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LEGAL PROTECTION TOWARDS PUBLIC COMPANIES FROM BANKRUPTCY

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Abstract

Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (UU KPKPU) only requires the provision that a Bankruptcy/PKPU application to be submitted by one creditor, and that it can be proven that the public company has at least two creditors, one of which is past due. Financial Services Authority (OJK) has the authority to regulate and supervise activities in the capital market field or sector carried out by public companies. OJK should be responsible for providing legal protection for public companies that submit applications for bankruptcy. The research method used is a normative legal research method. The results of this research confirm that Article 55 paragraph (1) of the OJK Law and Article 8 paragraph 4 of Law Number 4 of 2023 on the Development and Strengthening of the Financial Sector (P2SK Law) are the legal basis or legal protection that gives the authority to the Financial Services Authority to carry out regulation and supervision of financial services activities in the capital markets sector, where financial services activities in the capital markets sector are also carried out by public companies. There must be rules that are made firmly and explicitly so that the OJK is given responsibility, function and authority in protecting public companies from bankruptcy by carrying out insolvency tests. This means that before a public company is submitted for bankruptcy, the OJK must first carry out an insolvency test to determine whether the public company is in a state of insolvency or is actually in a state of solvency. If the results state that the public company is indeed insolvent, then the OJK must provide a product stating either in the form of a cover letter or a certificate that the public company is suitable for the debtor to submit a bankruptcy petition.

Keywords: *Public Company; Bankruptcy; Insolvency Test*

1. INTRODUCTION

The impact of the Covid-19 pandemic has gradually decreased and is expected to truly end. Throughout 2020, the government and the Financial Services Authority (*Otoritas Jasa Keuangan/OJK*) have attempted to maintain the foundations of the national economy by issuing several national policies, including Regulation of the Financial Services Authority of the Republic of Indonesia Number 11/POJK.03/2020 on National Economic Stimulus as a Countercyclical Policy on the Impact of the Spread of Coronavirus Disease 2019 and Regulation of the Financial Services Authority of the Republic of Indonesia Number 14/POJK.05/2020 on Countercyclical Policy on the Impact of the Spread of Coronavirus Disease 2019 for Non-Bank Financial Services Institutions. Finally, we should be grateful that the Covid-19 pandemic did not have an economic crisis impact on the Republic of Indonesia.

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Even though a series of policies as mentioned above have been issued, the Covid-19 pandemic continues to have a hard impact on the business world, where entrepreneurs have to think hard in order to maintain the continuity of their business, including by implementing production efficiency, terminating employment relations, cutting salaries, business merger, cessation of production, closure of part of the business, and so on.

During the Covid-19 pandemic, companies of course have to spend a lot of capital to maintain their businesses. This is because there is an imbalance between income and company operational costs as a result of reduced or lost opportunities to produce and sell goods. For this, there must be a solution, such as funding or additional capital to maintain and meet company targets that will be set.

There is one instrument for providing funds for companies that intends to obtain funds from the public to maintain the company in the event of a shortage of capital availability, which is public offering. Public offering is an activity carried out by an Issuer to sell Securities to the public based on the procedures regulated in the Law and its implementing regulations.[1] The public offering carried out by a company can be in the form of debt public offering or capital (equity) public offering.

There are consequences if a company (closed company) carries out a capital (equity) public offering, where the company in question will become a public company (Tbk) owned by more than 300 (three hundred) parties, to which the public company in question attaches obligations including:[2]

1. Implementing the principles of good corporate governance;
2. Implementing the principle of openness (disclosure principle);
3. Submitting financial reports and/or certain circumstances to the Financial Services Authority or stock exchange, as regulated in the Financial Services Authority Regulations or stock exchange regulations.

The definition of a public company according to Law Number 4 of 2023 on Development and Strengthening the Financial Sector (hereinafter referred to as the P2SK Law) is "Companies with the number of shareholders and paid-up capital determined by Regulations Authority Financial services,." This definition is different from what is stated in Law Number 8 of 1995 on Capital Markets (hereinafter referred to as the Capital Markets Law), namely in Article 1 number 22 which explains that a public company is a company whose shares are owned by at least one 300 (three hundred) shareholders and have paid-up capital of at least IDR 3,000,000,000 (three billion rupiah) or a number of shareholders and paid-up capital as determined by Government Regulation.

Then in implementation, funds resulting from a public offering (emissions) carried out by a company which in this case has become a public company, the management of which is handed over entirely to the public company itself, so that in this case the application of the principles of openness and good corporate governance must be strictly implemented and enforced.

[1] See Article 22 of *Law Number 4 of 2023 concerning Development and Strengthening of the Financial Sector.*
[2] See Consideration letter b of *Regulation of the Financial Services Authority of the Republic of Indonesia Number 43/POJK.04/2020 concerning Obligations for Disclosure of Information and Corporate Governance for Issuers or Public Companies that Meet the Criteria of Issuers with Small-Scale Assets and Issuers with Medium-Scale Assets.*

One of the main objectives of enforcing corporate governance is to create a system that can maintain balance in company control in such a way as to reduce opportunities for mismanagement and create incentives for management to maximize the productivity of asset use so as to added value to the company.[3]

However, no matter how the implementation of the principle of openness (disclosure principle) and the principle of good corporate governance (good corporate governance) has been implemented and enforced properly and consistently, it is difficult for public companies not to be filed for bankruptcy, because Law Number 37 of 2004 on Bankruptcy and Suspension of Debt Payment Obligations (hereinafter referred to as the Bankruptcy & PKPU Law) only requires that a bankruptcy application be submitted by 1 (one) creditor where the creditor can prove that the public company has a minimum of 2 (two) creditors, one of which has matured. The fairly easy requirements for filing a bankruptcy petition against a public company mean that the public company is in a vulnerable position to be submitted to a bankruptcy petition, even though the bankruptcy applicant (creditor) must be able to prove that the debt submitted in the bankruptcy petition is a debt that can be proven.

The definition of bankruptcy as regulated in the Bankruptcy & PKPU Law states that bankruptcy is a general confiscation of all the assets of the Bankrupt Debtor, the management and settlement of which are carried out by the Receiver under the supervision of the Supervisory Judge.[4] If we look at the definition of bankruptcy as referred to above, it is clear that the consequences of bankruptcy cause a public company declared bankrupt to lose control of all the assets it owns, even though there are exceptions as intended in Article 22 of the Bankruptcy & PKPU Law.

Bankruptcy is an elaboration of the two principles contained in Article 1131 and Article 1132 of the Indonesian Civil Code. Article 1131 of the Indonesian Civil Code determines that all of a person's existing and future assets, both movable and immovable, become collateral for all obligations. To implement this provision, Article 1132 of the Indonesian Civil Code orders that all of the debtor's assets be sold at auction in public on the basis of a judge's decision, and the proceeds distributed to the creditors equally, unless among the creditors there is a creditor whose receivables have priority.[5]

In running its business, it is difficult for a public company not to have more than 2 (two) creditors. In the current post-pandemic conditions, it is commonplace for public companies to have overdue debts to one of their creditors.

Bankruptcy is a challenge for a public company in managing and establishing good relationships with creditors, no matter how small the public company's debt is one of the creditors, considering the Bankruptcy & PKPU Law do not limit how much the debt can be worth, submitted bankruptcy petition or request for postponement of debt obligations, which can lead to bankruptcy. So, in this case, it is very possible for a public company that has a very large asset value to be filed for bankruptcy by creditors who actually have receivables from a very small public company.

[3] Mas Achmad Daniri, *Lead By GCG* (Jakarta: Gagas Bisnis Indonesia, 2014), 89.
[4] See Article 2 point 1 of *Law Number 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations.*
[5] Erna Widjajati, *Hukum Perusahaan dan Kepailitan di Indonesia* (Jakarta: Jalur, 2016), 66.

Bankruptcy is a frightening specter, and of course lurks for public companies when a creditor or creditors submits an application for declaring bankruptcy. So in the face of this anxiety, it turns out that there is still a glimmer of hope that comes from optimizing the roles, duties and functions of the Financial Services Authority (OJK). Since the publication and enactment of Law Number 21 of 2011 on the Financial Services Authority, there has been a transitional provision that states that the functions, duties and authority for regulating and supervising financial services activities in the capital markets sector previously fell under the authority of the Minister of Finance and the authority of the Capital Markets and Finance Institutions Supervisory Agency (Bapepam-LK) is now under the authority of the Financial Services Authority (OJK). The transfer of authority is regulated in Article 55 paragraph 1 of Law Number 21 of 2011. Therefore, since the enactment of Law Number 21 of 2011, every business activity carried out by public companies is now under the domain and authority of the Financial Services Authority. The Financial Services Authority also regulates and supervises activities carried out by public companies.

In connection with the above, several issues arise as the discussion of this research. The issues in this research are regarding the duties and authorities of regulation and supervision carried out by the Financial Services Authority on activities carried out by public companies in the capital market sector; regarding legal provisions for public companies that have filed for bankruptcy; and regarding how legal protection is carried out by the Financial Services Authority in the form of bankruptcy testing for public companies, before the public company is filed for bankruptcy. Therefore, according to the researcher, the right title to be included in this research is "Legal Protection for Public Companies from Bankruptcy"

2. RESEARCH METHODS

This research used qualitative and normative legal research methods. Legal normative research means that this research used system of legal norms,[6] which includes research on legal principles, legal rules, and doctrine. The approach method that researcher used in conducting this research was an inductive descriptive approach. The legal materials in this research were in the form of primary, secondary and tertiary legal materials.

3. ANALYSIS AND DISCUSSION

3.1. The Financial Services Authority is an Institution Tasked with Developing, Regulating and Supervising Capital Market Activities

The Financial Services Authority (OJK) is an independent institution established based on Law Number 21 of 2011 (hereinafter referred to as the OJK Law) which functions in the next context of implementing an integrated regulatory and supervisory system for all activities in the financial services sector, including the banking sector,

[6] According to Mukti Fajar ND and Yulianto Ahmad, normative legal research is legal research of law as a system of norms. The norm system in question is about principles, norms, rules of laws and regulations, court decisions, agreements and doctrines (teachings). Salim HS and Erlies Septiana Nurbani, *Penerapan Teori Hukum Pada Penelitian Tesis Dan Disertasi* (Jakarta: Rajawali Press, 2014), 13.

capital markets, as well as the non-bank financial services sector, such as insurance, pension funds, financing institutions and other financial service institutions.[7]

Based on Chapter 8 point 4 of the P2SK Law which amends Article 6 of OJK Law, OJK carries out regulatory and supervisory duties towards:

1. Financial services activities in the Banking sector;
2. Financial services activities in the Capital Markets, Derivatives finance and carbon exchange sectors;
3. Financial services activities in the insurance, guarantee and pension fund sectors;
4. Financial services activities in the Financing Institutions, venture capital companies, microfinance institutions and other LJK sectors;
5. Activities in the ITSK sector as well as digital financial assets and crypto assets;
6. The behavior of financial services business actors as well as the implementation of consumer education and protection; and
7. The financial sectors are integrated and carry out assessments of the systemic impact of financial conglomerations.[8]

Focusing on the Supervision of the Capital Markets Sector, OJK has a task maintenance an integrated system of regulation and supervision of the capital markets sector for all activities in the financial services sector. In carrying out the supervisory function of the Capital Markets sector, OJK has the following main tasks:

1. Prepare implementing regulations in the Capital Market sector;
2. Implement capital market crisis management protocols;
3. Establish accounting provisions in the capital markets sector;
4. Formulate standards, norms, criteria guidelines and procedures in the capital markets sector;
5. Carrying out analysis, development and supervision of capital markets including sharia capital markets;
6. Carrying out law enforcement in the capital markets sector;
7. Resolving objections submitted by parties subject to sanctions by the OJK, Stock Exchange, Clearing Guarantee Institution, and Depository and Settlement Institution;
8. Formulate the principles of investment management, securities transactions and institutions and governance of issuers and public companies;
9. Provide guidance and supervision to parties who obtain business permits, approval, registration from the OJK and other parties operating in the capital markets sector;
10. Give written orders, appoint and/or determine the use of statutory managers for financial services parties/institutions carrying out activities in the capital markets sector in order to prevent and reduce losses to consumers, society and the financial services sector; and
11. Carry out other tasks assigned by the Board of Commissioners. [9]

[7] "FAQ Otoritas Jasa Keuangan," Otoritas Jasa Keuangan, https://www.ojk.go.id/id/pages/faq-otoritas-jasa-keuangan.aspx.
[8] See Article 8 of *Law Number 4 of 2023 concerning Development and Strengthening of the Financial Sector*.
[9] "Fungsi dan Tugas Pokok," Otoritas Jasa Keuangan, https://ojk.go.id/id/kanal/pasar-modal/tentang-pasar-modal/pages/tugas.aspx.

With a series of OJK authorities both in the form of regulation and supervision in the capital markets sector, of course public companies cannot be separated from regulation and supervision and become objects of regulation and supervision from the OJK. How could it not be an example if a closed company wants to make a public offering in the form of shares so that it changes to become a public company, you must first go through the stages and fulfill various prerequisites that must be fulfilled by the company which have been determined by OJK.

It is known that the process of implementing a public offering of equity securities (shares) can be divided into at least 6 (six) stages, namely:[10]

1. Pre-Emission Stage

   The pre-issuance stage is a series of preparations carried out by the Company internally starting from holding a GMS to obtain shareholder approval for an equity public offering, then amending the articles of association in accordance with Law Number 8 of 1995 on Capital Markets, as well as carrying out signing agreements including securities/share underwriting agreements, securities/share administration management agreements, preliminary securities/share listing agreements and then submitting an application for a registration statement to OJK.
2. Emission Stage

   This emission stage is the stage of carrying out a public offering in the form of shares on the stock exchange until the shares are listed on the stock exchange. The public offering stage can of course be carried out after obtaining permission or, usually being declared an effective registration statement by OJK.
3. Post-Emission Stage

   This post-emission stage is the stage where the Issuer is required to submit information in the form of periodic reports or reports of important and relevant events after the public offering.
4. Allotment

   Allotment is the stage where the proceeds from a public offering are allocated to securities buyers. This allotment can be done in 2 (two) ways, namely definite allotment and centralized allotment.
5. Delivery of Securities

   After the securities allotment is carried out, the next process consists of handing over the securities to the securities buyers.
6. Realization Report on Use of Funds

   Issuers who have conducted a public offering are required to submit a Fund Use Realization Report (LPPD) to OJK until all proceeds from the public offering have been realised.

Due to a series of processes that are quite long, require quite large costs, have time limitations, fulfill the prerequisites which are quite complicated and detailed, this is indeed a reflection of compliance for the public company in question, but what is the

[10]See Article 2 paragraph (1) *Regulation of the Financial Services Authority of the Republic of Indonesia Number 30/POJK.04/2015.*

series of regulations and supervision carried out by OJK in question? Compared to the protection provided to a public company that is filed for bankruptcy by one of its creditors.

3.2. Legal Protection for Public Companies by the Financial Services Authority in the Event of a Bankruptcy Application

Based on weekly statistics released by the Data Management Department and OJK statistics per the first week period March 2024, in 2023 the total number of companies that will be recorded as public is 903 (nine hundred and three) companies, of which 79 (seventy nine) are new listing companies. Then, in 2024 the total number of listed public companies will be 921 (nine hundred and twenty one) companies, of which 19 (nineteen) are newly listed companies.[11]

If we look at the funds raised from public offerings, throughout 2022, the total funds raised through public offerings on the capital market was recorded at IDR 267.73 trillion. Based on single investor data identification collected by PT Custodian Indonesian Securities Center, the number of investors increased by 37.68% compared to the previous year which was recorded at 7.49 million investors. Apart from that, the capital market capitalization value of the Republic of Indonesia has increased by more than 15% compared to 2021, which was IDR 9,495 trillion as of 29 December 2022. This is certainly a quite encouraging achievement amidst the conditions of economic recovery following Covid-19 pandemic.[12] This situation of course reflects that the economy is starting to revive again and tends to recover after Covid-19 pandemic throughout 2022 to 2024.

The existence of OJK as an institution that carries out regulation and supervision in the field of capital market, or more often called the regulator of the capital market, seems to have no role and no regulation if a public company is filed for bankruptcy by its creditors, even though it is for the sake of justice as intended in Article 33 paragraph (4) of the 1945 Constitution which as a consideration for the establishment of OJK Law, OJK should take part in legal protection for public companies that are about to be declared bankrupt, bearing in mind that protection for public companies will also of course have an impact on shareholders as the public in public companies that are declared bankrupt.

Condition referred to above should be in line with the spirit and objectives contained in article 4 of the Capital Markets Law which states:

> "The guidance, regulation and supervision as intended in Article 3 are carried out by Bapepam with the aim of creating orderly, fair and efficient Capital Market activities as well as protecting the interests of investors and the public."

[11] "Statistik Pasar Modal Indonesia," Otoritas Jasa Keuangan, https://ojk.go.id/id/kanal/pasar-modal/data-dan-statistik/statistik-pasar-modal/default.aspx.
[12] "Mengenal Lebih Jauh Pengaturan UU P2SK Dalam Rangka Penguatan Sektor Pasar Modal," Otoritas Jasa Keuangan, last modified July 20, 2023, https://www.ojk.go.id/ojk-institute/id/capacitybuilding/upcoming/2576/mengenal-lebih-jauh-pengaturan-uu-p2sk-dalam-rangka-penguatan-sektor-pasar-modal.

It is clear that there is a gap or discrepancy between the legal rules that explain the expected conditions (*das sollen*) and the actual conditions (*das sein*), where OJK is expected to provide legal protection for public companies that want to be declared bankrupt, but in reality the OJK cannot do anything to provide legal protection when a public company is filed and/or declared bankrupt, because it does not have the authority granted by law.

3.3. The Application for a Bankruptcy Statement by the Financial Services Authority Must First Carry Out an Insolvency Test as Legal Protection for Public Companies in Facing a Bankruptcy Application.

Bankruptcy practices in Indonesia as regulated by the Bankruptcy & PKPU Law are quite easy and simple, where a debtor who has 2 (two) creditors, one of whom is past due and can be collected and the debt is simple, can already be filed bankruptcy statement to the Commercial Court. This requirement is the same for public companies.

The ease of prerequisites for submitting a bankruptcy declaration application will certainly cause danger and panic in the capital market environment, especially public companies, because of course public companies, apart from seeking funding through public offerings in the form of capital (equity), will also seek funding for company management through instruments. So it is certain that a public company has at least 2 (two) creditors and it is very normal that one of its debts to one of its creditors is due and can be collected. If we look at Article 2 paragraph (4) of the Bankruptcy & PKPU Law which explains:

> "In the event that the debtor is a securities company, stock exchange, clearing and guarantee institution, depository and settlement institution, the bankruptcy application can only be submitted by the Capital Market Supervisory Agency."

Public companies should also be the authority of OJK, considering that, as mentioned above, one of the regulatory and supervisory functions of OJK in the capital markets sector is public company governance.

Implementation of OJK's responsibilities in carrying out legal protection for public companies within application for a bankruptcy declaration by first carrying out a insolvency test. Indeed, we are still hampered by the bankruptcy law system in Indonesia, where the Bankruptcy & PKPU Law does not provide room for OJK to file bankruptcy petitions against public companies.

Due to the lack of authority from OJK in filing bankruptcy petitions against public companies, researcher see the need for regulation or at least an amendment that expands the contents of Article 2 paragraph (4) of the Bankruptcy & PKPU Law, by giving OJK the authority to submit request for a bankruptcy declaration by first carrying out an insolvency test on the public company that wishes to file for bankruptcy.

OJK's authority to apply for bankruptcy by first carrying out an insolvency test, carried out using an economics approach, is open to the public, even though the insolvency test using an economic approach is a concept in the Common Law legal system.

Elucidation of Article 8B of Law Number 4 of 2023 on Development and Strengthening of the Financial System states that:

> "Submitting an application for a bankruptcy declaration for a Bank is entirely within the authority of the Financial Services Authority and is solely based on an assessment of the financial condition and overall condition of the banking sector……etc."

This provision actually reflects the need for an insolvency test in bankruptcy applications which is the authority of OJK, even though the mandate to assess financial conditions does not clearly refer to the insolvency test mechanism. In Bankruptcy & PKPU Law, the definition of insolvency is only contained in the explanation of Article 57, paragraph 1, which explains that "what is meant by insolvency is a state of being unable to pay."

The definition of insolvency formulated in the explanation of Article 57 paragraph (1) of Bankruptcy & PKPU Law does not provide an explanation of the follow-up, circumstances, procedures and consequences of the insolvency itself.

M. Hadi Shubhan explained that there are no peace efforts in the bankruptcy process because the bankrupt debtor does not offer peace, the bankrupt debtor offers peace but is rejected by the creditors, or the bankrupt debtor offers peace and is then approved by the creditors but rejected by the commercial court judge, then the next process is the insolvent stage.[13]

Regarding the meaning of not being able to pay and not wanting to pay, it was also expressed by H. Man S. Sastrawidjaja, stating that:[14]

> "A situation of being unable to pay is a situation where the Debtor does not have funds or are insufficient to pay off his debt, while not wanting to pay is a situation where the Debtor has sufficient funds to carry out his obligations, but the Debtor may have certain considerations so that he does not make payments."

The meaning of the Bankruptcy & PKPU Law regarding insolvency must be linked to several other articles contained in the Bankruptcy & PKPU Law, namely:

Article 178 paragraph (1):

> "If at the receivables matching meeting no peace plan is offered, the peace plan offered is not accepted, or ratification of the peace is rejected based on a decision that has obtained permanent legal force, by law the bankruptcy estate is in a state of insolvency."

Article 187 paragraph (1):

> "After the bankrupt assets are in a state of insolvency, the Supervisory Judge can convene a meeting of creditors at the specified day, time and place to hear from them as necessary regarding how to settle the bankrupt assets and, if necessary, to match receivables, which will be entered after the end of the time limit as intended

[13] M Hadi Shubhan, *Hukum Kepailitan: Prinsip, Norma dan Praktek di Pengadilan* (Jakarta: Kencana, 2019), 144.
[14] Ministry of Law and Human Rights, A*cademic Paper of Draft Law Concerning Amendments to Law of the Republic of Indonesia Number 37 of 2004 Concerning Bankruptcy and Postponement of Debt Payment Obligations* (Jakarta: National Legal Development Agency, 2018), 15.

in Article 113 paragraph (1), and has not yet been matched as intended in Article 133."

Article 184 paragraph (2), paragraph (3) and paragraph (4):

(1) By still paying attention to the provisions of Article 15 paragraph (1), the Curator must begin settling and selling all bankruptcy assets without the need to obtain the Debtor's approval or assistance if:
   a. The proposal to administer the Debtor's company has not been submitted within the time period as regulated in this law, or the proposal has been submitted but rejected; or
   b. Management of the Debtor company is stopped.
(2) In the event that the company is continued, objects can be sold which are part of the bankruptcy assets, which are not needed to continue the company.
(3) Bankruptcy debtors can only be given home furniture and equipment, medical equipment used for health purposes, or office furniture as determined by the Supervisory Judge.

After reading the definition of insolvency as intended in the explanation of Article 57 paragraph (1) of the Bankruptcy & PKPU Law, linked to Article 178 paragraph (1), Article 184 and Article 187 paragraph (1) of the Bankruptcy & PKPU Law as well as the opinions of the experts referred to above, then it can be ascertained that the determination of insolvency according to the Bankruptcy & PKPU Law is not determined using an economics approach such as insolvency test, insolvency ratio, debt to equity, liquidity, profitability, leverage and solvency, so in this case it can be ascertained that Indonesian bankruptcy law is different from bankruptcy law in Common Law system countries in general.

In Common Law system countries in general, bankruptcy decisions are handed down by the court based on an economics approach by making the state of insolvency the main condition for a person or legal entity to be declared bankrupt with all the legal consequences. Therefore, the debtor can be declared bankrupt from the moment the bankruptcy petition is registered with the Court, because only debtors who have been declared insolvent by a court order may apply for bankruptcy. The requirement that the debtor has been proven insolvent in order to be declared bankrupt indicates that when the debtor is filed for bankruptcy in court, the debtor is actually already in a state of *de facto* bankruptcy before being declared *de jure* bankrupt by the court. Thus, in countries with Common Law system, the application to be declared bankrupt to the court is solely for the administrative purposes of managing and settling the bankrupt's assets.[15]

Based on the legal system in force in Indonesia, bankruptcy decisions handed down by commercial courts are not based on an economic approach. The commercial court's decision declaring the debtor bankrupt does not take into account the conditions of the debtor's financial ratios such as liquidity, profitability, leverage and solvency or the results of the public accountant's audit of the debtor's financial balance for the current year. The bankruptcy decision handed down by the commercial court will also not consider whether the debtor's liquidation value is still greater than the going concern

[15] Elyta Ras Ginting, Hukum Kepailitan Rapat-Rapat Kreditor (Jakarta: Sinar Grafika, 2016), 131.

value or vice versa, or wheter the debtor's liabilities are greater than his assets, the debtor's business profitability ratio, leverage ratio and so on. In short, the commercial court decision declaring the debtor bankrupt does not at all assess the debtor's solvency.[16]

It is clear the difference between the application of insolvency according to the Bankruptcy & PKPU Law and the application of insolvency according to the common law system, but in fact researcher are of the opinion that with current legal developments, the adoption of both legal systems is not prohibited and in fact the combination of legal systems is a solution to the shortcomings that exist in implementation of a legal system.

In fact, there is an example of a combination of legal applications in Indonesia, this can be seen in Law Number 40 of 2007 on Limited Liability Companies (hereinafter referred to as the LLC Law) which adopts legal concepts originating from the Common Law legal system, namely the principle of Fiduciary Duty, the principle of Piercing the Corporate Veil, the principle of Business Judgment Rule, the principle of Ultra Vires and Intra Vires.

The adoption of the principles existing in the Common Law legal system, so that they are applied in the LLC Law, is proof that the Republic of Indonesia has not implemented the civil law legal system absolutely, meaning that as long as it is useful and in accordance with the norms that live within the Indonesian nation, the combination of two legal systems is not a problem.

According to Prof. Mahfud, the Indonesian state is not a Common Law (Anglo Saxon) or Civil Law (Continental European) legal system but a Prismatic legal state, where the state is based on the ideals (ideas about law) of Indonesian law. So the existence of these two systems is a "balancer" and their adoption is not absolute. There is still a filtering process in them.[17]

Because the Indonesian State in its development has not implemented the civil law legal system absolutely (for example, the enactment of Law Number 40 of 2007 on Limited Liability Companies, where there are concepts in the Common Law legal system), then the application of the insolvency test in bankruptcy law in Indonesia is reasonable and grounded, for this reason the definition of insolvency should be explained using economic approaches.

Sutan Remy Sjahdeini stated that the Debtor's insolvency is a condition for the Debtor to be filed for bankruptcy, or what could be called a financial condition. Based on the above, in theory there are two types of insolvency:

1. Balance sheet insolvency, is a situation of the Debtor's inability to pay his debts, where the value of all debts exceeds the value of all his assets. Or what is commonly said is that the value of the debtor's debt exceeds the value of his assets.

[16] *Ibid.,* 132.
[17] Bernadetha Aurelia Oktavira, "Mengenal Perbedaan Civil Law dan Common Law," *Hukum Online*, October 6, 2023, https://www.hukumonline.com/klinik/a/perbedaan-civil-law-dan-common-law-lt58f8174750e97/.

2. Cash flow insolvency, is a financial situation where the Debtor is unable to pay his debts due to the momentary condition of the Debtor's finances, because the Debtor is unable to pay his debts after they are due and can be collected, or because at that time the Debtor does not have or does not have enough liquidity to pay the debt or debts. Cash flow insolvency conditions where the Debtor experiences a cash flow deficit (cash flow deficit), namely the cash outflow (cash out flow) is greater than the cash inflow (cash in flow). This occurs as a mismatch (inequality) between the amount of income inflow and expenditure flow because the amount of outflow is smaller than the inflow. Debtors who can apply for bankruptcy to the Commercial Court should only be those who have experienced balance sheet insolvency, and not cash flow insolvency. Insolvency or a situation where the Debtor is unable to pay the debt can also be interpreted as a failure. Bankruptcy as failure can be interpreted in several ways, namely economic failure and financial failure. Economic failure means that this company has a level of profit that is less than its obligations. Economic failure occurs when the actual cash flow of the company is far below the expected cash flow. Meanwhile, financial failure can be interpreted as a state of insolvency, namely of the terms of negative net worth in a conventional balance sheet or the present value of expected cash flows is less than liabilities.[18]

Apart from the concept of insolvency with an economic approach which according to researcher can be applied in the bankruptcy law system in Indonesia, it is hoped that the technical implementation of bankruptcy debtors with public company status will first be declared insolvent based on an economic approach and followed up with a request for a bankruptcy declaration to the Commercial Court by OJK.

Prof. Hikmahanto emphasized that if the prerequisite for a debtor to be declared bankrupt was only on the basis of the debtor's failure to pay off one of his debts, then it would be very easy for a debtor to be declared bankrupt, which would then be followed by the liquidation of his assets. Even though the debtor could technically still be in a "solvent" state, for this reason Prof. Hikmahanto, among other things, suggested that bankruptcy status should be determined for debtors who can be proven to be in insolvent status, or based on the insolvency test doctrine.[19]

Dr. Hadi Shubhan explained that the application of the insolvency test doctrine is a form of legal protection for solvent debtors who have good intentions before or during the examination of the bankruptcy petition filed against them.[20]

Based on the provisions as intended in the OJK Law covers task and responsibility of OJK and because there is no OJK authority to file bankruptcy applications for public

[18] Ministry of Law and Human Rights, A*cademic Paper of Draft Law Concerning Amendments to Law of the Republic of Indonesia Number 37 of 2004 Concerning Bankruptcy and Postponement of Debt Payment Obligations* (Jakarta: National Legal Development Agency, 2018), 194.
[19] Ricardo Simanjuntak, *Undang-undang Kepailitan dan PKPU Indonesia* (Jakarta: Kontan Publishing, 2023), 99.
[20] *Ibid.*, 100.

companies by first carrying out an insolvency test, the researcher sees the need to reform the bankruptcy law system in Indonesia and regulations, especially in providing legal protection for public companies that have good intentions when facing bankruptcy applications.

The regulation as referred to above is to give authority to OJK to submit a bankruptcy application for a public company by first carrying out an insolvency test using an economic approach to provide protection for the public company being filed for bankruptcy.

4. CONCLUSION & SUGGESTION

Public Company is a company whose shares are owned by at least 300 (three hundred) holder shares, meaning that quite a lot of them are owned by the public investors, so that legal protection for public companies with good intentions of course automatically also provides protection for the community as mandated by Article 4 of the Capital Markets Law.

OJK is an institution that regulates and supervises the capital markets sector, meaning that public companies are also objects of protection for the OJK, so that in the case of public companies that have good intentions they will be filed for bankruptcy while their assets are greater than the debt, then of course OJK must be able to provide protection for the public company that wants to file a bankruptcy petition.

The absence of OJK's authority to file a bankruptcy petition against a public company can be a trigger and a new idea to improve the current bankruptcy legal system in Indonesia. Therefore, it is necessary to make changes and updates to the Bankruptcy and PKPU Law, the OJK Law, the Capital Market Law, and the P2SK Law, which are expected to provide authority for OJK to file a bankruptcy statement by first conducting a bankruptcy test, where this bankruptcy test can be believed to be a protection for public companies. Therefore, there must be rules that are made firmly and firmly so that OJK is given the responsibility, function, and authority to protect public companies from bankruptcy by conducting a bankruptcy test. This means that before a public company is filed for bankruptcy, OJK must first conduct a bankruptcy test to find out whether the public company is in a state of bankruptcy or is truly in a state of solvency. If the results state that the public company is indeed bankrupt, then OJK must provide a product that states either in the form of a cover letter or a statement that the public company is eligible for debtors to file a bankruptcy petition.

The use of an insolvency test with an economics approach using the Balance sheet insolvency or Cash flow insolvency method will of course be a consideration for court commerce in providing decisions for public companies that are filed for bankruptcy, so it is hoped that the commercial court's decision will be based on the conditions of the debtor's financial ratios such as liquidity, profitability, leverage and solvency or the results of a public accountant's audit of the public company's financial balance sheet for the current year.

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