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阐述全球并购操作的《第四版年度指南》

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Feature Articles | 专题

Feature Article: Mechanics of M&A in Indonesia

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A. Regulatory Framework

In general, mergers and acquisitions in Indonesia are governed by the following laws and regulations:

(a) Law No. 40 of 2007 regarding Limited Liability Companies ('Company Law') as well as its implementing regulation, i.e. Government Regulation No. 27 of 1998 regarding Mergers, Consolidations, and Acquisitions of Limited Liability Companies ('PP 27');

(b) Law No. 25 of 2007 regarding Investment as well as its implementation, i.e. Presidential Regulation No. 44 of 2016 regarding List of Business Fields that are Closed to Investment and Business Fields that are Conditionally Open for Investment, Regulation of Head of Investment Coordinating Board (BKPM) No. 14 of 2015 regarding Guideline and Procedure of Principle License in Investment as amended by Regulation No. 6 of 2016, and Regulation of Head of Investment Coordinating Board (BKPM) No. 15 of 2015 regarding Guideline and Procedure of Investment Licensing and Non-Licensing; these laws and regulations only apply to the merger and acquisition transaction which involves a foreign investment;

(c) Law No. 5 of 1999 regarding Prohibition of Monopoly and Unfair Business Competition as well as its implementing regulation, among others: Government Regulation No. 57 of 2010 regarding Merger, Consolidation, and Shares Acquisition which may Cause the Monopoly Practice and Unfair Business Competition, Government Regulation No. 57 of 2010 regarding Merger or Consolidation and Shares Acquisition which May Cause the Monopoly Practice and Unfair Business Competition, Business Competition Supervisory Commission (Komisi Pengawas Persaingan Usaha or KPPU), Regulation No. 11 of 2010 regarding Consultation on Merger or Consolidation of Business Entity and Acquisition of Shares in the Company, and KPPU Regulation No. 13 of 2010 regarding Guidelines on Merger, Consolidation of Business Entity and Acquisition of Shares which may cause Monopoly Practices and Unfair Business Competitions, as lastly amended by KPPU Regulation No. 2 of 2013;

(d) Law No. 8 of 1995 regarding the Capital Market as well as several other regulations issued by the Capital Market and Financial Institution Supervisory Agency (Badan Pengawas Pasar Modal dan Lembaga Keuangan or BAPEPAM-LK) which is currently known as Financial Services Authority (Otoritas Jasa Keuangan or OJK), such as:

   (i) Financial Services Authority (Otoritas Jasa Keuangan) Regulation No. 54/POJK.04/2015 on Voluntary Tender Offers;

   (ii) Rule No. IX.G.1 on Mergers and Acquisition of Public Companies or Issuer

Companies as an attachment to the Decree of Chairman of BAPEPAM- LK No. Kep-52/PM/1997;

(iii) Rule No. IX.H.1 on Public Company Acquisition as an attachment to the Decree of the Chairman of BAPEPAM-LK No. Kep-264/BL/2011;

(iv) Rule No. IX.E.2 on Material Transaction and Change of Main Business as an attachment to the Decree of BAPEPAM-LK No. Kep-614/BL/2011;

(v) Financial Services Authority (Otoritas Jasa Keuangan) Regulation No. 31/POJK.04/2015 on Disclosure of Material Information or Fact by Issuers or Public Company; and

(vi) Financial Services Authority (Otoritas Jasa Keuangan) Regulation No. 29/POJK.04/2015 on Issuers or Public Company exempted from Reporting and Disclosure Requirement.

These laws and regulations will be applied only if either the target or the purchaser is a publicly listed company;

(e) Related tax regulations, among others: Law No. 7 of 1983 as currently amended by Law No. 36 of 2008 regarding Income Tax Law, Law No. 8 of 1983 as currently amended by Law No. 42 of 2009 regarding Value Added Tax Law No. 21 of 1997 as currently amended by Law No. 20 of 2000 on the Acquisition Duty of land and/or building, and Government Regulation No. 34 of 2016 on Income Tax of transfer of land and building and conditional agreement and its amendment; and

(f) Any other specific regulations depending on the nature of business of the target or the purchaser (as applicable), such as banking sector, forestry, mining.

B. Mechanics of Mergers and Acquisitions

Mergers

Company Law and PP 27 define a merger as a legal act which is conducted by a company or more to merge itself into another company which has existed previously and the merging company will then be dissolved.

Since there will be a transfer of assets and liabilities of the merging company into the merged company, the tax aspect of a merger transaction will relate to the following:

(a) Transfer Tax

Transfer tax will be in the form of:

(i) VAT (in the event that one of the parties of the merger is not a registered taxable entrepreneur); and/or

(ii) fees for acquisition of land and building (bea perolehan hak atas tanah dan bangunan or BPHTB) if the transfer relates to property/land. At the request of the taxpayer, the Director General of Taxation may grant a BPHTB reduction of up to 50% for land and building rights transfers in business mergers or consolidations at book value;

(b) Income tax as a result of capital gain by the transfer of assets and liabilities of the merging company to the merged company.

Transfers of assets in business mergers must generally be conducted at market value. Gains resulting from this type of restructuring are assessable, while losses are generally claimable as a deduction from income. However, a tax-neutral merger, under which assets are transferred at book value, can be conducted subject to the approval of the Director General of Taxation, in which the merger plan must pass a business purpose test by the Director General of Taxation. As for a tax-driven arrangement, it is prohibited and therefore tax losses from the combining companies may not be passed to the surviving company.

Acquisitions

In Indonesia, there are two types of acquisitions: shares acquisitions and asset acquisitions. For the purpose of this article, we will only elaborate further on shares acquisitions. Company Law defines a shares acquisition as a legal act conducted by a legal entity or individuals to acquire either all or most of the shares in a company which may result in a change of control of such company.

A shares acquisition can be achieved by means of:

(a) Transfer of majority shares in the target company to the purchaser

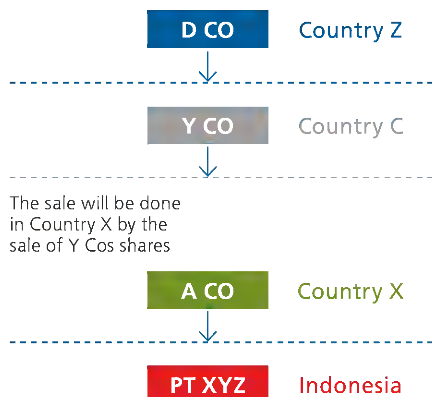
If the acquisition is achieved by a transfer of shares, the seller will have an obligation to pay taxes in relation to the capital gain achieved for such transfer of shares under the following conditions:

(i) if the seller is an Indonesian tax subject, the obligation to pay tax on the capital gains is the seller's obligation. There is no obligation on the part of the buyer to withhold any amount from the sale price;

(ii) if the seller is not an Indonesian tax subject, the resident buyer must withhold 20% of the estimated net income (i.e. the capital gain amounting to 25% of the transaction value) to the seller from the sale of the shares, except where the taxation of capital gains is reserved to the treaty partner by an applicable tax treaty. To obtain the benefit of the applicable tax treaty, the seller must comply with the certification, eligibility, information and reporting requirements in force in Indonesia. Currently, the seller would need to provide a certificate of tax domicile issued by competent tax authority (the Internal Revenue Services) to the purchaser and the company;

(iii) if the target is a publicly listed company, the obligation to pay tax on the capital gains as a result of the transfer of shares will be subject to final income tax at the rate of 0.1% of the gross amount of the transaction, provided that the share being sold is not a founder share. If it is a founder share, then the tax will be added by 0.5% of the nominal value of the shares in the company by the closing of the stock exchange at the end of 1996 or the nominal value of the shares in the initial public offering if the shares of the company are listed on the stock exchange after 1 January 1997.

In relation to this tax obligation, if the seller is a multinational company, they usually prefer to complete the deal outside of Indonesia, in a country which has a favourable tax regime for them, e.g. they usually own the shares in an Indonesian company through their subsidiary in country X ('A Co') which has a favourable tax regulation to them. Once they decide to exit from the Indonesian company, they will do the transaction through A Co so that the sale will be conducted in country X for the purpose of having a lower tax rate rather than doing the transaction in Indonesia.



However, if Country X is a tax haven country, the disposal of shares of A Co in Country X might be subject to tax pursuant to Regulation of Minister of Finance No. 258/PMK.03/2008 regarding Withholding of Income Tax of Article 26 for the Income of Sale or Transfer of Shares as Intended under Article 18 Paragraph (3c) of Income Tax Law Which is Obtained by Non- resident Taxpayer ('PMK 258'). Pursuant to PMK 258, the transfer of shares of a company which was established in a tax haven country and has a special relationship with Indonesian company or permanent establishment in Indonesia is subject to 20% of the estimation of the net amount. The estimation of the net amount will be calculated as 25% from the sale price. However, if the country origin of the seller has a tax treaty agreement with Indonesia, the withholding of the income tax for the gains will only be conducted once the treaty provides that Indonesia has the right of taxation for this type of transaction. We believe that there is no special rule dealing with the disposal of stock in real property, energy, and natural resources companies.

Under Bank Indonesia Regulation No. 17/3/PBI/2015 on Mandatory Use of Rupiah in the Territory of Indonesia ('BI Regulation'), Bank Indonesia requires every business actor to set a price of a good and/or service in Rupiah. In addition to BI Regulation, Bank Indonesia has issued a circular letter No. 17/11/DKSP as implementing regulation of the BI Regulation on 1 June 2015 ('Circular Letter'). Article 2 point A of the Circular Letter clearly mentions that every business actor in Indonesia must set the price of a good and/or service only in Rupiah and is prohibited from setting the price in any other currency (dual quotation); or

(b) Issuance of new shares in the target company to be subscribed by the new shareholder which dilutes the share proportion of the previous shareholder in the target company

If the acquisition is achieved by subscription of new shares in the company, the subscription of these new shares will not be subject to tax.

Nevertheless, if such subscription of new shares is based on the conversion of an existing loan (i.e. shareholder loan, advance payment and/or convertible bond), such conversion shall be subject to be taxed (if the amount of advances (shareholder loan) is lower than the value of shares, the difference may be deemed as deemed interest given to the lender, which will be subject to income tax). Further, Government Regulation No. 15 of 1999 stipulates that the conversion of a certain form of claim into shares must be announced in two newspapers.

In the event the conversion of the existing loan comes from offshore, the Regulation of Bank Indonesia (Peraturan Bank Indonesia) No. 16/22/PBI/2014 concerning Reporting of Foreign Exchange Flow Activity and Reporting of the Application of Prudential Principles in Management of Offshore Loan of Non-Bank Corporations ('PBI No. 16/22/PBI/2014') states that an Indonesian company (and individual, as relevant) conducting foreign exchange activities, inter alia, obtaining an offshore loan, must submit foreign exchange traffic reports ('Foreign Exchange Traffic Report') and the application of prudential principles reports ('Prudential Principles Reports') periodically to Bank Indonesia in accordance with the provisions and procedures set forth in PBI No. 16/22/PBI/2014 and subsequent implementing regulations prevailing from time to time.

The Foreign Exchange Traffic Report consists of reports on:

(i) the execution of the loan agreement, the realisation and repayment of the loan thereunder including all payments of interest under the loan agreement;

(ii) foreign exchange activities other than offshore loan conducted by an Indonesian company (which includes a guarantee granted by an Indonesian

party in favour of an offshore party); and

(iii) an offshore loan plan. An Indonesian company proposing to obtain an offshore loan must submit certain reports which include information and supporting data on the offshore loan plan for one year (and any amendment to it) e.g. nominal amount of the offshore loan, type of the offshore loan, and the relationship with the creditor.

The Prudential Principles Reports consist of:

(i) the application of prudential principles report;

(ii) the application of prudential principles report which has passed attestation procedure;

(iii) information on the satisfaction of credit rating requirement; and

(iv) financial statements.

Other than the above, the utilisation of certain types of offshore loan, i.e. (i) loans related to project development whose financing is in the nature of 'nonrecourse', 'limited-recourse', 'advanced payment', 'trustee borrowing', 'leasing' and so forth; (ii) loans related to project development whose financing is based on 'BOT', 'B&T' and so forth, shall be coordinated under the Team PKLN as required by the Presidential Decree No. 39 of 1991, dated 4 September 1991 concerning Coordination of the Management of Offshore Loan ('Decree No. 39/1991'). Further, article 12 of Decree No. 39/1991 stipulates that the borrower of an offshore loan shall submit a regular report to the PKLN team regarding the performance of the obtained offshore loan.

In addition, article 3 of the Minister of Finance Decree No. KEP-261/MK/IV/5/1973 concerning Rules on the implementation for obtaining offshore loan, as later amended by No. 417/KMK.013/1989 and No. 279/KMK.01/1991 stipulates a regular report regarding offshore loan shall be submitted to the Department of Finance and Bank Indonesia as of the effective date of the loan agreement and subsequently every three months; or

(c) Mandatory Tender Offer for a Publicly Listed Company

If the acquisition transaction occurs in a publicly listed company, it will trigger a mandatory tender offer ('MTO') since there is a change of 'controller' in the publicly listed company. A controller is defined as a party who (i) owns more than 50% of the issued shares in the company; or (ii) has less than 50% of shares but has the means to determine the management and/or policies of the company. However, the change of controller as a result of an issuance of new shares pursuant to a rights issue is exempted from a MTO requirement.

In order to conduct a MTO, the new controller must:

(i) submit a draft announcement of the information disclosure in relation to the MTO along with its supporting documents to OJK and the target company within two business days after the takeover announcement;

(ii) submit any changes and/or additional information on the draft announcement and its supportive documents within five business days after receipt of the request to change the draft from the OJK (if any);

(iii) announce the information disclosure in at least one Indonesian daily newspaper having national circulation within two business days after receipt of the letter from OJK stating that the new controller may announce the disclosure of information on the MTO (the new controller must also submit evidence of the announcement in a daily newspaper as mentioned above to OJK within two business days after the date of the announcement). The announcement of information

disclosure in respect of the MTO must include:

- the background of the takeover;
- details of the estimated number and percentage of shares to be purchased;
- details of the number and percentage of shares of the target company that has been acquired, including call option, any rights to receive dividend or any benefit as well as proxy in voting rights in the target company;
- details of the new controller, including name, address, nationality and affiliation relationship with the target company, if any (for individual) or the establishment, capital structure, board of directors and commissioners, shareholding composition, beneficial owner and affiliation relationship with the target company, if any (for non-individual);
- details of the target company, including name, address, and line of business;
- terms and conditions of the MTO i.e. purchase price and calculation method, MTO period, terms payment, purchase mechanism, and explanation on any governmental approvals that must be obtained in relation to the MTO, if any;
- names and addresses of the capital market supporting institutions or professionals involved in the MTO; and
- any other important information i.e. details of any lawsuit in relation to the takeover and additional information that is required so that the disclosure is not misleading;

(iv) conduct the MTO within a 30-day period as of the day following the date of the announcement of the information disclosure as stated in (iii) above;

(v) make a MTO settlement, with money transfer, at least no later than 12 business days after the end of the MTO period; and

(vi) submit a report on the MTO's result to OJK within five business days after the end of the MTO settlement. The settlement of the MTO transaction must be made with money settlement as mentioned in (v) above. It cannot be exchanged with a securities settlement.

The price of a MTO transaction is regulated as follows by the regulations regarding the MTO:

(i) in the event the acquisition is directly exercised over shares of a publicly listed company listed and traded at the stock exchange, the lowest MTO price must be at least:

- the average of the highest price of the daily trading at the stock exchange during the last 90 days before the acquisition announcement or the negotiation announcement; or
- the exercise price of the acquisition, whichever is higher;

(ii) in the event the acquisition concerns shares of a publicly listed company listed and traded at the stock exchange, however during the period of 90 days or more before the acquisition announcement or before the negotiation announcement, the said shares were not traded on the stock exchange or its trade was temporarily suspended by the stock exchange, the MTO price must be at least:

- the average of the highest price of the daily trading at the stock exchange during the last 12 months, counted backwards from the last trading day or the day it was temporarily suspended; or
- the exercise price of the acquisition, whichever is higher;

(iii) in the event the acquisition concerns shares of either a publicly listed company or an equity issuer whose shares are unlisted, the MTO price must be at least:

- the exercise price of the acquisition; or
- the fair price determined by the appraiser, whichever is higher;

(iv) in the event the acquisition indirectly concerns shares of a publicly listed company listed and traded at the stock exchange, the MTO price must be at least equal to the average of the highest price of daily trading at the stock exchange during the last 90 days before the acquisition announcement or negotiation announcement;

(v) in the event the acquisition is indirectly exercised over shares of a publicly listed company listed and traded at the stock exchange, but during the last 90 days or more before the acquisition announcement or before the negotiation announcement, was not traded at the stock exchange or its trade was temporarily suspended by the stock exchange, the MTO price must be at least the average of the highest price of daily trading at the stock exchange during the last 12 months counted backwards from the last trading day or the day the trade was temporarily suspended; and

(vi) in the event the acquisition is indirectly exercised over shares of either a publicly listed company or an equity issuer whose shares are unlisted and not traded on the stock exchange, the MTO price must be at least equal to the fair price as determined by the appraiser.

The period for price determination, as mentioned in (i) and (iv) above, will follow the exercise period of the MTO in the event the exercise of the MTO exceeds the deadline of 180 days as of the negotiation announcement (provided that this MTO price calculation is higher than the MTO price under (i) and (iv) above).

Following the takeover, if a new controller owns more than 80% of paid-up shares of a target company after exercising the MTO, the new controller must transfer a portion of the shares to the public, so that there will be at least 20% shares of the target company owned by at least 300 persons within two years as of completion of the MTO.

In the event the Takeover results in ownership of more than 80% of paid-up shares of the target company, a MTO must still be carried out to give the public shareholders the chance to benefit from the offer price determined under Rule IX.H.1, even though the new controller will later have to divest at least the same percentage of shares it has acquired in the MTO to at least 300 persons within two years.

The above obligations will not apply if the target company undertakes a corporate action (such as a rights issue) which dilutes the new controller's shareholding and results in compliance with the minimum free float requirement as explained above.

If change of control in a publicly listed company results from an issuance of new shares by virtue of the rights issue of a pre-emptive right (which is defined as a right attached to a share enabling the shareholders to purchase new securities, including shares, securities convertible into shares and warrants, before they are offered to other parties), under the Financial Services Authority (Otoritas Jasa Keuangan) Regulation No. 29/POJK.04/2015, the requirements to make a MTO are waived.

Prior to making a rights issue, the Listco must submit a registration statement relating to the rights issue to the OJK at least 28 days before the extraordinary general meeting of shareholders ('Registration Statement'). Under current Indonesian regulations, Listco may not proceed with a rights issue until the

Registration Statement (filed with OJK) becomes effective. Unless stipulated otherwise by OJK, the Registration Statement will become effective only after the shareholders approve the rights issue at an extraordinary general meeting of shareholders. In practice, OJK will review and give comments on the Registration Statement document within 28 days.

Before making a rights issue, if a public company seeks to raise a specific amount, Listco must obtain a guarantee from a party, the Standby Purchaser, which agrees to purchase any remaining excess rights shares ('Remaining Excess Rights') at a price which is at least equal to the exercise price. There are no restrictions on the identity of such a party. Any party may act as the Standby Purchaser, including the principal shareholder of Listco.

If, after the excess rights application by the shareholders, there are still Remaining Excess Rights, the Standby Purchaser will be responsible to purchase the Remaining Excess Rights at the exercise price and must pay for the Remaining Excess Rights within two working days after the end of the trading period.

Timeline

The timeline for mergers and acquisitions depends on the complexity of the transaction. For a normal transaction, the process should be completed within two to four months. However, for a complex transaction or a transaction which involves a publicly listed company, the process could take longer.

Employees

Pursuant to article 127 of Company Law, a company must announce to its employees any plan of change of ownership at the latest by 30 days prior to the call of a general meeting of shareholders for the agenda of change of ownership in the company. In general, the employees do not have a direct say in a merger or an acquisition. However, if the merger and/or acquisition results in a change of control in the company, the employees will be entitled to request for a termination and receive severance payment from the company. Pursuant to Law No. 13 of 2003 regarding Manpower ('Labour Law'), once the employees decide to terminate their employment with the company, the company will be required to pay the severance package to the employee, which amounts are regulated under the Labour Law or the company's regulation or the Collective Labour Agreement. The components of the severance package are severance payment, service appreciation payment and compensation payment.

Documentation

In general, the following documents are required to be prepared for a merger and acquisition transaction:

- announcement of the summary of the merger/acquisition plan to the public through at least one newspaper having nationwide circulation;
- announcement to the employees in writing;
- resolution of general meeting of shareholders or circular resolution of shareholders of the company approving the merger/acquisition plan;
- BKPM's approval on the merger/acquisition plan (applicable only if it involves foreign investment);
- Notarial deed of acquisition or deed of merger in Indonesian language;
- approval or receipt of notification in relation to the merger/acquisition from the Ministry of Law and Human Rights;
- announcement of the result of merger/acquisition in at least one newspaper having nationwide circulation;
- updated shareholders' register of the company as a result of the merger/acquisition;

- new share certificates of the shareholders of the company as a result of the merger/acquisition;
- updated company registration number.

If the transaction involves a merger or an acquisition through an issuance of new shares, a merger/acquisition plan will be required in addition to the abovementioned documents. A merger/acquisition plan should consist of the following information, among others:

- name and domicile of the merging/acquiring and surviving/acquired entities;
- the reason behind the merger/acquisition transaction;
- the method of assessment and conversion of shares of the merging company into the shares of the surviving company;
- the amount of shares to be acquired (for acquisition transactions only);
- the readiness of the funding (for acquisition transactions only);
- draft amendment of the articles of association of the company after the merger/acquisition (if any);
- financial statement of the merging company (for merger transactions only);
- further plan or ceasing of business activities of the merging company (for merger transactions only);
- pro-forma balance sheet of the surviving company/the acquiring company;
- the manner of settlement on the status, rights, and obligations of the members of the board of directors, board of commissioners, and employees of the merging/acquired company;
- the manner of settlement on the rights and obligations of the merging company against the third party (for merger transactions only);
- the manner of settlement on the rights of the shareholders who do not approve the merger/acquisition of the company;
- the names of the members of the board of directors and board of commissioners of the surviving company as well as their honorariums, salaries and allowances for merger transactions only);
- the estimated period of entering into a merger/acquisition;
- the report on the situation, development and result that have been attained of the merging company (for merger transactions only);
- the main activities of the merging company and the alteration occurred during the current accounting year (for merger transactions only);
- the detailed issues arising during the accounting year that affect the activities of the merging company (for merger transactions only).

C. Anti-trust Review

Notification to KPPU of a merger or acquisition transaction is mandatory only when the transaction is not conducted between affiliated companies and the value of assets or the value of sales of the companies involved in the transactions exceeds a certain amount, i.e. (a) if the combined national assets of the parties to the transaction exceed IDR 2.5 trillion (approximately USD 205 million); and/or (b) if the combined national turnover (revenue) of the parties to the transaction exceeds IDR 5 trillion (approximately USD 410 million); and/or (c) if the combined national assets exceed IDR 20 trillion (approximately USD 1.65 billion) once the parties are banking institutions. Combined national assets or national turnover means the total amount of assets and turnover of the parties to the transaction and their parents/subsidiaries in Indonesia. In the event that the abovementioned thresholds are met, then the merger/acquisition transaction must be reported to KPPU within 30 days of its effective date. Failing to comply with this

requirement may result in a sanction in the amount of IDR 1 billion (approximately USD 81 thousand) per day of delay provided that the maximum administrative sanction that can be imposed due to the delay will not exceed IDR 25 billion (approximately USD 2.05 million). In practice, in 2014, KPPU only imposed fines to four companies which failed to submit the notification on time, the total of which was around IDR 8.25 billion for a total of 41 delay days, or approximately IDR 200 million per day.

Nevertheless, recently, KPPU has been taking a stricter approach to business actors' compliance with the notification requirement in respect of their merger, consolidation and share acquisition. The mandatory notification to KPPU is in place only if the value of the merger, consolidation and share acquisition exceeds the threshold limit as stipulated by the prevailing regulation. The stricter approach is apparent from KPPU's current uncompromising attitude in imposing fines on companies which are tardy in their compliance with the notification requirement. This year sees KPPU's tendency of increasing the amount of the fines, as shown in a recent case where a company which was late in submitting the required notification of its offshore acquisition was made to pay IDR 2 billion for its four days of delay, or IDR 500 million per day.

The KPPU also provides a chance for business entities conducting mergers/acquisitions to have a pre-consultation with the KPPU in the event that the transaction might be complex, so that they will have time to evaluate the transaction and provide remedies to the KPPU if the KPPU believes that the merger/acquisition transaction may potentially result in monopoly or unfair business competition.

The KPPU regulations state that once the KPPU has confirmed the submission is complete, it will conduct an initial review, which should be completed within 30 business days as of the confirmation date. If the KPPU concludes that the proposed transaction does not result in a monopoly and/or unfair business competition, it should announce its opinion by the end of the 30-day period. However, if based on its initial review the KPPU finds that (a) the HHI index after the proposed transaction is above 1800 with the delta above 150; (b) the parties concerned or their affiliates have a dominant position, the KPPU will conduct a subsequent review, which should be finalised within 60 business days after completion of the initial review. However, the prevailing legislation is silent on the maximum duration to review the completeness of the submission. Based on our experience, the duration usually depends on the complexity of the overlapping business of the parties concerned, so there is no exact timeline for the KPPU to confirm that the submission is complete.

D. Tax Protection in a Merger/Acquisition Transaction

In the agreement for a merger or acquisition, the parties to the agreement usually put a representations and warranties clause where the seller or the target provides certain representations and warranties to the purchaser in relation to the condition of the stock and/or business asset, such as (a) the seller or the target company has paid all of its tax obligations to the government as of the execution date of the agreement and will provide the purchaser with a list of outstanding tax obligations that may be incurred in the future until the closing date from time to time, (b) in the event that after the closing date, the result of the tax correction made by the authorised agency appears to be beyond the reasonable tax propriety, the seller/the target agrees and binds itself to bear all of the payments in connection to such tax correction provided that such tax correction has resulted from the transaction done by the target company prior to the closing date, (c) the seller/the target company has made all returns, given all notices and submitted all computations, accounts or other information required to be

made, given or submitted to any tax authority in accordance with the laws, and all such returns and other documentation were and are true, complete and accurate, (d) the seller/the target company has not carried out, been party to, or otherwise involved in any transaction where the sole or main purpose or one of the main purposes was the unlawful avoidance of tax or unlawfully obtaining of a tax advantage. In addition, the purchaser could also add a tax covenant from the seller to the purchaser as a schedule to the agreement.

Aside from the representations and warranties clause itself, an indemnity or a payment for misrepresentation or incorrect warranties is usually provided for under the agreement. The parties to the agreement can set aside a certain amount of money as a remedy of such misrepresentations or incorrect warranties.

Nevertheless, if the tax issues in the target company are too complicated and too costly to be remedied, the purchaser usually decides not to acquire the shares in the target company but acquire its business instead. In this case, the purchaser usually sets up a new company or acquires a new company with a good record which will further acquire the business of the target company.

E. Recent Developments

Effective as of 12 May 2016, the Indonesian government enacted a new Investment Negative List, as regulated under Presidential Regulation No. 44 of 2016 ('Negative List') which revokes the previous negative list. This Negative List supported several policies enacted by Indonesian government, which aim to shorten the administrative procedures on licensing. We are of the view that the Indonesian government is willing to attract foreign investors to invest and build their business in Indonesia through the Negative List and such licensing policies. These changes might affect mergers and acquisitions transactions in Indonesia once foreign investment is involved. However, in the case of mergers and acquisitions, the Negative List seems to maintain the policy of grandfathering existing companies which in general means that the new policy in the Negative List will not apply to the existing companies which have obtained approval from Investment Coordinating Board prior to the issuance of the Negative List, subject to the fulfilment of certain requirements. The Negative List provides that in the event of a change in shareholding composition resulting from a merger or an acquisition in the same line of business, the maximum foreign shareholding is:

(a) in the case of a merger, as per the investment licence of the surviving entity;

(b) in the case of an acquisition, as per the investment license of the acquired company.

In addition, as of 1 July 2016, the Indonesia government enacted the Law No. 11 of 2016 on Tax Amnesty ('Tax Amnesty'), in which the Indonesian government will allow the taxpayer to write off their outstanding and payable tax obligations after the taxpayer has first disclosed their assets and pay certain ransom fees. The enactment of this Tax Amnesty might also affect mergers and acquisitions transactions in Indonesia.

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专题：印度尼西亚的并购运作

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A. 规章制度

总体而言，印度尼西亚并购受以下法律法规管辖：

(a) 关于有限责任公司的 2007 年第 40 号法律（“公司法”）及其实施条例，即关于有限责任公司兼并、合并和收购的 1998 年第 27 号政府条例（“PP 27”）；

(b) 关于投资事宜的 2007 年第 25 号法律及其实施条例，即关于不接受投资的商业领域以及有条件地对投资开放的商业领域的清单的 2016 年第 44 号总统条例、根据 2016 年第 6 号条例修改的关于主要投资许可指南和程序的 2015 年第 14 号投资协调委员会负责人条例（BKPM）、关于投资许可和非许可指南和程序的 2015 年第 15 号投资协调委员会负责人条例（BKPM）；这些法律法规仅适用于涉及外国投资的并购交易；

(c) 关于禁止垄断和不公平商业竞争的 1999 年第 5 号法律及其实施条例，包括：关于可能会导致垄断和不公平商业竞争的兼并、合并和股份收购的政府条例 2010 年第 57 号，关于可能会导致垄断和不公平商业竞争的兼并、合并和股份收购的政府条例 2010 年第 57 号，商业竞争监督委员会（Komisi Pengawas Persaingan Usaha 或 KPPU）关于经营实体兼并或合并以及公司股份收购咨询的 2010 年第 11 号条例，近期根据 2013 年第 2 号 KPPU 条例进行修改的关于可能会导致垄断和不公平商业竞争的经营实体兼并、合并和股份收购指南的 2010 年第 13 号 KPPU 条例；

(d) 关于资本市场的 1995 年第 8 号法律以及资本市场与金融机构监督局（Badan Pengawas Pasar Modal dan Lembaga Keuangan 或 BAPEPAM-LK）颁布的其他多部条例，该机构现称为金融服务局（Otoritas Jasa Keuangan 或 OJK），其他条例如下：

(i) 金融服务局（Otoritas Jasa Keuangan）关于自愿要约收购的第 54/POJK.04/2015 号条例；

(ii) 第 Kep-52/PM/1997 号 BAPEPAM-LK 主席令附件——关于上市公司或发行人并购的第 IX.G.1 号规则；

(iii) 第 Kep-264/BL/2011 号 BAPEPAM-LK 主席令附件——关于上市公司收购的第 IX.H.1 号规则；

(iv) 第 Kep-614/BL/2011 号 BAPEPAM-LK 主席令附件——关于重大交易和主要业务变更的第 IX.E.2 号规则；

(v) 金融服务局（Otoritas Jasa Keuangan）关于发行人或上市公司重要信息或事实的披露的第 31/POJK.04/2015 号条例；

(vi) 金融服务局（Otoritas Jasa Keuangan）关于发行人或上市公司豁免报告和披露要求的第 29/POJK.04/2015 号条例。

只有当目标公司或买方为公开上市公司时，才适用这些法律法规；

(e) 相关税法，包括：目前根据 2008 年第 36 号法律修改的关于所得税法的 1983 年第 7 号法律，目前根据 2009 年第 42 号法律修改的关于增值税的 1983 年第 8 号法律，目前根据 2000 年第 20 号法律修改的关于土地和建筑物购置税的 1997 年第 21 号法律，2016 年第 34 号关于土

地和建筑物转让所得税及条件性协议的政府条例及其修正；

(f) 其他特定条例，视乎目标公司或买方的业务性质（如适用），如银行业、林业和矿业。

B. 并购运作

兼并

《公司法》和 PP 27 对兼并的定义：一家或多家公司将其自身并入之前既已存在的另一公司然后解散施并公司的法律行为。

因施并公司资产和负债会转让给合并后公司，兼并交易在税务方面会涉及到以下方面：

(a) 转让税

转让税形式：

(i) 增值税（当其中一个兼并方不是注册应税企业）；

(ii) 转让涉及财产 / 土地时，土地和建筑物购置费（beaperolehanhakatastanahdanbangunan 或 BPHTB）。经纳税人要求，税务总局局长可按照账面价值将商业兼并或合并中的土地和建筑物转让权的 BPHTB 最多减少 50%；

(b) 施并公司资产和负债转让给被并入公司后的财产收益所产生的所得税。

企业兼并中的资产转让通常必须以市场价格执行。此类重组所产生的收益须缴税，而损失通常可抵扣所得。但是，资产按照账面价值转让的税收中立兼并可在获得税务总局局长批准后进行，审批时，兼并计划必须通过税务总局局长的经营目的测试。对于税收驱动安排，这点是禁止的，因此施并公司的税收损失不能转移至存续的公司。

收购

印度尼西亚有两类收购：股份收购和资产收购。就本文而言，我们仅深入阐述股份收购。《公司法》对股份收购的定义：法律实体或个人收购一家公司全部或绝大部分股份且该收购会使该公司控制权发生变化的法律行为。

股份收购实现方式：

(a) 将目标公司的多数股份转让给买方

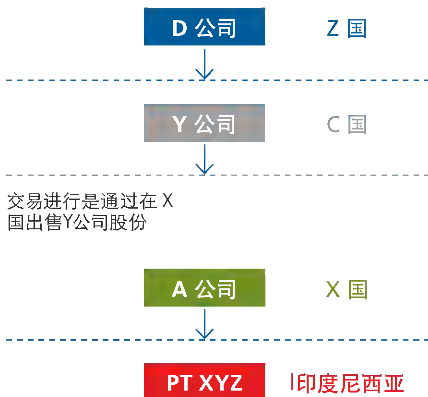
如果以股份转让的形式实现收购，那么在以下情况下，卖方应有义务缴纳股份转让所得财产收益相关的税款：

(i) 如果卖方为印度尼西亚纳税主体，缴纳财产收益税款的义务应由卖方承担。买方无义务从售价中代扣任何款项；

(ii) 如果卖方不是印度尼西亚纳税主体，居民买方必须从股份出售额中扣除卖方预估净所得的 20%（即达到交易价 25% 的财产收益），但适用税收协定规定由协定方缴纳财产收益税的除外。如想受益于相关税收协定，卖方必须遵守印度尼西亚现行有效的证明、资格、信息和报告要求。目前，卖方须向买方和公司提供税务主管机构（国税局）签发的税务居住地证明；

(iii) 如果目标公司为公开上市公司，因股份转让而产生的财产收益纳税义务应为按照交易总额 0.1% 的税率缴纳最终所得税，但前提是所出售的股份非创始人股份。如果是创始人股份，那么税款应相应地增加，增加额为 1996 年底股票交易所停市前公司股份的票面价值的 0.5%，或者如果公司股份于 1997 年 1 月 1 日后在股票交易所上市，则为首次公开募股之时股份票面价值的 0.5%。

关于该纳税义务，如果卖方为跨国公司，通常倾向于在印度尼西亚之外的、对此等跨国公司实施优惠税收制度的国家完成交易，例如，他们在实施优惠税收制度的 X 国设有子公司（“A 公司”）并通过该子公司持有其在印度尼西亚公司的股份。一旦这些公司决定退出印度尼西亚公司，他们将通过 A 公司实现交易，这样即可以在税率较低的 X 国完成出售，无需在印度尼西亚进行交易。



但是，如果 X 国是税务优惠国，在 X 国处置 A 公司股份时，可能须缴税，因为根据财务部长第 258/PMK.03/2008 号第 26 条规定，非居民纳税人出售或转让股份所得符合所得税法第 18 条第 (3c) 款规定的须预提所得税（"PMK258"）。根据 PMK 258，在税务优惠国成立并且与印度尼西亚公司或常设机构具有特殊关系的公司在进行股份转让时，须缴纳净额预估值的 20%。净额预估值按照从销售价扣减 25% 进行计算。但是，如果卖方的来源国与印度尼西亚之间订立了税收协议，那么只有当协议规定印度尼西亚对此类交易有征税权时，才可预扣收益所得税。我们认为目前没有关于不动产、能源和自然资源公司股票处置的具体规则。

根据印度尼西亚银行第 17/3/PBI/2015 号关于在印度尼西亚境内强制使用印尼盾的条例（"BI 条例"），印度尼西亚银行要求各经营者设定具体商品和服务的印尼盾价格。除 BI 条例之外，印度尼西亚银行还于 2015 年 6 月 1 日发布了 BI 条例的实施条例，即第 17/11/DKSP 号通知函（"通知函"）。通知函第 2 条 A 项明确提到，印度尼西亚经营者只能以印尼盾设定商品和服务价格，不得以任何其他货币设定价格（双重报价）；

(b) 发行目标公司新股，由新股东认购，稀释目标公司原有股东的股权比例。

如果以认购公司新股的形式实现收购，那么认购这些新股时，无需缴税。

但是，如果此等新股认购是通过转换现有贷款实现的（即：股东贷款、预付款、可转换债券），那么对此等转换须征税（如果预付款（股东贷款）金额低于股份价值，差额部分应被视为给予放贷人的利息，该部分须缴纳所得税）。此外，1999 年第 15 号政府条例规定，将某种形式的债权转换成股份时，必须在两家报纸上公告此等转换。

现有贷款转换来自海外的情况下，印度尼西亚银行第 16/22/PBI/2014 号条例关于外汇流动活动以及非银行企业海外贷款管理适用审慎性原则的报告 (PBI 第 16/22/PBI/2014 号) 规定，开展外汇活动，尤其是获得海外贷款的、印度尼西亚公司（和相关个人）必须根据 PBI 第 16/22/PBI/2014 号规定的条款和程序以及后续生效的实施条例定期向印度尼西亚银行提交外汇流通报告（"外汇流通报告"）和审慎性原则适用报告（"审慎性原则报告"）。

外汇流通报告含以下报告内容：

(i) 贷款协议的签署、其项下的贷款实现和偿还，包括贷款协议项下的所有利息支付；

(ii) 印度尼西公司进行的海外贷款以外的外汇活动（包括印度尼西亚方向海外方签发的保函）；

(iii) 海外贷款计划。拟获取海外贷款的印度尼西亚公司必须提交相关报告，其中含有一年期海外贷款计划的信息和支持数据（及其任何修正本），即海外贷款的面额、类型以及与债权人的关系。

审慎性原则报告含以下内容：

(i) 审慎性原则报告的适用；

(ii) 已通过认证程序的审慎性原则报告的适用；

(iii) 信用评级要求符合情况；

(iv) 财务报表。

除上述内容之外，PKLN 小组必须根据 1991 年 9 月 4 日发布的关于境外贷款管理协调事宜的总统令 1991 年第 39 号（“第 39/1991 号令”）的要求协调各类境外贷款，即 (i) 融资性质为“无追索权”、“有限追索权”、“预付款”、“受托人借贷”、“租赁”等的项目开发相关的贷款；(ii) 融资基于“BOT”、“B&T”等的项目开发相关的贷款。此外，第 39/1991 号令第 12 条还规定，海外贷款借款方应定期向 PKLN 小组提交所获得的海外贷款的履约情况报告。

此外，财务部长关于海外贷款获取实施细则的第 KEP-261/MK/IV/5/1973 号令（之后根据第 417/KMK.013/1989 号和第 279/KMK.01/1991 号修改）第 3 条规定，自贷款协议生效之日起以及之后每三个月须定期向财务部和印度尼西亚银行提交海外贷款相关报告；

(c) 公开上市公司强制性要约收购

如果公开上市公司的收购交易导致上市公司“控制人”变更的，便会触发强制性要约收购（“MTO”）。控制人是指具备以下条件的一方：(i) 持有公司 50% 以上的已发行股份；或 (ii) 持有股份不足 50% 但能够影响公司管理和 / 或政策决定的。但是因根据配股情况发行新股而引起的控制人变更不受 MTO 要求的制约。

为执行 MTO，新任控制人必须：

(i) 在收购公告发出后两个工作日内向 OJK 和目标公司提交 MTO 相关信息披露公告草稿及其证明文件；

(ii) 收到 OJK 发出的草稿变更要求（如有）后五个工作日内提交公告草稿及其证明文件的变更、新增信息；

(iii) 收到 OJK 发出的关于新任控制人可发布 MTO 信息披露公告的信函后两个工作日内，在印度尼西亚至少一家全国发行的日报上发布信息披露公告（新任控制人还应在发出公告后两个工作日内向 OJK 提交关于已按照上述规定在日报上发布公告的证明）。MTO 相关信息披露公告必须含有以下信息：

- 收购的背景内容；
- 拟购买股份的详细预估数量和比例；
- 已收购的目标公司股份的数量和比例，包括买入期权、获得股息或任何权益的权利以及目标公司投票权代理；
- 新任控制人的详细信息，包括姓名、地址、国籍、与目标公司的关联关系（如有，针对个人），成立情况、资本结构、董事会和委员会、股权构成、实益所有人以及与目标公司的关联关系（如有、针对非个人）；
- 目标公司的详细信息，包括名称、地址和业务范围；
- MTO 条款和条件，即：购买价和计算方法、MTO 期限、付款条款、购买机制、MTO 必须获得的任何政府批准（如有）的解释；
- MTO 涉及的资本市场支持机构或专业人士的姓名 / 名称和地址；
- 任何其他重要信息，即：与收购相关的任何诉讼的详细信息、确保披露不具有误导性所需的其他信息；

(iv) 自以上第 (iii) 项规定的信息披露公告之日起 30 日内进行 MTO；

(v) MTO 期限结束后最多 12 个工作日内以转账形式完成 MTO 结算；

(vi) MTO 结算完成后五个工作日内向 OJK 提交 MTO 结果报告。MTO 交易结算必须按照以上第 (v) 项所述以资金结算形式完成，不能以证券作为结算替代。

MTO 交易价格在以下各方面受 MTO 相关条例监管：

(i) 如果是直接收购公开上市公司在股票交易所上市交易的股份，MTO 最低价至少应为：

- 发出收购公告或协商公告前最近 90 日内，股票交易所每日交易的平均最高价；或
- 收购行使价格，取其中的较高者；

(ii) 如果是收购公开上市公司在股票交易所上市交易的股份，但在发出收购公告或协商公告前至少 90 日内，有关股份未在股票交易所交易，或股票交易所暂停了有关股份的交易的，MTO 价格至少应为：

- 自最后交易日或暂停交易日起的前 12 个月内，股票交易所每日交易的平均最高价；或
- 收购行使价格，取其中的较高者；

(iii) 如果是收购公开上市公司或股份发行人未上市股份的，MTO 价格至少应为：

- 收购行使价格；或
- 估价员确定的公允价格，取其中的较高者；

(iv) 如果是间接收购公开上市公司在股票交易所上市交易的股份，MTO 价格至少应等于发出收购公告或协商公告前 90 日内股票交易所每日交易的平均最高价；

(v) 如果是间接收购公开上市公司在股票交易所上市交易的股份，但在发出收购公告或协商公告前至少 90 日内，有关股份未在股票交易所交易，或股票交易所暂停了有关股份的交易的，MTO 价格至少应等于自最后交易日或暂停交易日起的前 12 个月内股票交易所每日交易的平均最高价；

(vi) 如果是间接收购公开上市公司或股份发行人未在股票交易所上市交易的股份的，MTO 价格应至少等于估价员确定的公允价格。

MTO 的行使超出自协商公告之日起的 180 日期限时，则如以上第 (i) 项和第 (iv) 项所述，价格的确定期限将遵循 MTO 的行使期限（但该 MTO 价格计算值应高于以上第 (i) 项和第 (iv) 项下的 MTO 价格）。

收购之后，如果新任控制人在执行 MTO 后持有的目标公司已缴款股份超过 80%，新任控制人必须将一部分股份转让给公众，以确保自完成 MTO 起的两年内，目标公司的股份中至少有 20% 由至少 300 人持有。

如果收购导致持有超过目标公司已缴款股份的 80% 的，仍须进行 MTO，从而给予公众股东机会使其受益于第 IX.H.1 条项下所确定的要约价格，即使新任控制人会在两年内将 MTO 中收购的至少相同比例的股份出售给至少 300 人。

如果目标公司采取企业行动（例如配股）导致新任控制人股权稀释并且达到上述最低公众持股量要求，则上述义务不适用。

根据金融服务局（Otoritas Jasa Keuangan）第 29/POJK.04/2015 号条例，如因公开上市公司通过优先认股权（其定义为：股份随附的使股东能够在新发行的证券（包括股份、可转换成股份的证券和认股权证）发售给其他方之前购买此等证券的权利）配售新股，导致上市公司控制权变更，则可豁免进行 MTO 的要求。

配售股份前，上市公司必须在召开临时股东大会前至少 28 日向 OJK 提交配股相关的登记声明（“登记声明”）。根据印度尼西亚现行法规，上市公司必须在登记声明（在 OJK 备案）生效后才可配售股份。除非 OJK 另有其他规定，登记声明只有在各股东在临时股东大会上批准配股后才产生效力。在操作上，OJK 会在 28 日内审核登记声明并提出意见。

配售股份前，如果上市公司希望提出具体金额，上市公司必须获得一方（备选买方）的保证，即该买方同意按照至少等于行使价的价格购买任何剩余额外配售股份（“剩余额外配售股”）。对该方的身份无任何限制规定。任何一方均可作为备选买方，包括上市公司的主要股东。

如果股东在申请额外配股后，仍有剩余额外配售股份，备选买方将负责按照行使价格购买剩余额外配售股份，并且必须在交易期后的两个工作日内就剩余额外配售股份付款。

时间安排

并购的时间安排取决于交易复杂度。对于正常交易，应在二到四个月内完成。但是，对于复杂交易或涉及公开上市公司的交易，过程可需要更长的时间。

员工

根据《公司法》第127条的规定，公司最迟必须在召集股东大会商议公司所有权变更之前30日内向其员工公布所有权变更计划。通常情况下，员工对并购无直接发言权。但是，如果并购导致公司控制权变更，则员工应有权申请辞职并获得公司的遣散费。根据2003年第13号人力资源相关法律的规定（"劳动法"），一旦员工决定终止与公司的雇佣关系，公司必须向员工支付遣散费，具体金额按照劳动法或公司条例或集体劳动合同确定。遣散费构成包括遣散金、服务奖励金和赔偿金。

文件

在并购交易中，通常须编制以下文件：

- 至少在一家全国发行的报纸上向公众发布并购计划概要公告；
- 向员工发布书面公告；
- 关于批准并购计划的股东大会决议或公司股东传阅决议；
- BKPM对并购计划的批准（仅在涉及到外国投资时适用）；
- 印尼语收购或兼并公证书；
- 司法与人权部签发的并购批准或通知收悉书；
- 至少在一家全国发行的报纸上发布并购结果公告；
- 因并购而进行的公司股东登记簿更新；
- 因并购而签发的公司股东新股证书；
- 更新后的公司注册号。

如果是通过发行新股完成并购交易，除上述文件之外，还需提供并购计划。并购计划应含有以下信息，包括：

- 施并/收购实体和存续/被收购实体的名称和地址；
- 并购交易背后的原因；
- 评估方法以及施并公司股份向存续公司股份的转换；
- 拟收购股份数额（仅收购交易）；
- 资金备用情况（仅收购交易）；
- 并购后的公司章程修正稿（如有）；
- 施并公司财务报表（仅兼并交易）；
- 施并公司经营活动的进一步计划或终止（仅兼并交易）；
- 存续公司/收购公司的预计资产负债表；
- 施并/被收购公司董事会成员、委员会成员和员工的身份、权利和义务的解决方式；
- 施并公司对第三方的权利和义务的解决方式（仅兼并交易）；
- 不同意公司并购的股东的权利解决方式；
- 存续公司董事会和委员会成员姓名及其报酬、薪资和津贴（仅兼并交易）；
- 完成并购的预计期限；
- 施并公司状况、发展以及已取得成绩的相关报告（仅兼并交易）；
- 当前会计年度施并公司的主要活动以及发生的变化（仅兼并交易）；
- 会计年度内发生的影响施并公司活动的具体问题（仅兼并交易）；.

C. 反垄断审查

只有当并购交易不是在关联公司之间进行的、并且交易相关公司的资产值或售价超过一定金额时，才需强制向KPPU发出并购通知，即(a)交易方的全国合并资产超过25000亿印尼盾（约2.05亿美元）；和/或(b)交易方的全国合并营业额（收入）超过5万亿印尼盾（约4.1亿美元）；和/或(c)交易方为银行机构时，全国合并资产超过20万亿印尼盾（约16.5亿美元）。全国合并资产或合并营业额是指交易方及其母公司/子公司在印度尼西亚的资产和营业额总额。

如达到上述门槛，则必须在并购交易生效日期后 30 日内向 KPPU 报告该并购交易。如未遵守该要求，则每延误一日即可能会受到 10 亿印尼盾（约 81000 美元）的处罚，但因延误而征收的行政罚款最高不超过 250 亿印尼盾(约 205 万美元)。实际上,2014 年,仅四家未按时提交通知的公司受到 KPPU 的处罚，罚款总额约 82.5 亿印尼盾，延误天数总计为 41 日，或每日约 2 亿印尼盾。

尽管如此，KPPU 为使经营者遵守兼并、合并和股份收购的通知要求，近期采取了更加严格的方法。只有当兼并、合并和股份收购价值超过现行法规规定的门槛限值时，才强制性要求通知 KPPU。KPPU 对延误遵守通知要求的公司征收罚款，目前的这种不妥协态度体现了更加严格的措施。今年，KPPU 趋向于增加罚款金额，例如，在近期的一则案例中，某一公司延误提交了所要求的海外收购通知，四天延误期被罚款 20 亿印尼盾，或每天 5 亿印尼盾。

在交易可能非常复杂的情况下，KPPU 允许进行并购的企业实体提前与 KPPU 协商，从而有时间评估交易并且在 KPPU 认为并购交易可能会导致垄断或不公平商业竞争的情况下向 KPPU 提供救济措施。

KPPU 条例规定，KPPU 确定所提交的资料齐全后即进行初始审核，该审核应当在确认日期后的 30 个工作日内完成。如果 KPPU 认为拟定交易不会导致垄断或不公平商业竞争，应在 30 日内公布其意见。但是，如果 KPPU 在初始审核中发现 (a) 拟定交易后的 HHI 指数超过 1800，delta 值超过 150；(b) 相关方或其关联方占主导地位，KPPU 会进行后续审核，该审核应当在初始审核完成后 60 个工作日内完成。但是，现行法规未规定审核资料完整性的最长期限。根据我们的经验，期限长短通常取决于相关方重迭业务的复杂度，因此，KPPU 在确认资料完整性方面没有确切的时间安排。

D. 并购交易中的税收保护

在并购协议中，协议方通常会提出声明和保证条款，其中卖方或目标公司会向买方作出股票或商业资产方面的声明和保证，如 (a) 截至协议签署日期，卖方或目标公司已向政府交纳其所有税款，并且在成交日之前，会适时向买方提供未来可能产生的未缴纳税款项目的清单，(b) 如果在成交日之后，经授权机构调整后的税款额超过合理税额，那么只要该税款调整是目标公司在成交日之前的交易所造成的，卖方 / 目标公司同意并且承担缴付此等税款调整相关的全部款项的责任，(c) 卖方 / 目标公司已依法向任何税务主管机构提交所有要求提交的报税单、发出所有要求发出的通知，并提交全部要求提交的计算资料、账目或其他信息，并且所有此等报税单和其他文件由始至终真实、完整、准确，(d) 卖方 / 目标公司从未开展任何以非法避税或非法获取税收优惠为唯一目的或主要目的或其中一项主要目的的交易，也从未成为此类交易的一方或参与此类交易。此外，买方也可将卖方对买方的税务契约作为协议附件。

除声明和保证条款本身之外，该协议项下通常还会针对失实陈述或虚假保证作出赔偿或付款规定。协议方可另拨一定金额，作为对此等失实陈述或虚假保证的补救措施。

尽管如此，如果目标公司的税务问题过于复杂、成本过于高昂，以致无法补救，买方通常会决定不收购目标公司的股份，而是收购其业务。这种情况下，买方通常设立新公司或收购一家记录良好的新公司，然后由该新公司收购目标公司的业务。

E. 近期发展情况

2016 年 5 月 12 日，印度尼西亚政府颁布新的投资负面清单，该清单受总统令 2016 年第 44 号监管（“负面清单”），原负面清单因此被撤销。该负面清单是对印度尼西亚政府颁布的旨在简化行政许可程序的多项政策的辅助。我们认为印度尼西亚政府愿意通过负面清单和此等许可政策吸引投资者在印度尼西亚投资建设业务。这些变化可能会影响印度尼西亚境内涉及到外国投资的并购交易。但是，进行并购时，负面清单似乎保存了现有祖父公司政策，这是指，

在满足相关要求的前提下，负面清单中的新政策不适用于发布负面清单之前已获得投资协调委员会批准的现有公司。负面清单规定，因同一业务范围内的并购导致股权构成发生变化时，外资持股比例最高为：

(a) 如果是兼并、按照存续公司的投资许可证执行；

(b) 如果是收购，按照被收购公司的投资许可证执行。

此外，2016 年 7 月 1 日、印度尼西亚政府颁布 2016 年第 11 号税收特赦法（“税收特赦”），其中，纳税人首先披露其资产并支付一定的赎回费后，印度尼西亚政府允许纳税人冲销其应缴纳但未缴纳的税款债务。该税收特赦法的颁布可能也会对印度尼西亚并购交易产生影响。

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