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Mergers & Acquisitions

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CONTENTS

Indonesia

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Overview

"*Indonesia is back on the map and will only be more important in the next decade*"[1] is the tagline of *The Economist* at the end of 2022, indicating the significance of Indonesia in Asia's global economy. Following the success of the G20 meeting at the end of 2022 in Bali, Indonesia has once again proven that it is ready to welcome foreign investments to fuel its economic revival.

Indonesia is currently the fourth most populous country in the world, with a population of more than 280 million people. For many years, it has been a global spotlight for investment opportunities, if not only being hindered by investment protection difficulties, legal uncertainties and regulatory issues. As one of the agendas of the G20 meeting, the Indonesian Government committed to provide support for economic growth by doing various regulatory reforms across numerous sectors with the aim to ease business licensing and investment issues.

Based on PWC Indonesia's analysis in 2022,[2] M&A hit a record high in 2021 and transaction momentum is expected to continue after the pandemic in 2022. Indonesia's economic growth surged by 5.01% (year-on-year) during the first quarter of 2022, which was deemed the largest growth in the ASEAN region. At the end of 2022, the Ministry of Investment of Indonesia recorded that investment realisation reached 1,207.2 trillion rupiah (approximately USD84 billion) in 2022, exceeding the target set by President Joko Widodo of 1,200 trillion rupiah. This is an increase of investment by 34% and the highest in Indonesia's history.

In general, there is no official public registry that keeps track of private M&A deals in Indonesia. However, the Indonesian Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha* or "**KPPU**") recorded at least 300 M&A notifications submitted to the KPPU in 2022, which is an increase of 28.7% compared to the previous year where, as a comparison, there were 233 notifications submitted to the KPPU in 2021).[3] As such, there are approximately 28.7% increases in 2022. Such notification constitutes M&A deals that resulted in post-M&A asset valuation exceeding 2.5 trillion rupiah (approximately USD165 million) or 20 trillion rupiah for banking sector deals (approximately USD1.3 billion), or sales value exceeding 5 trillion rupiah (approximately USD330 million). As a comparison, in 2021, there were 233 notifications submitted to the KPPU.

M&A-related laws

M&A in Indonesia is mainly governed by:

(i) Law of the Republic of Indonesia No. 40 of 2007 on Limited Liability Companies (as amended by Law No. 6 of 2023 on the Stipulation of Government Regulation No. 2 of 2022 *in lieu* of Law No. 11 of 2020 on Job Creation into Law) ("**New Job Creation Law**")) ("**Company Law**");

(ii) Law of the Republic of Indonesia No. 25 of 2007 on Investment as amended by the New Job Creation Law ("**Investment Law**");
(iii) Law of the Republic of Indonesia No. 8 of 1995 on Capital Market, as amended by Law of the Republic of Indonesia No. 4 of 2023 on the Development and Strengthening of the Financial Sector ("**PPSK Law**"), "**Capital Market Law**");
(iv) Government Regulation of the Republic of Indonesia No. 27 of 1998 on Mergers, Consolidations and Acquisitions; and
(v) Presidential Regulation of the Republic of Indonesia No. 10 of 2021 on Investment Business Fields as amended by Presidential Regulation of the Republic of Indonesia No. 49 of 2021 on Amendment to Presidential Regulation of the Republic of Indonesia No. 10 of 2021 on Investment Business Fields ("**Positive List**").

In addition, there are several other laws and regulations affecting the M&A process, such as: (i) Law of the Republic of Indonesia No. 27 of 2022 on Personal Data Protection ("**PDP Law**"); (ii) Law of the Republic of Indonesia No. 5 of 1999 on Prohibition of Monopolistic Acts and Unfair Business Competition (as amended by the New Job Creation Law); (iii) Law of the Republic of Indonesia No.13 of 2003 on Labor (as amended by the New Job Creation Law); (iv) and other industry-specific regulations that may stipulate prior approvals from the relevant supervisory bodies. It is to be further noted that, the rules of the Financial Services Authority (*Otoritas Jasa Keuangan*/"**OJK**") and the Indonesia Stock Exchange apply to M&As involving public listed companies.

The relevant government authorities governing M&A activities are generally:
(i) The Ministry of Law and Human Rights ("**MOLHR**") as the authority providing relevant approvals/reporting for change of shareholders under the Company Law.
(ii) The Online Single Submission ("**OSS**") system as managed by Indonesian Capital Investment Board ("**BKPM**"), together with the relevant government authority of the relevant business of the company, have the authority for the issuance of business licensing, which is now being assessed based on risk-based assessments.
(iii) OJK is the main government authority for M&A involving public companies, banks and financial services companies.
(iv) Various government authorities depending on the line of business of the target company (for example, Bank Indonesia ("**BI**") as the relevant authority in a payment system business).

Acquisition methods

The Company Law generally stipulates four types of M&A transactions, namely: (i) acquisitions; (ii) mergers; (iii) consolidations; and (iv) spin-offs.

From a practical perspective, the main methods commonly used to acquire a company in Indonesia are the acquisition of shares, reorganisation (mergers and consolidations) and business transfers.

(i) Acquisition of Shares of a Private Company

The two methods of acquiring shares of a private company in Indonesia are a share transfer (from existing shareholders) and a new share issuance.

The Company Law defines acquisition as a legal act performed by a legal entity or an individual to acquire shares of a target that results in a transfer of control. As such, if a company acquires a target company either by means of a shares transfer or by way of a new shares issuance, and such action constitutes an "acquisition of control" under the Company Law, the necessary procedures for an acquisition of control must be taken in accordance

with the provisions under the Company Law (including certain announcements to creditors and employees). The Company Law does not elaborate on what is defined as "*control*"; however, it is generally accepted that this would mean having the majority percentage of shares and/or the ability to influence management members (including appointment thereof) and policy in a company. If a transfer of shares does not fall under "acquisition" above, then a simpler process is applicable (will not necessarily require certain announcements to creditors and employees).

In general, the transfer of shares generally takes effect on the execution of a share purchase agreement (which can be privately drawn or in a notarial deed form). However, if an acquisition falls under "acquisition of control", the share purchase agreement shall be made in a notarial deed. For acquisition by way of subscription of new shares, a share subscription agreement is usually entered. Issuance of new shares requires an amendment to the shareholding composition of the company due to capital increase, and must therefore obtain an approval or be notified to MOLHR (as applicable).

Compared to acquisitions, mergers, consolidations and spin-offs are less frequent in Indonesia.

Due diligence exercise over the target and entry to a conditional share purchase agreement/ share subscription agreement are common practice in acquisition of shares in Indonesia. However, we have seen representations and warranties insurances ("**RWI**") being deployed in several acquisition transactions in Indonesia, in general this practice is still less frequent (usually seen if a transaction is involving a US-based acquirer/seller).

(ii) Acquisition of shares in public companies

Acquisition of publicly listed companies is regulated and supervised by OJK and mainly regulated by OJK Regulation No. 9/POJK.04/2018 on Acquisition of Publicly Listed Companies ("**POJK 9/2018**").

POJK 9/2018 stipulates a different definition of "control" applicable for public listed company acquisition. A party is deemed to have a control of a company if such party directly or indirectly: (i) have more than 50% of the total issued shares in a public company; or (ii) have the ability to determine, directly or indirectly, the management and/or policy of the public company in any way.

POJK 9/2018 introduces examples of documents or information that may be used as evidence of control over a public company:

(i) an agreement with other shareholder that shows a possession of more than 50% of the voting rights in the public company;
(ii) a document/information that provides the authority to control financial and operation policy of the public company based on the articles of association or an agreement;
(iii) a document/information that provides the authority to appoint or dismiss most members of the Board of Directors ("**BOD**") and Board of Commissioners ("**BOC**");
(iv) a document/information that provides the ability to control the majority voting rights in the BOD and BOC meetings, resulting in a control over the public company; and/or
(v) other document/information indicating a control over the public company.

A mandatory tender offer is required to be conducted by the acquirer following such acquisition of control. The mandatory tender offer shall be conducted by the new controller after the completion of acquisition of the shares owned by the public (minority shareholders). A mandatory tender offer can be carried out by: (i) the new controller; or (ii) another party appointed by the new controller (this must be a subsidiary of the controller with at least 50% of the shares being owned by the controller). Certain procedures (including the submission

of a draft announcement to OJK (including supporting documents) and announcement in daily newspaper with a nationwide circulation) must be conducted. The mandatory tender offer needs to be conducted within 30 days from the date of the announcement.

In light of the above, it is important to consider whether the acquisition of a public company will trigger the mandatory tender offer.

It is also possible to structure an acquisition of shares of a publicly listed company through a voluntary tender offer mechanism. However, it may be worth mentioning that, unlike other jurisdictions, Indonesian law does not provide for a right to demand the sale of shares (the so-called squeeze-out right), which allows an acquirer to compulsorily acquire the shares of minority shareholders of the target company if the acquirer acquires a certain number of shares or more.

(iii) Business transfer

When acquiring a private company in Indonesia, instead of acquiring shares of the target company, it is also a common practice to establish a new company and all (or part) of the target company's business to be transferred to the new company. This method is usually tax driven and often considered by the acquirer due to existing liabilities in the target company. However, as a general rule of thumb in Indonesia, licences and permits of the target company cannot be transferred to the newly established company, which may create disadvantages such as the need to re-apply for the licenses and permits under the newly established company, and the possibility of taxation issues at the time of asset transfer. If a company transfers assets exceeding 50% of its total net assets to another company, a special resolution of the shareholders meeting of the transferor company is required.

Foreign investment requirements

M&A in Indonesia by foreign investors may be subject to the applicable foreign investments restrictions depending on the line of business of the target company.

Under the Investment Law, a company with only domestic investment is referred to as a *Penanaman Modal Dalam Negeri* ("**PMDN**") company (domestic investment company), while a company with foreign investment is referred to as a *Penanaman Modal Asing* ("**PMA**") company (foreign investment company). To put it simply, an Indonesian company with even a minority foreign investment is classified as a foreign investment company under the Investment Law. A foreign investment company can be either a joint venture (with a local shareholder) or 100% foreign investment, subject to the foreign investment restriction regulations.

The foreign investment regime in Indonesia is mainly regulated by the Investment Law and Positive List, which prohibits foreign investment in certain sectors or sets limits on the percentage of shareholding held by foreign investor in certain sectors/business lines.

Additionally, specific industries may be subject to the authority and certain foreign ownership limitation stipulated by specific government agencies (for example, OJK or BI for banking/finance business).

Other than foreign investment restriction above, there are general capital requirements applicable to a foreign investment company. A foreign investment company must have at least IDR10 billion issued and paid-up capital. In addition, a foreign investment company must have an investment value of more than IDR10 billion (which is applicable to each line of business and subject to certain exceptions).

Other considerations

Other issues worth considering in an acquisition transaction include termination benefits and merger control filing to the KPPU.

As a rule of thumb, an employer may terminate the employment of the employees (and the employees are entitled to receive the certain termination benefits) in the event of:

(i) a merger, consolidation or separation of a company and the employee does not agree to continue the employment relationship or the employer does not agree to accept the employee; and

(ii) an acquisition of a company (including in the event of an acquisition that amends the terms of employment and the relevant employee does not agree to continue the employment relationship).

Any merger, consolidation or acquisition that falls under certain thresholds must be notified to the KPPU. Please see the section of "Update on Merger Control Regime" in this article.

Significant deals and highlights

Although we have seen economic growth in 2022, we have also seen quite a number of layoffs in various businesses in the midst of the global recession in 2022. In spite of this, M&A transactions in Indonesia remain strong due to the support by the Indonesian government policies, including the relaxation of health protocol restriction as the COVID-19 pandemic subsidies.

One of the biggest deals was the acquisition in the telecommunication sector of PT Link Net Tbk by Axiata Group Berhad. In June 2022, Axiata Investments (Indonesia) Sdn. Bhd., Axiata's subsidiary, and PT XL Axiata, Tbk completed the acquisition of Link Net's 66.03% shares from Asia Link Dewa Pte. Ltd. and PT First Media, Tbk with a valuation of 8.72 trillion rupiah (approximately USD570 million). It is a strategic move for Link Net and XL Axiata to leverage immediate synergies through their combined roles in wireless communication services, sharing of backbone and transmission networks, along with the extensive relationships with their respective customers in Indonesia.

Another notable deal was carried out in coal mining industry, i.e., acquisition of PT Golden Energy Mines, Tbk by PT ABM Investama, Tbk through its subsidiary, namely PT Radhika Jananta Raya from GMR Coal Resources Pte. Ltd. The deal was carried out through an acquisition of 30% shares of PT Golden Energy Mines with a valuation of IDR6.2 trillion (approximately USD400 million).

Despite the economic slowdown, including in tech deals, several tech companies were still able to raise investment funds. Xendit, a digital payment platform raised USD300 million in a Series D funding. Similarly, Traveloka, an Indonesia-based online travel company managed to secure USD300 million investment from various investors shareholders.

Fintech industries also attracted a number of foreign investors recently, such as, notably, the investment of Silvrr Technology Co., Ltd (Akulaku) a fintech company providing digital financial services in Indonesia (and other South East Asia countries) by MUFG bank for USD200 million and series investment of Finaccel (Kredivo), a leading "buy now pay later" ("**BNPL**") company and digital banking business in Indonesia by Mizuho Bank in the amount of USD270 million.

Key developments

As at the date of this article, there has been no update or discussion for regulatory reforms in relation to M&A procedures under the Company Law. However, there have been several regulatory highlights issued in the past year that are relevant M&A transactions in Indonesia.

Job Creation Law update

Law No. 11 of 2020 on Job Creation ("**Job Creation Law**") was enacted on November 2, 2020, and considered a breakthrough approach by the Indonesian Government. It is the first law covering a comprehensive set of regulations in an omnibus format that governs and amends laws and regulations in various sectors. The issuance of the Job Creation Law is intended to boost the growth of the Indonesian national economy, ease doing business and increase investment opportunities, and ultimately create more job opportunities in Indonesia.

Following a decision from the Constitutional Court that declared the Job Creation Law to be conditionally unconstitutional, Indonesian Government issued Government Regulation *in lieu* of Law (*Peraturan Pemerintah Pengganti Undang-Undang –Perppu*) No. 2 of 2022 on Job Creation ("**Perppu No. 2 of 2022**"), as a temporary solution to rectify the Job Creation Law. Finally, on March 21, 2023, Perppu No. 2 of 2022 was approved by the House of Representatives to become a law (i.e., the "**New Job Creation Law**").

The New Job Creation Law is expected to offer greater clarity and assurance regarding its implementation to boost the Indonesian economy, attracting more investments, and, ultimately, generating more job opportunities in the country. However, as controversy with the process remains, it is still uncertain whether there will be another petition submitted to the Constitutional Court to contest the New Job Creation Law.

Peer-to-peer ("**P2P**") lending company investment – lock-up period

In the past year, we have seen an increased foreign investors' interest in fintech investment, including in P2P lending companies. For investment in a P2P lending company, several considerations must be taken due to the recently issued OJK Regulation No.10/POJK.05/2022 on the Information Technology-Based Co-Financing Services ("**OJK Reg 10/2022**"), including certain approval requirements for each of the following change of ownerships:

(i) change of shareholders in a P2P lending company that is not publicly listed;
(ii) change of shareholders in the shareholders of a P2P lending company that is not publicly listed;
(iii) controlling shareholder in a publicly listed P2P lending company; and
(iv) controlling shareholder of the shareholder in a publicly listed P2P lending company.

Furthermore, OJK Reg. 10/2022 provides that P2P companies and their shareholders are not allowed to conduct a change in the shareholding structure within three years since the issuance of a business licence from OJK (as a P2P lending company) that causes: (i) the addition of a new shareholder; and/or (ii) a change of controlling shareholder.

This lock-up period may likely raise a timeline issue for prospective investors to acquire or invest in a P2P lending company.

Personal data protection issues in M&A transactions

The new PDP Law was recently enacted in October 2022. The PDP Law serves as a comprehensive regulatory framework for personal data-processing activities, applicable to all types of businesses, industries, and organisations, whether private or public. While the PDP Law applies to all data-processing activities, other laws and regulations may provide additional or more stringent provisions for specific types of data processing that fall under the scope of such regulations insofar as they do not contradict with the provisions set out under the PDP Law.

In relation to M&A transactions, personal data protection compliance is an important aspect that should not be overlooked. First and foremost, with the recent global trend of

enforcement relating to personal data protection violation, an acquirer must be aware of the personal data compliance of the target company to identify potential should there be non-compliances, not to mention, handling of personal data during the due diligence stage, which is also of importance.

There may be certain information, including employee information, customer/supplier information or third-party information, that is to be shared/disclosed during due diligence stage. The seller or target company must ensure that it has the appropriate lawful ground and complies with the applicable regulations for disclosure of such information.

It is also important to note that, Article 48 the PDP Law now expressly requires that, in the event that a personal data controller performs a merger, separation, acquisition or consolidation of a legal entity, such personal data controller is obligated to submit a notification of the transfer of personal data to the data subject prior to conduct such transaction (closing of M&A transaction).

The PDP Law is currently in effect, with a two-year adjustment period for controllers or processors, and full enforcement of its provisions is still subject to the issuance of 11 implementing regulations mandated under the PDP Law.

Material amendments in securities companies regulation

In past years, we have also seen the trend from OJK in introducing a single presence policy towards certain businesses to encourage consolidation and strong competition in fragmented industries, such as banking businesses. Recently, OJK introduced a similar policy under the PPSK Law that is applicable to securities companies (i.e., underwriter, broker, and/or investment manager). In a nutshell, the policy stipulates that a party cannot own and/or control directly or indirectly (save for government shares ownership or equity participation) more than one securities company. This new policy introduces a stark difference compared to the previous situation, where there is no single presence policy applicable for securities companies. The PPSK Law mandates for any party incompliant with this provision to divest in three years.

In addition, OJK also introduced certain new restrictions for securities companies' business activities. Previously, under Article 30 (2) of Capital Market Law, a securities company may conduct activities as underwriter, broker, and/or investment manager. This is then changed under the PPSK Law, whereby a securities company cannot conduct activities as an underwriter and/or broker in combination with investment manager. Given this change, the PPSK Law mandates business actors to adjust their business activities in accordance with this provision no later than one year by separating their investment manager business activity.

Considering the above, foreign investors need to keep these different considerations in mind if they intend to invest in securities companies in Indonesia.

Update on merger control regime

The KPPU has recently issued KPPU Regulation No.3 of 2023 on the Assessment of Merger, Consolidation, or Acquisition of Shares and/or Asset that could Result in Monopolistic and/or Unfair Business Competition Practices ("**KPPU Merger Regulation**").

KPPU Merger Regulation introduces a new provision with regard to the threshold of assets and sales for mergers, consolidations and acquisitions, which needs to be notified to the KPPU. As a general rule of thumb, a notification to the KPPU is required if the following thresholds are met: (i) a combined value of assets exceeding IDR2.5 trillion; and/or (ii) combined annual sales value exceeding IDR5 trillion. Under the previous regime, the value of the assets will be calculated based on worldwide assets. Currently, the calculation of assets and sales value shall be based on assets and sales generated within the Republic of Indonesia.

In addition, the parties involved in transactions should have assets or generate sales/business within the Republic of Indonesia. A notification to the KPPU is not required if only one party in the transaction fulfilled the condition above. Other provisions include: (i) a shorter period of review by the KPPU for completeness of documents; (ii) filing submissions through an online portal; and (iii) determination of filing fee by the KPPU.

Industry sector focus

With the economy starting to shift to a better outlook after the COVID-19 pandemic, shown through an increase of 28.7% in M&A transactions from the previous year, as reported to the KPPU,[4] investment banks are projecting an increase in M&A activities, whereby such activities are driven by different elements, from growth prospects to distress in certain industries this past year and the upcoming years.

In Indonesia, M&A growth is mainly driven by four key sectors: (i) energy, mining, and utilities; (ii) telecommunications, media and technology ("**TMT**"); (iii) business services; and (iv) transportation.[5] These sectors have seen significant transactions worth billions of US dollars. This impressive growth is attributable to the Indonesian government's effortful support through multiple regulation changes and development plans that include infrastructure development.

Mining and TMT are specifically attracting multiple investors and driving the M&A growth since the Indonesian government majorly focuses on infrastructure development. The growth in energy, mining and utilities are driven by the growing interest of electric vehicles ("**EV**"), where Indonesia is home to the world's largest nickel reserves, which is a crucial component of the batteries used in electric vehicles.

For TMT, the digital revolution climate in Indonesia is vastly attracting major players, bringing both risks and opportunities to the sector. The increased interest from private equity investors is advancing at an accelerated rate as corporations operating in TMT endeavour to maintain their competitiveness and improve their fundamental abilities. Top emerging trends include digital banking, cryptocurrency, transformative technologies and even artificial intelligence.

We have seen a particularly strong interest from foreign investors for fintech and digital banking investments in the past year. Due to the huge economic potential from Indonesia's unbanked population and government support in the form of regulatory reforms (such as recent OJK and BI regulations, particularly in P2P lending business and digital banking business), we have seen banking institutional investors being active in fintech investment in the past year (as it is with the case with Akulaku and Kredivo's investments).

However, investors in the market are not without challenges and competition, especially between private equity and venture capital companies, and political issue. President Jokowi's term will end in 2024 but there is still no clear successor who carries similar view towards economic progression. Nonetheless, Indonesia's positive investment climate and optimistic regulations provide substantial support for an upsurge in transactions, capital inflow, and global interest. Business leaders must comprehend their current business position and the most effective way to take advantage of transaction opportunities. Identifying suitable transactions and execution strategies will optimise the value that can be delivered to stakeholders. It is anticipated that the M&A climate will remain robust in 2023 and beyond.

The year ahead

In 2022, we saw Indonesia regaining the trust of foreign investors, especially after the economy bounced back from the COVID-19 pandemic and the global supply chain was disrupted due to the geopolitical situations.

M&A activity in the beginning of 2023 is expected to remain the same and consistent with the environment in the second half of 2022. The M&A outlook for the year ahead possesses different impacts across industries. Macroeconomic volatility and the geopolitical conflict will create different opportunities for different sectors in the upcoming year.

Additionally, with the G20 forum 2022 being held in Indonesia, it has created considerable positive impact towards the acceleration of M&A activity in Indonesia, where environmental, social, and governance ("**ESG**") advancement is a key focus of industries.

We may expect several regulatory changes considering the upcoming election in 2024, although we believe that this will likely relate to certain sectors (and not particularly relate to M&A provisions under the Company Law).

* * *

Endnotes

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3. Indonesia Business Market Competition Commission ("**KPPU**"). 2022.
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Abi's practice covers a broad range of corporate and commercial areas, including M&A, restructuring, joint ventures, and foreign investments. He has been involved in numerous cross-border acquisitions and investments in companies from various industries including banking, financial services, manufacturing, information technology, e-commerce, and fintech. He also advises foreign investors on operations, corporate governance, and legal compliance, advising, whether at the outset of their investment or in connection with the compliant functioning of their ongoing businesses.

Abi is recognised for his in-depth knowledge of financial services and information technology sectors, having advised local and multinational financial institutions (multi-finance, insurance, and venture capital companies), tech players, and investors in investing and consolidating operations in Indonesia. He advises clients across the fintech ecosystem from start-ups to large technology companies, tech investors, financial institutions as well as industry associations. Abi also counsels clients on data protection, blockchain technology, and cryptocurrency.

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