research in legal research is normative legal research.¹⁶ Normative legal research is research

¹⁵ *Ibid.*

¹⁶ Peter Mahmud Marzuki, 2011, *Penelitian Hukum*. Kencana Prenada Media Group, Jakarta, p. 35.

that provides a systematic explanation of the rules governing a particular legal category, analyzes the relationship between regulations explaining areas of difficulty and possibly predicting future development).¹⁷ The type of data in this study is the type of secondary data and tertiary data. Primary legal material is an authoritative legal material, meaning that it has authority.

The primary legal material used consists of statutory regulations, official records, minutes in the making of legislation and judges' decisions. In this study the primary legal material used was Law No. 40 of 2007 concerning Limited Liability Companies ("Company Act"); Law No. 13 of 2003 concerning Manpower ("Manpower Act"); Republic of Indonesia Government Regulation Number 27 of 1998 Concerning Merger, Consolidation, and Acquisition of Limited Liability Companies ("PP 27/98"); Law No. 7 of 1992 concerning Banking jo. Law No. 10 of 1998 concerning Amendments to Law No. 7 of 1992 concerning Banking ("Banking Law"); Law 8 of 1995 concerning the Capital Market ("Capital Market Law"); Government Regulation No. 28 of 1999 concerning Mergers, Consolidations, and Acquisitions of Banks ("PP 28/99"); Financial Services Authority Regulation No. 74/POJK.04/2016 concerning Merger or Business Merger of Open Companies ("POJK 74/2016"); Financial Services Authority Regulation No. 31/POJK.04/2015 concerning Disclosure of Information or Material Facts by

Issuers or Public Companies ("POJK No.31/2015"); Regulation No. IX.E.1 concerning Affiliated Transactions and Conflicts of Interest of Certain Transactions, Attachment to the Decision of the Chairman of the Capital Market and Financial Institution Supervisory Agency No. Kep-412/BL/2009 dated November 25, 2009 ("Regulation No.IX.E.1"); Articles of Association of BTPN and SMBCI; Merger Deed No.10 dated October 5, 2018, which was made before Ashoya Ratam, S.H., MKn, Notary in South Jakarta ("Merger Deed").

Secondary legal material is legal material that provides an explanation of primary legal material that can be obtained from scientific books, lecture material, thesis material, textbooks because textbooks contain basic principles of legal science and the classical views of scholars who have high qualifications and other documents related to the problems in writing this paper. Tertiary legal material is material that provides instructions and explanations for primary and secondary legal materials which can be obtained from the legal dictionary and or from the Indonesian General Dictionary.

C. Research Results and Analysis

1. Merger Implementation Procedure and Merger Types Applied in BTPN and SMBCI

We need to know in advance how the arrangements related to the merger procedure, while the general conditions for this merger are regulated in Article

¹⁷ *Ibid.*, p. 32.

126 of the Company Act jo. Article 4 paragraph (1) PP 27/98, that the legal act of Merger, Consolidation, Acquisition, or Separation must pay attention to the interests of: the Company, minority shareholders, the Company's employees; Creditors and other business partners of the Company; and Community and fair competition in doing business. The conditions stated above, are "cumulative", so that even one of them is violated, resulting in the merger can not be implemented.¹⁸

After fulfilling the above conditions, the Company must prepare a merger plan. The draft merger is regulated in Article 123 paragraph (1) and paragraph (3) of the Company Act jo. Article 7 paragraph (1) PP 27/98, namely: the Board of Directors of the company which will merge and who receives the merger compile the Merger Draft; The proposed Merger Draft made by each Director must obtain the approval of their Board of Commissioners.¹⁹

In Article 123 paragraph (2) of the Company Act, the Draft of Merger must contain at least:²⁰

- a. The name and domicile of each Company in the Merger;
- b. The reasons and explanations of the Board of Directors of the Companies in the Merger and the Merger requirements;

- c. Procedures for the valuation and conversion of shares in the merging Company into shares of the surviving Company;
- d. The draft for any amendment of the articles of association of the surviving Company;
- e. The financial reports contemplated in Article 66 paragraph (2) subparagraph a covering the last 3 (three) financial years from each of the Companies in the Merger;
- f. The plans for continuing or terminating the business activities of the Companies in the Merger;
- g. A pro forma balance sheet of the surviving Company in accordance with accounting principles generally applied in Indonesia;
- h. Method of settlement of the status, rights and obligations of the members of the Board of Directors, Board of Commissioners and employees of the merging Company;
- i. Method of settlement of the rights and obligations of the merging Company against third parties;
- j. Method of settlement of the rights of shareholders who do not agree to the Merger of the Companies;
- k. Names of the members of the Board of Directors and Board of Commissioners and the wages, honoraria, and allowances for members of the Board of Directors and Board of Commissioners of the surviving Company;

¹⁸ M. Yahya Harahap, *Op cit.*, p. 486.

¹⁹ Law No. 40 of 2007, Article 123 paragraph (1) and (3) jo. Government Regulation No. 27 of 1998 regarding Merger, Consolidation, and Acquisition of Limited Liability Companies (Republic of Indonesia State Gazette of 1998 Number 40), Article 7 paragraph (1).

²⁰ Law No. 40 of 2007, Article 123 paragraph (2).

- l. Estimated period for implementation of the Merger;
- m. Report on the circumstances, development and results achieved of each of the Companies in the Merger;
- n. Main activities of each Company in the Merger and changes which occurred in the current financial year; and
- o. Details of problems arising during the current financial year which affected the activities of the Companies in the Merger.

In addition to these requirements, Article 123 paragraph (4) of the Company Act adds one more requirement for certain companies that will merge their conditions, it is necessary to obtain "approval" from "relevant government agencies".²¹ According to the explanation in this article, what is meant by certain companies that require approval requirements from related government agencies is a company that has a "special business field". Among other things, bank financial institutions and non-bank institutions. While what is meant by related institutions, among others are *Bank Indonesia* ("BI") for merging banking companies.²²

Then the merger draft is requested for approval from the Board of Commissioners of each merging company. If it has been approved by the respective Board of Commissioners,

then the draft is submitted to each of the Company's GMS for approval.

Provisions regarding this GMS can be found in Article 89 paragraph (1) of the Company Act which states that the GMS to approve the Merger may only be held if in the meeting at least $\frac{3}{4}$ (three quarters) of the total number of shares with voting rights are present or represented in the GMS and the resolution shall be lawful if approved by at least $\frac{3}{4}$ (three quarters) of the number of votes cast, unless the articles of association specify a quorum to be present and/or provisions concerning the requirements for adoption of GMS resolutions which are higher. If the first GMS does not reach or fails to reach the quorum, a second GMS can be held with a minimum attendance quorum at least $\frac{2}{3}$ (two thirds) of the total number of votes with voting rights are present or represented in the GMS and the resolution shall be lawful if approved by at least $\frac{3}{4}$ (three quarters) of the number of votes cast, in the event that the quorum for the second GMS is not achieved²³, the Company may apply to the Chief Judge of the District Court whose jurisdiction covers the Company's domicile to determine the quorum for a third GMS at the request of the Company.²⁴

In the Article 127 paragraph (2) of the Company Act, The Boards of Directors of Companies in Mergers must publish an abstract of the draft in at least 1 (one) Newspaper and publish

²¹ Law No. 40 of 2007, Article 123 paragraph (4).

²² Law No. 40 of 2007, Elucidation of Article 123 paragraph (4).

²³ Law No. 40 of 2007, Article 89 paragraph (1) and paragraph (3).

²⁴ Law No. 40 of 2007, Article 86 paragraph (5).

it in writing to the employees of the Company in the Merger no later than 30 (thirty) days before the invitations to the GMS.²⁵ The announcement also includes a notification that interested parties can obtain the Merger draft at the Company's office as of the date of the announcement until the date the GMS is held. The purpose of this announcement according to the Elucidation of Article 127 paragraph (2) of the Company Act is to provide an "opportunity" for the parties concerned to know the proposed Merger. To them this law gives the right to file an "Objection" if they feel their interests have been impaired.²⁶

Based on Article 128 paragraph (1) of the Company Act *juncto* Article 129 of the Company Act Merger Plan that has been approved GMS poured into the Merger deed made before a notary public in the Indonesian language. A copy of the Deed of Merger of the Company is attached to the submission of application to obtain the approval of the Minister; and submitting notification to the Minister regarding amendments to the articles of association. If the Merger of the Company is not accompanied by changes to the articles of association, a copy of the Merger deed must be submitted to the Minister to be recorded in the Company's register.²⁷

After the draft merger has been poured into the deed of Merger, pursuant to Article 133 Paragraph (1) of the

Company Act Board of Directors who receive the Merger shall announce the result of the Merger within 1 (one) Newspaper or more within a period not later than 30 (thirty) days from the date of entry into force Merging.²⁸

Then how the practice of the merger of BTPN and SMBCI can be seen from the Merger Deed between the two Companies. Whereas based on the Deed of Merger, the Directors of BTPN and SMBCI have jointly prepared the Merger Draft (as defined below) as referred to in Article 123 Paragraph (1) of the Company Act (as defined below) which has subsequently been approved by each Board of Commissioners BTPN and SMBCI are as successive as it turns out in: i. BTPN Board of Commissioners Circular Decree No. PS/BOC/010/VII/2018 dated August 1, 2018; ii. Circular Decision of the Board of Commissioners as a Substitute for the Decision Taken in the SMBCI Board of Commissioners Meeting No. 026/BOC/Circular/VIII/2018 dated August 1, 2018. The proposed Merger is used as the basis for the preparation of the Merger Deed.

Whereas the Draft Merger mentioned above on August 1, 2018 has been signed by each of the Directors of BTPN and SMBCI. To comply with laws and regulations, including but not limited to: the Company Act; PP 27/98; PP 28/99; POJK 74/2016 BTPN and SMBCI have taken the following actions:

- a. On August 2, 2018, the Directors of BTPN and SMBCI jointly

²⁵ Law No. 40 of 2007, Article 127 paragraph (2).

²⁶ Law No. 40 of 2007, Elucidation of Article 127 paragraph (2).

²⁷ Law No. 40 of 2007, Article 128 paragraph (1) jo. Article 129.

²⁸ Law No. 40 of 2007, Article 13 paragraph (1).

- announced a summary of the Merger Draft through 1 (one) Indonesian language daily newspaper, *Bisnis Indonesia* and 1 (one) English daily newspaper, the Jakarta Post, on the 2nd August 2018;
- b. On August 2, 2018, each of the Directors of BTPN and SMBCI announced formally the proposed Merger (as defined below) BTPN and SMBCI to their employees;
 - c. Submitting a Statement of Business Combinations including the Draft Merger, to the Financial Services Authority ("OJK") on August 2, 2018 with letter No. S.201/DIR/CCS /VIII /2018, dated August 2, 2018 and OJK has submitted a statement of no further response and the Business Merger Statement has become effective in accordance with the Statement of Effective Merger from OJK Capital Market Supervisor No. S-138/D, 04/2018 dated October 1, 2018;
 - d. On September 5, 2018 and October 3, 2018, the Directors of BTPN and SMBCI jointly announced Additional Information and/ or Amendments to the Merger Draft summary through 1 (one) Indonesian language daily newspaper, *Bisnis Indonesia* and 1 (one) newspaper the English language daily, the Jakarta Post, respectively on September 5, 2018 and October 3, 2018.

Whereas until the time limit specified in the legislation in force, which is 7 days prior to the invitation of the BTPN and SMBCI EGMS, there were no objections raised against the proposed merger of SMBCI into BTPN by the creditors of BTPN and SMBCI. Then in the BTPN EGMS and the SMBCI EGMS have approved the Draft Merger and the Deed of Merger concept as evidenced in the Minutes of the Extraordinary General Meeting of Shareholders of BTPN on October 5, 2018 and Minutes of the Extraordinary General Meeting of Shareholders of SMBCI on October 5, 2018, which made by a notary.

Furthermore, based on Article 5 of the Merger Deed, the actions prior to the effective date of the merger are:

- a. Announcement, where the Directors of BTPN and SMBCI have jointly announced the Summary of the Merger Draft together with the changes and/ or additions through 1 (one) Indonesian language daily newspaper, *Bisnis Indonesia* and 1 (one) English language daily newspaper, the Jakarta Post, on August 2, 2018, September 5 and October 3, 2018. The Merger Plan has also been announced to all BTPN and SMBCI employees, respectively on August 2, 2018;
- b. Requirements according to the Capital Market regulations BTPN have fulfilled all the requirements that apply to the Capital Market in connection with the Merger, as required in capital market

- regulations, including obtaining an Effective Statement of Merger from OJK Capital Market Supervisor No. S-138/D, 04/2018 dated October 1, 2018;
- c. Requirements according to banking regulations BTPN and SMBCI will fulfil all applicable requirements in the field of banking in connection with the Merger, as required in banking regulations, including obtaining a merger permit from the OJK (Department of Licensing and Banking Information).
 - d. Submission to the Minister of Law and Human Rights, i.e. after obtaining approval from the Japan Financial Services Agency (JFSA) as referred to in Article 10 point (e) of the Merger Deed, the BTPN Board of Directors will submit the Deed of Merger and amendments to the BTPN's articles of association to the Minister of Law and Human Rights Humans, then announce the disclosure of information to the public in connection with affiliated transactions, 2 days after the Effective Date of Merger as stipulated in *Bapepam-LK* Regulation No. IX.E.1, Attachment to Decree of the Chairman of *Bapepam-LK* No. Kep-412/BL/2009 concerning Affiliated Transactions and Conflicts of Interest of Certain Transactions.

Then looking at the point of view of the types of company activities involved in a merger, there are several types of mergers or mergers, viz:²⁹

a. Horizontal Merger Horizontal

Is a combination of one company with another company whose operations are still in the same line of business and that merges to produce similar product.

b. Vertical Merger

Is a merger carried out by a company engaged in the same field or business but different in the level of operation.

c. Conglomerate Merger

Mergers are carried out by companies that do not have a relationship either vertically or horizontally.

d. Congenitive Merger³⁰

Is a merger of 2 (two) or more companies whose business activities are of the same type or in the same industry, but do not produce the same product and there is no supplier relationship.

BTPN which is engaged in Banking and SMBCI which also acts in the banking sector, based on the facts, is linked to the theory of the merger type, both Banks are included in the Horizontal Merger classification because of the combination of one company with another company whose operations are still in the same line of business namely in the field of banking and combining it produces similar products that are even now in the banking field.

²⁹ Binoto Nadapdap, *Op.cit.*, p. 209-212.

³⁰ M. Yahya Harahap, *Op.cit.*, p. 484.

2. Protection of Minority Shareholders in The Implementation of Merger of BTPN and SMBCI

In an effort to protect the majority shareholder, the application of the principle of one man one vote has actually been regulated in Law Number 4 of 1971, which amended Article 54 of the KUHD. This principle places minority shareholders as a party prone to exploitation. Only in certain cases, that is, what is included in the dangerous area, special attention is given by law to protect minority shareholders. Capital Market Law introduces the principle of special vote, where the application of this principle is carried out with the following program:³¹

a. Single Majority Principle

In this case the majority holder is required to abstain from voting.³² One version of this principle is the "layered election system", which for example was introduced by Decree of the Chairman of *Bapepam* No. Kep.01/PM/ 1993, dated January 29, 1993, which has now been replaced by *Bapepam* and LK Regulations Number IX.E.1 regarding Affiliated Transactions and Conflicts of Interest in Certain Transactions. The principle of multi-layered voting is operationalized by holding twice the vote. In the first vote, only shareholders who did not

have conflicting interests or only minority shareholders were allowed to vote. Meanwhile, shareholders who conflict with interests/majority shareholders may only continue the meeting if the decision of the minority shareholders accepts the proposal concerned, namely proposals to conduct transactions that conflict with interests.

b. Super Majority Principle

In this case voting conducted at the GMS requires more than a simple majority (51%) to win the vote. For example, the application of the principle of super majority requires voting of 2/3 votes, even up to 3/4 votes. A decision from a meeting cannot be taken if the number of consenting ballots is less than the number of percentages. In practice, standard Limited liability Company statutes generally apply the principle of super majority in certain matters that may be crucial for all shareholders, including minorities. The Company Act applies the principle of super majority, both to matters that are self-determined in the company's articles of association, or to activities that have been determined themselves by law, for example if the company changes its articles of association, mergers, acquisitions, consolidations, and purchases stock returns.

Referring to the summary of the BTPN and SMBCI Merger Plan, on 2 August 2018, Assegaf Hamzah & Partners

³¹ Asmawati, "Perlindungan Hukum Pemegang Saham Minoritas Akibat Merger Bank", *Jurnal Ilmu Hukum Jambi*, Vol. 5, No. 2, 2014, p. 24.

³² Dani Amran Hakim, "Perlindungan Hukum Terhadap Kepentingan Para Pihak Di Dalam Merger Bank", *Fiat Justitia Jurnal Ilmu Hukum*, Vol. 9, No. 3, 2015, p. 403.

was appointed to act as an independent legal consultant for and on behalf of BTPN in connection with the proposed merger between BTPN and SMBCI. Assegaf Hamzah & Partners provided Analysis that the merger between BTPN and SMBCI was included in the category of Affiliated Transactions as referred to in Regulation No. IX.E.1 because at the time of the merger, BTPN and SMBCI are directly controlled by the same party, Sumitomo Mitsui Banking Corporation ("SMBC"). However, the Merger Transaction is not a Conflict of Interest Transaction as referred to in No. IX.E, so that no Independent GMS is needed. On 6 February 2019 BTPN has made Information Disclosure Regarding Affiliated Transactions aimed at fulfilling Regulation No. IX.E.1 and POJK No.31/2015.

In addition to the principle of special vote and the principle of super majority, the protection of shareholders in relation to the merger can be seen with the principle of derivative suit and fair dealing.³³ This is consistent with the protection to minority shareholders that have been mandated by the Company Act.

The principle of Derivative Suit is reflected in the provisions of Article 61 paragraph (1) of the Company Act, which is that each shareholder has the right to file a lawsuit against the Company in a district court if it is harmed because of the Company's actions which are considered unfair and

without reasonable reason as a result of the resolution of the GMS, Directors, and/or board of Commissioners.³⁴

Then, the application of the principle of fair dealing is in the provisions of Article 126 of the Company Act, that in a legal act mergers must pay attention to minority shareholders.³⁵ According to Article 126 paragraph (2) of the Company Act, shareholders who do not agree with the GMS decision concerning Merger are allowed to exercise their rights as referred to in Article 62 of Company Act³⁶, namely in the form of the right to request the Company to buy its shares at a fair price. In the event that the shares requested to be purchased exceeds the limit of the share repurchase provisions by the Company as referred to in Article 37 paragraph (1) letter b, the Company shall endeavor to have the remaining shares purchased by a third party.³⁷

The principle of fair dealing is very closely related to the existence of appraisal rights, namely the form of protection of shareholders who do not agree with the merger, but their voice is not sufficient to hinder the implementation of the merger, therefore the merger is still carried out and the shareholders are forced to accept the merger. Therefore, the law considers that special attention and treatment is needed for them. This special treatment is realized by what is called appraisal rights.³⁸

³³ Adrian Sutedi, 2015, *Buku Pintar Perseroan Terbatas*, Raih Asa Sukses, Jakarta, p. 201.

³⁴ Law No. 40 of 2007, Article 61 paragraph (1).

³⁵ Law No. 40 of 2007, Article 126.

³⁶ Law No. 40 of 2007, Article 126 paragraph (2).

³⁷ Law No. 40 of 2007, Article 62.

³⁸ Adrian Sutedi, *Op cit.*, p. 197.

Some theories support the principle of appraisal rights as a protection for minority shareholders in a merger. The theory, among others³⁹:

- a. **Defeated Expectation Theory.** This theory explains that if a person already has shares in a company engaged in a particular field, it cannot be forced to own shares in a company that is already different as a result of the merger, even though he is only a minority shareholder. Therefore, rather than being forced to be in a company he does not like, he would rather go out and look for a company he likes.
- b. **Locus Poenitentiae Theory (Regret).** This theory says that the existence of appraisal rights means that the management of the merger deal will be extra careful so that they are encouraged not to do a merger which is detrimental to the company/shareholders. So, the enforcement of this appraisal rights law institution can be a means of checking, but not too interfering in management matters that might make the wrong decision in carrying out the merger.
- c. **Compensation Theory (Compensation).** This theory says that there is still a possibility of the shareholders being harmed because of the merger's legal institutions. Therefore, the

application of appraisal rights for the affected shareholders, namely by buying back shares and those who do not approve the merger, can be a fair compensation for the losses.

- d. **Consistency Theory.** This theory explains that the law turns out to be inconsistent in applying appraisal rights. Because many other corporate changes besides mergers, changes in the articles of association and so on are also potential to harm the interests of minority shareholders. For example, management drastically changed the direction of the company's business, which in this case was not given appraisal rights to minority shareholders who did not approve it.
- e. **Capital Market Theory (Capital Market).** This theory says that especially for publicly traded companies, appraisal rights are not needed since the party who approves them can sell their shares in the capital market at a fair market price for the relevant stock.
- f. **Cash Drain Theory.** This theory says that with the application of appraisal rights, the possibility of the company lacking funds because the company must buy shares from minority shareholders who do not approve the merger. This lack of funds is not impossible to cause the company to cancel the merger

³⁹ *Ibid.*, p. 198-199.

directly or indirectly, even though the merger may be very beneficial for the company concerned.

Based on the Standby Purchase Agreement dated 1 August 2018 between Bank BTPN and SMBC (hereinafter referred to as the "Standby Purchase Agreement") and the provisions of Article 2 of the Merger Deed, Bank BTPN agreed to appoint SMBC to be a Standby Buyer who would buy shares from the Company's shareholders who wish to participate in a share purchase offer program that will be conducted in connection with the Merger. In this case BTPN was given the opportunity to sell its shares (cash offer) to SMBC. If there are shareholders participating in the cash offer, the number of SMBC share ownership in BTPN will increase.

Each shareholder of Bank BTPN will be given the opportunity to sell its shares to the Standby Buyer at a price of Rp 4,282 (four thousand two hundred eighty two Rupiah) per share which is a fair market value as assessed by the Public Appraisal Service Office Jennywati, Kusnanto & Partners, where the price is a price higher than the average price of 90 (ninety) days of highest daily trading on the stock exchange during the last 90 calendar days prior to the approval of the Merger Plan by the Board of Commissioners and Directors of the Merging Participating Company on August 1, 2018.

The shareholders of the Company who are entitled to request that their shares be purchased by the Standby Buyer are the shareholders registered in

the Company's Register of Shareholders on September 4, 2018, which is 1 working day before the date of the Meeting invitation. If there are shareholders of the Company requesting that the shares be purchased by the Standby Buyer, but their names are not recorded in the Register of Shareholders of the Company on September 4, 2018, then the shareholders are not entitled to have their shares bought by the Standby Buyer.

The shareholders of BTPN have approved the SMBCI Merger Plan into BTPN along with the required transaction documents, including the Merger Draft document and the Deed of Merger Concept of the Company with SMBCI, as the results of the BTPN Extraordinary General Meeting of Shareholders held on October 5, 2018 ("*RUPS LB*") Contained in the Deed of Minutes of the General Meeting of Shareholders of PT Bank *Tabungan Pensiunan Nasional Tbk* No. 09 dated October 5, 2018, was made by Ashoya Ratam, SH., MKn., Notary in South Jakarta. The EGMS was attended or represented by shareholders who all owned a total of 5,446,724,479 shares or constituted 94,631% of the total shares with voting rights issued by BTPN, thus the GMS LB had fulfilled the quorum requirements as specified in Article 27 letter a and Article 26 letter a POJK number 32 / POJK.04 / 2014 juncto Article 12 paragraph 1 and Article 11 paragraph 1 letter a of the BTPN Articles of Association and Article 88 of the Company Act.

Then the approval regarding the Merger refers to the Deed of Decision

of the Decision of the General Meeting of Shareholders of PT Bank *Tabungan Pensiunan Nasional Tbk* No. 22 dated January 21, 2019 made by Ashoya Ratam, SH., MKn., Notary in South Jakarta and has obtained a letter from the Ministry of Law and Human Rights No. AHU-AH.01.10-0006176 dated January 22, 2019 concerning Receipt of Corporate Merger Notification of PT Bank BTPN Tbk. That BTPN and SMBCI have agreed to designate February 1, 2019 as the Effective Date of Merger, taking into account the approval of the relevant authorities and in accordance with:

- a. Minutes of Joint Meeting of the Board of Commissioners Inviting the Directors of PT Bank *Tabungan Pensiunan Tbk* dated November 26, 2018 number MoM.004a/BOC-BOD/XI/2018.
- b. Circular Decision of the Board of Commissioners as a Substitute for the Decision Taken in the Meeting of the Board of Commissioners of PT Bank Sumitomo Mitsui Indonesia dated December 7, 2018 number 038/BOC/Circular/XII/2018.
- c. Minutes of Joint Meeting of the Board of Commissioners Inviting the Directors of PT Bank *Tabungan Pensiunan Tbk* dated November 26, 2018 number MoM.006/BOD-BOC/XI/2018.
- d. The Minutes of the Board of Directors' Meeting of PT Bank Sumitomo Mitsui Indonesia dated December 7, 2018 number

022/Minutes/BOD-MTG/XII/2018 related to the Circular Decision of the Directors as a Substitute for Decisions Taken in a Meeting of the Directors of PT Bank Sumitomo Mitsui Indonesia dated January 21, 2019 number 001/BOD/Circular/I/2019.

3. Protection of Employee Rights in The Implementation of The Merger of BTPN and SMBCI

a. Companies Merge Relating to Labor Relations.

Of the many benefits obtained from carrying out the Merger action, there is also an element of loss in it. The element of loss as a result of this Merger action is felt more by parties who are classified as weak/small whose position is risky, for example, those who are weak due to structure, parties who are weak due to finance, parties who are weak due to localization, and also because of the application of the Appraisal Right.⁴⁰

Apart from minority shareholders, employees are also internal company stakeholders who must be protected. However, the Company Act does not provide special procedures for employees whose interests are harmed by the act of acquisition. Therefore, what applies is the general provisions in the Manpower Act and the Civil Code. Lawsuits based on illegal conduct can be filed by the employees themselves or through trade

⁴⁰ Rizki Tri Anugrah Bhakti, "Kedudukan Pihak Yang Lemah Pada Perusahaan Yang Melakukan Merger Dengan Memberikan Perlindungan Hukum Terhadapnya", *Jurnal Cahaya Keadilan*, Vol. 3, No. 1, 2015, p. 68.

unions.⁴¹

In 1997 there was a plan for a banking merger in Indonesia, when the government dated January 2, 1998 announced the merger of 4 state-owned banks and BTN to become a subsidiary of BNI bank and addressed to the directors of Bank Indonesia as a condition for the implementation of the merger set forth in the merger deed. The four banks are Bank *Expor Impor Indonesia (EXIM)*, Bank *Dagang Negara (BDN)*, Bank *Bumi Daya (BBD)*, and Bank *Pembangunan Indonesia (Bapindo)* which are members of one new bank, namely Bank *Mandiri*. The national bank merger journey was then continued with the merger between Bank *Bali*, Bank *Universal*, Bank *Prima Express*, Bank *Arta Media*, and Bank *Patriot* under one "flag" namely Bank *Permata*, whose merger agreement was agreed and signed on 31 October 2002. Until merger plan between Bank *Danpac Tbk*, Bank *Pikko*, and Bank *CIC* in 2003, all of which are under *Chikara Capital Ltd* as the majority shareholder. The merger of the 5 banks merger was carried out in stages and will be completed effectively at the end of 2002, where Bank *Arta Media* and Bank *Prima Express* were operationally integrated into Bank *Permata* on 21 October 2002, and on 4 November 2002 Bank *Universal*, then Bank *Patriot* was integrated on December 16, 2002. The merger of 5 of these banks resulted in the termination of employment of around 950 employees

with the severance formula calculated according to the decree of the Minister of Manpower number 150, where the employee's problems had been agreed between the union and BPPN on the 30th of October 2002.⁴²

As described above, one of the impacts of the merger, consolidation and acquisition is on bank employees who will merge or merge themselves. This impact is in the form of Termination of Employment. Each bank has a different policy and mechanism in resolving the rights of employees affected by the layoff. However, in the event that a company merges with another company, this does not automatically end the working relationship between your company and you. This is stated in Article 61 paragraph (2) and paragraph (3) of Law No. 13 of 2003 concerning Manpower ("Manpower Act"), which reads:⁴³

- (2) *The employment agreement does not expire due to the death of the employer or the transfer of rights to the company due to the sale, inheritance, or grant.*
- (3) *In the event of a company transfer, the rights of workers/laborers will be the responsibility of the new employer, unless specified otherwise in the transfer agreement [...].*

From the above article it can be seen that the employment relationship with

⁴¹ Sabri Fataruba, "Perlindungan Hukum Bagi Pihak Berkepentingan Atas Proses Akuisisi PT. Bank Jasa Arta Oleh PT. Bank Rakyat Indonesia Tbk", *Jurnal Sasi* Vol. 71, No. 2, 2011, p. 20.

⁴² Misranto, "Kedudukan Hukum Karyawan Bank Pasca Dilakukan Merger, Konsolidasi dan Akuisisi", *Jurnal Perspektif Hukum*, Vol. XII, No. 2, 2007, p. 113.

⁴³ Law No. 13 of 2003 regarding Manpower (Republic of Indonesia State Gazette of 2003 Number 39), Article 61 paragraphs (2) and (3).

the company does not end because of the merger. Both workers and employers can terminate employment in the event of a merger. For termination of employment, workers are entitled to severance pay, reward money for years of service and compensation money. The full sound of Article 63 of Manpower Act is as follows:⁴⁴

- (1) *Employers can terminate employment against workers/ laborers in the event of a change in status, merger, smelting, or changes in company ownership and workers/laborers unwilling to continue work relations, then workers / laborers are entitled to severance pay 1 (one) time in accordance with the provisions Article 156 paragraph (2), 1 (one) time service period stipulation in Article 156 paragraph (3) and compensation rights according to the provisions in Article 156 paragraph (4).*
- (2) *The employer can terminate the employment of workers/ laborers because of a change in status, merger, or amalgamation of the company, and the employer is not willing to accept workers / laborers in his company, then the worker/labourer is entitled to severance pay of 2 (two) times the provisions [...].*

b. Regarding The Deadline for Decision of Workers or Employers Want to Continue Employment

Regarding the deadline for the decision whether workers or employers want to continue working relations or

not, the Manpower Act does not regulate it. Therefore, basically those things that are not regulated in the Manpower Act, the arrangements are submitted to their respective companies through company regulations, collective labor agreements, or employment agreements. Based on the Merger Plan, the Employee Rights are conveyed as follows: It is expected that all employees of the Merging Participating Bank will be willing to become employees of the Merging Receiving Bank. and the Surviving Bank will comply with all regulations, provisions and policies concerning workers in accordance with the applicable Labor Law. The work requirements and human resource policies of the Merging Bank will not change until the Effective Date of the Merger. To maximize the joining of Bank Merging employees, the Merging Participating Bank will jointly conduct an optimal strategic study of human resources and adjust relevant policies as needed. Placement of employees of the Merging Banks in the Merging Receiving Bank will be adjusted to the organizational structure and business strategy of the Merging Receiving Bank.

Referring to the Merger Deed, the provisions regarding BTPN and SMBCI Employees are as follows:

- 1) Permanent employees of BTPN who decide to continue working at BTPN will remain BTPN employees on the Effective Date of the Merger, under the terms and conditions of work that are the same as the existing terms

⁴⁴ Law No. 13 of 2003, Article 63.

and conditions agreed by the permanent employees of BTPN.

- 2) Permanent SMBCI employees who decide to work for BTPN after the Merger will become BTPN employees on the Effective Date of the Merger, under the terms and conditions of work agreed by the permanent employees of SMBCI prior to the Merger.
- 3) In the event that an SMBCI employee resigns, the employee is entitled to 1 (one) severance pay in accordance with Article 156 paragraph (2) of Manpower Act, 1 (one) time service term award in accordance with Article 156 paragraph (3) of Manpower Act and compensation rights according to the provisions in Article 156 paragraph (4) Manpower Act.⁴⁵

D. Conclusion

The conclusion that can be drawn from the description above show BTPN and SMBCI did the merger procedure well and in accordance with existing regulations and had an expansive goal in favor of all shareholders. BTPN and SMBCI are included in the Horizontal Merger classification because they have the same line of business and produce similar products. Furthermore, the protection of minority shareholders in the implementation of the merger between BTPN and SMBCI can be found by the application of the principles of fair dealing and appraisal rights, that BTPN

has appointed SMBCI as a standby buyer in the event that there are shareholders who wish to participate in the share purchase offer program in connection with the Merger, where the offered price refers to the fair market price as assessed by *KJPP JKR*. In addition, the Company Act has confirmed the existence of the principle of derivative suit by giving the right to shareholders to file a lawsuit against the Company in a district court if it is harmed because of the Company's actions which are considered unfair and without reasonable reason. Besides it, BTPN has fulfilled the principle of protection to employees because it has taken the steps required by the legislation, namely announcing to employees related to the merger plan and providing opportunities for employees to remain employees in the company resulting from the merger with existing agreed work conditions by BTPN permanent employees.

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⁴⁵ Law No. 13 of 2003, Article 156.

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