

The Consultant in Legal Diligence Independent Capital Market Supporting Proportion of Legal Preparation

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THE CONSULTANT IN LEGAL DILIGENCE INDEPENDENT CAPITAL MARKET SUPPORTING PROPORTION OF LEGAL PREPARATION

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1 ABSTRACT

A legal consultant is required to provide an independent opinion or assessment as a capital market advocating profession as defined in Article 67 of Law No. 8 of 1995 concerning the capital market. When in line with the Law on Advocates, the wording of the article contradicts that "the lawyer is acting in law for the legal benefit of a customer" as set out in Article 1(2) of Law No. 18 of 2003 on Advocates. This contradiction, therefore, provides the background to the following proposed problems: (1) primarily the obligations of the legal adviser to provide legal protection for the investor for the capital market supporting the profession to be established to establish due diligence, an independent legal; (2) Legal due diligence as a legal adviser's independent opinion. The two problem formulations have been analyzed using a standardized method of legal research to identify legal concepts and principles for the regulation of the capital markets.

The findings were: (1) An independent attitude expressed after the legal, theoretical and philosophical analysis, that is, not affiliated, not monitored, no conflicts of interest and no partial element, mainly obligations of consultation as a profession of capital market support, to establish an independent legal system, due diligence. (2) The parties have established their internal legal safeguards because the legal relation between the lawyer and the service user is bound by an agreement. Although this legal relationship could be classified as a contractually secure legal endeavour, it must be attentive to legislation and customs and property (heteronomous elements).

Keywords: Internal Legal Protection, Independent, Legal Due Diligence

INTRODUCTION

The capital market is indispensable for the development of a country's economy. It is because the capital market basically carries out two important functions in driving the economy of a country: the economic function and the financial function (Usman & Ika, 1997). Philosophically, the capital market in Indonesia has a very strategic role in national development as a source of financing for the business world and a platform for investment. Which means that the capital market aims to encourage national development to promote fair growth and national economic stability to improve the welfare of the community. From an economic aspect, the objective of developing a capital market in a country is to raise funds, where the capital market has an important role as a source of financing for the medium and small business world, to build the business world, and as a platform for investment (Ibid). From the socio-political aspect, the capital market is a means of democratizing company ownership and expanding public participation in owning shares as an effort to distribute income (Nasarudin & Surya, 2011).

The main principle in the capital market is the disclosure which serves as the spirit of the capital market itself. The definition of the disclosure in the Black Law Dictionary is "the complete relevance of all material facts (Nasarudin & Surya, 2011). In order to conduct an initial public offering in the capital market, issuers have an obligation to disclose the information to the public in the form of submitting company conditions, one of which is from a legal perspective. IPO (Initial public offering) First public stock sale of a company, offering an issuer equity security to public through a registration statement. Information disclosure is not only in the context of IPO but also when a public company takes corporate action. Corporate action according to Francis Groven defined as. corporate action takes place when a securities issuer's financial position capital structure is being changed that affects the securities issued, (Ibid).

Legal information disclosure is then shared in the prospectus, which is one of the registration statement documents submitted by the issuer to the Financial Services Authority. Information disclosure can be a consideration for investors in deciding their investment in the capital market. This is in line with by Randolph P. Beatty and Ivo Welch who stated that "... registration declarations are intended to reveal all information that the investment decision requires to a reasonable investor (Ibid).

Legal disclosure of the information is carried out by a legal consultant in a legal audit report and a legal opinion report. These reports are called Legal Due Diligence (LDD). Based on their functions and responsibilities, the legal consultant provide opinions in the IPO process based on applicable regulations related to the use of IPO proceeds and the potential risks faced by issuers, as stated by Randolph P. Beatty and Ivo Welch that "The legal counsel inform the issuers of the IPO about the disclosures required by regulatory requirements in the narrative sections of the registration Statement. These disclosures should include the discussion on management, the use of processes and the risk factor section of the statement of registration (Ibid).

Legal consultants in formulating LDD are obliged to act independently as regulated in Article 67 of Law Number 8 of 1995 on the Capital Market, that "... in conducting business activities in the Capital Market sector, Professionals supporting the capital market must provide an independent view or evaluation". The principle of Legal Consultants is interesting to study more deeply when it is related to the substance of advocates in Law No. 18 of 2003 on Advocate. The Advocate Law has different regulations regarding Advocates in providing legal services. Article 1 point 2 of the Advocate Law explicitly states explicitly that the advocate acts for the legal interests of the client. This suggests that an advocate's actions must reflect the interests of the client.

Formulation of the Problem

Based on this context, the problem formulations listed below are proposed: (1) The main obligations of lawyers to promote the profession of legal proper due diligence as a capital market; (2) Legal due diligence as a legal adviser's independent opinion to provide investors with legal protection.

RESEARCH METHODS AND APPROACH

The two formulations of the problem were analyzed using the standard legal research method (Juanamasta et al., 2019a; Kalbuana, Prasetyo, et al., 2021; Kalbuana, Suryati, et al., 2021; Luwihono et al., 2021; Prabowo et al., 2020; Prasetyo et al., 2021, 2021; Prasetyo, Aliyyah, Rusdiyanto, Charubiah, et al., 2021; Prasetyo, Aliyyah, Rusdiyanto, Nartasari, et al., 2021b, 2021a; Rusdiyanto et al., 2020, 2021, 2020; Rusdiyanto, Hidayat, et al., 2020a; Shabbir et al., 2021; Susanto, Prasetyo, Indrawati, Aliyyah, Rusdiyanto, Tjaraka, Kalbuana, Rochman, et al., 2021)(Juanamasta et al., 2019b; Kalbuana, Prasetyo, et al., 2021; Luwihono et al., 2021; Prabowo et al., 2020; Prasetyo et al., 2021, 2021; Prasetyo, Aliyyah, Rusdiyanto, Chamariah, et al., 2021; Prasetyo, Aliyyah, Rusdiyanto, Nartasari, et al., 2021b; Rusdiyanto, Hidayat, et al., 2020b; Rusdiyanto et al., 2020, 2020; Shabbir et al., 2021; Susanto, Prasetyo, Indrawati, Aliyyah, Rusdiyanto, Tjaraka, Kalbuana, Syafi'ur Rochman, et al., 2021). It is a method of research that identifies legal concepts and principles in order to resolve legal questions while prescribing what should be done (Marzuki, 2005). For this legal research, primary and secondary legal materials are used as research sources. Primary juridical materials are lawful sources that are in principle authoritative and therefore have the competence to make laws, official records or minutes and decisions of judges. Meanwhile, all publications on legislation that aren't official documents have secondary legal material. Legal publications include legal dictionaries, textbooks, law journals, and judicial commentaries (Ibid). In this study, the approaches used were status, conceptuality, comparative approach, case studies, and philosophy (Ibid).

Analysis and Results the Obligations of Legal Consultants in the Preparation of an Independent Legal, Due Diligence as a Capital Market Support Profession

The objective of developing a capital market in a country is to create a sustainable and stable national economy. To achieve this objective, financial services activities need to be organized in an orderly, transparent, fair, sustainable, accountable, and stable way. The services must also be able to protect consumer and society's interests. It is mentioned in the preamble to Law No 21 of 2011 on Financial Services Authority, which aims at protecting the consumers' and societal interests as one of the main objectives of capital market development. This is in line with one of the duties and responsibilities of a legal consultant in the capital market, in which "to conduct an assessment and submit a legal opinion regarding the fulfillment of the requirements of an offering, transaction, or investment activity conducted in the financial services sector, (Safitri, 2013).

The orientation of legal protection to the interests of consumers and society in the capital market has compelled legal consultants as capital market supporting professionals to act independently in providing legal judgments and opinions. The definition of independent is an attitude that must be possessed by a legal consultant in carrying out legal due diligence, in the Black's Law Dictionary it is divided into 3 (three) definitions, first "No subject to the control or influence of another" means that no one controls or influences, the second "Not associated with another (of the larger) entity" which is more directed to the independent subsidiary, and the third "Not dependent or contingent on something else" which is oriented to contrast with a dependent

person, (Garner, Op. Cit). From the definitions, it is clear that the meaning contained in the term of independent is first, not controlled or influenced by other parties, second, not related or has a relationship with other parties, and third, not dependent on other parties.

Along with this line, independent advice is defined by Black's Law Dictionary as "...advice which is impartial and does not promote the interest of the person who gives it. This term means that an opinion can be said to be independent if it is impartial and has no interest in the party requesting that opinion. In the context of legal consultancy as a capital market supporting profession, this definition can be interpreted that in providing an independent opinion, the opinion given does not have an element of partiality (impartial) and the independent opinion givers have no interest in the party requesting or obtaining their opinion or judgment.

The definition of independent advice is very suitable in the Black Law Dictionary, when it comes to the presence of a lawyer as a profession supporting the capital market. The principle of the legal advisor's independence as a professional support capital market is interpreted as a separate attitude from a legal advisor not controlled or influenced, is not related to other entities, and is not dependent on other parties. Thus, an independent party will be able to provide an independent opinion because the opinion given does not have a partial element and an independent opinion giver has no interest in the party requesting or obtaining the independent opinion. An independent attitude also means that a legal consultant is not affiliated with any public company or issuer, meaning that he/she has no relationship with any public company or issuer through share ownership and there is no control or influence from any public company or issuer.

Apart from being independent, legal consultants are required to be professional in carrying out their profession. The professional attitude refers to the level of skill that legal consultants should have in carrying out their profession. The level of skill that a legal consultant should have is the ability to act carefully, thoroughly, and prudently. A careful, thorough, and prudent professional attitude is one that always questions, evaluates, and critically analyzes various facts, evidence, and information that are known, received, or obtained by legal consultants. And legal consultants are also obliged to demonstrate their integrity, which is by forthrightly and transparently disclosing the truth of information or material facts that they have obtained so that the information presented is not misleading. In practical terms, legal consultants in conducting LDD do not provide an untrue statement or misrepresent or omit material facts. All of these attitudes must be met by a legal consultant in providing assessments and/or opinions independently and professionally.

Legal Due Diligence to Provide Legal Protection to Investors as an Independent Opinion of Legal Counsel

Since legal consultants and service users, or in this case the issuers, have a legal relationship that based on a contractual relationship, it is very appropriate for this study to use the theory of legal protection based on agreements or contracts initiated by Moch. Isnaenai, as described that:

The law, in this case, contract law, either by the business actors or by the internal parties, tries to create protective shields from the impact of the waves of loss that are always lurking. The protective shield provided by law in the business world, according to its origin, can be divided into two different types: internal and external legal protection.

It is also explained that external legal protection, through legislation in the form of statutory regulations, is legal protection created by authorities. This external legal protection, in general, is a bulwark prepared by the legislators to ward off loss as well as injustice for market players.

In the capital market sector, there are several forms of external legal protection. A study on legal protection for investors conducted by Rafael La Porta et.al. found several forms of external legal protection created by the authorities to provide legal protection for investors or

shareholders in the capital market, they are “Receive pro-rata dividends, vote on managers, take part in the shareholders meeting, subscribe to new securities issues on the same terms and conditions as insiders, sue managers or a majority for suspected expropriation, call special shareholders' meetings. (Porta et al., 2000).

In contrast to external legal protection, Moch. Isnaeni provides an explanation related to internal legal protection that:

“..... is a safeguard shall be provided for in the formulation of contract clauses that they jointly compile for the interests of the parties which are build on the basis of the agreement. In addition, the parties were able to agree and build their own security net by entering into an agreement on the principle of contract freedom. This internal legal protection can be developed properly as long as both parties have a balanced bargaining position. If the bargaining position is balanced, then an agreement written to properly protect the interests of each contractor can ensure a fair contract (Isnaeni, Op. Cit).

However, there are still things that need to be explored further regarding the legal relationship between capital market legal consultants and service users based on the theory of internal legal protection. Because essentially, in providing opinions or assessments legal consultants must be independent, so legal protection efforts are not solely for the interests of the parties or the contractor.

The principle of the contract or agreement is limited to the parties who hold the obligations and receive the benefits of a legally binding agreement. In essence, the agreement they made was only binding and valid for the two parties who enter into an agreement, this is a reflection of the principle of the privity of contract as one of the important principles in contract law. With the privity of contract, the agreement only binds the parties who make it so that third parties who are not contractors are not bound by it (Ibid). Privity of contract, comes from the root word privity which is defined by the Black Law Dictionary as “..The connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interest. The term of privity of contract is described by John Gooley as follow: “. what has been referred to as the “fundamental” principles of contract law; namely, privity of contract. Pursuant to this principle, only parties to a contract can enforce the contract. Persons who stand to gain a benefit from the contract, but are not parties to it, have no rights of enforcement (John Gooley, et.al., 2015).

In the context of John Gooley's view, contracting privacy differ from the definition of "the contracting party's relationship, allowing the parties to sue each other, but preventing a third party from so doing" in the Black Law Dictionary, which defines that contractual privacy. The requirement of privacy has been alleviated by modern laws and doctrines of implied guarantees and strict liability allowing a recipient of third parties or other predictable users to sue a defective product's seller (Ibid).

A similar view of the privity of contract was expressed by Lastuti Abubakar, who explained that the privity of contract is a principle of personality that emphasizes that the agreement made cannot harm third parties who are not bound by the agreement. Likewise, the third parties outside the agreement cannot claim a right in the agreement. The binding of the parties to the agreement is not merely what is expressly stated in the agreement, but everything that according to the principle of the agreement is required by propriety, (Abubakar, 2009).

A comprehensive view regarding the privity of contract was made by Moch Isnaeni who explained that as a principle, the privity of contract is like the freedom of contract principle which does not apply absolutely, meaning that in certain situations there are exceptions to be made to avoid unfairness. The exceptions can be in the form of committing deviations, thus, the principle is sacrificed for the sake of maintaining justice as one of the objectives of the law (Isnaeni, Op. Cit). Furthermore, it was also explained that the posture of deviation from the privity of contract due to the emergence of a certain situation as a valid reason is a sign of the relativity of the principle. All of these are deemed appropriate and proper and must be enforced, in order to realize justice as one of the fundamental objectives of the law. However, if the

principle of the privity of contract is absolute, it means that it must apply in any circumstances (Ibid). From these two views, it can be seen that deviation from the privity of contract is very possible and is made to avoid injustice or to realize justice as one of the most basic objectives of law.

From the perspective of the principle of a contract, essentially every contract contains the principle of the privity of contract. However, this principle is not absolutely autonomous, meaning that the binding power stated in the contract is not only for the contractors but also takes into account the developing laws, habits, and appropriateness. It is said that in a contract, apart from an autonomous element in the form of the will of the parties, heteronomous elements are also present. According to Moch Isaeni, the heteronomous elements exist in the regulations, customs, and propriety, which also have a binding power to the parties. So, the binding power of a contract, apart from being determined by the autonomic element, is also strengthened by the binding power by the heteronomous elements (Ibid).

From the view expressed by Moch Isaensi, in the context of a binding agreement between legal consultants and issuers or service users, even though it departs from the privity of contract, a personal tie to protect the interests of the contractors and has an autonomous principle, however, there is also a presence of heteronomous elements in the form of the regulations, custom, and propriety. Apart from these three heteronomous elements, the contract must also take into account the interests of consumers and society, in this case, the interests of investors or minority shareholders and independent shareholders in certain transactions.

This is in line with the duties and obligations of a legal consultant in providing an independent opinion or assessment. This independence contains heteronomous elements as stipulated in the laws and regulations, customs, and propriety that apply in the capital market. Thus, in order to avoid injustice, from a practical point of view, legal consultants in conducting legal due diligence have an obligation not to provide any untrue statement of a material fact or is otherwise false or misleading. This is in line with the duties and obligations of a legal consultant in providing an independent opinion or assessment. This independence contains heteronomous elements as stipulated in the laws and regulations, customs, and propriety that apply in the capital market. Thus, in order to avoid injustice, from a practical point of view, legal consultants in conducting legal due diligence have an obligation not to provide any misstatement of a material fact or is otherwise false or misleading.

This idea suggests an obligation for the legal counsel ¹ to provide an indigenous opinion or evaluation as a professional supporting the capital market. It is based on the concept that an agreement is internal legal protection with the privity of contract but also limited by heteronomous elements in order to provide protection against investors, minority shareholders, and independent shareholders in accordance with company actions and transactions carried out by service users.

CONCLUSION

Based on the discussion in the previous section, it can be concluded that: The independence principle of an advisor as a profession supporting the capital market has to be expressed and demonstrated by an independent attitude. By independent attitude, it means that the legal consultant is not under the control or influence of service users, is not affiliated with service users, do not have a conflict of interest with service users or the transactions being carried out, and have no element of service user partiality. Legal relations between legal consultants and service users are subject to a convention and their respective domestic legal protection is established by the parties. While this legal relation is classified as a contractual privacy-based internal legislation protection effort, a contract is not entirely autonomous since it must also respect regulations, customs, and ownership, or is known as heteronomous elements. Taking heteronomous elements into account in the capital market is a legal obligation to provide protection to investors, minority shareholders, and independent shareholders.

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