

MOHAMED IDWAN GANIE
ARUM TARINA

CORPORATE
ACQUISITIONS
AND MERGERS
IN INDONESIA



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Corporate Acquisitions and Mergers in Indonesia

**Mohamed Idwan Ganie
Arum Tarina**

Lubis Ganie Surowidjojo Law Firm

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Corporate Acquisitions and Mergers in Indonesia

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LOCAL ECONOMIC, POLITICAL, AND CULTURAL ASPECTS

[01] Indonesian civil law, including its commercial law, was inherited from the Dutch and adopted at the time of Indonesia's independence. Dutch civil law is derived from the French Code Civil and the latter is historically and conceptually derived from Roman law.

[02] The main form of business entity (the only form of legal entity whose capital is divided into shares) is the limited liability company (Perseroan Terbatas abbreviated 'PT') – a corporate entity whose capital is divided into shares and with the personal liability of its shareholders limited to the amount of the shares subscribed by them. The PT is managed by a two-tier system comprising a board of directors (consisting of one or more members) charged with its day-to-day management under the supervision of a Board of 'Komisaris'/Commissioners (consisting of one or more members). The PT was initially regulated in the Commercial Code inherited from the Dutch and in its authentic Dutch text was referred to as '*Naamloze Vennootschap*' (NV); in form and substance it is almost identical to the old form of NV applicable in the Netherlands prior to the Dutch law reform which resulted in a distinction between NVs and BVs.

[03] In 1995 Indonesia promulgated its own law on the PT (Law No. 1/1995 on PT) to substitute the section in the Indonesian Commercial Code dealing with PTs. By virtue of the promulgation of such law, the provisions on PT in the Commercial Code are no longer applicable.

[04] The Law No. 1/1995 on PT does not make changes to the basic legal concept of PT and, among other things, introduces streamlined incorporation procedures and different classes of shares, incorporates stricter provisions for payment of share capital and protection of minority shareholders, and introduces provisions on mergers and acquisitions (previously governed under the Indonesian Commercial Code).

[05] On 16 August 2007, the Government promulgated Law No. 40/2007 regarding PT (Law No. 40/2007 or the Company Law), which replaced Law No. 1/1995 as the previous law on PT. This new law set out new provisions on, among other issues, mergers, consolidations, and acquisitions, separation or spin-off policy, and obligation for a company whose business concerns the field of, or is connected with, natural resources to carry out its social and environmental responsibility.

[06] In various sectors the government has issued special provisions on mergers and acquisitions relevant only to specific industries, mostly of a procedural and technical nature.

[07] Separate regulations under the tax laws do not necessarily mirror the legal and accounting impact of a merger under the Company Law and Indonesian accounting principles, but are primarily tax oriented. Other non-industry specific regulations have added legal uncertainty or administrative complexity, to say the least. Examples are the new antitrust regulations requiring approval for mergers and acquisitions from a special Antitrust Supervisory Commission and new labour

regulations requiring significant compensation to employees in cases of mergers and acquisitions, even if the relevant employee does not forfeit employment and remains employed (admittedly, in certain cases, by a new employer from a legal point of view).

[08] The ideal situation would be a 'one-stop shop' and that legal implications would be deemed implemented by operation of law rather than requiring further implementing steps which in turn contain the risk of rejection (in the case of approval needed to transfer certain assets notwithstanding the merger) and potentially rendering the commercial objectives of the merger or acquisition impossible.

[09] In view of the above, it is difficult to determine positive progress in a merger transaction until the very last step has been completed. The smooth implementation of a proposed merger or acquisition will therefore largely depend on good coordination in order to overcome 'programmed' obstacles and the risk of failure at the very end or at best the risk of a high tax bill.

Politics and Culture

[10] Indonesia is a large and spread out archipelagic state with population and majority of development generally concentrated on the Java Island. However, natural resources on Sumatra, Kalimantan (Borneo), and Papua are playing increasingly important roles in the Indonesian economy and politics. In this respect, there has been a certain degree of resource nationalism that has at times resulted in what can be viewed as protectionist policies towards the natural resource sector. At the same time, the government fully realizes that the outlying islands severely lack much-needed infrastructure, and such development is often only possible through foreign investment.

[11] Except for such protectionist tendencies, that generally affect populist issues such as natural resources or traditional business sectors, Indonesia has a vibrant democracy and a reasonably developed legal system. An issue that has unfortunately been persistent for a number of decades in Indonesia is the level of corruption, which generally affects government officials and courts, particularly at first and second instance.

[12] In certain sectors, particularly those likely to be exposed to significant regulatory overhead and/or a history of corrupt practices the valuation expectations of vendors can be entirely unrealistic due to a combination of a view that it is impossible for an outsider to secure the assets/licenses that they hold and often the fact that the assets/licenses were secured by the owners at minimal cost, resulting in little downside to holding out for a future potential transaction (this is particularly true of mineral concessions). Additionally, and generally, silent partners are a prevalent feature in certain sectors, resulting in agreement for a transaction having to be secured not only from the actual shareholders of the target but also from 'stakeholders' who have influence over the shareholders.

Special Provisions

Special Provisions for the Banking Sector

[13] Mergers and acquisitions in Indonesia historically started in the banking and insurance sector. Because of a lack of general provisions in the Commercial Code, the Government at that time issued special regulations on mergers and acquisitions of banks (applicable only to the banking sector), with slight improvements and adjustments required to comply with Law No. 40/2007, which is still applicable today.

[14] Banking in general is regulated under Law No. 7/1992 as further amended with Law No. 10/1998 on Banking (a further amendment is being drafted as of mid-2012), while special provision on mergers and acquisition of bank is regulated under the Government Regulation No. 28 of 1999 on Mergers, Consolidation, and Acquisitions of Bank.

[15] Bank Indonesia, as the central bank of Indonesia, has also issued Regulation No. 14/24/PBI/2012, which provides a single presence policy of Indonesian banking limiting a party to become a controller of only one local bank, except for: (i) controlling shareholder in two banks that carry out business under a different principle, namely conventional and Shariah-based principles; and (ii) controlling shareholder in two banks, one of which is a Joint Venture Bank (as will be described below).

[16] Based on the regulation, a party is deemed a controlling shareholder if: (i) it holds 25% or more of shares of a bank and owns voting rights; or (ii) it holds less than 25% of shares of a bank but owns voting rights and has evidently exercised control over the bank, either directly or indirectly. A party who has become the controlling shareholder in more than one bank or who purchased other bank's shares thereby becoming the controlling shareholder in more than one bank is required to adjust its ownership structure as follows:

- (a) to implement a merger or consolidation on banks under its control;
- (b) to form a Bank Holding Company by: (i) establishing a new legal entity as the Bank Holding Company; or (ii) appointing one of the banks under its control as the Bank Holding Company; or
- (c) to establish a holding function. Holding Function is a function owned by controlling shareholder in the form of Indonesian Bank or Indonesian Government to consolidate and directly control its subsidiaries' all activities.

[17] The adjustment to ownership structure as set out in this Bank Indonesia Regulation was required to be completed by:

- (a) for the first two restructuring options, i.e., merger and establishment of a holding Bank Holding Company, the act must be implemented within one year after (i) the Regulation enters into force; (ii) after the execution of the purchase on other bank's shares and causes them meet criteria as controlling shareholders of the bank they purchased;

- (b) for the establishment of a holding function, the act must be carried out within six months after (i) the Regulation enters into force; (ii) after the execution of the purchase on other bank's shares and causes them meet criteria as controlling shareholders of the bank they purchased.

[18] New regulations on bank ownership have been issued, Bank Indonesia Regulation (PBI) No. 14/8/PBI/2012 concerning Share Ownership in Commercial Banks, restricting bank ownership to 20% for individuals, 30% for legal entities, and 40% for financial institutions, with above 40% ownership being permissible upon the fulfilment of certain requirements and following a certain period. This makes acquisitions of banks significantly more challenging, with the recent example of the acquisition by DBS of Bank Danamon that was ultimately abandoned after failing to secure regulatory approval within a reasonable time. More broadly, the regulation governing foreign investment (any shareholding and transactions by foreigners except in relation to listed companies) has been revised, slightly modifying the approval procedures that have to be carried out prior to the share transfer.

Special Provisions for Companies Operating under Foreign or Domestic Investment Laws

[19] On 26 April 2007, the Government promulgated the new law on investment, Law No. 25/2007 on Investment (Investment Law). The implementing regulations include, among others, the requirements of merger and acquisition by the Investment Coordinating Board (*Badan Koordinasi Penanaman Modal* or BKPM), which is regulated under the (i) Head of Investment Coordinating Board Regulation No. 14 of 2015 on the Guidelines and Procedures for Capital Investment Principle License (BKPM Regulation No. 14/2015); (ii) Head of Investment Coordinating Board Regulation No. 15 of 2015 on Guidelines and Procedures for Capital Investment Licensing and Non-Licensing (BKPM Regulation No. 15/2015); (iii) Head of Investment Coordinating Board Regulation No. 16 of 2015 on the Guidelines and Procedures for Capital Investment Facility Services (BKPM Regulation No. 16/2015), as well as the restrictions on investment as stipulated under the Presidential Regulation No. 39 of 2014 on the Business Closed for Investment and Business Opened for Investment under certain Conditions in Investment (known as the Indonesian Negative Investment List/*Daftar Negatif Investasi* (DNI)).

[20] Under BKPM Regulation No. 14/2015, a domestic company is subject to Principle License application using SPIPISE where the value of its investment is equal to or higher than IDR500 million. In the event its investment is less than IDR500 million, Principle License application could use SPIPISE. Online SPIPISE is an application built to serve investors in filing the licensing process for the implementation of investment activities in the territory of the Republic of Indonesia. All foreign investments must be processed through the BKPM. The minimum investment for foreign investments under BKPM Regulation No. 14/2015:

- (a) A minimum investment of above IDR10 billion (excluding investment for land and buildings) only applies for foreign investment companies, and applies for 1 line of business in the same subclass business pursuant to Indonesian Standard Industrial Classification (KBLI) and 1 project location in 1 region/municipal.
- (b) The minimum investment for an expansion of business with the same line of business and the same project location can be less than IDR10 billion (excluding investment for land and buildings), provided that the total investment for that line of business and that project location must be above IDR10 billion (excluding investment for land and buildings), for: (i) project expansion of 1 business in 1 business group pursuant to KBLI in the same location; or (ii) expansion of one or more business in 1 subclass business pursuant to KBLI, that is not receive facility or receive facility outside Industry sector, in 1 location in 1 region/municipal.

[21] In addition, under BKPM Regulation No. 14/2015, foreign investment companies with issued and paid up capital of less than IDR2 500 000 000 that want to apply for an extension of the project completion period or a business expansion to BKPM must first increase their issued and paid up capital to be at least IDR2 500 000 000. All foreign investment must assume the form of a limited liability corporation (PT), with the exception of investment in certain sectors (e.g., Banking and Oil & Gas, which can presently also operate through branches and representative offices, respectively).

[22] Under BKPM Regulation No. 15/2015, foreign investment companies can apply for a business license (or expansion business license) if they have total realized investments of more than IDR10 billion (excluding investment for land and buildings) for 1 line of business and 1 project location. However, foreign investment companies that have obtained a principle license (or expansion principle license) with a total investment of less than IDR10 billion (excluding investment for land and buildings) where their principle license (or expansion principle license) is still valid can apply for a business license (or expansion business license) without the need to first fulfil the minimum total investment realization above.

[23] The limits on foreign capital ownership that are set out in Presidential Regulation No. 39 of 2014 also apply to mergers, acquisitions, and amalgamations. Therefore, the resulting foreign shareholding in the surviving company, the acquiring company, or the amalgamated company will be subject to the enumerated ownership limits.

Special Provisions for Public Companies

[24] The third wave of mergers and acquisitions took place involving public companies after the reformation of the Indonesian capital market in the 1980s. Law No. 8/1995 on Capital Market enables special regulations on mergers and acquisitions to be issued by regulating bodies for public companies, resulting in special regulations on mergers and acquisitions issued by the Capital Market and Financial Institution Supervisory Agency (BAPEPAM & LK) now called the Financial Services

Authority (*Otoritas Jasa Keuangan*–OJK). Although BAPEPAM-LK was replaced by the OJK, all prevailing BAPEPAM-LK regulations remain in force until replaced or revoked.

[25] Mergers and acquisitions of public companies are specifically regulated under: (i) Regulation No. IX.F.1, Decree of the Head of BAPEPAM & LK No. KEP-263/BL/2011 on Voluntary Tender Offers; (ii) Regulation No. IX.G.1, Decree of the Head of BAPEPAM & LK No. Kep-52/PM/1997 on Merger or Consolidation of Public Company or Issuer; and (iii) Regulation No. IX.H.1, Decree of the Head of BAPEPAM & LK No. KEP-264/BL/2011 on Acquisition of Public Company.

THE REGULATORY FRAMEWORK

Business Vehicles

[26] In Indonesia, the most common form of business vehicle is PT. PT are divided into two types, private and public companies. A private company is a legal entity that constitutes an alliance of capital established pursuant to a contract in order to carry on business activities with an authorized capital all of which is divided into shares, meanwhile public company is a company whose shares are owned by at least 300 shareholders with a capital of at least IDR3 000 000 000, or a number of shareholders and paid up capital stipulated by specific Government Regulation.

[27] To carry out business in Indonesia, foreign investment must be in the form of a PT, with the requirements to establish a PT set out in Law No. 40/2007. However, since shareholders are foreign, the regulations dealing with large-scale and foreign investment also apply. Pursuant to BKPM Regulation No. 14/2015 the required total investment value has to be more than IDR10 000 000 000 excluding any immovable assets (land and buildings). The paid up capital has to be at least IDR2 500 000 000 and the value held by each shareholder has to be at least IDR10 000 000, however it should be noted that such minimum capital requirement will be subject to BKPM's approval upon their review on the investment application permit.

[28] The structure of PT is two-tier system comprising of a Board of Directors charged with its day-to-day management, which is supervised by a Board of Commissioners. Based on Law No. 40/2007, Board of Directors may consists of one or more members, and in case it consists of two or more members, the division of management tasks and authority between the members is determined in resolutions of the General Meeting of Shareholders (GMS), and one of the members is appointed as a president director. Sectoral regulations may require a specific number of directors and their respective qualifications.

[29] Unlike the Anglo-Saxon system, there is no such position as non-executive directors. The duty to supervise the board of directors is vested on the Board of Commissioners, which is tasked with the supervision of the company policies, the

general management of the company and its business, as well as advising the Board of Directors.

[30] The board of directors shall represent company in and out of the courts as well as bear the responsibility for the management of the company. Except as stipulated otherwise in the company's articles of association, each director has the full power to bind and represent the company in all aspects (e.g., entering into contracts on the company's behalf and representing it in dispute settlement). However, the articles of association or the Board of Directors' decision may limit the respective power and duties of each director. The board of directors has the authority to give a written power of attorney to one or more employees of the company or to some other persons for and on behalf of the company to perform specific legal actions if the Board of Directors cannot represent the company.

Laws Affecting M&A

[31]

- Indonesian Civil Code ('ICC').
- Law No. 40/2007 regarding PT ('*Law No. 40/2007 or the Company Law*').
- Law No. 25/2007 concerning Investment ('*Law No. 25/2007*').
- Law No. 37/2004 concerning Bankruptcy and Suspension of Obligation for Payment of Debts ('*Law No. 37/2004*').
- Law No. 30/2004 as amended by Law No. 2/2014 concerning Notary Office ('*Law No. 30/2004*').
- Law No. 42/1999 concerning Fiduciary Security ('*Law No. 42/1999*').
- Law No. 30/1999 concerning Arbitration and Alternative Dispute Resolution ('*Law No. 30/1999*').
- Law No. 9/2006 concerning Security Right over Warehouse Receipt as amended by Law No. 9/2011 ('*Law No. 9/2006*').
- Law No. 4/1996 concerning Security Right over the Land ('*Law No. 4/1996*').
- Law No. 5/1960 concerning Agrarian ('*Law No. 5/1960*').
- Government Regulation No. 131 of 2000 concerning Income Tax on Deposit and Saving Interest and Discounted of Bank Indonesia Certificate ('*GR No. 131/2000*').
- Government Regulation No. 24 of 1997 concerning Land Registration ('*Land Registration*').
- Presidential Regulation No. 39 of 2014 concerning Negative Investment List ('*PR No. 39/2014*').
- Minister of Trade Regulation No. 36 of 2007 as lastly amended by Minister of Trade Regulation No. 39 of 2011 concerning Trade Business License ('*MoT Regulation 36/2007*').
- Head of Investment Coordinating Board Regulation No. 14 of 2015 on the Guidelines and Procedures for Capital Investment Principle License ('*BKPM Regulation No. 14/2015*').