

Mergers & Acquisitions 2024

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Overview

Indonesia is faced with challenges in developing the national economy amidst several issues affecting global economic conditions in the world throughout 2023. The world economy is expected to continue to be overshadowed by various conditions of global uncertainty ranging from supply chains, natural disasters, geopolitics, economic fragmentation, commodity price volatility, the threat of climate change and rising world oil prices.

Despite the above, Indonesia's economy experienced a cumulative growth through the Q3-2023. This steady growth pertains to the strength and superior performance of the Indonesian economy relative to other nations. The robustness of the economy is demonstrated by the sustained strength of domestic demand and supply up until Q3-2023. There was a growth in household consumption and exports whilst we have seen a decline in imports, which was mainly due to the global economic downturn.

Following the national elections this year, investment patterns are expected to stabilise as investors, who had previously adopted a wait-and-see approach to observe the stance of the new government, resume their investment activities.

In addition, the government is currently building a new capital city, Nusantara (“**IKN**”). This creates enormous investment potential for the development of IKN, including technology, energy, education, housing, health, office buildings and other sectors. To encourage investor to participate, the government provides several business facilities such as ease of licensing process, tax holidays, tax allowances and import duty exemptions.

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 *in lieu* of Law No. 2 of 2022 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); and (iv) 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* or “**OJK**”) and the Indonesian Stock Exchange (“**IDX**”) apply to M&A involving publicly 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 system, as managed by the Indonesian Capital Investment Board, together with the relevant government authority of the relevant business of the company, has 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 using a shares transfer or by way of a new

shares issuance, and such action constitutes a “change of control” under the Company Law, certain procedures are necessary to be undertaken pursuant to the Company Law (including announcements to creditors and employees, as well as having the shares purchase agreement made in a notarial deed). 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, a 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). For acquisition by way of subscription of new shares, parties usually enter into a share subscription agreement. Issuance of new shares requires an amendment to the articles of association of the company due to capital increase and therefore must obtain an approval or be notified to MOLHR (as applicable).

Compared to acquisitions, other corporate actions such as 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 being deployed in several acquisition transactions in Indonesia, albeit being less frequent in practice (usually seen if a transaction involves 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 publicly listed company acquisition. A party is deemed to have a control of a company if such party directly or indirectly: (i) has more than 50% of the total issued shares in a public company; or (ii) has 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 shareholders 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 operational 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 control over the public company; and/or
- (v) other documents/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 an announcement in a daily newspaper with 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 purchases 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 licences 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* company (domestic investment company), while a company with foreign investment is referred to as a *Penanaman Modal Asing* 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 a foreign investor in certain sectors/business lines. Additionally, specific industries may be subject to the authority of, and certain foreign ownership limitations stipulated by, specific government agencies (for example, OJK or BI for banking/finance business).

Other than foreign investment restrictions 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 (i) termination benefits to employees; and (ii) merger control filing to the Indonesian Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha* or “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).

In relation to merger control filing, any merger, consolidation or acquisition that falls under certain thresholds must 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 was calculated based on worldwide assets. Currently, the calculation of assets and sales value is 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 fulfils the condition above.

Significant deals and highlights

Throughout 2023, the country has observed frequent activity in terms of M&A actions. This occurred despite the unpredictable global economic climate and a noted decline in M&A notifications in 2023 by KPPU. As of October 2023, KPPU had received 112 notifications, a decrease from the 323 notifications recorded in year 2022. This downturn is reportedly due to the worldwide recovery, encompassing Indonesia, from the COVID-19 pandemic, leading to an improvement in the national economy and gradual recovery of businesses as well as the presidential election, which was concluded earlier this year. Previously, following the COVID-19 pandemic, many business entities undertook M&A as a part of their exit strategy or restructuring endeavours amidst the economic challenges they were encountering. M&A are also expected to increase in 2024 following the successful presidential election process in Indonesia.

In 2023, state-owned enterprises PT Angkasa Pura I (Persero) and PT Angkasa Pura II (Persero) officially merged into PT Angkasa Pura Indonesia, or InJourney Airports, at the end of 2023. This merger is anticipated to enhance service quality through the creation of InJourney Airports, enabling travellers to have a consistent and homogeneous experience across all airports in Indonesia via the standardisation of operating systems and protocols. Moreover, this homogenised experience across all airports, coupled with the organisation of every facet of the tourism sector, has the potential to attract larger numbers of tourists, thus fostering a more equitable airport experience.

In the banking industry, PT OCBC NISP Tbk (“**OCBC**”) marked a significant move in late 2023 when it entered into a sale and purchase agreement with the Commonwealth Bank of Australia (“**CBA**”) to acquire 99% shares in PT Bank Commonwealth from CBA. This acquisition is intended to bolster the Indonesian banking infrastructure and the consolidation programme while aiding the company’s business growth. The planned acquisition is anticipated to augment OCBC Indonesia’s business scale as OCBC identifies PT Bank Commonwealth as having a desirable and complementary customer base, particularly within the consumer, small and medium enterprise, and retail segments.

In the technology industry, TikTok acquired 75% shares in PT GoTo Gojek Tokopedia Tbk (“**GOTO**”), one of the largest marketplaces in Indonesia, earlier this year. One of the reasons behind this corporate action is the ban imposed by the Indonesian government on online shopping businesses on social media platforms to protect Micro, Small, and Medium Enterprises (“**MSMEs**”). As a result, TikTok’s online shopping business can resume operations through GOTO’s marketplace, Tokopedia.

Key developments

As of the date of this chapter, 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 for M&A transactions in Indonesia.

Carbon Trading Exchange Regulation

For investment and investors in Indonesia’s carbon market, the IDX has launched a carbon trading exchange as one of its supports to cut emissions. Within the carbon trading system, companies engaged in renewable energy or decarbonisation efforts will be able to sell carbon credits, while emitters such as coal-fired power plant operators can buy those credits to compensate for their carbon emissions.

OJK Regulation No. 14 of 2023 (“**Carbon Exchange Rule**”) aims to provide certainty related to the substance of carbon trading and carbon exchange, as well as technical arrangements for the implementation of carbon trading through carbon exchange. Through the issuance of the Carbon Exchange Rule, carbon trading can now be conducted for both domestic and cross-border carbon trading.

Under the Carbon Exchange Rule, carbon units can be traded in the carbon exchange in the form of:

- Technical Approval on Emission Ceiling for Business Actors (*Persetujuan Teknis Batas Atas Emisi bagi Pelaku Usaha*), which are approvals on the emission ceilings of green house gas for business actors and/or approvals for *emission quotas* within a certain period of any business actor; and
- Green House Gas Emission Reduction Certificates (*Sertifikat Pengurangan Emisi Gas Rumah Kaca*), which are certificates evidencing the reduction of emission by businesses and/or activities that have undergone measurement, reporting and verification, as well as being recorded in Indonesia’s Carbon Registry & Certification Platform (SRN-PPI) with a given registry number and/or code.

Personal data protection issues in M&A transactions

The new PDP Law will be fully enforced in the upcoming October of 2024. 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 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 non-compliance, 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 the 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 of 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 conducting 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, the government 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 was no single presence policy applicable for securities companies. The PPSK Law mandates for any party non-compliant with this provision to divest in three years.

In addition, the government also introduced certain new restrictions for securities companies' business activities. Previously, under Article 30 (2) of Capital Market Law, a securities company could conduct activities as underwriter, broker and/or investment manager. This was 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 the Language Law requirement

Under *Surat Edaran Mahkamah Agung* (“SEMA”) No. 3 of 2023, a directive concerning the use of Bahasa Indonesia in agreements between Indonesian private institutions or individuals and foreign parties has been further outlined. In general, under Law No. 24 of 2009 on Flag, Language, and Coat of Arms, and National Anthem, an agreement involving an Indonesian party must be made in the Indonesian language and also written in the national language of the foreign party and/or English and may be questioned on its binding effect in court if both languages are not presented. This is relevant, particularly in the drafting of agreements such as SPA and other definitive agreements in an M&A transaction involving international parties.

The SEMA provision suggests that failure to include an Indonesian translation in agreements made in a foreign language may not be a sufficient reason for contract annulment, except if it can be proven that the absence of translation was due to bad faith by one of the parties. Unlike the Language Law (which is a positive law and binding), SEMA’s directives are not legally binding and serve as guidance for judges.

Hence, as a practical implication, the inclusion of an Indonesian version alongside the foreign language text is still advisable and shall be the current position and practice for M&A transactions involving foreign and Indonesian parties.

Industry sector focus

Indonesia’s improvements and economic condition could be seen to have recovered from the COVID-19 pandemic. The processing industry, agriculture, trade, mining and construction sectors are identified as the leading sectors contributing to Indonesia’s development.

The manufacturing sector plays a crucial role as it provides foreign investors opportunities in sectors like basic metals, automotive and technology. The increased interest in foreign investment in basic metals is backed by global demand for nickel, essential in steel and electric vehicle (“EV”) battery production, supported by Indonesia’s vast nickel reserves and forgiving investment laws. The automotive industry is a priority in Indonesia’s industrial roadmap, given its status as a key market in ASEAN. The rise in internet users and the popularity of the e-commerce and fintech sectors further drive technological innovation and market expansion.

Renewable energy initiatives in Indonesia are gaining momentum as the government seeks to reduce dependence on fossil fuels and address climate change. Recent efforts have focused on solar, hydro and geothermal power projects. Collaborations like that between the Japanese Bank for International Cooperation and the Indonesian government aim to develop renewable energy infrastructure, while agreements with international banks and multinational corporations (“MNCs”) support Indonesia’s goal of achieving net-zero emissions by 2060. Indonesia’s energy sector also prioritises the EV market, aiming to increase renewable energy availability and develop industries related to EVs and minerals. Nickel has emerged as a vital component in this transition, with Indonesia offering incentives for global electric car manufacturers to produce EVs and many foreign companies investing in nickel processing plants for EV batteries. The government further incentivises EV adoption through tariff reductions and subsidies for electric motorcycle production.

Indonesia is embarking on a significant endeavour to boost its infrastructure, with a focus on building roads, ports, railways, airports and expanding telecommunications and

broadband networks. This initiative aims to address economic disparities by improving infrastructure nationwide, including in the newly designated capital city, IKN. The government actively seeks investments in transportation infrastructure to modernise public transportation systems and enhance regional connectivity. This prioritises the construction of essential infrastructure components, such as the State Palace, House of Representatives and residential developments for relocating public servants, along with fundamental infrastructure to accommodate the new residents of IKN. Multiple international companies from various Asian countries have expressed intentions to invest in IKN projects, primarily focusing on the city's general infrastructure and development.

The fintech sector in Indonesia is currently undergoing substantial growth, supported majorly by the country's increasing potential and demographics, particularly in MSMEs. The government is actively engaging in discussions about leveraging fintech innovations to bridge financing gaps, fostering an environment conducive to innovation. Fintech, primarily comprising peer-to-peer lending and e-payment platforms, has emerged as a leading investment sector in Southeast Asia, surpassing e-commerce in private equity and venture capital industries.

The year ahead

With the new capital city set to move from Jakarta to IKN, located in East Kalimantan, and a newly elected president, Indonesia is undergoing many changes and adjustments set to be seen now and in the upcoming years.

Indonesia has grown to become the dominant source of nickel and with the advancements on infrastructure and trade, Indonesia needs to take a hold of vested interests in business and to reform the bureaucracy to attract future international investors to conduct businesses in the country. There are multiple speculations as to whether Indonesia will be undergoing changes in regimes and new developmental plans or continuing the initially vast growing plan of widespread development in Indonesia as introduced by Jokowi in the previous presidency.

We expect 2024 and the upcoming 2025 to be a huge year for Indonesia as we expect a push in infrastructure developments and environmental sustainability initiatives as Indonesia further evolves into an economic powerhouse as it is envisioned to be in 2045. Considering this, we may expect several regulatory changes in various sectors and industries.



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