Merger Control

2018

Seventh Edition

Contributing Editors:
Nigel Parr & Ross Mackenzie

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Overview of merger control activity during the last 12 months

According to its website, the Indonesian Business Competition Supervision Commission (the "KPPU") received 90 merger notifications in 2017, which is a significant increase from the previous year, when the KPPU received 65 notifications. This increase can at least partly be explained by the KPPU's increased enforcement efforts (as discussed in further detail below).

While the number of merger notifications has increased, in many cases the KPPU is still to issue an opinion. At the time of writing, 35 of the 2017 notifications have not yet been reviewed, because the KPPU is still verifying whether the submission is complete. 26 notifications were not reviewed by the KPPU, as the underlying transaction was not notifiable under Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unhealthy Business Competition (the "Indonesian Competition Law" or "ICL"). 10 transactions that were notified in 2017 are in the process of being reviewed by the KPPU and an opinion is expected shortly. Finally, the KPPU has issued opinions regarding 19 transactions that were notified in 2017.

The low number of opinions that were issued so far illustrates that the KPPU is currently struggling with a capacity issue. The authority has experienced an outflow of staff in recent years. Only a handful of officials are currently working for the Directorate of Mergers to handle merger notifications.

Merger notification procedures are not only lengthy because of the KPPU's lack of staff, but also because the authority expects parties to always make a full submission, even if it is clear from the outset that there is no market overlap between the acquiring party and its affiliates on the one hand, and the target company and its affiliates on the other hand. Note that the Indonesian Competition Law also does not make a distinction between first stage and second stage clearances.

New developments in jurisdictional assessment or procedure

Merger control in Indonesia is governed by the Indonesian Competition Law, Government Regulation No. 57 of 2010 on Mergers, Consolidations and Acquisitions of Shares that May Result in Monopoly or Unfair Business Competition Practices, and four KPPU regulations which set out guidelines, the last of which was issued in 2013. Since then, there have been no amendments to the legislation relating to merger control.

Based on the above legislation, a transaction – even if foreign-to-foreign – should be notified to the KPPU if:

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- *The transaction constitutes a merger, consolidation or an acquisition within the meaning of Indonesian competition law.*

  According to the KPPU Guidelines, an acquisition within the meaning of Indonesian competition law would involve a change of control, i.e., the acquiring party owning more than 50% of the shares and voting rights or holding factual control, i.e. the ability to influence or direct the company's policy and/or management. This occurred, for instance, in the acquisition of shares in PT Asuransi Dharma Bangsa by AXA SA in 2011. Although AXA SA acquired only 40% of the shares in the target, while the remaining 60% of the shares were acquired by Bank Mandari, the KPPU considered that AXA SA gained control over the target, as: (i) AXA SA had the power to nominate two out of three directors, including the President Director; and (ii) AXA SA's core business is in insurance, while Bank Mandiri's core business is in banking.[1]

  While the law is unclear, one conservative interpretation is that there could also be a change of control if there is a change from sole to joint control. Based on information from a KPPU official, we understand the notification requirement was triggered by a change from sole to joint control in a purchase of shares in PT Putra Sinar Remaja by Reco Kris Private Limited in 2017.[2]

  The acquisition can be realised through an acquisition of shares, private or public takeover, or share subscription.

  A merger, consolidation or an acquisition involving a joint venture would also need to be notified. However, no notification is required if two or more shareholders create a Greenfield joint venture. Asset transactions are also exempted and do not need to be notified to the KPPU. However, there is now a tendency for the KPPU to require parties to also make a notification in case of non-share transactions that are similar to share transactions, such as capital interest transactions.[3] See also our comments below under 'Reform proposals'.

- *The transaction meets the thresholds:*
  - the combined asset value exceeds IDR 2.5 trillion (approximately US$ 185 million at current exchange rate) (for banking businesses, the threshold is IDR 20 trillion or approximately US$ 1.48 billion); and/or
  - the combined sales value exceeds IDR 5 trillion (approximately US$ 370 million).

  The KPPU Guidelines provide that the assets and/or sales value must be calculated based on the latest annual financial reports, unless there is a difference in value of more than 30% compared to the previous year, in which case the calculations must be based on the average assets value and/or sales of the last three years.

  Relevant for the calculation are the assets and/or sales value of: (i) the target; (ii) the acquiring party; (iii) the ultimate shareholders of the target/the acquiring party; and (iv) all controlled direct and indirect subsidiaries of the ultimate shareholders, the acquiring party and the target. Even if a company is part-owned, the entire assets and sales value should be considered when calculating the threshold. However, only assets or sales within Indonesia will be counted to establish whether the threshold has been met. Revenue accruing from export activities should be excluded from the calculation. Note that the assets and/or sales of a single entity, e.g. only the target, may trigger the notification requirement.

  In case a transaction would involve a change from single control by an existing shareholder to joint control by the existing shareholder and the acquiring party, it would

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be prudent to not only take into account the assets and/or sales value of the acquiring party and target, but also the assets and/or sales value of the existing shareholder, its ultimate shareholders (which are also the ultimate shareholders of the target), and all controlled direct and indirect subsidiaries of these ultimate shareholders.

It is common to use historical exchange rates when calculating the thresholds. However, where the exchange rate is worse at the time of closing of the transaction and as a result, the thresholds would be met, it is prudent to use this exchange rate.

- *The target is an Indonesian business actor (e.g. an Indonesian limited liability company (perseroan terbatas or PT) or the transaction otherwise has a direct impact on the Indonesian market, i.e.:*
  - all parties involved in the transaction are conducting business in Indonesia, whether directly or indirectly (the KPPU Guidelines give an example of "conducting business" through controlled subsidiaries in Indonesia), or
  - one of the parties to the transaction is conducting business in Indonesia while the other party is conducting sales in Indonesia, or
  - one of the parties to the transaction is conducting business in Indonesia while the counterparty has a sister company conducting business in Indonesia.

  The KPPU's authority to assess foreign-to-foreign transactions is based on the definition in the Indonesian Competition Law of the term "business actor", which is an individual or a business entity established and domiciled in, or conducting activities within the Indonesian jurisdiction. Since the 2007 Temasek case, the KPPU applies the Single Economic Entity doctrine to determine whether a business entity is conducting activities within the Indonesian jurisdiction. In this case, the KPPU argued that a group of companies should be deemed to constitute a Single Economic Entity if the subsidiaries cannot independently determine its policies. This implies that where the holding company is just a passive investor, i.e. with no voting rights, no representatives in the management of the company, no ability to determine company policies or company management, no access to confidential information, a group of companies should be deemed to constitute a Single Economic Entity.[4] The KPPU arrived at a similar conclusion in the 2010 Pfizer case.[5]

  According to the KPPU Guidelines, other mergers, consolidations or acquisitions involving a foreign party are assessed by the KPPU on a case-by-case basis, where the KPPU will look at whether: (i) the transaction has any effect on local competition; and (ii) its authority can effectively be applied – likely using the Single Economic Entity doctrine, as discussed above. This occurred, for instance, in a 2013 transaction involving the acquisition of KUFPEC Indonesia (Pangkah) (BV) (KUFPEC) by PT Saka Energi Indonesia, a subsidiary of PT Perusahaan Gas Negara. In this case, albeit being a Dutch limited liability company, KUFPEC was deemed by the KPPU to conduct business in Indonesia because it held a 25% participating interest, through direct investment, in the Pangkah Block, off the coast of Surabaya.[6]
- *The transaction is conducted between non-affiliated companies: If the transaction is conducted between affiliates, the transaction is exempted (regardless if other criteria are met).* According to the KPPU Guidelines, a company is an affiliate of another if:
  - it either directly or indirectly controls or is controlled by that company;
  - both it and the other company, directly or indirectly, are controlled by the same parent company; or

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- there is a "main principal shareholder" relationship with the counterparty (*pemegang saham utama*).

If the target is foreign, the aforementioned should be determined on the basis of the law applicable in the jurisdiction in which the target is established and domiciled.

While Greenfield joint ventures and asset transactions are exempted, the KPPU is closely following market developments and may issue a warning where it feels that a transaction may have anticompetitive effect, even though no merger notification is required. This occurred, for instance, at the end of 2016, when PT Indosat Tbk and PT XL Axiata Tbk, two major players in the Indonesian telecommunication sector, announced plans to establish a joint venture. The KPPU issued a warning to the parties, stating that it had concerns the joint venture would be used as a facilitating device to exchange confidential information for price-fixing, market allocation and output restriction. We understand that following a meeting with the KPPU, the parties decided to put the joint venture plans on hold.

The KPPU also commonly sends letters to parties, requesting them to make a notification, where it is not clear from market information whether or not the transaction meets the criteria for notification. This occurred, for instance, in April 2018, when Grab and Uber announced their plan to join forces.

To avoid any misguided statements from the KPPU and resulting negative public perceptions, or worse, the KPPU imposing fines for late notification or initiating a formal investigation because a transaction is suspected to result in monopolistic practices or unhealthy business competition, it may be advisable to do a formal pre-merger consultation or otherwise clarify the transaction and ask for guidance from the KPPU prior to completion of the transaction.

There can be certain other advantages to doing a pre-merger consultation, including:

- A pre-merger consultation would allow the merging parties to know in advance what remedies may need to be offered. Based on this information, they could decide not to implement the merger if they feel that the remedies to be offered cause more harm than the benefit the merger promises. Under these circumstances, the parties also have more leverage to negotiate remedies with the KPPU.
- If the merging parties, prior to the completion of the transaction, have performed a pre-merger consultation, the relevant antitrust legislation provides a chance for the KPPU to accelerate the post-merger notification process, regardless of the types of merger. The KPPU has asserted that in case a pre-merger consultation has been conducted, it will not conduct a reassessment except if there are substantial changes to the information submitted during the pre-merger consultation or there is material change to the market condition when the post-notification is conducted, compared to the market situation before the merger is completed.

The parties doing the consultation are the acquiring entity and the target, while in case of a post-merger notification, it is the acquiring entity that is responsible for making the notification.

Upon a complete submission of a request for consultation, the KPPU should complete its initial assessment of the transaction within 30 business days, and its comprehensive assessment within 60 working days. However, as discussed in further detail below, in practice it will take several months before the KPPU deems the submission complete. Therefore, a pre-merger consultation would only be useful if closing of the transaction is not foreseen in a few months' time. If during the consultation the transaction is closed, the consultation process will stop, rendering the process useless, although a pre-merger consultation may somewhat speed up the post-merger notification process.

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Irrespective of whether the parties have done a pre-merger consultation, the acquiring party should submit a post-merger notification to the KPPU within 30 business days after the transaction becomes legally effective. In the event of a failure to notify within 30 business days, the KPPU may impose sanctions in the amount of IDR 1 billion (approximately US$ 70,000) per day, up to a maximum of IDR 25 billion (approximately US$ 1.75 million). A fine may even be imposed if the acquiring party has done a pre-merger consultation, but failed to submit the post-merger notification with 30 business days.[7]

To date, the KPPU has imposed fines for late notification of transactions in nine cases.[8] The KPPU has to date never imposed the maximum daily fine of IDR 1 billion or the total maximum fine of IDR 25 billion. However, there is no clear correlation between the number of days of delay and the size of the fines that have thus far been imposed, resulting in a high degree of legal uncertainty for companies that fail to notify their transactions within the prescribed period.

A KPPU decision to impose a fine for late notification may still be appealed to the courts. However, based on existing case law, there appears to be little chance that these KPPU decisions would be overruled on appeal: public records reveal that to date, all such court appeals have in the end been dismissed.[9]

As part of the notification, the acquiring party (in case of an acquisition) will need to submit: a notification form and additional documents, consisting of a power of attorney (if the notification is submitted by the party on behalf of a third party, e.g. a law firm); constitutional documents; company profiles; financial statements of the last three years, and schemes of ownership of the relevant parties; documents evidencing that the transaction is legally effective; a summary of the acquisition; and a business plan for the next three to five years. The KPPU may, and commonly does, ask parties to submit additional documents.

Before initiating its assessment, the KPPU will normally ask the notifying party to submit a summary of notification. This document should summarise the relevant facts as stated in the notification form and additional documents earlier submitted. In addition, the KPPU will normally invite the notifying party and/or its representatives to a clarification meeting, during which the officials handling the notification may already raise certain questions for clarification and request the notifying party to submit additional documents/information.

Upon the submission of a complete notification, the KPPU should complete its assessment of the transaction within 90 business days. To meet the legally prescribed deadline of 90 business days after complete submission of a notification for the review of a merger notification, the KPPU will normally only declare that the submission is complete when it is sure that the deadline can be met. Based on our review of the notifications in 2017 that were declared complete by the KPPU, it takes 193 days on average for the KPPU to declare a submission complete. In case the notification involves a foreign acquiring party and/or foreign target, this can even take 227 days. This is probably still a low estimate, considering that the notifications in 2017 that were not yet declared complete by the KPPU have not been taken into consideration when calculating this average.

Once a notification has been declared complete, the KPPU normally manages to meet the deadline and issue its opinion within 90 business days. However, in all, notifying parties should expect to only receive an opinion from the KPPU regarding their notified transaction a year after completion of the transaction, or even later. Apart from the uncertainty, the delays should have no impact on the transaction as such, as Indonesian competition law does not impose waiting periods or suspension of the completion of a transaction pending the issuance of an opinion by the KPPU.

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Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

The KPPU has reviewed a variety of industry sectors in the framework of merger control in the past 12 months, ranging from mining to petrochemicals, consumer packaging, food commodity trading, and the cinema business. Looking at its enforcement efforts (outside the realm of merger control), it appears that the authority is taking a particular interest in food commodities. However, the KPPU's focus will likely broaden in the coming years (see our comments under 'Key policy developments', below).

The approach adopted to market definition is set out in separate KPPU guidelines that were issued in 2009.[10] In accordance with the guidelines, the KPPU will look at product markets and geographical markets. To determine product markets, the KPPU looks at demand-side and supply-side substitution. For this it applies the SSNIP (Small but Significant, Non-transitory Increase in Price) test. To determine geographic markets, the KPPU looks at transportation costs, travel time, tariffs and regulations that may restrict the trade between cities/regions. In practice, the KPPU usually determines that the geographical market of a product is nationwide. This is always the case if products are sold online.

Given the limited number of notifications submitted in recent years, to date the KPPU has defined only a limited number of markets. When submitting a post-merger notification, it may therefore be helpful to share copies of decisions of competition authorities from other jurisdictions to give the KPPU some guidance in determining market definitions. Nonetheless, the KPPU sometimes likes to use its own market definitions in deviation from definitions used by competition authorities in other major jurisdictions.

In addition to using its own market definitions, the KPPU prefers to take a national approach and will generally not consider the nature of international competition when assessing transactions in the framework of merger control.

Key economic appraisal techniques applied, e.g. as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

In case the transaction is notifiable, the KPPU will look at five different aspects to assess the transaction:

- *Market concentration*: To determine market concentration, the KPPU applies the Hirschman-Herfindahl Index (HHI), Delta HHI, or if no data available, other approaches to measure concentration, e.g. CR_4. Only if HHI > 1800 or Delta HHI > 150, does the KPPU look at other aspects below.
- *Entry barriers*: If the market concentration test is positive, the KPPU will consider entry barriers. In doing so it will, for instance, look at: the ease for new players to enter the market; strength of new players; time needed to enter market; switching costs; homogeneity of products; and brand loyalty.
- *Potential for anti-competitive behaviour*: Apart from entry barriers, the KPPU will also assess the potential of anti-competitive behaviour by the relevant parties, looking at potential unilateral effect, coordinated effect, and market foreclosure.
- *Efficiency*: The KPPU will assess a transaction more positively if it has potential efficiency effects, benefiting customers. Efficiency gains should be compared against the anti-competitive effects of the transaction.
- *Bankruptcy*: Finally, the KPPU will assess a transaction more positively if the transaction can prevent one of the relevant parties from bankruptcy. Decrease of market players

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by bankruptcy would be deemed less beneficial than decrease of market players by the transaction.

Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation

Unlike in other jurisdictions, a merger notification in Indonesia does not result in the KPPU approving, conditionally approving or rejecting the acquisition. Instead, the KPPU will render an opinion, which can be:

- no allegation of monopolistic practice or unfair business competition;
- an allegation of monopolistic practice or unfair business competition; or
- a conditional no-allegation of monopolistic or unfair business competition.

In view of the above, even in case the KPPU renders an opinion in the form of an allegation of monopolistic practice or unfair business competition, the parties can still proceed with the acquisition. However, in such case the KPPU will likely initiate a formal investigation, which can result in certain sanctions.

Based on historical records, notifying parties should have little fear that their transaction needs to be unwound or assets need to be divested, a particular concern given that Indonesian merger control regime is a post-merger regime. In all 2017 cases, the KPPU concluded that the notified transaction was not suspected to result in monopolistic practices or unhealthy business competition. Before 2017, the KPPU only imposed remedies in a handful of cases. To the best of our knowledge, in all cases, the remedies consisted of behavioural remedies, instead of structural remedies.[11]

Key policy developments

New KPPU Commissioners were installed in May 2018. Only two out of nine Commissioners are incumbent Commissioners. We understand that the new Commissioners intend to be friendlier towards businesses and aim to prioritise mediation rather than enforcement measures in handling antirust issues. In addition, they will focus on certain latent and periodic issues, i.e. relating to food commodities, education, healthcare, energy, telecommunication, logistics, banking & finance and sectors that are controlled by State Owned Enterprises. In addition, the KPPU will focus on current and strategic issues, i.e. relating to e-commerce, e-payment, use of big data, and online transportation applications.[12] Otherwise there are no key policy developments relating to merger control to note at this stage.

Reform proposals

The Indonesian Parliament is current deliberating over a competition bill that is to replace the current Indonesian competition law.

The latest version of the bill that we reviewed introduces a mandatory pre-merger regime. It also imposes the pre-merger notification requirement on companies establishing a joint venture or engaged in an asset-acquisition transaction. The KPPU no longer issues opinions, but directs that a transaction should be approved. The KPPU is deemed to have approved a transaction if it has not completed its assessment of the proposed transaction within 25 business days. However, we understand that some stakeholders are now arguing that the current post-merger regime should be maintained, as Indonesia is said not to have the resources to apply a pre-merger regime.

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Fines are increased in the bill to be calculated as a percentage of the parties' turnover, ranging from minimum 5% (five per cent) to 30% (thirty per cent).

The bill does not contain clear transitional provisions, raising concerns that in case a pre-merger regime is introduced, transactions that are not yet closed at the time of enactment of the new law, cannot be closed pending approval of the transaction by the KPPU.

The bill is planned to be enacted this year. However, political processes in Indonesia are unpredictable, so the Parliament may need more time to conclude its deliberation.

* * *

Endnotes

1. KPPU Opinion No. A13911, point 20.
2. The KPPU Opinion has yet to be published.
3. See KPPU Opinion No. 21/KPPU/PDPT/VII/2015. The transaction in this case involved participation in a Vietnamese limited liability company in the form of capital interest. We understand that a Vietnamese limited liability company does not issue shares.
4. KPPU Decision No. 07/KPPU-L/2007, point 151. The decision was upheld by Supreme Court Decision No. 496K/PDT.SUS/2008 and No. 128PK/PDT.SUS/2009.
5. KPPU Decision No. 17/KPPU-I/2010. However, the decision was annulled by District Court of South Jakarta No. 05/Pdt.KPPU/2010/PN.Jkt.Pst. The District Court decision was upheld by Supreme Court Decision No. 294 K/PDT.SUS/2012.
6. KPPU Opinion No. 14/KPPU/PDPT/V/2014.
7. This is illustrated by KPPU Decision No. 07/KPPU-M/2014 (acquisition shares PT HD Finance, Tbk by PT Tiara Marga Trakindo), in which case PT Tiara Marga Trakindo did conduct a pre-merger consultation, but submitted the post-merger notification only 41 business days after closing of the transaction.
8. KPPU Decision No. 09/KPPU-M/2012 (acquisition shares PT Austindo Nusantara Jaya Rent by PT Mitra Pinasthika Mustika); KPPU Decision No. 01/KPPU-M/2014 (acquisition shares PT Tandan Abadi Mandiri by PT Muarabungo Plantation); KPPU Decision No. 03/KPPU-M/2014 (acquisition shares PT Sukses Abadi Karya Inti by PT Dunia Pangan); KPPU Decision No. 07/KPPU-M/2014 (acquisition shares PT HD Finance, Tbk by PT Tiara Marga Trakindo); KPPU Decision No. 02/KPPU-M/2014 (acquisition shares PT Subafood Pangan Jaya by PT Balaraja Bisco Paloma); KPPU Decision No. 17/KPPU-M/2015 (acquisition shares Woongjin Chemical Co. by Toray Advanced Materials Korea Inc.); KPPU Decision No. 16/KPPU-M/2015 (acquisition shares PT Binsar Natorang Energi by LG International Corp.); KPPU Decision No. 02/KPPU-M/2017 (acquisition shares PT. Citra Asri Property by PT. Plaza Indonesia Realty, Tbk.); KPPU Decision No. 08/KPPU-M/2017 (acquisition PT Mutiara Mitra Bersama by PT Nirvana Property)
9. See Supreme Court Decisions No. 679 K/Pdt.Sus-KPPU/2014 and No. 29 PK/Pdt.Sus-KPPU/2017; Supreme Court Decisions No. 687 K/Pdt.Sus.KPPU/2014 and 51 PK/Pdt.Sus-KPPU/2016; Supreme Court Decision No. 95 K/Pdt.Sus-KPPU/2015; and Supreme Court Decision No. 310 K/Pdt.Sus-KPPU/2017.
10. KPPU Regulation No. 3/2009 regarding Interpretation Guidelines on Relevant Markets.
11. Opinion KPPU No. 18/KPPU/PDPT/VII/2013 (the acquisition of Wyeth (Hong Kong) Holding Company Limited by Nestlé S.A.); Opinion KPPU No. 03/KPPU/

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PDPT/II/2014 (the acquisition of PT. Axis Telekom Indonesia by PT. XL Axiata Tbk.); Opinion KPPU No. 24/KPPU/PDPT/IX/2014 (the acquisition of PT Medika Sarana Traliansia by PT Koridor Usaha Makmur).

12. See: https://epaper.kontan.co.id/news/528219/Komisioner-KPPU-Baru-Janji-Ramah-ke-Pengusaha.

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Chandrawati Dewi
Tel: +62 21 250 5125 – ext 379 / Email: cdewi@abnrlaw.com
Chandrawati Dewi is a partner in ABNR Counsellors at Law in Jakarta. Her practice focuses on foreign investment, capital markets, M&A, and antitrust. Prior to joining ABNR, she worked for the Economic Law and Improved Procurement Systems Project (ELIPS Project); a USAID-funded project focusing primarily on the development of economic law in Indonesia. From 2000 to 2004 she was assigned to the Singapore Office of ABNR.
Dewi graduated from the Faculty of Law, Parahyangan Catholic University, majoring in Economic and Business Law. She is a member of the Indonesian Advocates Association (PERADI) and the Association of Indonesian Legal Consultants (AKHI).

Gustaaf Reerink
Tel: +62 21 250 5125 – ext 421 / Email: greerink@abnrlaw.com
Gustaaf Reerink is foreign counsel in ABNR Counsellors at Law in Jakarta. His practice focuses on foreign direct investment, corporate / M&A and antitrust.
Prior to joining ABNR, Gustaaf worked as an associate in the Amsterdam and Brussels offices of De Brauw Blackstone Westbroek.
Gustaaf graduated from Leiden University, where he earned an LL.M. degree in private law, an M.A. degree in Indonesian studies, and a Ph.D. degree in law, governance and development. In addition, he read law at King's College London and the School of Oriental and African Studies in London. He is admitted to the Amsterdam, Netherlands Bar, a registered foreign lawyer in Indonesia, and a Member of the Chartered Institute of Arbitrators (CIArb).

Bilal Anwari
Tel: +62 21 250 5125 – ext 424 / Email: banwari@abnrlaw.com
Bilal Anwari is a senior associate in ABNR Counsellors at Law in Jakarta. Bilal's main practice areas include litigation, arbitration and alternative dispute resolution, anti-trust, bankruptcy, shipping and maritime, and general corporate law.
Prior to joining ABNR, Bilal worked at several other prominent law firms in Jakarta.
Bilal graduated from the Faculty of law, Padjadjaran University, Indonesia, majoring in international law. In addition, he earned an LL.M. degree in International Business Law from the University of Melbourne, Australia, under the Australia Awards Scholarship. He is a member of the Indonesian Advocates Association (PERADI).

ABNR Counsellors at Law

Graha CIMB Niaga – 24th Floor, Jl. Jenderal Sudirman Kav. 58, Jakarta 12190, Indonesia
Tel: +62 21 250 5125 / Fax: +62 2150 5001 / URL: www.abnrlaw.com

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