Chambers
Global Practice
Guides

Definitive global law guides offering
comparative analysis from top-ranked lawyers

Corporate M&A 2022

Indonesia: Law & Practice
Emir Nurmansyah and Giffy Pardede
ABNR Counsellors at Law

practiceguides.chambers.com

INDONESIA

Law and Practice

Contributed by:
Emir Nurmansyah and Giffy Pardede
ABNR Counsellors at Law see p.12

CONTENTS

1. TRENDS

1.1 M&A Market

Deal activity has been picking up pace again compared to 12 months ago when deals started to slow down due to COVID-19. Inbound work remains the dominant deal activity, and covers a wide range of industries, including finance, land, health, telecoms, distribution activities, e-commerce, TMT and others.

1.2 Key Trends

Top trends are in the health sector, with M&A in hospitals (specialist), clinics and laboratories. Foreign direct investment (FDI) in laboratories is picking up with joint ventures of foreign lab businesses entering into the Indonesian market, particularly due to the need for COVID-19 PRC testing. There has also been interest in distributors of chemical and other ingredients for pharma manufacturing, including for the production of COVID-19 PCR reagents.

1.3 Key Industries

The industries experiencing the most M&A activity in the last 12 months have been the health, finance and e-commerce industries, with the majority of deals occurring in these sectors.

Sectors particularly negatively affected by the COVID-19 pandemic were tourism and hospitality, as well as the airline industry.

2. OVERVIEW OF REGULATORY FIELD

2.1 Acquiring a Company

Companies are acquired mostly by direct acquisition from existing shareholders (equity deal), although asset deals have been seen due to legacy issues in the target company. Some potential capital market deals are also being considered.

2.2 Primary Regulators

There is no "primary regulator" for M&A. In general, M&A involving FDIs do not need any prior governmental approval unless specifically required by the relevant ministry, for example, in the oil and gas and mining sectors.

2.3 Restrictions on Foreign Investments

Restrictions on foreign investments typically take the following form:

- 100% closed to FDI;
- minimum Indonesian shareholder requirement (joint venture); or
- special requirement to co-operate with micro, small or medium-sized enterprises.

In February 2021, Indonesia revamped its policy with regard to foreign investment by moving away from a highly protectionist to a more open stance with the issuance of the "positive investment list" under Presidential Regulation No 10 of 2021.

2.4 Antitrust Regulations

The antitrust regulations in place in Indonesia are:

- Law No 5/1999 on the Prohibition of Monopolistic Practices and Unhealthy Business Competition (the Indonesian Competition Law);
- Government Regulation No 57/2010 on Mergers, Consolidation and Acquisition of Shares that may result in Monopolistic or Unfair Business Competition Practices (GR 57/2010); and
- Indonesian Competition Commission (KPPU) Regulation No 4/2012 on Guidelines for the Imposition of Penalties for Late Notification of a Merger, Consolidation of a Company or the Acquisition of Shares in a Company (Guidelines on Penalties for Late Notification), among others.

2.5 Labour Law Regulations

The primary regulation of concern for acquirers is Law No 13 of 2003 on Manpower (as amended), which provides an opportunity for workers to seek termination due to a change of control, in the event there is a change to the terms and conditions of employment (remuneration and benefits) as caused by the company post completion. However, this concern has partly been addressed by the new Job Creation Law, which gives more certainty to shareholders to maintain employees in connection with the acquisition of a company.

2.6 National Security Review

In general, a review on FDIs will be conducted post completion by the "post-audit" committee, which is ad-hoc and comprises representatives from several government bodies: Trade Ministry, Investment Board (the BKPM), and the relevant line ministry. Otherwise, the FDI is specifically regulated and supervised by the line ministry or other government institution supervising the industry (eg, Indonesian FSA or central bank), in accordance with the relevant regulations.

3. RECENT LEGAL DEVELOPMENTS

3.1 Significant Court Decisions or Legal Developments

In recent years, the government has introduced Law No 11 of 2020 on Job Creation and numerous implementing regulations, particularly residential Regulation No 10 of 2021 on Investment and Business Lines related to business sectors that are open, conditionally open, or closed for foreign investment. These new regulations are a revolutionary change from the previous restrictive foreign-investment paradigm to one that is essentially permissive, with many sectors previously reserved for local players (or co-ownership with a local player) now fully open or subject to more relaxed foreign ownership limitations.

Further, the new regulation identifies 245 business fields as priority sectors to be assisted by fiscal and non-fiscal incentives. Fiscal incentives comprise tax holidays and allowances, plus investment and customs and excise facilities. Non-fiscal incentives include licensing, infrastructure, energy, raw-material, immigration, labour and other facilities. It is expected that a generally more relaxed approach to foreign investment above will inevitably lead to more M&A transactions.

3.2 Significant Changes to Takeover Law

There have been no significant changes to the takeover law, which s part of Indonesia's Company Law (Law on Limited Liability Companies). There are not expected to be any significant changes in the coming 12 months.

4. STAKEBUILDING

4.1 Principal Stakebuilding Strategies

This is not customary in Indonesia for a bidder to build a stake in the target prior to launching an offer.

4.2 Material Shareholding Disclosure Threshold

It is mandatory for companies in Indonesia to report any change in shareholdings to the Ministry of Law and Human Rights in order for it to be recorded in the company registry maintained by the Ministry, regardless of the percentage or materiality.

This information can be accessed by the public through the Ministry of Law database, subject to fees. In addition, disclosure of prospective shareholding must also be made to the public

by way of announcement in a national newspaper, if company acquisition results in a change of control over that company.

For listed companies, disclosure regarding shareholding must be made for shareholders with at least a 5% shareholding in a listed company, meaning it is separated from "public" shareholding in that company. There are generally administrative requirements to complete.

4.3 Hurdles to Stakebuilding

Typically, the articles of association of a company contain provisions related to shareholding, such as a need to secure GMS approval to transfer shares or a need to first offer shares to the other shareholders before a shareholder can transfer their shares to other parties.

These requirements may have an impact on or be a hurdle to stakebuilding, for example, reaching the necessary quorum mandated in the articles of association. In addition, the law also prescribes that an increase in shareholding by way of subscription of new shares or converting debt into shares are subject to GMS approval.

External factors (depending on the line of business of the target company) include the need to secure approval from a specified governmental body to purchase shares or increase shareholding in a company, which may also prove to be a hurdle, both to levels of scrutiny and timing of the process.

4.4 Dealings in Derivatives

Within the context of M&A, deals involving derivatives are generally allowed and are common.

4.5 Filing/Reporting Obligations

There is no specific disclosure or filing/reporting obligation for the purchase or subscription of derivatives. Disclosure must be made, however, when converting debt (including from debt securities) into shares in a company, by way of a newspaper announcement. Reporting/filing under the competition laws to the KPPU is subject to certain thresholds, and criteria generally apply (but not to derivatives).

4.6 Transparency

For the acquisition of a non-listed company, there is generally no requirement to disclose the reason for acquisition, or intentions with regard to control of the company, even in the newspaper announcement and the announcement made to employees. However, in certain business sectors such as financial services, the purpose and intention of the acquisition must be disclosed, particularly to the authority concerned as part of the assessment by that authority.

5. NEGOTIATION PHASE

5.1 Requirement to Disclose a Deal

The disclosure obligations depend on the type of company. When acquiring a private (non-listed) company, the only disclosure obligations are to make an announcement in a national newspaper and to the employees of the company 30 days before the GMS to reach a resolution on the plan. This will be the stage after parties enter into a definitive transaction document such as conditional share purchase or a subscription agreement.

If the acquisition is related to a publicly listed company, the disclosure would depend on the materiality of the transaction, but in some cases it depends on whether or not the buyer decides to announce to the public (through a newspaper or via the stock exchange website) that it is in negotiation with the seller. If the buyer elects to announce the negotiation, it must provide information on the negotiation within two business days of a development in the negotiation (typically evidenced by the signing of a defini-

tive agreement, eg, a CSPA). Once the acquisition is effective, the buyer must announce its completion in a newspaper or stock exchange website within one business day of completion (if it results from an increase of capital without pre-emptive rights) or after the latest share distribution (if from a rights issue).

5.2 Market Practice on Timing

The timing of disclosure and the legal requirements are generally the same.

5.3 Scope of Due Diligence

The scope may vary from one transaction to another but would usually cover the following.

- Corporate documents – this includes review of the deed of establishment, articles of association and their amendments, as well as documents related to past share transfers in the target company.
- Licences – review of the following licences held by the company:
  (a) general licences, ie, those that must be held by limited liability companies in general, such as a Business Identification Number (NIB), Tax ID (NPWP), etc; and
  (b) business licences, ie, those related specifically to the business activities undertaken by the target company.
- Manpower – review of general compliance with manpower regulations such as reporting requirements, compliance with minimum wages, as well as sample employment contracts between the company and its employees.
- Agreements – review of material agreements to which the company is a party, the primary aim being to check if there is any limitation/restriction in the agreements that may be relevant to the proposed transaction, eg, restriction on increase of capital, transfer of shares or obligation to notify a counterparty of changes to shareholdings, etc.
- Assets – general review of assets, with emphasis on verifying the validity of the ownership check if fixed assets are secured as collateral to a creditor.
- Insurance – general review of insurance policies maintained by the company.
- Litigation – to check if the company as an entity, its directors and commissioners, or any of its assets are currently involved in or threatened by a dispute with a third party.

Generally, the scope remains the same as before the pandemic, but it is noted that, increasingly, termination or force majeure clauses in contracts that involve a target company are being reviewed.

5.4 Standstills or Exclusivity

Exclusivity is usually demanded by a bidder from a seller for a certain period of time, within which they expect the deal to be closed. In practice, the typical exclusivity period may range from three to six months from the initial MOU.

5.5 Definitive Agreements

Definitive agreements are permissible and common.

6. STRUCTURING

6.1 Length of Process for Acquisition/Sale

This will depend on the speed of the transaction, but typically deals to acquire a private company (non-listed) are completed within three to nine months from initial negotiation, followed by due diligence, preparation and signing of transaction documents, fulfilment of conditions precedent, and signing of facilitation documents (share purchase agreement or GMS resolutions to approve increase capital/share issuance). The time to acquire a listed company is obviously longer and the process can take up to a year, as various

additional obligations are imposed compared with a non-listed counterpart.

In the early days of the pandemic, lockdown policies adversely impacted the timeline and caused delays, particularly if a deal required government/authority involvement, eg, if approval or assessment from the government was necessary. The government is preparing for a return to the normalisation of its procedures, so it is expected that there will be less hindrance to deal timelines.

6.2 Mandatory Offer Threshold

A mandatory offer is triggered any time a change of control arises in a public company.

6.3 Consideration

The most common consideration used in the Indonesian M&A market is cash. Value gaps occur mostly in financial institutions where non-performing loans play a significant role in creating value discrepancies. Common tools are escrow arrangements to set off non-performing loans that remain after one year and also outright carving out of non-performing loans at closing, to be acquired by exiting/selling shareholders.

Typically, "holdback" amounts are prevalent in current deals where 10-20% are held back by the buyer to offset post-completion findings, eg, tax and others. The period of the holdback varies, but it is usually one year.

The legal characteristic of the holdback is not typically a price reduction, but usually pre-designation of funds to indemnify against damages that might arise post completion.

6.4 Common Conditions for a Takeover Offer

Typical conditions for a takeover offer include governmental approval, compulsory announcement and other statutory requirements. No restrictions exist on the use of offer conditions.

6.5 Minimum Acceptance Conditions

No information is available in this jurisdiction.

6.6 Requirement to Obtain Financing

Business combinations can be conditional on the bidder obtaining financing. The reality is that buyers often require financial support in order to complete an acquisition. However, an acquisition in certain sectors, particularly financial services, requires the funding for acquisition to come from the buyer's own resources, ie, not from external loans.

The rationale behind this requirement is that the financial services authority (OJK) wishes to ensure that players entering Indonesia's financial business landscape have adequate capital and strong financial viability, in order to prevent or minimise the risk of a collapse, which might have a domino effect on the highly regulated financial sector.

6.7 Types of Deal Security Measures

The most common deal security measures are by way of inclusion of non-solicitation provisions in transaction documents, albeit the terms may vary from one deal to another, eg, coverage of the provisions, time limitation, etc.

In light of the ongoing pandemic, parties have devoted different amounts of attention to force majeure provisions in transaction documents to manage risk, principally by making sure that the pandemic, ongoing on the date of the transaction document, cannot be classified as a force majeure event as it was already known to the parties at the start.

Conversely, it seems that parties prefer more flexibility towards conditions and timing of deals so as to manage the risk of delays due to the

current climate, particularly if regulatory body approval is a statutory requirement.

There are no new contractual considerations for managing "pandemic risk"; typically, the market practice approach that existed prior to the pandemic is still applicable.

There have not been any changes to the regulatory environment, specifically to address deal security measures.

6.8 Additional Governance Rights

A party does not necessarily need to have 100% ownership of a company to gain full control of it. Most of the corporate actions or resolutions reserved to the GMS under the Company Law require the approval of 75%, 66.6% or simple majority voting rights. For shareholdings, a shareholder can also seek control or additional control in the company via a reserved matters arrangement, which would enable it to have a say or veto certain action, even with a minority shareholding.

In addition, a party can secure governance rights by gaining control of the board of directors, typically by the right to nominate majority members of the board of directors or to nominate key members, eg, a person in charge of company financial matters. Although it has a lesser influence compared with the board of directors, a party may wish to consider having the right to nominate members to the board of commissioners, which has power and authority to supervise the board of directors.

6.9 Voting by Proxy

Generally, shareholders can be represented by proxy in the GMS and also vote by proxy (if they have shares that confer voting rights). In the casting of votes, a vote cast by a shareholder applies to all of its shareholdings.

It is not possible for a shareholder to split its vote or to authorise more than one proxy for part of its shareholdings. In addition, in casting a vote, a shareholder cannot be represented by a proxy who is a member of the board of directors or commissioners, or an employee of the company.

6.10 Squeeze-Out Mechanisms

Indonesian law does not explicitly provide scope to squeeze out a minority shareholder. Therefore, dilution would reduce the holding of a minority shareholder but not exclude it entirely.

6.11 Irrevocable Commitments

The need for an irrevocable commitment depends on the transaction in question. However, commitment to approval is typically required as a condition to closing. Should approval be given but a deal not be closed, the principal shareholder can simply unwind its approval.

7. DISCLOSURE

7.1 Making a Bid Public

A bid is made public if it targets or is launched by a listed company (see **5.1 Requirement to Disclose a Deal**). There is no requirement to publish a bid if it only involves non-listed companies, apart from the requirement to announce the proposed acquisition in a newspaper. The main purpose is to make creditors aware of the acquisition and provide them an opportunity to object to it.

7.2 Type of Disclosure Required

In a private company, there is no need to disclose information on share issuance unless it would amount to a change of control. In a public company, there are statutory disclosure requirements at any time that rights issuance takes place.

7.3 Producing Financial Statements

There are no general regulatory requirements for bidders to provide a financial statement, except for certain areas of business, for example in connection with financial institutions that must apply for approval from the regulator, which would require them to produce audited financial statements; if they are prepared by Indonesian accountants, they must adhere to the Indonesian GAAP.

7.4 Transaction Documents

There is generally no requirement to disclose transaction documents in full. Only certain information is required to be disclosed, for example, in regard to pricing for the acquisition of a listed company. The disclosure of certain terms of the transaction documents may also be necessary, particularly if the transaction requires approval from the authority concerned.

8. DUTIES OF DIRECTORS

8.1 Principal Directors' Duties

The board of directors is responsible for the operations of a company and representing it (within and outside court), and for binding the company with a third party. The board of directors must perform its fiduciary duty, not specifically to shareholders, but rather to the company, in the best interests of the company in accordance with its articles of association.

8.2 Special or Ad Hoc Committees

It is common for a board of directors to establish a special or ad hoc committee to help them with an M&A transaction. However, this committee should not address conflicts of interest, but assist with the deal generally. In fact, a director is not allowed to represent a company should a conflict of interest arise, and in that event another director should represent the company.

If somehow all directors have conflicts of interests, the rule is that the board of commissioners represents the company. However, if that also has a conflict of interest, Indonesian Company Law provides a right to shareholders to appoint another party.

8.3 Business Judgement Rule

Indonesian Company Law adopts a similar concept to the business judgement rule in that it provides that the board of directors should manage the company in its best interests and in accordance with its objectives and purposes. However, the board of directors is not liable for losses if:

- it can substantiate that the losses were not attributable to its fault or negligence;
- it managed in good faith and prudence in the interests of the company and in accordance with its objectives and purposes;
- it has no conflict of interest, directly or indirectly, in the acts of management that resulted in losses; and
- it took preventive measures against the occurrence or continuation of losses.

Notwithstanding the above, Indonesian Company Law provides the rights to the shareholders having or representing at least 1/10 of voting rights to, in the name of the company, institute legal proceedings at a district court against a member of the board of directors whose fault or negligence resulted in losses to the company.

Therefore, court proceedings must determine the culpability of the board of directors for losses suffered by the company, taking into account director liability as noted above.

8.4 Independent Outside Advice

Independent M&A advice typically sought by directors includes that on legal, finance, tax, and valuation matters. Whilst independent advice

was previously only sought after by the buyer's side, recent trends in the Indonesian market suggest that sellers are increasingly seeking independent advice too, for instance through vendor due diligence, albeit typically with a different level of scrutiny than that carried out for the buyer's side.

8.5 Conflicts of Interest
Generally, conflicts of interest have not been the subject of judicial scrutiny.

9. DEFENSIVE MEASURES

9.1 Hostile Tender Offers
This is not applicable in Indonesia.

9.2 Directors' Use of Defensive Measures
This is not applicable in Indonesia.

9.3 Common Defensive Measures
This is not applicable in Indonesia.

9.4 Directors' Duties
This is not applicable in Indonesia.

9.5 Directors' Ability to "Just Say No"
This is not applicable in Indonesia.

10. LITIGATION

10.1 Frequency of Litigation
This is not applicable in Indonesia.

10.2 Stage of Deal
This is not applicable in Indonesia.

10.3 "Broken-Deal" Disputes
This is not applicable in Indonesia.

11. ACTIVISM

11.1 Shareholder Activism
Shareholder activism is not significant in Indonesia. Nevertheless, Indonesian Company Law provides protection for shareholders, including minority shareholders, by giving them the right to request the company to buy its shares at a reasonable price should the shareholder not object to the following acts of a company that may harm the shareholder or the company:

- amendments to the articles of association;
- transfer or encumbrance of the majority of the net assets of the company; or
- a merger, consolidation, acquisition, or demerger/spin-off of the company.

11.2 Aims of Activists
Shareholder activism is very rare in Indonesia and the pandemic did not change this.

11.3 Interference with Completion
As pointed out in **11.1 Shareholder Activism**, any shareholder has a right to request that the company buy its shares at a reasonable price if it disagrees with certain acts of the company, including M&A. (However, it should be noted that the exercise of this right would not actually halt the transaction.)

ABNR Counsellors at Law is one of Indonesia's longest-established law firms (founded 1967), and pioneered the development of international commercial law in the country following the reopening of its economy to foreign investment after a period of isolationism in the early 1960s. ABNR has over 100 partners and lawyers (including two foreign counsel), making it one of the largest independent, full-service law firms in Indonesia and one of the country's top-three law firms by number of fee earners, providing the scale needed to simultaneously handle large and complex transnational deals across a range of practice areas. The firm also has a global reach as the exclusive Lex Mundi (LM) member firm for Indonesia since 1991. LM is the world's leading network of independent law firms, with members in more than 100 countries. ABNR's position as LM member firm for Indonesia was reconfirmed for a further six-year period in 2018.

AUTHORS

Emir Nurmansyah is a senior partner at ABNR and a member of the firm's management board. After some 30 years in legal practice, he is one of the most respected and versatile lawyers in Indonesia today, and a market-leading lawyer for project finance and development, banking and finance, corporate M&A, and foreign direct investment. He also offers extensive experience and expertise in restructuring and insolvency, shipping, aviation and technology, media and telecommunications.

Giffy Pardede is a key member of ABNR's project finance, M&A, foreign direct investment and real estate practices, advising clients across a wide range of industries and economic sectors, including oil and gas/natural resources, financial services and fintech, manufacturing, consumer goods, pharmaceuticals and healthcare, power and renewables, automotive, plantations and agriculture, and tourism and hospitality.

ABNR Counsellors at Law

Graha CIMB Niaga 24th Floor
Jl. Jenderal Sudirman Kav 58
Jakarta 12190
Indonesia

Tel: +62 21 250 5125
Fax: +62 21 250 5001
Email: info@abnrlaw.com
Web: www.abnrlaw.com

Chambers Guides to the Legal Profession

Chambers Directories are research-based, assessing law firms and individuals through thousands of interviews with clients and lawyers. The guides are objective and independent.

practiceguides.chambers.com