

INDONESIA



Law and Practice

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TnP Law Firm

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TnP Law Firm is one of Indonesia's leading law firms, with four partners, three associate partners and 22 associates. The firm offers a comprehensive range of services related to mergers and acquisitions, covering various aspects of corporate and commercial matters. Its expertise includes providing corporate and regulatory advice, ensuring compliance, facilitating restructuring and reorganisation, overseeing foreign investments and joint ventures, and handling complex M&A transactions. Notable

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1. Trends

1.1 M&A Market

The outlook for Indonesia's M&A market remained stable in 2024. As the public slowly recovered from the COVID-19 pandemic, followed by the dynamics of the Indonesia's political situation during the election, the demand for M&A transactions in the market remained consistent. We experienced some deals being pressed to be completed before the election outcome, while others were postponed until after the election. The Business Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha* or KPPU) recorded a slowdown in M&A deals compared to 2023, from 323 merger filing notifications to 155 merger filing notifications. This slowdown was attributed to the introduction of a new merger filing policy (as further detailed below), mixed sentiment in the global markets, and public anticipation of policy shifts following the presidential election last year.

Nonetheless, the public still showed optimism towards Indonesia's M&A climate, and the diversity of the industries entering the M&A market compared to the previous year, such as digital technology, renewable energy, media and telecommunications, healthcare and hospitality, may be noted. The addition of many new industries to the M&A market has significantly contributed to a more diverse M&A climate in Indonesia. Compared to the previous year, Indonesia's M&A market also showed a broader range of players of different sizes joining the trend, from conglomerate groups to micro, small and medium-sized enterprises (MSMEs). As the deals spread across various unexpected industries, this offers promising market conditions for the upcoming years.

1.2 Key Trends

In 2024, various new industries entered the M&A market, despite technology companies and renewable energy companies remaining the key players. The year started off with the merger of two leading e-commerce platforms in Indonesia, Tokopedia and TikTok Shop, as well as the acquisition of oil and gas company PT Petrosea Tbk by the group company PT Petrindo Jaya Kreasi Tbk, the major player in the oil and gas sector in Indonesia. The closing of these deals in February 2024 received positive feedback from the public, establishing them as the ground-breakers for the market dynamics throughout the year to come. Mid-2024, PT Jasa Marga (Persero) Tbk successfully secured USD1 billion equity financing for the development of the 1,184 km Trans-Java Toll Road. The year ended with a notable transaction in the hospitality sector, namely the acquisition of Bakmi GM, one of Indonesia's prominent restaurant chains, by conglomerate group Djarum Group.

From a regulatory standpoint, there have been no significant changes following the outcome of the 2024 presidential election. As the investment climate has remained conducive over the past few years, the new government appears to have decided to maintain and continue promoting the investment policies implemented since the enactment of Law No. 11 of 2020 on Job Creation, as further enacted by Law No. 6 of 2023 ("*Job Creation Law*").

1.3 Key Industries

Technology, Media and Telecommunications

Following the significant development of the digital sector in Indonesia, which has been one of the most highly promoted industries, deals within the technology, media and telecommunications (TMT) sector have attracted public attention. In 2024, two leading e-commerce platforms, Tik-

Tok Shop and Tokopedia, finalised their merger transaction, which had been progressing since 2023, aimed at forming a strategic partnership. In the coming years, we anticipate the merger of XL Axiata and Smartfren, two prominent players in the telecommunications sector, with the deal estimated to be worth USD6.5 billion.

Energy and Mineral Resources

As one of the prominent industries in Indonesia, the dynamics of the energy and mineral resources industry have remained consistent over the past few years. In 2024, there were at least three M&A transactions within this industry. One of these was the acquisition of PT Petrosea Tbk by PT Petrindo Jaya Kreasi Tbk's subsidiary, which also played a vital role in the development of Indonesia's capital markets ecosystem. At the state-owned enterprise end, PT Mineral Industri Indonesia (Persero) acquired a controlling stake in PT Vale Indonesia Tbk. Further, one of the key players in the renewable energy sector, conglomerate group Barito Group, has also undertaken several corporate actions through its subsidiaries. One example is the acquisition of Sidrap's wind power plant by PT Chandra Asri Pacific Tbk and PT Barito Renewables Energy Tbk.

Healthcare and Pharmaceuticals

Companies within healthcare and pharmaceutical sectors have also become predominant in Indonesia's M&A market. In 2024, Sight Investment Company Pte Ltd acquired Siloam Hospitals, a healthcare facility owned by the Indonesian conglomerate group Lippo Group, through a voluntary tender offer. Additionally, two pharmaceutical companies completed their acquisitions: PT Diagnos Laboratorium Utama Tbk acquired a Singaporean artificial intelligence-based DNA company, Asa Ren Pte Ltd, and PT Pyridam Farma Tbk acquired an Australian med-

icine production company, Probiotec Limited, through its subsidiary PYFA Australia Pty Ltd.

2. Overview of Regulatory Field

2.1 Acquiring a Company

In practice, there are two types of acquisitions in Indonesia, namely, share acquisitions and asset acquisitions.

Share Acquisitions

Share acquisitions are mainly governed by Law No. 40 of 2007 on Limited Liability Companies, as amended by Law No. 6 of 2023 on the Ratification of the Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation into Law ("*Company Law*"). Under the Company Law, share acquisitions can be carried out either directly by purchasing shares from the existing shareholders or indirectly by subscribing new shares issued by the company's board of directors. For direct acquisitions by way of purchasing shares from the existing shareholders, the transactions are set out in a sale and purchase agreement, while for indirect acquisitions by way of subscribing newly issued shares in the company, the transactions are set out in a sale subscription agreement.

Asset Acquisitions

Unlike share acquisitions, there is no specific regulation in Indonesia that governs asset acquisitions. Nonetheless, these practices are popular among individuals or business entities that intend to acquire only specific business units or assets of the target companies. The objects of transactions may vary from tangible assets to intangible assets.

Generally, asset acquisitions are formalised through a sale and purchase agreement, fol-

lowed by the leveraging of the assets. However, additional documents and/or actions may be required depending on the assets being acquired. For example, if an acquisition involves lands, the parties must execute a deed of transfer of ownership before a land deed officer and, subsequently, register such deed in the Land Registry.

2.2 Primary Regulators

In Indonesia, M&A activities are primarily supervised by the following regulatory agencies:

- the Ministry of Law (formerly the Ministry of Law and Human Rights) as the main regulator;
- the Investment Co-ordinating Board (*Badan Koordinasi Penanaman Modal* or BPKM) for investment-related matters; and
- the KPPU, to ensure fair competition results from the transactions.

Additionally, specific regulators may be involved depending on the line of business of the parties involved in the transactions, eg, the Financial Services Authority (*Otoritas Jasa Keuangan* or OJK) for M&A transactions within the financial sector or transactions involving listed companies.

2.3 Restrictions on Foreign Investments

In February 2021, Indonesia introduced the “*positive investment list*” as the new foreign investment policy under Presidential Regulation No. 10 of 2021 on Investment Business Fields, which was later amended by Presidential Regulation No. 49 of 2021. This new policy provides for ease of foreign investment and offers a bigger investment opportunity for foreign investors in Indonesia compared to the previous “*negative investment list*” policy.

Under the new regulation, all business fields are generally open for investment, except for business fields that are declared closed for investment or business fields that are specifically allocated for, among others, the government or small to medium-sized enterprises. For foreign investors, the new regulation categorises foreign investment into three main categories, namely, business fields that are open subject to certain requirements, business fields that require partnerships with local MSMEs, and business fields that are completely closed for investment. However, the new regulation limits foreign investors to only engaging in large-scale businesses with an investment value exceeding IDR10 billion, excluding the value of land and building premises.

The new regulation particularly restricts seven business fields that are completely closed for investment, as follows:

- narcotics cultivation and industry class I;
- all forms of gambling and/or casino activities;
- fishing of endangered species listed in Appendix I of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);
- collection or use of coral and utilisation of coral taken from nature, which is used for building material/lime/calcium, aquariums and souvenirs/jewellery, including live or recently dead coral from nature;
- chemical weapons manufacturing;
- production of chemicals and ozone-depleting substances; and
- the alcohol-containing liquor industry, alcohol-containing beverage industry (wine) and malt-containing beverage industry.

2.4 Antitrust Regulations

In Indonesia, the antitrust regulations relating to M&A transactions are as follows:

- Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, as last amended by the Job Creation Law;
- Government Regulation No. 57 of 2010 on Mergers, Consolidations of Business Entities and Company Share Acquisitions that could lead to monopolistic practices and/or unfair business competition; and
- KPPU Regulation No. 3 of 2023 on the Assessment of Mergers, Consolidations or Acquisitions of Shares and/or Assets that may result in monopolistic practices and/or unfair business competition (*"KPPU Regulation No. 3/2023"*).

In the case of mergers, consolidations or share acquisitions, KPPU Regulation No. 3/2023 requires business entities to submit a mandatory post-transaction notification to the KPPU within 30 business days, for transactions that fulfil the following conditions:

- transactions whose value exceeds the asset and/or sales value threshold, eg, the combined asset value of the parties involved exceeds IDR2.5 trillion or the combined annual sales value of the parties involved exceeds IDR5 trillion based on the latest financial year before the date of the transaction;
- transactions that result in a change of control, eg, business entities holding more than 50% of shares or voting rights in the company, or holding 50% or less of shares or voting rights but having the capacity to influence and determine the company's management and/or policies;

- transactions that are not affiliated party transactions;
- transactions between business entities that own assets and/or generate sales in Indonesia;
- transactions that result in an increase in the ability of the business entities that acquire the assets to control certain markets; and
- asset acquisitions that are not classified as exempted asset acquisition transactions.

Submission of Notification

Under KPPU Regulation No. 3/2023, post-transaction notifications must be submitted to the KPPU by the surviving entities (in the case of a merger), the business entities resulting from the consolidation, or the acquiring entities (in the case of an acquisition of shares or assets). The submission can be made through the electronic notification system of the KPPU.

As a precautionary measure, KPPU Regulation No. 3/2023 also allows business entities that intend to carry out mergers, consolidations or acquisitions of shares and/or assets to consult with the KPPU. This pre-consultation aims to give the business entities brief information on the proposed mergers, consolidations or acquisitions of shares and/or assets from the KPPU's perspective.

Affiliated Transactions

Under KPPU Regulation No. 3/2023, mergers, consolidations or acquisitions of shares and/or assets between affiliated parties do not require a post-transaction notification.

2.5 Labour Law Regulations

In Indonesia, labour matters are primarily governed by Law No. 13 of 2003 on Labour, as amended by the Job Creation Law, along with its implementing regulations, including Govern-

ment Regulation No. 35 of 2021 on Temporary Employment Agreements, Outsourcing, Working Hours and Breaks, and Termination of Employment Relationships.

Under the Company Law, if a company carries out a corporate action such as a merger, consolidation, acquisition or spin-off, such company must inform its employees in writing regarding the proposed corporate action. If there is a change in policy due to such transaction and the change is deemed unfavourable to the employees, the employees will then have the right to either retain or terminate their employment contracts with the company (with certain compensation as further detailed below) after the change in policy occurs.

If, upon a merger, consolidation or acquisition, the surviving entity (in the case of a merger or consolidation) or acquiring entity (in the case of an acquisition), as a new employer, decides not to retain an existing employee's contract or the employee decides not to continue the employment with the new employer, the employee is entitled to receive compensation, which includes severance pay (*uang pesangon*), tenure awards (*uang penghargaan masa kerja*) and compensation of rights (*uang penggantian hak*). The amount of compensation received by each employee may vary based on the employment tenure and other factors based on the relevant regulations.

As an additional note, if each company involved in a merger has a collective work agreement, the collective work agreement that is more favourable to the employees will prevail.

2.6 National Security Review

There are no requirements for national security review of acquisitions in Indonesia.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

There have been several legal developments in Indonesia in recent years that relate to M&A, including the following.

Foreign Direct Investment

As described in 2.3 Restrictions on Foreign Investments, Indonesia introduced a new policy on foreign investment activities in 2021, namely the “*positive investment list*”. The issuance of this “*positive investment list*” is aimed at improving Indonesia's investment climate by promoting simpler investment requirements and providing various incentives for prospective investors, as well as ensuring greater protection to MSMEs.

One of the significant changes in this investment policy is the reduction of the number of lines of business that are subject to investment restrictions, from more than 300 lines of business to only 48. Among these 48 lines of business that are still subject to foreign investment restrictions are the following:

- investments that require a 100% domestic investment, such as the vessel industry, telecommunications tower providers and the traditional medicine industry;
- investments in industries with a foreign capital ownership restriction, such as mining, scheduled commercial air transportation, published media and power generation below 1 MW; and
- investment activities that require special licences, such as the defence equipment industry.

Personal Data Notification Request

On 17 October 2022, Indonesia enacted Law No. 27 of 2022 on Personal Data Protection (“PDP Law”). Through this new regulation, Indonesia introduced a new requirement for mergers, acquisitions, consolidations or dissolutions of legal entities. Under the PDP Law, if the mergers, acquisitions, consolidations or dissolutions involve the transfer of personal data, the legal entities that are going through such corporate actions must inform the personal data owners of the transfer of their personal data to other legal entities. The PDP Law allows the announcement to be made either directly to the personal data owners or through an electronic or non-electronic public announcement. The details of the mechanism by which to conduct this notification will be further set out in more specific regulations, which have not yet been issued or enacted.

Merger Control Regulation

As detailed in 2.4 Antitrust Regulations, on 31 March 2023, the KPPU introduced KPPU Regulation No. 3/2023. In addition to the mandatory post-transaction notification to the KPPU, the new regulation also revamps the local nexus test for foreign-to-foreign transactions. Under the previous merger filing regulation (which was governed by KPPU Regulation No. 3 of 2019), the merger filing requirement was triggered if one of the parties involved in a transaction had business activities, assets or sales in/to Indonesia. On the other hand, under KPPU Regulation No. 3/2023, a notification of the foreign-to-foreign merger transaction only needs to be filed with the KPPU if both parties involved in the transaction have assets and/or generate sales/turnover in Indonesia.

3.2 Significant Changes to Takeover Law

There has been no change to the takeover rules under the Company Law in the past 12 months, and as far as we are aware, no material changes are expected in the next 12 months.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

Although stakebuilding prior to launching an offer is uncommon in Indonesia, there are some practices where the bidders intentionally pursue this strategy by either gradually increasing their share ownership in the target companies or through derivatives. While increasing share ownership in the target company is the more common practice, some bidders prefer the latter approach due to commercial or tax conveniences.

4.2 Material Shareholding Disclosure Threshold

In general, the Ministry of Law holds the records of shareholding compositions of limited liability companies in Indonesia. Any changes to a company’s shareholding composition must be submitted to the Ministry of Law in order to be updated in the company data held by such ministry. Additionally, in the event of mergers, acquisitions or consolidations, the prospective purchasers must announce the proposed corporate actions publicly in a daily Indonesian newspaper with national circulation.

There is an additional requirement for investors in public companies. Under OJK Regulation No. 4 of 2024 on the Reports on Ownership of or Any Changes of Ownership in Public Company Shares and Reports on Activities of Guaranteeing Public Company Shares, investors whose share ownerships are at least 5% of shares with

voting rights in public companies or investors that hold a controlling stake in public companies must report a decrease of share ownership to the OJK if such decrease results in their voting share becoming less than 5%. The report must be submitted to the OJK no later than five business days upon the change of share ownership.

4.3 Hurdles to Stakebuilding

Under the Company Law, articles of association may specify that changes in shareholding composition of private companies must be approved by the existing shareholders through the general meetings of shareholders. The Company Law determines the minimum quorum for convening a general meeting of shareholders and for passing a shareholder resolution. However, the Company Law provides flexibility for limited liability companies to set out higher quorums in their articles of association for convening the general meetings of shareholders. Therefore, if there is any discrepancy between the quorum requirements set out in the Company Law and articles of association, the articles of association will take precedence over the quorum requirements under the Company Law.

The quorum requirements can significantly impact any change of shareholding composition, let alone any stakebuilding process. Companies with higher quorum requirements to convene a general meeting of shareholders or to pass a shareholder resolution might face challenges in securing approval from the shareholders for changes to the shareholding composition, particularly those with a large number of shareholders. Furthermore, companies in specific industries may encounter hurdles in changing their shareholding composition due to specific requirements set out by the relevant authorities.

As an aside, in terms of public companies, one of the exemptions from triggering a mandatory tender offer (see below) is when a new controller acquires control by acquiring not more than 10% shares every 12 months.

4.4 Dealings in Derivatives

Although the involvement of derivatives in merger and acquisition transactions is neither specifically governed nor prohibited by the Indonesian laws, this practice has been used in several transactions, as some companies prefer to use derivatives for tax efficiency purposes. Generally, those transactions might involve, among other things, convertible or exchangeable bonds.

4.5 Filing/Reporting Obligations

There are no specific filing or reporting requirements for transactions that are carried out using derivatives. However, reporting obligations may be triggered depending on the derivatives used in such transactions. For example, for the conversion of debt into shares, the company may need to file a report with the KPPU if the conversion exceeds the merger filing thresholds. On the other hand, public companies intending to carry out a debt-to-equity conversion are required to announce their intention to the shareholders through a disclosure of information and submit the disclosure of information to the OJK.

Additionally, the OJK requires companies that intend to issue debt securities and/or sukuk without public offerings in Indonesia or to an Indonesian party to, among other things, submit documents for the issuance of such derivatives to the OJK, without prejudice to the companies' obligation to obtain prior approval from other relevant authorities. Upon the issuance of debt securities and/or sukuk without public offerings, the companies (or issuers) must then submit a

report on the issuance of such derivatives to the OJK.

4.6 Transparency

A purchaser intending to acquire a private company must announce its intention through a daily Indonesian newspaper with national circulation. However, there is no requirement, and it is rather uncommon in practice, for a purchaser to disclose the purpose of acquiring such target company in the newspaper announcement.

However, disclosure of the acquisition's purpose may be required depending on the industry. Some industries may require filing to or approval from the authorities for pursuing an acquisition. For example, the financial sector heavily regulates the requirements for acquiring or disposing of shares in companies within this sector, so prospective acquirers may be required to disclose the purpose of their acquiring certain financial companies or banks. In other cases, under OJK Regulation No. 9 of 2018 on Takeover of Public Companies ("*OJK Regulation No. 9/2018*"), the new controller of public company must make a mandatory tender offer by submitting a mandatory tender offer statement, which also requires the new controller to disclose the purposes of the acquisition.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

Disclosure obligations may differ for private and public companies. As described above, the acquisition of a private company requires the purchaser, as the prospective controller, to announce the intended acquisition through a daily Indonesian newspaper with national circulation. Under the Company Law, the newspaper

announcement must be made at least 30 days prior to the effective date of the acquisition.

On the other hand, in the case of acquisition of a public company, the prospective controller must conduct a mandatory tender offer after the acquisition becomes effective. Prior to the effective date of the acquisition, the prospective controller may, but is not obliged to, announce the ongoing negotiation with the seller through a daily Indonesian newspaper with national circulation. This approach is commonly taken by prospective controllers of public companies if they expect a rise in the target public companies' shares, which would affect the minimum mandatory tender offer price. Eventually, if the target company becomes aware of the potential change of control, the target company must submit a disclosure of material information or facts regarding the proposed change of control to the OJK and announce it to the public.

5.2 Market Practice on Timing

Based on market practice, the timing of disclosure is in accordance with the requirements set out under the applicable laws and regulations.

5.3 Scope of Due Diligence

There is no specific provision for due diligence under the prevailing laws and regulations in Indonesia. Based on common practice and depending on the nature of the target company's business, the scope of due diligence typically covers the following aspects:

- corporate documents;
- licensing requirements and compliance matters;
- assets;
- material agreements;
- employment matters;
- intellectual property; and

- disputes.

Additionally, it is also common for the prospective purchasers to conduct financial and tax due diligence.

5.4 Standstills or Exclusivity

As there is no definitive rule for this, it is quite common for prospective purchasers to request an exclusivity period during the earlier stages of the deal (eg, during term sheet negotiations and the due diligence period). This exclusivity period typically lasts three to six months from the signing of the term sheet.

5.5 Definitive Agreements

It is not permissible for the terms and conditions of a tender offer to be documented in a definitive agreement.

In the case of tender offers, OJK Regulation No. 54/POJK.04/2015 on Voluntary Tender Offers (*"OJK Regulation No. 54/2015"*) explicitly prohibits voluntary tender offers from being governed by a definitive agreement given the regulation requires the prospective new controller to keep the proposed tender offer confidential from the target company and its affiliates until it is formally launched. That being said, the tender offeror can set conditions in the voluntary tender offer announcement, which will be subject to the OJK's review and approval. On the other hand, mandatory tender offers are highly regulated under OJK Regulation No. 9/2018, and the OJK prohibits a mandatory tender offer from being subject to conditions. Therefore, it is not permissible for the terms and conditions of mandatory tender offers to be governed by a definitive agreement.

6. Structuring

6.1 Length of Process for Acquisition/Sale

While the timeline depends on the scale of the deal and the conditions of the target company, the acquisition a company generally takes around three to six months to complete. This period includes the term sheet negotiation, the due diligence process, the fulfilment of pre-closing conditions and the closing. However, the timeline may vary for each deal, as certain industries may have additional requirements during the pre-closing stages, which could extend the time before closing.

The acquisition of a public company may take a longer period to complete, due to the mandatory tender offer requirement, which will be subject to a declaration of effectiveness issued by the OJK before formally launching the tender offer.

6.2 Mandatory Offer Threshold

The mandatory tender offer threshold applies only to the acquisition of public companies, following a change of control of those public companies. However, in a mandatory tender offer, the new controller is not required to purchase shares owned by:

- shareholders who have jointly undertaken the acquisition with the new controller;
- other parties that have secured an offer with the same terms and conditions from the new controller;
- other parties that, at the same time as the new controller, are undertaking a mandatory tender offer or voluntary tender offer over the shares of such public company;
- a principal shareholder (ie, a party that owns 20% or more shares in the public company); and

- another controller of the public company.

6.3 Consideration

In the Indonesian market, cash remains the common form of consideration in M&A transactions, especially those involving public companies. However, current practices show that various forms of consideration are used, depending on the scale of the deals. If the acquisition is carried out through the issuance of new shares by the company, the Company Law allows the subscription to be made in either cash or in-kind contributions. On the other hand, if the acquisition is made directly from the existing shareholders, the consideration can take the form of either cash or shares in another company. Additionally, other forms of consideration may also be taken for tax efficiency purposes. To bridge the value gaps between the sellers and the purchasers, some of the most common tools include escrow agreements, the carving out of non-performing loans and other unconsidered assets, or maintaining the company's cash by prohibiting the dividend distribution to shareholders.

6.4 Common Conditions for a Takeover Offer

There is no requirement for a takeover offer in the acquisition of a private company. However, if the acquisition involves a public company, the new controller must make a mandatory tender offer to the holders of the remaining minority stakes in the public company.

Apart from the exemption of shares to be offered in the mandatory tender offer as elaborated in **6.2 Mandatory Offer Threshold**, OJK Regulation No. 9/2018 prohibits the new controller from setting out certain offer conditions or restrictions to the shareholders of the public company participating in the offer. On the other hand, in the case of a voluntary tender offer, OJK Regulation No.

54/2015 explicitly allows the prospective new controller to include certain offer conditions in the voluntary tender offer, although there is no further elaboration on the extent to which such conditions can be offered. However, they will be subject to the OJK's review and approval.

6.5 Minimum Acceptance Conditions

In the case of mandatory tender offers, there are no minimum acceptance conditions. The purpose of a mandatory tender offer is for the new controller to purchase the remaining minority stakes in the public company; therefore, the minimum acceptance concept is not applicable. Instead, a common practice is to set the acceptance condition based on the maximum number of shares the new controller can purchase in the mandatory tender offer to the extent there are regulatory restrictions that prohibit the new controller from acquiring all of the shares tendered in the mandatory tender offer (eg, foreign shareholding restrictions). The same practice goes with a voluntary tender offer; however, given the nature of a voluntary tender offer, which provides flexibility for the new controller to set out certain offer conditions (as elaborated above), the new controller is permitted to set out a minimum acceptance condition in the voluntary tender offer as the one of the offer conditions.

6.6 Requirement to Obtain Financing

While in some industries that are supervised by the OJK, parties that intend to acquire shares in companies engaged in those industries are prohibited from obtaining financing to finance the acquisition, in other industries, it is common for prospective purchasers to secure third-party financing to acquire shares in the target company. This approach is generally pursued by prospective purchasers involved in deals that include a voluntary tender offer or rights issue, where a statement of fund sufficiency is required

by the OJK. While the specifics depend on the agreement between the seller and the purchaser, some transactions may require the purchaser to provide proof of fund sufficiency to the seller to secure the closing of the transaction.

6.7 Types of Deal Security Measures

Deal security measures are commonly implemented in Indonesia. Some deals may include deal security measures in the form of break fees or non-solicitation provisions. The amount of break fees depends on the agreement between the seller and purchaser, but it is common practice for the break fees to amount to half of the expenses incurred by the sellers.

6.8 Additional Governance Rights

To become a controller of a company, a party is not necessarily required to hold 100% of the ownership of a target company. Instead, the Company Law prohibits a party from holding all the stakes in a company, which would result in there being a single shareholder in that company.

The number of shares (with voting rights) owned by shareholders determines their rights in the general meeting of shareholders. The higher the shareholding percentage, the more influence a shareholder has in approving resolutions at the general meeting of shareholders. Most resolutions require approval by more than 50% of shares with voting rights present at the meeting. However, certain corporate actions require a higher quorum, such as changes to the articles of association, which require more than two-thirds of the company's voting shares present at the meeting. Other corporate actions, such as mergers, consolidations, acquisitions or dissolution of companies, require more than three-quarters of the voting shares present at the meeting. That being said, a 75% stake in a company should be

sufficient for a controller to secure the majority vote at a general meeting of shareholders.

In current practice, shareholders may govern the additional governance rights through a separate agreement (eg, a shareholder agreement). Under this agreement, shareholders may set higher thresholds for certain reserved matters, such as requiring unanimous approval for specific reserved matters.

6.9 Voting by Proxy

The Company Law allows shareholders with voting rights who are entitled to attend the general meeting of shareholders to appoint a proxy to attend the general meeting of shareholders and cast a vote on their behalf. The proxy is typically granted through a written power of attorney.

6.10 Squeeze-Out Mechanisms

The concept of squeeze-out mechanism is not applicable in Indonesia given that the practice is not governed under any prevailing laws and regulations.

6.11 Irrevocable Commitments

As this is decided on a case-by-case basis, some transactions may require a pre-closing condition in the form of an irrevocable commitment from the principal shareholder of the target company to approve the transaction at the general meeting of shareholders. In some cases, this is crucial to secure the deal. If the transaction is subsequently postponed or cancelled after approval is obtained, the principal shareholder may withdraw their commitment.

7. Disclosure

7.1 Making a Bid Public

While this applies only to public companies, the time at which a bid becomes public depends on the type of tender offer, as follows.

Mandatory Tender Offer

In a mandatory tender offer, a potential bid becomes public when the offeror announces the completion of the acquisition and the change of control of the public company to the OJK and the public, but the intention to carry out a mandatory tender offer subsequent to the change of control has not yet been explicitly announced. Later on, a bid becomes public when the offeror declares the intention to purchase the minority stakes of the public company through a mandatory tender offer statement, under a condition that the mandatory tender offer statement has been declared effective by the OJK, meaning the OJK has no objections to the tender offer.

However, as elaborated above, in some cases, the prospective new controller may announce the ongoing negotiation with the seller indicating the potential change of control in the public (target) company. As a result, this announcement could lead the public to anticipate a mandatory tender offer for the public company.

Voluntary Tender Offer

While the procedure for a voluntary tender offer differs from that for a mandatory tender offer, the bid becomes public when the prospective new controller announces the voluntary tender offer statement to the public. For the avoidance of doubt, this voluntary tender offer statement must include a statement indicating that the voluntary tender offer statement has not yet been declared effective by the OJK; hence, the public can anticipate the upcoming tender offer by the

prospective new controller. After the voluntary tender offer statement is declared effective by the OJK, the prospective new controller must announce any amendment and/or additions to the voluntary tender offer statement.

7.2 Type of Disclosure Required

For both private and public companies, the issuance of shares must be approved by the general meeting of shareholders. If the issuance of new shares is intended to effect a change of control of a company, the prospective controller must, prior to subscribing to the new shares, announce the proposed acquisition in a daily Indonesian newspaper with national circulation, as detailed above.

7.3 Producing Financial Statements

In general, there is no specific requirement for bidders to disclose their financial statements in their disclosure documents. However, it depends on the industry of the target company, as the authorities of some industries may require the prospective controller of a target company to submit their financial statements prior to acquiring the target company. In that case, the financial statements must adhere to the prevailing accounting standards in the prospective controller's jurisdiction. If the prospective controller is an Indonesian company, then the financial statements need to be prepared according to the Indonesian Generally Accepted Accounting Standards (GAAP).

7.4 Transaction Documents

The disclosure of transaction documents is not required if the transaction involves a private company.

On the other hand, the disclosure of transaction documents in the case of an acquisition of a public company depends on the specific situa-

tion. Typically, the new controller is only required to disclose the key terms of the agreement to the extent required in the mandatory tender offer statement. However, in some cases, the OJK may request for the full version of the transaction documents to be disclosed to the OJK while the mandatory tender offer statement is being reviewed by the OJK.

8. Duties of Directors

8.1 Principal Directors' Duties

In a business combination in Indonesia, the board of directors must fulfil its fiduciary duty in managing the company, acting in good faith and in the best interest of the company. The duties of the board of directors are not solely owed to the company's shareholders but to the entire company, including all of its stakeholders. For this purpose, the board of commissioners supervises the actions of the board of directors to ensure the fulfilment of fiduciary duty by all members of the board.

8.2 Special or Ad Hoc Committees

In the Indonesia's M&A climate, the concept of special or ad hoc committees is not explicitly introduced, but there is no prohibition against the establishment of special or ad hoc committees in business combinations. Although this practice is generally applied on case-by-case basis, some boards of directors prefer to establish special or ad hoc committees for certain deals to assist them in identifying potential targets and in managing, negotiating and finalising the deals. However, the authority of the special or ad hoc committees is limited to assisting the board of directors, as the final decision will then be made solely by the board of directors.

The main purpose of the establishment and utilisation of special or ad hoc committees in certain deals is not necessarily to address a conflict of interest. Instead, if a conflict of interest arises in a particular deal, the Company Law stipulates that the conflicted members of the board of directors must not represent the company, meaning that they are not allowed to act in their capacity as members of the board of directors. If all members of the board of directors are conflicted, the board of commissioners must then represent the company. If, in that eventuality, all members of the board of commissioners are also conflicted, then the shareholders may appoint another party to represent the company.

8.3 Business Judgement Rule

While the board of directors is obliged to fulfil its fiduciary duty, the Company Law also acknowledges the concept of "*business judgement rule*" as the "*protection*" for the members of the board of directors in performing their fiduciary duty, particularly for the issuance of new shares and merger transactions. Therefore, the members of the board of directors are not held liable for losses incurred under certain circumstances:

- when such losses are not attributable to the directors' fault or negligence;
- when the directors have managed the company with good faith and prudence in the interest of the company and in accordance with the purposes and objectives of the company;
- when there is no conflict of interest against the directors, either directly or indirectly, with respect to the actions taken that resulted in losses to the company; and
- when the directors have taken a preventive measure to avoid the occurrence of subsequent losses.

8.4 Independent Outside Advice

To perform its fiduciary duty, the board of directors may, although it is not mandatory, seek advice from independent third parties prior to making decisions regarding the management of the company. The most common practice for the board of directors in this regard is consulting with external counsel, whether for legal, tax or financial matters. This approach not only provides the board with a solid foundation for making decisions on behalf of the company but also helps the board identify potential risks early on, allowing the board to consider mitigation measures at the outset.

In the case of public companies, certain transactions may require the board of directors to seek advice from an independent appraiser, particularly to appraise the fair value of the object of the transaction. This may be required if the board of directors intends to carry out a merger or consolidation transaction, or if the potential transaction is categorised as a material transaction or an affiliated party transaction under the OJK regulations.

8.5 Conflicts of Interest

In terms of private companies, under the Company Law, members of the board of directors are prohibited from representing the company if they have conflicts against the company's interest. If there are conflicts of interest, the company must be represented by:

- other members of the board of directors who are not subject to conflicts of interest;
- members of the board of commissioners, if all members of the board of directors are subject to conflicts of interest; and
- another third party appointed by the general meeting of shareholders, if all members of the

board of directors and board of commissioners are subject to conflicts of interest.

As an additional note, in the case of public companies, the OJK also prohibits members of the board of directors from representing the public company if there are conflicts against the public company's interest. That being said, if there are conflicts of interest, the above rule shall also apply to public companies.

Conflict of Interest Transaction

In terms of public companies, OJK Regulation No. 42/POJK.04/2020 on Affiliated Party Transactions and Conflict of Interest Transactions sets out certain particular requirements to be fulfilled by public companies intending to conduct a conflicts of interest transaction, as follows:

- appoint an appraiser to determine the fair value of object of the conflict of interest transaction and/or fairness of such transaction;
- announce a disclosure of information on the conflict of interest transaction;
- submit the above disclosure of information including its supporting documentation to the OJK; and
- obtain prior approval of the general meeting of independent shareholders.

9. Defensive Measures

9.1 Hostile Tender Offers

Hostile tender offers are not common in Indonesia, but no regulations prohibit them.

9.2 Directors' Use of Defensive Measures

In the case of proposed mergers and acquisitions, there are no defensive measures available for directors of private or public companies.

However, if an acquisition is to be carried out by way of a voluntary tender offer, OJK Regulation No. 54/2015 explicitly prohibits the directors of the target company from carrying out any transactions for the purpose of preventing the company's acquisition.

9.3 Common Defensive Measures

As described in 9.2 **Directors' Use of Defensive Measures**, there are no defensive measures available in Indonesia under the prevailing laws and regulations.

9.4 Directors' Duties

As defensive measures are not applicable in Indonesia, the board of directors must uphold its fiduciary duty in performing its obligations.

9.5 Directors' Ability to "Just Say No"

Since a business combination is a corporate action that must be resolved through a general meeting of shareholders, directors cannot simply "*just say no*" and take action on behalf of the company to prevent a business combination from occurring. However, if the acquisition is to be carried out by way of a voluntary tender offer, OJK Regulation No. 54/2015 allows the directors of the target company to issue a statement objecting to the proposed tender offer.

10. Litigation

10.1 Frequency of Litigation

To date, litigation in connection with M&A deals has not been common in Indonesia.

10.2 Stage of Deal

As previously stated, litigation in connection with M&A is not common in Indonesia. However, a

potential issue may arise if, upon the closing of the M&A deal, there is a misrepresentation or breach of warranties or undertakings by the seller.

10.3 "Broken-Deal" Disputes

This is not applicable as litigation in connection with M&A is not common in Indonesia.

11. Activism

11.1 Shareholder Activism

The prevailing laws provide some protections to the minority shareholders of a company. While the articles of association may offer greater protection to the shareholders, generally, all shareholders, including the minority shareholders, have the right to file a claim against the company if certain actions are deemed to have resulted in a loss to the shareholders.

Under the Company Law, if certain actions by the company, including but not limited to mergers, acquisitions or consolidations, are deemed not beneficial to the minority shareholders, the minority shareholders may request that the company repurchase their shares at a reasonable price. Additionally, in the context of public companies, certain transactions, such as transactions involving conflict of interest, must be approved by independent shareholders through a general meeting of independent shareholders.

11.2 Aims of Activists

Please refer to 11.1 **Shareholder Activism**.

11.3 Interference With Completion

Please refer to 11.1 **Shareholder Activism**.