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Notary Authority in the Making of Minutes Deed of Electronic General Meeting of Shareholders (E-GMS) For Public Company based on the Principle of Legal Certainty

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Abstract: *This research analyzes the authority of notaries in creating minutes deeds for e-GMS of Public Companies, based on the principle of legal certainty. The research uses normative juridical methods, employing a conceptual approach to laws, regulations, theories, and expert opinions to address the issues raised. The findings indicate that the stipulations in article 12 of POJK 16/2020, which require that e-GMS minutes be made in the form of a notarial deed without signatures from the GMS participants, align with article 46 of UU-JN. This alignment provides legal certainty regarding the Notary's authority in conducting e-GMS. Despite conflicts between POJK 16/2020 and UU-PT, POJK 16/2020 is considered a specific provision (lex specialis) through UU-4/2023, while UU-PT is a general provision (lex generalis). Article 8 paragraph (1) letter b of POJK 16/2020 aligns with article 16 paragraph (1) of UUJN-P, emphasizing the necessity of physical presence for notaries, appearing parties, and witnesses in notarial deeds. Without clear "specific conditions" as mentioned in article 9 of POJK 16/2020, the requirement for notarial deeds must follow the Notary Law. If the physical presence requirement is unmet, the deed only holds the evidentiary strength of an underhand deed as per article 16 paragraph (9) of UUJN-P. For supervision and law enforcement purposes, the Capital Market Notary must state in the deed that the submission of electronic data by the e-GMS Provider does not absolve its responsibility in ensuring the validity of the electronic data in the implementation of the e-GMS for Public Companies.*

Keywords: *Notary Authority, Minutes of Meeting, e-GMS, Public Company, Principle of Legal Certainty*

I. INTRODUCTION

The rapid flow of the current era of technological disruption has brought us to significant changes that create a shift in societal habits. Conventional work systems have now transformed into technology-based digital (electronic) work systems. This phenomenon also demands the corporate sector in the business world to swiftly adapt to the revolution of the digital ecosystem, in order to support the enhancement of national economic development in line with the principles of good corporate governance.

The presence of the Law of the Republic of Indonesia Number 40 of 2007 concerning Limited Liability Companies (hereinafter referred to as UU-PT) through Article 77 paragraph (1), states that, "The General Meeting of Shareholders (GMS) can also be conducted via teleconference, video conference, or other electronic media that allow all GMS participants to see and hear each other directly and participate in the meeting." This provision positions the UU-PT as one of the pillars in the regulatory framework in Indonesia, providing opportunities for the utilization of technology and information.

The General Meeting of Shareholders (GMS) holds the highest authority within the company, and its decisions cannot be annulled by anyone except by the court if there are valid grounds for doing so. Furthermore, due to its supreme authority, in addition to possessing residual powers (i.e., powers not allocated to other organs such as the Board of Directors and the Board of Commissioners), the law and/or the company's articles of association often require GMS approval for the company to make significant decisions.[1] Consequently, a GMS that is not properly minuted is invalid and considered never to have existed. As a result, the decisions made and established in the GMS cannot be implemented.[2]

The provisions regarding the minutes of the GMS conducted electronically (e-GMS) are regulated in Article 77 paragraph (4) of the UU-PT, which states, " Each GMS as referred to in paragraph (1) must be minuted and approved and signed by all GMS participants."

Based on its classification, Limited Liability Companies under the Limited Liability Company Law are divided into Private Companies, Public Companies, and Publicly Listed Companies (PT Tbk). For Publicly Listed Companies, known as 'Emiten', and Public Companies, they must comply not only with the provisions stipulated in UU-PT but also with the regulations set by the Financial Services Authority (OJK).

The minutes of electronic GMS (e-GMS) for Public Companies are also regulated in Article 12 paragraph (1) of the Regulation of the Financial Services Authority of the Republic of Indonesia Number 16/POJK.04/2020 concerning the Implementation of General Meetings of Shareholders of Public Companies Electronically (POJK 16/2020), which stipulates that, "The minutes of the electronic GMS must be made in the form of a notarial deed by a Notary registered with the Financial Services Authority without requiring the signatures of the GMS participants." However, the provisions regarding the minutes of the e-GMS for Public Companies as regulated by POJK 16/2020 conflict with Article 77 paragraph (4) of the UU-PT, which states that the e-GMS minutes should be approved and signed by all GMS participants.

Additionally, POJK 16/2020 through Article 9 also states that, "Under certain conditions, a Public Company may not hold a physical GMS as referred to in Article 8 paragraph (1) letter b or may restrict the physical presence of shareholders, either partially or entirely, in the conduct of the electronic GMS." The phrase "certain conditions" in the provisions of Article 9 of POJK

[1] Munir Fuady, *Perseroan Terbatas Paradigma Baru,* (Bandung: Citra Aditya Bakti, 2017), 129-130.

[2] Yahya Harahap, *Hukum Perseroan Terbatas,* (Jakarta: Sinar Grafika, 2009), 340.

16/2020 is not detailed regarding its application.

Based on the provisions of Article 12 paragraph (1) of POJK 16/2020 mentioned above, the minutes of the e-GMS must be made in the form of a notarial deed by a Notary. The Republic of Indonesia Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 on the Position of Notary (UUJN-P) in Article 1 point 7 provides the definition that, "A Notarial Deed, hereinafter referred to as a Deed, is an authentic deed made by or before a Notary in accordance with the form and procedures established in this Law." The function of an authentic deed is as probationis causa, which is intentionally made for future legal proof and recognition of a legal act.[3]

A Notary, as a public official authorized to make authentic deeds, is required by the provisions in the explanation of Article 16 paragraph (1) letter m of UUJN-P to "physically attend and sign the Deed in the presence of the appearing parties and witnesses". However, the ambiguity or vagueness in the phrase "certain conditions" in the provisions of Article 9 of POJK 16/2020 also impacts the Notary's authority if the GMS conducted electronically is not held with physical meetings. If this physical presence requirement is not met, based on Article 16 paragraph (9) of UUJN-P, the relevant deed only has the evidentiary strength of a private deed.

In this research, the author aims to analyze: First, how legal certainty is ensured regarding the Notary's authority in the implementation and creation of the minutes of the e-GMS of Public Companies considering the normative conflict between Article 77 paragraph (4) of the UU-PT and Article 12 paragraph (1) of POJK 16/2020? Second, how does the Notary's authority ensure legal certainty regarding the validity of the minutes of the e-GMS of Public Companies based on Article 9 of POJK 16/2020 concerning the non-physical attendance of meeting participants and based on the electronic data attached to the minutes of the deed?

II. METHOD

This research employs normative legal research methods using primary data sources derived from library research based on legislative regulations. The approach methods used are the statue approach and the conceptual approach with the type of research being doctrinal research.

This study utilizes primary legal materials such as the Limited Liability Company Law (UU-PT), the Financial Services Authority Regulation (POJK 16/2020), the Notary Office Law (UU-JN), the Electronic Information and Transactions Law (UU-ITE), and other relevant legislative regulations. The techniques for collecting and analyzing legal materials in this research are conducted through document study and literature study by inventorying all legal materials according to the classification of issues, which are then systematically arranged to answer the legal issues formulated in the problem statement.

[3] Melia Putri Purnama Sari, "Urgensi Pembuatan Postnuptial Agreement Dalam Bentuk Akta Pihak Sebagai Probationis Causa Berdasarkan Kebenaran Formil", *Jurnal Pakuan Law Review* 9, no. 3 (2023): 26,https://journal.unpak.ac.id/index.php/palar/article/view/8731.

III. ANYLISIS AND DISCUSSION

1.1 The Position of POJK 16/2020 in the Implementation of e-GMS for Public Companies

Public Companies include a Publicly Listed Company (PT Tbk) and a Public Company. According to Article 1 point 22 of Law Number 8 of 1995 concerning Capital Markets (UU-PM), a Public Company is "a Company whose shares are owned by at least 300 (three hundred) shareholders and has a paid-up capital of at least IDR 3,000,000,000.00 (three billion rupiah) or the number of shareholders and paid-up capital as determined by Government Regulation".

Meanwhile, a Publicly Listed Company (PT Tbk) in the capital market is known as an 'Emiten', which is a party that conducts a public offering of equity securities. Therefore, to be considered an Emiten, the company must meet the requirements to become a Public Company, but a Public Company is not necessarily an Emiten, which is a company that lists its shares for public offering on the Stock Exchange.

The implementation of the General Meeting of Shareholders conducted electronically (e-GMS), the minutes of the e-GMS in Article 77 paragraph (4) UU-PT stipulates that, "Each GMS as referred to in paragraph (1) must be minuted and approved and signed by all gms participants."

However, for Public Companies that must also comply with the provisions regulated by the Financial Services Authority (OJK), Article 12 paragraph (1) of POJK 16/2020 provides a different provision, stating that, "The minutes of the electronic GMS must be made in the form of a notarial deed by a Notary registered with the Financial Services Authority without requiring the signatures of the gms participants." Thus, regarding the signing of the minutes of the e-GMS, there is a normative conflict between Article 77 paragraph (4) UU-PT and Article 12 paragraph (1) of POJK 16/2020.

Based on the theory of the hierarchy of legislation, POJK 16/2020, as the implementing regulation of the Law of the Republic of Indonesia Number 21 of 2011 concerning the Financial Services Authority (UU-OJK), should not provide legal content that differs from the norms of higher-level legislation, namely Laws, in this case, the Limited Liability Company Law (UU-PT).

The legal foundation for the formation of POJK 16/2020 is derived from the Government Regulation in Lieu of Law of the Republic of Indonesia Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (Covid-19) Pandemic and/or in the Context of Facing Threats that Endanger the National Economy and/or Financial System Stability (Perpu 1/2020).

Perpu 1/2020 was then established as Law of the Republic of Indonesia Number 2 of 2020 concerning the Stipulation of Government Regulation in Lieu of Law of the Republic of Indonesia Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (Covid-19) Pandemic and/or in the Context of Facing Threats that Endanger the National Economy and/or Financial System Stability into Law (UU-2/2020).

Based on Article 23 paragraph (1) letter c of UU-2/2020, the the Financial Services

Authority is delegated the authority to stipulate provisions regarding the utilization of information technology in the conduct of General Meetings of Shareholders or other meetings that, based on legislative regulations, must be conducted by financial service industry players. Public Companies are part of the financial service industry, whose regulation and supervision activities fall under the jurisdiction of the OJK, meaning that Public Companies must comply with the Financial Services Authority Regulations (POJK).

However, after Law 2/2020 was amended by Law Number 7 of 2021 concerning the Harmonization of Tax Regulations, on January 12, 2023, the Law of the Republic of Indonesia Number 4 of 2023 concerning the Development and Strengthening of the Financial Sector (UU-4/2023) was enacted. In the fourth part, it amends and adds new articles to the UU-OJK, which in Article 8A paragraph (1) letter c and its explanation states,

In addition to the authority of the Financial Services Authority as referred to in Article 8, the Financial Services Authority has the authority to: establish policies regarding the utilization of information technology in the conduct of General Meetings of Shareholders or other meetings based on the provisions of laws and regulations.

The explanation elaborates*, Policies regarding the utilization of information technology in the conduct of General Meetings of Shareholders or other meetings that can be regulated by the Financial Services Authority include the form and manner of interaction and participation among participants as well as the form of minutes.*

Paragraph (3) of the same article further stipulates, "Further provisions regarding the implementation of the Financial Services Authority's authority in order to implement the policies referred to in paragraph (1) letter a, letter b, and letter c are regulated in the Financial Services Authority Regulations."

Based on the content of Article 8A paragraph (1) letter c of UU-4/2023, which has amended and added new articles to the UU-OJK, the Financial Services Authority has been given the authority by attribution to establish policies regarding the conduct of General Meetings of Shareholders or other meetings in Public Companies utilizing technology. This includes the form and manner of interaction and participation among participants, as well as the form of minutes, as regulated in the Financial Services Authority Regulations.

Given the parallel existence of two laws, namely the UU-OJK and the UU-PT, it is necessary to apply a legal principle, whereby based on the principle of *lex specialis derogat lex generalis*, which teaches that specific regulations (*lex specialis*) override general regulations (*lex generalis*), UU-4/2023 is positioned as a special provision (*lex specialis*) while the UU-PT is positioned as a general provision (*lex generalis*). Thus, the POJK issued based on UU-4/2023 has a legal foundation to regulate the implementation of e-GMS specifically for Public Companies, including the minutes of the meeting which are determined not to require the signatures of the GMS participants.

1.2 Legal Certainty Regarding the Notary's Authority in the Implementation and Creation of Minutes of e-GMS for Public Companies

The position of POJK 16/2020 was formed based on an evaluation of the obstacles in

Article 77 of the UU-PT, even though there is a normative conflict with Article 12 paragraph (1) of POJK 16/2020. However, the explanation of Article 8A paragraph (1) letter c of UU-4/2023 explicitly grants the Financial Services Authority the authority to establish policies regarding the utilization of information technology in the conduct of GMS or other meetings, one of which is the form of meeting minutes.

In the implementation of e-GMS, the Company's Shareholders may conduct teleconferences across cities or islands, even countries, while if the provisions in the UU-PT stipulate that the minutes of the e-GMS 'must be approved and signed by all GMS participants' as regulated in Article 77 paragraph (4), this will certainly pose difficulties for the Notary.

The original notarial minutes cannot be circulated for signature by all meeting participants, as the original minutes made by the Notary must be kept by the Notary, and only a copy with identical content is provided to the company. Moreover, as stipulated in Article 66 of UUJN-P, even for judicial purposes, investigators, public prosecutors, or judges can only take photocopies of the notarial minutes and/or documents attached to the notarial minutes, and this must be done with the approval of the Notary Honorary Council.

The explanation of Article 77 paragraph (4) of the UU-PT provides that, "The term 'approved and signed' means approved and signed either physically or electronically," making it possible for the signing by all GMS participants to be in a separate attachment from the notarial minutes. However, as long as there are parties who have not given their approval and signed the meeting's resolutions, the resolutions of the GMS are considered not yet valid and agreed upon, thus preventing the Notary from issuing the notarial minutes and subsequently providing a copy of the deed to the Company. As a result, the decisions and resolutions made in the e-GMS cannot be implemented.

If the agenda of the e-GMS includes amendments to the articles of association, Article 21 paragraph (9) of the UU-PT stipulates that, "after the 30 (thirty) day period as referred to in paragraph (7) has elapsed, the application for approval or notification of amendments to the articles of association cannot be submitted to the Minister". Additionally, if the approval of the meeting's resolutions is signed electronically, the Notary must also ensure that the owner of the electronic signature is certified by a recognized institution in accordance with the provisions of laws and regulations.

The provisions regarding the minutes of e-GMS as stated in Article 12 paragraph (1) of POJK 16/2020 require them to be made in the form of a 'notarial deed by a Notary', thus the need for the role and authority of the Notary in the implementation of e-GMS in Public Companies becomes much more essential. Regarding the provision 'by a Notary', it also clarifies that what is meant in the article is a notarial deed in the form of a relaas deed. This is because the article includes the element 'made by', which indicates that the notarial deed referred to is a type of relaas deed. Authentic deeds made by a Notary are divided into two types, namely: [4]

[4] Tan Thong Kie, *Studi Notariat beberapa Mata Pelajaran dan Serba Serbi Praktik Notaris,* (Jakarta: Ichtiar Baru Van Hoeve, 2007), 120.

1) *Deeds made by the Notary (relass deeds or official deeds) Deeds made by the Notary contain descriptions of actions performed based on circumstances observed or witnessed by the Notary. Examples of deeds made by the Notary include: minutes of GMS of a Limited Liability Company, bundle registration deeds, and others.*
2) *Deeds made before the Notary (partij deeds) Deeds made by the Notary containing descriptions of what is explained or narrated by the parties appearing before the Notary. These deeds can include credit agreements and others.*

Normatively, the provisions in the Notary Office Law do not actually provide a definition for the two types of notarial deeds, which are divided into relaas deeds and partij deeds. However, in the context of the implementation of GMS, minutes of the meeting in the form of a notarial deed are known as Minutes of Meeting Deeds. The phrase 'Minutes of Meeting' is included in the body of Article 46 of Law of the Republic of Indonesia Number 30 of 2004 concerning the Notary Office (UU-JN), the content of which was not amended in UUJN-P. Article 46 of UU-JN states that:

(1)*If in the preparation of the recording of assets or minutes concerning an act or event, there is an Appearing Party who:*

a. *refuses to sign; or*
b. *is not present at the closing of the deed, while the Appearing Party has not signed the deed, this must be stated in the deed and the deed remains an authentic deed.*

(2)*The refusal as referred to in paragraph (1) letter a must be stated in the deed by providing the reasons.*

This article states that in the creation of Minutes concerning an act or event, it is possible for the Appearing Party not to sign, as long as the reason is stated in the deed, and in such a case, paragraph (1) letter b of the same article states that the deed remains authentic. Therefore, if the minutes of the e-GMS regulated in Article 12 paragraph (1) of POJK 16/2020 are aligned with Article 46 of UU-JN, it normatively provides a legal basis for Notaries, both in the process of creation and in the product of the deed.

In line with Gustav Radbruch's concept of the principle of legal certainty, which states that the fundamental values of legal purposes must include justice, utility, and legal certainty. The provisions for the minutes of the e-GMS deed as regulated in POJK 16/2020 also provide legal certainty for Notaries that in the creation of Minutes of e-GMS Deeds, Notaries do not have to wait for the approval and signatures of all GMS participants as stipulated in Article 77 paragraph (4) of the UU-PT. Furthermore, considering the large number of shareholders in Public Companies, it is highly impractical for all shareholders to sign the deed. The challenges in implementing the e-GMS as stated in Article 77 of the UU-PT underlie the formation of a more comprehensive regulation for the electronic General Meeting of Shareholders in POJK 16/2020. The alignment between the norms in UU-JN and POJK 16/2020 also provides legal certainty for the authority of Notaries.

Unlike the regulation of e-GMS in Public Companies as stipulated in POJK 16/2020, which requires that the minutes of the e-GMS be made in the form of a notarial deed by a Notary, the regulation on the implementation of e-GMS issued by the OJK is specifically for

Public Companies (a Publicly Listed Company and a Public Company) only, and not as a legal basis for other companies subject to the Limited Liability Company Law.

According to Article 1868 of the Indonesian Civil Code (KUHPerdata), an authentic deed is "a deed made in the form prescribed by law, made by or before public officials authorized for that purpose at the place where the deed was made."

According to Irwan Soerodjo, there are three essential elements to fulfill the formal requirements of an authentic deed based on the definition in Article 1868 of the KUHPerdata, which are:[5]

a. *In the form prescribed by law;*
b. *Made by and/or before a Public Official;*
c. *The deed is made by or before a Public Official authorized to do so and at the place where the deed was made.*

Regarding the Notary's obligation in making a deed, Article 16 paragraph (1) letter m of UUJN-P stipulates that,

In carrying out his/her duties, the Notary is obligated to: read the Deed before the Appearing Party in the presence of at least 2 (two) witnesses, or 4 (four) witnesses specifically for the making of a privately made Will, and have it signed immediately by the Appearing Party, the witnesses, and the Notary.

The explanation of Article 16 paragraph (1) letter m stipulates that, "The Notary must be physically present and sign the Deed in the presence of the Appearing Party and witnesses." Therefore, although the signing of Minutes of Meetings based on Article 46 of UU-JN may be signed by the Notary and witnesses only, the provisions in the UU-JN clearly require physical presence. If the provisions of Article 16 paragraph (1) letter m are not fulfilled, then according to Article 16 paragraph (9), the deed in question only has the evidentiary strength of a private deed.

In line with these provisions, POJK 16/2020 regulates physical presence in Article 8 paragraph (1) letter b, which stipulates that in the implementation of an electronic GMS, Public Companies must hold a physical GMS attended by at least:

1. the chairperson of the GMS;
2. one member of the Board of Directors and/or one member of the Board of Commissioners; and
3. capital market supporting professionals assisting in the conduct of the GMS.

Based on Article 64 of the UU-PM, Notaries are included as one of the Capital Market Supporting Professions. Therefore, even though the GMS of Public Companies is conducted electronically, Article 8 paragraph (1) letter b of POJK 16/2020 provides clear provisions regarding the obligation to still hold a physical meeting, which also applies to the Notary. As long as the requirement for physical presence in Article 8 of POJK 16/2020 is fulfilled, the Notary's obligation as stipulated in Article 16 paragraph (1) letter m of UUJN-P can still be met.

Regarding the location for the physical presence of the e-GMS, it is also regulated by the

[5] Irwan Soerodjo, *Kepastian Hukum Hak Atas Tanah di Indonesia.* (Surabaya: Arkola, 2003), 148.

Financial Services Authority in Regulation of the Financial Services Authority of the Republic of Indonesia Number 15/POJK.04/2020 concerning the Planning and Implementation of General Meetings of Shareholders of Public Companies (POJK 15/2020). In Article 11 paragraph (3) of POJK 15/2020, it is stated that the location can be:

a. *the domicile of the public company;*
b. *the place where the public company conducts its main business activities;*
c. *provincial capital where the domicile or main business activities of the Public Company are located; or*
d. *the province where the stock exchange that lists the public company's shares is located.*

In Indonesia, the Indonesia Stock Exchange (IDX) is located in the Special Capital Region of Jakarta. Therefore, if the shares of a Public Company are listed on the IDX Jakarta, the GMS can also be held in the Special Capital Region of Jakarta, even if the headquarters or main operations of the Public Company are located in another city. Public Companies can freely conduct the GMS or e-GMS in accordance with the provisions of Article 11 paragraph (3) of POJK 15/2020, provided that the Notary requested to draw up the minutes of the e-GMS is a Notary authorized in the area of their domicile and jurisdiction.

Article 18 of UU-JN explains that a Notary has a domicile in the district or city area, while the jurisdiction of the Notary covers the entire province of their domicile. If a Notary performs their duties outside their jurisdiction, the Notary may be subject to sanctions in the form of a written warning; temporary suspension; honorable discharge; or dishonorable discharge.

1.3 The Authority of Notaries in Ensuring Legal Certainty Regarding the Validity of e-GMS Minutes for Public Companies Based on Article 9 of POJK 16/2020

The existence of Notaries in Indonesia is closely related to the system of evidence in civil law, which recognizes hierarchical means of proof as mentioned in Article 1866 of the Indonesian Civil Code (KUHPerdata). It states that the means of proof consist of written evidence, witness evidence, presumptions, confessions, and oaths. It is known that written proof is conducted either with authentic writings or with private writings.[6]

The deed made by a Notary is called a notarial deed. A notarial deed, as an authentic deed, has an important function in societal life. The deed has two important functions: first, the formal function, which means that a legal act becomes more complete when it is made into a deed; second, the evidentiary function, wherein the deed serves as evidence, created by the parties involved in an agreement, intended for future proof.[7]

POJK 16/2020 has comprehensively regulated the implementation of e-GMS for Public Companies by maximizing information technology in synergy with the provisions of the UU-JN. However, there are still challenges due to other provisions in POJK 16/2020 that

[6] Herlien Budiono, "Autentisitas Akta dan Deontologi Notaris di Era Artificial Intelligence", in *Cyber Notary dan Tantangan Notaris di Era Digital,* (Bandung: Refika Aditama, 2023), 106.

[7] Sudikno Mertokusumo, *Mengenal Hukum: Suatu Pengantar,* (Yogyakarta: Liberty, 1999), 121-122.

provide the possibility of not requiring physical presence as stipulated in Article 8 paragraph (1) letter b of POJK 16/2020. This provision is contained in Article 9 of POJK 16/2020, which states, "Under certain conditions, a Public Company may not hold a physical GMS as referred to in Article 8 paragraph (1) letter b or may restrict the physical presence of shareholders either partially or entirely in the conduct of the GMS electronically."

Regarding the "certain conditions" referred to in the article, when linked to the philosophical basis for the creation of POJK 16/2020, it is intended to respond to the conditions of the Corona Virus Disease 2019 (Covid-19) pandemic. It is reasonable that "certain conditions" refer to the recommendation for social distancing, as the consideration of POJK 16/2020 explains that the issuance of POJK 16/2020 is based on the enactment of Government Regulation in Lieu of Law Number 1 of 2020 concerning State Financial Policy and Financial System Stability for Handling the Corona Virus Disease 2019 (Covid-19) Pandemic and/or in the Context of Facing Threats that Endanger the National Economy and/or Financial System Stability.

On the other hand, if "certain conditions" refer to the conditions as stated in the explanation of Article 2 paragraph (3) of POJK 15/2020, which are conditions of significant market fluctuations, such fluctuations, according to the Indonesian Dictionary (KBBI), are symptoms of price increases and decreases due to the influence of supply and demand. In the context of Public Companies, this means drastic changes in the value or financial condition of the company, which can be influenced by various factors, including internal company factors, global economic conditions, investor sentiment in the stock market, and others. Therefore, based on such conditions, the shareholders of a Public Company have the right to hold an Extraordinary GMS, which allows its implementation at any time. If this is conceptualized as "certain conditions," then the e-GMS without physical presence as regulated in Article 9 of POJK 16/2020 can be carried out.

The phrase "certain conditions" in the provision of Article 9 of POJK 16/2020 has not been detailed in POJK 16/2020, resulting in a vague norm that also affects the authority of the Notary in ensuring the authenticity of the deeds they make, as the concept in the UU-JN requires the element of 'Appearing Party,' which refers to the party directly facing the Notary.

Regarding the physical presence of the parties as regulated in POJK Number 15/POJK.04/2020 concerning the Planning and Implementation of General Meetings of Shareholders of Public Companies and POJK Number 16/POJK.04/2020 concerning the Implementation of General Meetings of Shareholders of Public Companies Electronically, it is stated that presence can be divided into two types, namely physical presence and electronic presence. Physical presence is further divided into personal presence and presence by proxy, which in the case of a proxy, is divided into physical proxy and electronic proxy (*e-proxy*).[8]

The presence of the appearing parties is a primary requirement in a deed, and this information will be included in the comparitie section of the notarial deed. The mechanism for conducting the e-GMS for Public Companies is a legally regulated arrangement as

[8] Ikhsan Lubis, *Transformasi Digital Penyelenggaraan RUPS (e-RUPS) Terkait Cyber Notary,* (Jakarta: Kencana, 2022), 199.

stipulated in the body of Article 8A paragraph (1) letter c of UU-4/2023, which amends UU-OJK. Therefore, for Capital Market Notaries, in drafting the Minutes of Meeting Deed, modifications are made in the comparitie section of the deed, explaining that the presence of participants is divided into 'parties attending the meeting physically' and 'parties attending the meeting electronically.'

As conveyed by Aulia Taufani in the "Webinar Implementasi E-RUPS Sebagai Sebuah Tantangan dan Peluang Pada Era Disrupsi" organized by the Association of Master of Notarial Law Students at the University of Indonesia, one thing that must be understood in ensuring the authenticity of deeds from the perspective of the Notary Office Law is that "the understanding of 'present' cannot be equated with 'appearing party.' This means that if someone is physically present, they can become the 'appearing party' in the deed, but if someone is present electronically, they cannot be considered as the 'appearing party,' because in the norms of the Notary Office Law, 'appearing party' is understood as actual physical presence."[9] The phrase "physical presence," when broken down word by word, means being present and physically.

"Present" means being there or coming, while "physically" means having a body or corporeal form. Thus, "physical presence" means being there in a corporeal form, in other words, having a tangible or visible physical form.[10] If this requirement is not met, then as stipulated in Article 16 paragraph (9) of UUJN-P, the relevant deed only has the evidentiary strength of a private deed, not as a notarial deed as required by Article 12 paragraph (1) of POJK 16/2020.

Article 16 paragraph (1) letter m of UUJN-P stipulates that, "The Notary must read the deed before the appearing party in the presence of at least 2 (two) witnesses, or 4 (four) witnesses specifically for the making of a privately made will, and have it signed immediately by the appearing party, the witnesses, and the Notary."

Article 16 paragraph (7) of UUJN-P further stipulates that the reading of the deed as referred to in paragraph (1) letter m is not mandatory if the appearing party requests not to have it read because the appearing party has read it themselves, understands, and comprehends its contents, provided that this is stated in the closing of the deed and initialed on every page of the minute of the deed by the appearing party, the witnesses, and the Notary.

Regarding the affixing of signatures and initials (initials in the sense according to the Indonesian Dictionary (KBBI) is the abbreviation of signatures), if viewed in the provisions of Article 44 paragraphs (1) and (2) in conjunction with Article 46 of UUJN-P, which states that, immediately after the deed is read, the deed shall be signed by each appearing party, witness, and Notary, except if there is an appearing party who cannot affix their signature by stating the reason. Based on these provisions, the reason for not signing by the appearing

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[9] "Webinar IMMK UI - Implementasi E-RUPS Sebagai Sebuah Tantangan dan Peluang Pada Era Disrupsi". *IMMK UI – Div. Ganbon TV*. Uploaded on May, 12, 2021. Accessed on May, 8, 2024. https://www.youtube.com/watch?v=Radm4H_OCkY&t=7s

[10] Muhammad Rizky Ilham Chalid. "Hambatan dan Prospek Hukum Penyelenggaraan Jasa Notaris secara Elektronik di Indonesia Memasuki Era Society 5.0". *Jurnal Hukum & Pembangunan* 52, no. 1 (2022): 260. https://scholarhub.ui.ac.id/jhp/vol52/iss1/12/.

party must be explicitly stated at the end of the deed. If this is not fulfilled, as stipulated in Article 44 paragraph (5) of UUJN-P, it results in the deed having only the evidentiary strength of a private deed and can be a reason for the party suffering the loss to claim reimbursement of costs, compensation, and interest from the Notary.

The provision regarding Article 16 paragraph (1) letter m of UUJN-P, as explained, emphasizes that "the Notary must be physically present and sign the deed in the presence of the appearing party and witnesses." Therefore, it can be concluded that: first, the Notary must be physically present; second, the signing must take place 'in the presence of' the Appearing Party and witnesses.

According to Habib Adjie, the use of the phrases "Appearing before me..." or "In the presence of me..." or "Has appeared before me..." have the same meaning and implication, namely that the parties are physically present before the Notary in accordance with the Notary's domicile or jurisdiction.[11]

In the Notary Office Law, there is no article that provides an exception to the physical presence requirement as stipulated in the explanation of Article 16 paragraph (1) letter m of UUJN-P. In connection with this, based on the provisions contained in Article 16 paragraph (9) of UUJN-P, it is stated that if the provisions in Article 16 paragraph (1) letter m are not fulfilled, the deed in question only has the evidentiary strength of a private deed.

The essential factor that determines the evidentiary strength of an authentic deed is the undeniable fact of ensuring the presence of the Notary in witnessing the reading and signing of the deed as the primary factor determining the authenticity of the deed. This procedure is not only a material element but an integral part of the making of an authentic deed because the objective is to prevent forgery, thus the presence of the Notary is the only fact that guarantees the truth and certainty of the deed's creation.[12]

The basis of the authenticity of the minutes of meeting deed or relaas deed based on Article 48 of UU-JN explains that the appearing party may not sign the deed, so the signing of the minutes of meeting deed can be done only by the Notary and the witnesses. This is understood because the Notary, in making the minutes of meeting deed, describes an event or incident based on what the Notary saw and heard himself, as a public official who has been sworn in and promised to act with integrity, honesty, accuracy, independence, and impartiality in performing his duties. Therefore, in holding this prestigious and noble office, the Notary is trusted to create an authentic deed based on the format specified in the legislation. However, the physical presence of the appearing party is still required to ensure that everything contained in the minutes of meeting deed is true and accurate.

According to Habib Adjie, a Notary is a position (not a Profession or Professional Position), and any position in this country has its own authority. Every authority must have a legal basis. Therefore, if an official acts outside of his authority, it can be declared an unlawful act. Therefore, an authority does not simply appear as a result of a discussion or

[11] Habib Adjie, *Implementasi Pasal 77 Ayat (1) Juncto Pasal 90 ayat (2) UUPT 2007 Tentang RUPS Perseroan Terbatas (Non Tbk) Secara Video Conference Oleh Notaris (Vicon),* (Bandung: Refika Aditama, 2022), 14.

[12] Herlien Budiono, *Op.Cit,* 117.

talk behind the scenes or due to debates or opinions in legislative bodies, but the authority must be explicitly stated in the relevant legislation.[13]

The terminology of notarial attributed authority requires that in exercising their official powers, Notaries must adhere to the legislation that defines the boundaries of their authority. According to Gustav Radbruch's concept of legal certainty, the element of legal certainty must be maintained for the order and stability of a state. Therefore, positive law that regulates the interests of individuals in society must always be obeyed, even if the positive law is less just or does not fully achieve the objectives of the law itself.[14] The law as it stands must be upheld, and its implementation should not deviate from the principle of "*fiat justitia et pereat mundus*" (let justice be done though the world perish). This is the essence of the desire for legal certainty.[15]

From the perspective of Article 8A paragraph (1) letter c of UU-4/2023 which amends UU-OJK, the Financial Services Authority (OJK) is granted the authority through the Financial Services Authority Regulations (POJK) as implementing regulations to set policies regarding the use of information technology in the conduct of General Meetings of Shareholders (GMS) or other meetings based on statutory provisions for Public Companies. However, in terms of the authenticity of the minutes of the meeting, which must be made in the form of a notarial deed by a Notary, the reference must still adhere to what is regulated in the UU-JN.

Habib Adjie opines that POJK 15/2020 and POJK 16/2020 are not supplements for the creation of deeds nor to fulfill the requirements of deed authenticity, but merely tools to facilitate the electronic conduct of General Meetings of Shareholders (GMS).[16] Therefore, to create legal protection and certainty both in the making of the deed and its final result, the implementation of e-RUPS must still be physically attended by the appearing party (the party authorized to act) and witnesses together with the Notary at the location where the e-RUPS is held, as stipulated in Article 8 paragraph (1) letter b and paragraph (3) of POJK 16/2020 in *jo.* with Article 11 paragraph (3) of POJK 15/2020.

1.4The Notary's Authority in Ensuring Legal Certainty for the Validity of the Minutes of e-GMS of Public Companies Based on Electronic Data Attached to the Deed Minutes

Regarding the provisions of the minutes of the meeting as regulated in Article 12 paragraph (2) of POJK 16/2020, it is stipulated that the e-GMS Provider must submit to the Notary a printed copy containing at least:

a. a list of shareholders attending electronically;
b. a list of shareholders who have granted proxies electronically;
c. a recapitulation of the quorum of attendance and the quorum of decisions; and
d. a transcript of the recordings of all interactions during the electronic GMS to be attached to the minutes of the GMS.

[13] Rahmida Erliyani dan Siti Rosydah Hamdan, *Akta Notaris Dalam Pembuktian Perkara Perdata dan Perkembangan Cyber Notary*, Third Edition, (Yogyakarta: Dialektika, 2023), 35.

[14] Theo Huijibers, *Filsafat Hukum Dalam Lintasan Sejarah.* (Yogyakarta: Kanisius, 1982), 165.

[15] Sudikno Mertokusumo, *Loc.Cit.*

[16] Ikhsan Lubis, *Op.Cit,* 203.

In the implementation of e-GMS as regulated in Article 4 of POJK 16/2020, the execution of e-GMS can be carried out using:

1. The e-GMS System provided by the e-GMS System Provider;
2. The e-GMS System provided by the Public Company.

The Electronic Implementation System of e-GMS, according to Article 1 point 6 of POJK 16/2020, is an electronic system or facility used to support the provision of information, implementation, and reporting of General Meetings of Shareholders (GMS) of Public Companies. Therefore, the Electronic System Provider for the Implementation of Electronic General Meetings of Shareholders (e-GMS Provider) is the party that provides and manages the e-GMS.

The e-GMS Providers referred to are the Central Securities Depository and Settlement Institutions appointed by OJK or other parties approved by OJK. According to Article 1 point 10 of UU-PM, the Central Securities Depository and Settlement Institution (LPP) is the party that organizes central custodial activities for Custodian Banks, Securities Companies, and other parties.

Currently, the function of LPP is carried out by PT Kustodian Sentral Efek Indonesia (KSEI). If the Electronic System Provider for e-GMS is provided by the Public Company itself or another party approved by OJK, then the e-GMS Provider must be connected with LPP and the Securities Administration Bureau to ensure shareholders entitled to attend the e-GMS. The e-GMS Providers, which are other parties approved by OJK, must be legal entities based in the territory of the Unitary State of the Republic of Indonesia.

According to Aulia Taufani, a Notary as a public official is obliged to make minutes of deeds for acts and events that occur in meetings. Therefore, the Notary's responsibility is to ensure that what is made in the minutes of deeds are actual events that occurred in the meeting, including electronic data information provided by the e-GMS organizer. As long as this has been made in the minutes of deeds, the Notary has carried out his duties and responsibilities according to the Law on Notary Positions (UUJN).[17]

In drafting the minutes of an e-GMS into a Notarial Deed of Meeting Minutes, the Notary must specify that the General Meeting of Shareholders (GMS) was conducted electronically. This includes detailing the time and date of the meeting, the venue where the meeting was held, the presence of the meeting participants, the agenda items discussed, and the resolutions passed. Furthermore, if any participant leaves the meeting (either physically or electronically), this must be noted in the deed. At the end of the deed, it must be stated that the printed copies of the electronic data will be provided by the e-GMS Provider to the Notary to be attached to the notarial minute. As stipulated in Article 12, paragraphs (4) and (5) of POJK 16/2020, the Notary must declare in the deed that the e-GMS Provider remains responsible for storing all data from the electronically conducted GMS.

The evidentiary power of all information or electronic documents and their printouts attached to the notarial minute, according to Article 5 of the Law of the Republic of Indonesia Number 1 of 2024 on the Second Amendment to Law Number 11 of 2008 on

[17] *Ibid,* 219.

Electronic Information and Transactions (UU-ITE), must comply with the Electronic System as regulated by the UU-ITE to be recognized as legally valid evidence in Indonesian procedural law. Referring to Article 6 of Government Regulation Number 71 of 2019 on the Implementation of Electronic Systems and Transactions, it is stated that 'every electronic system provider must register and apply to the Minister through an integrated electronic business licensing service in accordance with the provisions of the legislation'.

In accordance with Article 6 paragraph (1) of POJK 16/2020 *jo.* Article 35 paragraph (1) of POJK 15/2020, it is stipulated that the e-GMS Provider must be registered as an electronic system operator in accordance with the legislation. Therefore, every e-GMS Provider for Public Companies is required to first register as an Electronic System Operator at the Ministry of Communication and Information Technology of the Republic of Indonesia.

In addition to complying with the ITE Law regulations, e-GMS Providers must also meet other obligations and features set by OJK to accommodate all forms of electronic system implementation, (meeting operational standards of information technology systems, ensuring information technology security, system disturbances and failures, information technology system management transfers, storing all e-GMS implementation data, and having backup facilities for data centers and disaster recovery centers related to the implementation of e-GMS within the territory of Indonesia at safe and separate locations from the main data center and providing audit trails for all data processing activities in the e-GMS for supervision, law enforcement, and dispute resolution purposes).

These features must be fulfilled because Article 6 of the Law of the Republic of Indonesia Number 11 of 2008 concerning Electronic Information and Transactions states that, "Electronic Information and/or Electronic Documents are considered valid as long as the information contained therein can be accessed, displayed, its integrity is assured, and it can be accounted for, thereby explaining a situation."

The provider is also required to have a data center replacement facility in Indonesia, meet information technology standards, and store all GMS implementation data electronically. They are also responsible for any losses arising from errors or negligence in providing and managing the e-GMS. If legal issues or disputes arise regarding the authenticity of the electronic data provided to the Notary in the future, the integrity of the electronic data and its digital record is not based on the printed copy provided by the e-GMS provider to the Notary but on the central data stored in the e-GMS provider's server. Therefore, Article 12 paragraphs (4) and (5) of POJK 16/2020 stipulates that the submission of printed copies provided by the e-GMS provider to the Notary does not exempt the e-GMS provider from the responsibility to store all GMS implementation data electronically.

The role and responsibility of the e-GMS Provider are crucial in supporting the authenticity of the e-GMS minutes deed made by the Notary. Although the deed of minutes itself already has perfect evidentiary power, the role of the e-GMS Provider in providing a reliable electronic data system stored on the e-GMS Provider's server can also serve as additional evidence or double verification for Public Companies.

The requirement for professional human resources with expertise in information technology, as well as a stringent shareholder validation mechanism, ensures that the implementation of e-GMS is carried out by competent and experienced experts. This adds a layer of security and reliability to the system used. Furthermore, the regulations that have been standardized in the legislation provide legal certainty for all parties involved that only providers meeting the standards are permitted and recognized as electronic system operators for the implementation of e-GMS.

IV. CONCLUSION

1. Based on the theory of the hierarchy of legislation, the OJK, through Article 8A paragraph (1) letter c and paragraph (3) of UU-4/2023, is authorized to establish policies regarding the implementation of GMS or other meetings in Public Companies utilizing technology. Therefore, POJK 16/2020, through UU-4/2023, is positioned as a specific provision (*lex specialis*) while UU-40/2007 on Limited Liability Companies (UU-PT) is positioned as a general provision (*lex generalis*). The Notary's authority in e-GMS based on POJK 16/2020 becomes more important because the minutes of the e-GMS must be made by a Notary, unlike the provisions in UU-40/2007. Although the GMS is conducted electronically, POJK 16/2020 still provides legal certainty regarding the Notary's authority in accordance with the norms in the Notary Law (UU-JN), both regarding the minutes of meetings without requiring the signatures of GMS participants and regarding the obligation for physical presence.
2. The obligation for the physical presence of an 'Appearer' is an integral part of proving the creation of an authentic deed, to witness the truth and anticipate the possibility of denial or forgery. Article 9 of POJK 16/2020 does not explain the "specific conditions" that allow the absence of physical presence, so to ensure the validity of the e-GMS minutes deed, which must be made in the form of a notarial deed, its provisions must comply with the Notary Law (UU-JN) to guarantee legal certainty. Regarding the provisions of the minutes of the meeting as regulated in Article 12 paragraph (2) of POJK 16/2020, the e-GMS Provider is obliged to submit a printed copy of the electronic data to the Notary. Thus, to provide legal assurance regarding the printed copy of the electronic data, the Capital Market Notary must state in the deed that based on Article 12 paragraph (4) of POJK 16/2020, the submission of the printed copy as referred to in paragraph (2) does not exempt the e-GMS Provider from the responsibility to store the GMS implementation data electronically. This is because the role of the e-GMS system provider is crucial in ensuring the validity of the electronic data that will be attached to the notary's minute deed for supervision and law enforcement purposes.

SUGGESTION

The existence of POJK 16/2020 can be used as a reference for more comprehensive regulations regarding the implementation of e-GMS in the future, so that this regulation is expected to apply not only to Public Companies but also to Limited Liability Companies (PT) under the auspices of UU-40/2007 on Limited Liability Companies (UU-PT). The Ministry of Law and

Human Rights should introduce a recognized e-GMS platform, managed or appointed by the Government as a reliable electronic system operator and integrated with the company registry system managed by the Directorate General of General Legal Administration (Ditjen AHU). By supporting and facilitating the implementation of e-GMS, Limited Liability Companies other than Public Companies, and Publicly Listed Companies can also conduct e-GMS with legal certainty. Furthermore, in facing regulatory changes in Indonesia that have adapted to the use of technology and information, Notaries must be able to harmonize their authority as public officials who obtain authority based on the Notary Law, while still committing to the limitations of their authority as regulated in the Notary Law (UU-JN). This is necessary to ensure legal certainty for the authentic deeds they create.

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