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PROBLEMATIC OF IMPLEMENTATION OF ELECTRONIC GMS ON DEEDS MADE BY NOTARIES

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Abstract

The study reviewed the development of the digital era in the legal field, especially The Electronic General Meeting of Shareholders (GMS), which is ruled by law. The problem formulation was how the electronic GMS, according to positive law in Indonesia, and how the impact on the notarial deed related to its implementation. The method used by the researcher was normative and library study based on the primary material (legislation), secondary material (scientific works, journals, books, documents, and other literature), and tertiary legal materials (legal dictionaries). The study results were that E-GMS is effective today, then regulated in Art 77 UUPT and PJOK Number 16/Pojk.04/2020, so that the Limited Liability Company members can carry out the GMS as usual without being physically present to break the chain of the Covid-19 pandemic. Although the e-GMS arrangements have been regulated in the legislation, the lex specialist derogat lex generalist principle cannot be ignored; article 16 paragraph (1) letter (m) and Article 18 UUJN are still prioritized so that the electronic deed of the GMS cannot be carried out or will resulting in the legal force of the proof being a private deed.

Keywords: Covid-19 Pandemic; E-GMS; Notaries; Relaas Deed

1. INTRODUCTION

Advance technology and information rise in cyberspace. This advance makes communication more accessible by using gadgets and the internet, the all activities are running smoothly, effectively, and efficiently. One of the sectors which get advantages are business and trades, supported by various features and exciting offers for attracting the consumers, then help the workers in all companies all over the world to develops and introduces the product which resulted by worldwidee the entrepreneurs can also collaborate with business partners to run their business continuity to make a profit.

Perseroan Terbatas “Limited Liability Company “ (known as *PT*) comes from the English term “Limited” or limit; it means limited capital of a company, excluding personal assets of the shareholder.[1] *PT* is a shareholder association and acts as an artificial person

[1] Hilman Hadikusuma, *Bahasa Hukum Indonesia*, (Bandung: PT. Alumni, 2005), 111

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by the court. This law firm authorizes to accept, hold and transfer the assets, suing or being sued and performs other authorities mandated by the law.[2] *PT* which has legal entity status, acts as a legal subject with obligations and rights. It also means that the legal entity of a Limited Company doesn't exist according to the founder's will but is determined by the law.[3]

Limited Liability Companies, as an artificial legal subjects, should be equipped with the organ that supports their legal entity's function. As stipulated in Article 1 number 1 Law No. 40 of 2007 concerning Limited Liability Companies (called by *UUPT*), it states a legal entity or "company" which constitutes an alliance of capital established according to a contract to carry on business activities. And with an authorized capital, all of which is divided into shares and which fulfills the requirements stipulated in this Act and its implementing regulations. Related each organ in a company can be explained as follows:

a. General Meeting of Shareholders (hereinafter called the "GMS") means the Company Organ, which has authority not given to the Board of Directors or Commissioners.
b. Board of Directors" means the Company Organ with full authority and responsibility for the management of the Company in the interests of the Company by the Company's purposes and objectives and to represent the Company in and out of court by the provisions of the articles of association.
c. Board of Commissioners means the Company Organ with the task of general and/or specific supervision by the articles of association and advising the Board of Directors.

The company has been established by 2 (two) or more people; each should be a share, then make a deed of establishment by a notary. That does not apply to State-Owned Enterprise; its establishment is according to special regulation because it has special status and characteristics.[4] After signing the deed jointly or through a proxy, a Notary sends a request to the legal entity administration system to issue a decision from the Ministry of Law and Human Rights of the Republic of Indonesia (*Kemenkumham*) regarding the legalization of the legal entity.[5]

In article 1 paragraph 1 Law No. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning notary profession (hereinafter called *UUJN*), the point provides a statutory that was already in the *UUJN* or other laws that a Notary is a public official who then in that position also contains the authority to be able to do a deed, hereinafter referred to as an authentic deed along with other authorities by the relevant laws and regulations. In addition to making a deed of establishment, a notary also has another

[2] Munir Fuady, *Perseroan Terbatas Paradigma Baru*, (Bandung: PT. Citra Aditya Bakti, 2003), 3-12
[3] Gunawan Widjaja, *Tanggung Jawab Direksi Atas Kepailitan Perseroan*, (Jakarta: PT Raja Grafindo, 2003), 18
[4] I.G.A. Rai Widjaya, *Hukum Perusahaan*, Cet. ke-1, (Jakarta: Kesaint Blanc, 2000), 153.
[5] Ridwan Khairandy, *Pengantar Hukum Dagang*, Cet. ke-1, (Yogyakarta: FH UII Press, 2006), 39.

role in helping a limited liability company run its business, to put the minutes of the GMS in the form of a deed, or to be present at the GMS.

GMS minutes should be made; otherwise, the GMS is deemed invalid and never executed. Consequently, all deals can not be carried on. The GMS that be carried on before the notary is contained on position deed, while the other things executed without notary present, stipulated in a minute meeting written by Attorney in fact parties, such as Directors or company legal staff.[6]

On March 2nd, 2020, Indonesia confirmed *Corona Virus Disease* (COVID-19) first time. This plaque spread rapidly, as shown by increasing cases across countries and areas; it impacts politics, economics, society, culture, defenses and security, and social welfare, including Indonesia. Until July 6th, 2022, recorded 6.097.928 cases confirmed *COVID*-19 spread in 34 Indonesia provinces,[7] then many professions must be running by work from home using the platform for interacting with others, like zoom or google meet.

Regarding emergency conditions caused by the pandemic, the government has issued a new Finance Service Authority Regulation Republic of Indonesia No. 16/Pojk.04/2020 concerning the implementation of E-GMS in Public Companies, which has been expected to prevent Covid-19 from spreading. Besides that, it has an objective for technology utilizing as communication tools with electronics systems.[8] If E-GMS holds and requests a notary for his presence to record all the things that it has seen, witnessed, and heard, then it will raise problems for the notary; according to Article 16 paragraph m UUJN, the point is provided regulation when reading the deed then a notary must physically present and followed by at least two witnesses who signed the act before the parties, notary and all witnesses. Article 18 of Notary public also regulates that a notary has a working area in the entire province and regions in his scope of work. The E-GMS deed draft has an impact on not giving legal certainty with physical and attendance contacts, and the notary will obtain obstacles and perhaps emerge a new problem.

The minutes of the e-GMS must be made in the form of a notarial deed by a Notary registered with the OJK without requiring the signatures of the participants.[9] The GMS which is conducted electronically via teleconference is contrary to Article 18 UUJN, because during the e-GMS, the Notary may remain in the domicile or area of the office, but the parties who do not appear physically may be outside the domicile or area of the office Notary Public. Although the e-GMS still confuses, also in certain circumstances where the Notary finally faces the parties virtually and doubts the authenticity of the notarial deed, then Article 11 paragraph (1) of the ITE Law provides answers to these

[6] Sudaryat, *Legal Officer*, Cet. ke-I, (Bandung: Oase Media, 2008), 18.
[7] https://covid19.go.id/, accessed on 6 July 2022
[8] Rachmadi Usman, *Dimensi Hukum Perseroan Terbatas,* (Bandung: Alumni, 2004), 156
[9] Syifa Rana Tsary, *Juridical Analysis of GMS Electronic Policy (E-GMS) on the Morality of Notary Responsibilities*, IJMMU Journal, Vol. 9, No. 12, *Edition of December* 2022, https://ijmmu.com/index.php/ijmmu/article/view/4154/3659, pg. 200, accessed on 12 December 2022

doubts, namely; "Electronic signatures have legal force and legal consequences as long as they meet the following requirements: a) Electronic signature creation data relates only to the signer; b) The electronic signature creation data at the time of the electronic signing process is only in the power of the signer; c) Any changes to the electronic signature that occur after the time of signing can be noticed; d) Any changes to the electronic information related to the electronic signature after the time of signing can be noticed; e) There are certain methods used to identify who the signer is; and f. There are certain ways to show that the signer has given his/her consent to the associated electronic information.

Based on the results of previous studies that have been carried out by researchers, the novelty in this research is to examine the forms of various problems encountered when implementing E-GMS. The research was used to obtain updated results concerning the obstacles that impact the deed validity made by a notary in the E-GMS agenda, along with statutory provisions established to strengthen the legality of E-GMS. Based on the descriptions above, the writer will explain the problem in the research titled "Problematic of Implementation of E-GMS on deed made by a notary." The problems formulation are; 1) How is the E-GMS in a positive law perspective? 2) How are the impacts of E-GMS implementation on notarial deeds? The objectives of this research were to analyze the E-GMS based on Indonesia's positive law and the impact on notarial *relaas* deed, then it is expected to contribute knowledge to academics and practitioners in the law.

This research method was normative and literature. The writer will review an object based on related law material, both primary and relevant regulation, secondary as literature and other sources, and all primary and secondary material such as law dictionaries. Then all the material was inventoried and observed through the positive law in Indonesia.[10] The research was based on a statute approach and descriptive qualitative. The qualitative approach provides descriptive data like writing or oral from the informants, and observed behavior did not write in variables or hypotheses.[11]

2. ANALYSIS AND DISCUSSION

2.1. The E-GMS in a positive law perspective

The minutes of GMS underhand were stipulated on the Deed of Meeting Resolutions by the notary for 30 maximum periods since the date of the GMS decision. In every article of Association amendments, an authorized notary applies for approval or notifies to Law and Human Rights Ministry.[12] GMS term, according to English, is general shareholder's meeting, then in the Netherlands, *Algemene vergadering van andeelhouders*

[10] Bambang Waluyo, *Penelitian Hukum dalam Praktik*, (Jakarta: Sinar Grafika, 1991), 14

[11] Lexy J. Moleong, *Metodologi Penelitian Kualitatif,* Cet. ke-13, (Bandung: Remaja Rosdakarya, 2000), 2

[12] Erick Agustian, *Eksistensi Akta Risalah Rapat Umum Pemegang Saham Yang Dibuat Notaris Dalam Kaitan Perubahan Anggaran Dasar Perseroan Terbatas* (Studi Kasus Putusan Mahkamah Agung RI Nomor.209/K/Tun/2004), Thesis, Magister Kenotariatan, Universitas Diponegoro, 2011, 18

is one of the organs of a Limited Company except for Commissioners and Director.[13] The GMS organs member shareholders have the highest power and execute the top leader over the company[14], things that will be discussed in GMS concerning company condition information said by the Board of Commissioners and Director. The Annual GMS should be held no later than six months after the financial year ends, while other GMS can be held anytime at the company's needs.

According to the articles of association, the holding of the GMS is at the domicile of the company or at the place where the company has its activities. However, it can also be held through electronic media, which allows all GMS participants to see and hear each other and participate in the meeting. There are two forms of teleconference, audio conference; meeting participants can only hear the sound while the video conference; participants can listen to voices and see the form of other participants.[15] The conditions that must be met according to the Company Law so that the electronic GMS can be carried out legally, the first is the provisions regarding electronic media that are permitted to be used[16]; such as videoconferencing, teleconferencing, and other electronic media that are still included in that category. Then there is also a requirement that all participants participate directly in the meeting and simultaneously be able to see and hear clearly and now. In addition to these requirements, there are also requirements regarding the attendance quota in the GMS agenda forum and the number of votes to be able to take a decision; the first is regarding the attendance quota there is at least ¼ part of the total shares that have voting rights, are present, can also be represented. Then a decision can be considered valid if the decision has been agreed upon by more than half of the total votes.

This provision is also different from the provisions of the GMS, with an agenda to amend the articles of association of the company. In the GMS, which contains the schedule for amendments to the articles of association, the forum quota is at least 2/3 of the total shares with voting rights present and can also be represented. Then for the agenda for amendments to the articles of association, 2/3 of the votes are required to agree so that it can be said that the decision taken is said to be a good decision. The provisions are also different if the GMS held with the agenda of consolidation, regarding the submission of the company's application for a declaration of bankruptcy, then separation, acquisition, then the extension of the period of the establishment until the dissolution of the company is held. The requirements are for a forum quota of at least ¾ of the attendance of the total shares that have a vote or are present or can

[13] Munir Fuady, *Op.Cit.*, 135

[14] H.M.N. Purwosutjipto, *Pengertian Pokok Hukum Dagang Indonesia 2: Bentuk-bentuk Perusahaan*, Cet. ke-10, (Jakarta: Intan Sejati Klaten, 2005), 130.

[15] M.N.K. Dewi, *Kedudukan Hukum Akta Risalah Rapat Umum Pemegang Saham (Rups) Melalui Media Elektronik*, Arena Hukum Journal, *Vol. 9, No. 1, Edition of April 2016,* DOI: http://dx.doi.org/10.21776/ub.arenahukum.2016.00901.7 , pg. 113 accessed on 2 Februari 2022

[16] M. Yahya Harahap, *Hukum Perseroan Terbatas*, (Jakarta: Sinar Grafika, 2009), 314

also be represented. Then, to declare the decision taken as a good one, it is necessary ¾ part of the total votes.

In addition to being regulated by the Company Law, the electronic GMS is now increasingly legal to implement due to the establishment of POJK 16/Pojk.04/2020, the Implementation of the Electronic GMS. The POJK covers the availability of regulations and technical infrastructure. The e-GMS Implementation System is an electronic system to support the availability of information, implementation, and reporting of the GMS of a Public Company. E-GMS is equipped with electronic voting (e-voting) and electronic proxy. Through e-proxy, shareholders can authorize third parties to attend the GMS on their behalf so that the recipient of a power of attorney is positioned as a shareholder in a remote press conference, as well as voting through e-voting. E-GMS can be implemented in various ways, such as:

The first is with the e-GMS, which the provider has provided with the provision that it fulfills the requirements, as stipulated in the relevant laws and regulations, that it must be registered in the system by the agency with the authority that the party is indeed declared as the organizer. Then, of course, the organizers give full access to users to be able to access the e-GMS. Furthermore, the provider as the organizer must also stipulate provisions regarding standard operating procedures governing the implementation of the e-GMS, which is conducted electronically. And what is certain is that the provider, as the organizer, must also ensure that the entire GMS is carried out electronically properly and correctly. Then the provider is also obliged to provide all the e-GMS security and reliability. The e-GMS system service provider is required to inform users of any developments or changes to the service system or features available on the system. In addition, the provider of the e-GMS service system must also have backup data as a form of partner background in the GMS holder as a guide for monitoring steps as well as for data to be used if something unwanted happens in the future, such as a dispute, The stored data can be used as verification material, then testing material. They can also be used as law enforcement material. As a fulfillment of the force majeure factor, the e-GMS provider must also provide facilities that can be used as a data center and problems recovery center related to an e-GMS implementation in the territory of Indonesia which is, of course, in a safe place and separate from the data center. Then, the e-GMS system provided by the provider must be included in the minimum standards that have been determined as the minimum standards of information technology that can be used, as is the case with all security and then disturbances and failures of information technology systems in the system provided. Of course, the provider must also store all data related electronically with a guaranteed security system. And, of course, the provider of the e-GMS system must be responsible for all losses incurred in the future, provided that there are errors or omissions in the implementation and management of all systems in the electronic GMS.

The second is the e-GMS system provided by a public company. The requirements that must be met by the company to be able to hold an e-GMS are that the method used must first display or show all the rules for the implementation of the GMS, then all the materials needed and everything that is done in the event, which is of course required for the consideration of all shareholders in making decisions at the GMS. The system used must also be able to provide services and ensure that all participants participating in the GMS can interact with one another. Then the method used must also provide the required attendance forum quota by the provisions of the laws and regulations governing it. The system used to conduct the GMS must also be able to carry out voting and its calculations, including if there is more than one share classification. Then the system used to hold the GMS electronically must also be able to record all interactions in the forum, both audio and visual, and both in the form of non-audio visual, and store the database properly. Finally, the system must also be able to provide grant power of attorney related to the GMS participants electronically.

According to *POJK* 16/Pojk.04/2020 concerning the Implementation of the Electronic GMS, in particular Article 8, it also regulates the procedures used in the implementation of the e-GMS; the first is regarding the performance of the e-GMS conducted by a Public Company then its holding must contain all information related to the planning of the GMS holding to the implementation with attachment by notification of the agenda to the OJK, it must also include all information related to the innovation for the GMS. Then the public company must also be able to hold a GMS that is physically carried out, which is attended by at least one member of the Board of Directors and/or a member of the Board of Commissioners, also attended by professionals who support capital market matters to participate in helping the GMS run. Furthermore, the second is that the public company must also provide a place to carry out the e-GMS, which is used to carry out physically related to what has been referred to in the first provision regarding the physical GMS. Furthermore, the third is regarding the obligation of shareholders as well as all those who have the power to represent to be able to attend the GMS physically even though the GMS is conducted through electronic media with a service system that has been provided by a public company as a provider. Then the fourth is related to the provisions of the participants who attend the forum quota that has been determined. The e-GMS provider must also regulate who can physically participate in the GMS by considering who can physically attend first up to a predetermined maximum number. Then the fifth is related to the forum quota, which also counts the shareholders who are unable to participate physically; their attendance will still be calculated on a forum quota basis through the e-GMS system that has been provided by the provider.

Until then, a public company that provides an e-GMS service system for a company is also required to make an efficient order of the GMS agenda which at least contains the opening and then the determination of the attendance forum quota that will be used as well as any opinions or questions comes from each participant or his proxies electronically in every agenda item of the GMS, then until a decision is made on the agenda while still referring to the provisions governing the validity of a decision and until at the closing.

The e-GMS minutes must be stated in a notarial deed registered with the OJK without requiring participants' signatures. The e-GMS provider must submit to a notary a copy of the list of shareholders' attendance at the e-GMS, then those present with an electronic power of attorney, and a final recapitulation of the forum quota for attendance, the forum quota used for decision-making. Until also submitted transcripts of all interactions that exist in the e-GMS to be included or attached or attached to the minutes of the GMS.

2.2. The Impacts of E-GMS Implementation on Notarial Deeds

The development of science and technology provides convenience and welfare, but it can also cause new problems, for example, the manufacture of electronic deeds.[17] Now, the need for certificates as evidence is getting higher in line with business developments in various national or international business fields.[18] One of the authentic deeds whose proving strength is recognized is a notarial deed. Notaries must pay attention to the principle of carrying out their duties and positions, which consist of equality, trust, legal certainty, accuracy, providing reasons, prohibition of abuse of authority, prohibition of acting arbitrarily, proportionality, and professionalism.

Cyberspace provides new opportunities for notaries to serve the interests of clients effectively and efficiently who carry out their duties and positions electronically, which is then known as a cybernotary; the concept of transitioning the function of a notary, which was initially done conventionally, is now applied via the internet to realize electronic transaction security, using public infrastructure and electronic signatures.[19] Electronicsignaturesconsistofembeddedelectronicinformationconnectedtoothernews for verification and authentication.[20] Article 5 of Law Number 11 of 2008 concerning Information and Electronic Transactions (hereinafter referred to as the *ITE* Law) explains that electronic information and/or electronic documents and/or it is printed results are legal evidence and are an extension of legal evidence according to Procedural law applicable in Indonesia.

The *ITE* Law was issued to provide legal protection and certainty for internet-based activities, whether transactions or the use of information, to meet the needs of business people and the public, with the recognition that electronic evidence and digital signatures are legal evidence in court.[21] According to the *ITE* Law, electronic

[17] Siagian, S. S. S., *Legalitas Cyber Notary dan Tandatangan Dalam Rapat Umum Pemegang Saham*, Journal, Magister Kenotariatan Fakultas Hukum Universitas Sumatra Utara, https://mkn.usu.ac.id/images/27.pdf , accessed on 2 Februari 2022

[18] Sjaifurahman & Habi Adjie, *Aspek Pertanggungjawaban Notaris dalam Pembuatan Akta*, (Bandung: CV. Mandar Maju, 2011), 8.

[19] Zainatun Rossalina. et,al., *Keabsahan Akta Notaris Yang Menggunakan Cyber notary Sebagai Akta Otentik*, Jurnal Hukum, Pascasarjana Fakultas Hukum Universitas Brawijaya, http://hukum.studentjournal.ub.ac.id/index.php/hukum/article/view/1554 accessed on 3 February 2022

[20] Sentosa Sembiring, *Himpunan Perundang-Undangan Republik Indonesia tentang Informasi dan Transaksi Elektronik*, (Bandung: Nuansa Aulia, 2009), 4

[21] Dewi, A.S.K., *Penyelenggaraan Rups Melalui Media Elektronik Terkait Kewajiban Notaris Melekatkan Sidik Jari Penghadap*, Arena Hukum Journal, Vol. 8, No. 1, Edition of April 2015, https://arenahukum.ub.ac.id/index.php/arena/article/view/197 , accessed on 3 February 2022

signatures can be made in various ways; A digital code attached to an electronic message will specifically identify the sender.[22]

Minutes of the GMS are authorized by one of the people attending the e-GMS to do a notarial deed, which is the deed of the Statement of Meeting Resolutions which minimally caused problems because the deed was done conventionally.[23] However, problems will arise if the deed is done by a notary who is also present at the e-GMS. The notary is responsible for drawing up minutes of all matters discussed and decided at the GMS and ensuring that the implementation has met the formality requirements pursuant to applicable laws and regulations to maintain the authenticity and validity of the deed made. On the other hand, if the deed does not contain formal or material truths, the aggrieved parties can be held accountable and even sanctioned if found guilty. The Minutes of the e-GMS made by a Notary include an explanation that is seen, heard, and witnessed directly by him so that the parties' actions are stated in the form of a deed and are legal and perfect evidence.

The concept of a cybernotary regarding the obligation to read the deed before the parties are based on Article 16 paragraph (1) letter m of the *UUJN*; it can be conducted when drawn up the deed of the GMS and only applies to that. Because the deed does not regulate by law yet.[24] However, the *UUJN* is coercive (*dwingend recht*) which cannot be ignored or set aside by stakeholders[25], so that basically, the e-GMS does not fulfill one of the requirements for drawing up a notarial deed because the shareholders are not attending in the same place and at the same time dealing with a notary, so that the deed made has the potential to be degraded underhand.

3. CONCLUSION

The E-GMS is effectively legal now because it has been explicitly ruled in Article 77 of the Company Law and *POJK* Number 16/Pojk.04/2020 so that the organs of the Limited Liability Company can carry out the GMS as usual without having to be physically attending to break the chain of the pandemic Covid-19. Although the regulation of the e-GMS has been regulated in the legislation, the principle of lex specialist derogat lex generalist cannot be ignored. In the case of making a deed of the e-GMS minutes, which is seen, heard, and witnessed directly by a notary. Article 16, paragraph (1), letter (m), and Article 18 of the *UUJN* are still to be prioritized so that the making of an electronic

[22] Grace Wahyuni, *Keabsahan Tanda Tangan Elektronik RUPS Telekonferensi Berdasarkan Undang-undang No.40 Tahun 2007 tentang PT dan UU No.30 Tahun 2004 tentang Jabatan Notaris*, Thesis, FH Universitas Indonesia, Jakarta, 2010, https://lib.ui.ac.id/file?file=digital/2016-9/20270239-T37539-Grace%20Wahyuni.pdf , accessed on 3 February 2022

[23] Waringin Seto dan Hudi Asrori S., *Keabsahan Rapat Umum Pemegang Saham Perseroan Terbatas Dengan Bukti Kehadiran Para Pemegang Saham Secara Online*, Repertorium Journal, Magister Kenotariatan Universitas Sebelas Maret, Vol. 6 No. 1, 2019, https://jurnal.uns.ac.id/repertorium/article/view/27820 accessed on 3 February 2022, Surakarta, 5

[24] Dwi Merlyani, et al., "*Kewajiban Pembacaan Akta Otentik Oleh Notaris di Hadapan Penghadap Dengan Konsep Cyber Notary*," Repertorium Journal Ilmiah Hukum Kenotariatan, Vol. 9 No. 1 Edition of Mei 2020, http://journal.fh.unsri.ac.id/index.php/repertorium/article/view/358/244 accessed on 5 February 2022, pg. 36-47,

[25] B.D. Talitha, *Keabsahan Penyelenggaraan Rapat Umum Pemegang Saham Secara Teleconference,* Journal, Fakultas Hukum Universitas 17 Agustus 1945, Surabaya, http://repository.untag-sby.ac.id/7786/31/Uji%20plagiasi%20Bianda%20Dea%20Talitha%201311700081.pdf , accessed on 5 February 2022, pg. 2

deed cannot be carried out or will result in the legal force of proving the deed to be an underhand deed.

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