ICLG

The International Comparative Legal Guide to:

Mergers & Acquisitions 2019

13th Edition

A practical cross-border insight into mergers and acquisitions

Published by Global Legal Group, with contributions from:

Aabø-Evensen & Co Advokatfirma
Advokatfirman Törngren Magnell
Alexander & Partner Rechtsanwaelte mbB
Ashurst Hong Kong
Atanaskovic Hartnell
Bär & Karrer Ltd.
BBA
Bech-Bruun
D. MOUKOURI AND PARTNERS
Debarliev Dameski & Kelesoska Attorneys at Law
Dittmar & Indrenius
E&G Economides LLC
ENSafrica
Ferraiuoli LLC
Gjika & Associates
GSK Stockmann
HAVEL & PARTNERS s.r.o.
Houthoff
Kelobang Godisang Attorneys
Kılınç Law & Consulting
Law firm Vukić and Partners
Loyens & Loeff
Maples Group
Matheson
MJM Limited
Moravčević Vojnović and Partners in cooperation with Schoenherr
Motta Fernandes Advogados
Nader, Hayaux & Goebel
Nishimura & Asahi
Nobles
NUNZIANTE MAGRONE
Oppenheim Law Firm
Popovici Nițu Stoica & Asociații
Ramón y Cajal Abogados
Schoenherr
SEUM Law
Shardul Amarchand Mangaldas & Co.
Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates
Škubla & Partneri s. r. o.
SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH
Vieira de Almeida
Villey Girard Grolleaud
Wachtell, Lipton, Rosen & Katz
Walalangi & Partners (in association with Nishimura & Asahi)
WBW Weremczuk Bobeł & Partners Attorneys at Law
WH Partners
White & Case LLP
Zhong Lun Law Firm

glg
global legal group

Indonesia

Luky I. Walalangi

Siti Kemala Nuraida

Walalangi & Partners
(in association with Nishimura & Asahi)

1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The basic rule governing mergers or acquisitions of Indonesian companies is Law No. 40 of 2007 on the Limited Liability Company ("**Company Law**") and its implementing regulation, including Government Regulation No. 27 of 1998 on Merger, Consolidation and Acquisition of a Limited Liability Company ("**GR 27/1998**"), which sets out the general requirements for mergers, acquisitions and consolidation, such as mandatory quorum and voting requirements for general meetings of shareholders ("**GMS**"), newspaper announcements, announcements to employees, requirements to use a public notary and so on. For public companies, there are additional specific regulations, including: (i) Law No. 8 of 1995 on the Capital Market; (ii) Financial Service Authority (OJK) Regulation No. 9/POJK.04/2018 on Public Company Takeovers; (iii) OJK Regulation No. 74/POJK.04/2016 on the Merger or Consolidation of a Public Company; (iv) OJK Regulation No. 58 /POJK.04/2017 on the Electronic Submission of a Registration Statement or Company Action; and (v) OJK Regulation No. 54/POJK.04/2015.

Other relevant rules relating to M&A in Indonesia are, among others:

(i) the merger control rules, set by (a) Law No. 5 of 1999 on the Prohibition of Monopolistic Practices and Unfair Business Competition, (b) Government Regulation No. 57 of 2010 on Business Entity Mergers or Consolidation and Acquisition of Company Shares that May Cause Monopolistic Practices and Unfair Business Competition, and (c) the Business Competition Supervisory Board ("**KPPU**") Guidelines No. 2 of 2013;

(ii) the labour rights set by Law No. 13 of 2003 on Manpower;

(iii) the foreign investment rules under (a) Law No. 25 of 2007 on Investment, (b) Presidential Regulation No. 44 of 2016 on List of Business Fields Closed and Business Fields Open with Conditions for Investment ("**Negative List**"), and (c) Head of Investment Coordinating Board ("**BKPM**") No. 6 of 2018 on the Guidelines and Procedures of Investment Licensing and Facility;

(iv) applicable OJK regulations for banks, insurance and multi-finance companies; and

(v) the online registration system set by Government Regulation No. 24 of 2018 on the Electronic Integrated Licensing Services ("**GR 24/2018**").

1.2 Are there different rules for different types of company?

The general rules set by the Company Law apply to all companies. For specific sectors, such as banks, multi-finance, mining, insurance or public companies, additional rules and requirements apply.

1.3 Are there special rules for foreign buyers?

Not all business sectors are open for foreign participation. The government from time to time issues the so-called Negative List, setting out a classification of certain lines of business (also known as *Klasifikasi Baku Lapangan Usaha Indonesia* or "**KBLI**") that are either totally closed for investment (including businesses that are reserved for small and medium-scale enterprises) or opened for investment with certain conditions; for example (a) limitations on foreign ownership, (b) a requirement for local partnership, (c) limited permitted locations, and (d) a requirement for special licences.

1.4 Are there any special sector-related rules?

Yes, different sectors such as banks, multi-finance, insurance and mining have specific additional provisions that must be closely observed.

1.5 What are the principal sources of liability?

The Company Law and GR 27/1998 require any plan for a merger or acquisition to be announced in the nationwide newspapers and to the target's employees within 30 days prior to the call of the GMS. Within 14 days of the announcement, any creditors of the target have the right to object to the proposed merger or acquisition to the target's Board of Directors ("**BoD**"), and if such objection cannot be settled by the BoD, it must be resolved by the GMS. Note that the merger or acquisition may not proceed until the objection is resolved. The employees of the target do not have the same right to "block" the transaction, but they have the right to terminate their employment and seek severance payment.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

In practice, some parties structure the transaction as a business transfer rather than a shares transfer/shares subscription.

2.2 What advisers do the parties need?

The advisers needed by the parties depend on the scale and scope of the transaction. Potential buyers generally appoint legal and financial/tax advisors, but for specific cases such as those involving real property or industrial business, they may also appoint environmental advisors.

2.3 How long does it take?

The length of time it takes depends on the negotiation and due diligence process, but from a regulatory perspective, *at least* 30 days.

2.4 What are the main hurdles?

From the legal perspective, the hurdles vary depending on the type of companies and the approval required from government authorities (including the "fit and proper" test for banks, or insurance or multi-finance companies, or mandatory tender offer requirements for public companies).

2.5 How much flexibility is there over deal terms and price?

This is a contractual matter under Indonesian law, except in cases of mandatory tender offer or voluntary tender offer, in which case the price is subject to several minimum pricing requirements.

2.6 What differences are there between offering cash and other consideration?

For other considerations in the form of assets (such as land, equipment or other assets), the law requires these to be assessed by an independent assessor and announced in newspapers.

2.7 Do the same terms have to be offered to all shareholders?

The right of first refusal is a contractual matter in the Articles of Association ("**AOA**") of the company, while the pre-emptive right is a regulatory requirement; hence the answer is affirmative in the event of an issuance of new shares.

2.8 Are there obligations to purchase other classes of target securities?

Whether there are any obligations depends on the AOA of the target company.

In the case of acquisition of a public company resulting in a change of control, the mandatory tender offer rules apply to the new controller.

2.9 Are there any limits on agreeing terms with employees?

In the event of a merger or acquisition, the employees only have two options: (i) to continue employment under the existing employment contract; or (ii) to terminate the employment and receive severance payment.

2.10 What role do employees, pension trustees and other stakeholders play?

There is no specific role for employees. Please see our response to question 2.9 above.

2.11 What documentation is needed?

For acquisitions, the following documentation is typically needed: announcements; GMS Resolutions; a sale and purchase agreement or share subscription agreement; a deed of transfer; the shareholders register; a collective shares certificate; and notification to or approval from the Ministry of Law and Human Rights ("**MOLHR**") or other relevant government agencies, including the issuance of a Business Identification Number ("**NIB**") and a relevant merger report to be submitted to the Business Competition Supervisory Commission or the KPPU.

For mergers, the following documentation is typically needed: a merger plan; announcements; a deed of merger; the shareholders register; a collective shares certificate; and notification to or approval from the MOLHR or other relevant government agencies (including the issuance of a NIB) and a relevant merger report to be submitted to the KPPU.

2.12 Are there any special disclosure requirements?

In addition to the announcements described above, certain business sectors, such as finance and mining, require additional disclosures to the relevant government authorities. Also, for public companies, if the information is considered material, they are required to disclose it to the public.

Additionally, if the acquisition or merger met the threshold which requires a merger or acquisition report to be submitted to KPPU, the company is also required to submit certain documents such as a financial report, the company's profile, the structure of the company's group, an acquisition or merger summary, etc.

2.13 What are the key costs?

The key costs are the notary fee and advisor (legal, financial) service fee, and severance payment to employees if they decide to terminate their employment.

2.14 What consents are needed?

The following consents are needed: (i) approval from any organs as required under the target's AOA; (ii) approval/notification from creditors or other parties as may be required under the target's agreements; (iii) any government having authority over the company, depending on the target's sector; and (iv) approval by the MOLHR if a merger amends certain key provisions of the AOA.

2.15 What levels of approval or acceptance are needed?

Unless otherwise provided in the company's AOA, the quorum for merger and acquisition is at least ¾ of the total amount of shares with voting rights and approved by at least ¾ of the total number of votes cast in the GMS.

2.16 When does cash consideration need to be committed and available?

The acquisition of existing shares is a contractual matter between the parties. Acquisition by way of issuance of new shares requires prior approval from/notification to the MOLHR.

3 Friendly or Hostile

3.1 Is there a choice?

This is not a regulatory matter and purely a contractual matter.

3.2 Are there rules about an approach to the target?

No, there are no such rules.

3.3 How relevant is the target board?

The BoD of the target has a significant role, because it is required by law to act for its company's interest and not the shareholders. Also, if the transaction is based on the initiative of the BoD, the Company Law requires the BoD to prepare a merger or acquisition plan.

3.4 Does the choice affect process?

This does not apply in Indonesia as per question 3.1.

4 Information

4.1 What information is available to a buyer?

For private companies, there is no reliable public registry system in Indonesia where a person can easily and freely access information on a company. The Minister of Law and Human Rights maintains a company registration system, but this can only be accessed by a public notary and the information may not be comprehensive. Therefore, in Indonesian M&A, cooperation of the targets in a due diligence process is essential as the investor has to rely on the information provided by the target(s). For public companies, corporate information is generally more available due to disclosure requirements under Indonesian capital market law and regulations.

4.2 Is negotiation confidential and is access restricted?

This is basically a contractual matter, except in relation to public companies. Parties need to carefully observe the insider information rules and the disclosure requirements.

4.3 When is an announcement required and what will become public?

- a pre-acquisition/merger announcement in a newspaper and to employees should be done 30 days before the date of the GMS to approve the transaction; and
- a post-acquisition/merger announcement within 30 days of the relevant acquisition or merger becoming effective must be made.

In addition, specifically for the acquisition of a public company, disclosure of material information must be done two business days after the information comes to be known and the new controller must announce the acquisition in a daily newspaper and on the target company's website, Indonesian Stock Exchange's and/or OJK's website within two days of the date of acquisition. In relation to a merger: a pre-merger announcement of the summary of the merger plan must be made in a national newspaper or on the Indonesian Stock Exchange and target company's websites within two business days of the date the target company obtains approval from the OJK board of commissioners.

4.4 What if the information is wrong or changes?

Indonesia Company Law does not specify a specific measure, but considering the relevant organ of the company may be held liable for negligence, the target should re-announce the correct information.

Specifically for the merger of a public company, any change of information must be announced in a national daily newspaper or on the Indonesian Stock Exchange and target company's websites.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Listed shares can be bought from the market and the consideration will follow the market price. However, if the acquisition is made through a voluntary tender offer, the buyer must buy through the prescribed process and period, at the consideration determined in the announcement of the voluntary tender offer. For non-public companies, shares can only be bought from existing shareholders or by subscribing new shares.

5.2 Can derivatives be bought outside the offer process?

Yes, derivatives can be bought outside the offer process.

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Disclosure to OJK applies when a buyer acquires 5% or more of a company's shares. The same applies to derivatives in the event such derivatives are converted into shares. In addition, disclosure to the public in a daily nationally circulated newspaper or on the Indonesian Stock Exchange's website is required if the acquisition or conversion is above 50% or results in a change of control.

5.4 What are the limitations and consequences?

There is no limitation except for purchases through a voluntary tender offer as per question 5.1 above. Any violation of that mentioned in question 5.1 above is subject to an administrative sanction in the form of a written warning, fines, suspension of business activity, revocation of licence, and cancellation of any approval and/or registration.

6 Deal Protection

6.1 Are break fees available?

This is a contractual matter under Indonesian law.

6.2 Can the target agree not to shop the company or its assets?

This is a contractual matter under Indonesian law.

6.3 Can the target agree to issue shares or sell assets?

Yes, with the appropriate prior approval of the GMS and, if relevant, the BoD and/or Board of Commissioners.

6.4 What commitments are available to tie up a deal?

This is a contractual matter, but normally break fees are available.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

This is generally based on a contractual agreement between the parties, taking into account public policy, general corporate principles such as fair business competition and good faith principles.

7.2 What control does the bidder have over the target during the process?

As direct control over the target will only arise once the bidder has completed the transaction, the bidder usually gains certain indirect "control" over the target through negative covenants under the conditional sale and purchase agreement.

7.3 When does control pass to the bidder?

Control passes to the bidder once it validly becomes a shareholder, unless there is a contractual limitation through negative covenants.

7.4 How can the bidder get 100% control?

Under the Indonesia Company Law, a company must have a minimum of two shareholders. Therefore, theoretically a shareholder may directly hold up to 99.9% control. However, indirect shareholding is possible through shared ownership of the target by the bidder's subsidiary or sister company. Note that this is subject to any shareholding restriction the target may have relating to its business activities.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

No, discussions do not have to be published.

8.2 What can the target do to resist change of control?

This is not a regulatory matter in Indonesia.

8.3 Is it a fair fight?

See the response to question 8.2.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

Governmental authorities' approvals and preparation of documents and compliance with the timeline of procedure of acquisition under Company Law are major influences on the success of an acquisition.

9.2 What happens if it fails?

There are basically no regulatory penalties, unless contractually agreed otherwise.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in your jurisdiction.

In 2017, KPPU introduced a new draft amendment to the Antitrust Law. In relation to the Merger Rules, KPPU proposed (i) to change the requirement from "post-notification" to "pre-notification", (ii) to amend the definition of "business actor" to also include those conducting business outside Indonesia but affecting the Indonesian market, (iii) to introduce a leniency programme, and (iv) to include acquisition of assets as part of the subject for merger control. To date, the draft is still under discussion.

Acknowledgment

The authors would like to thank Andhika Indrapraja for his invaluable assistance during the preparation of this chapter. Mr. Andhika Indrapraja is a bright young Indonesian qualified lawyer with more than three years of experience, assisting clients on M&A, Real Estate, and General Corporate, with a specific focus on structuring foreign direct investment, mining, real property and construction.

Tel: +6221 5080 8600 / Email: aindrapraja@wplaws.com

Luky I. Walalangi

Walalangi & Partners
(in association with Nishimura & Asahi)
Pacific Century Place, 19th Floor, SCBD Lot 10
Jl. Jenderal Sudirman Kav. 52–53
Jakarta 12190, Indonesia

Tel: +6221 5080 8600
Email: lwalalangi@wplaws.com
URL: www.wplaws.com

Luky Walalangi is an expert and a leading lawyer in Banking and Finance, with more than 17 years of experience, whom *Asialaw Profiles* cites as "one of the best corporate lawyers in Indonesia". He is well-respected and highly regarded among leading finance practitioners. He is recognised by international law journals, including *Chambers Asia Pacific* (in M&A Practice as a recognised practitioner), *IFLR1000*, *Asia Pacific Legal 500* and *Asialaw Profiles*. He was recognised by *Asia Business Law Journal* 2018 as one of the A List: Indonesia's Top 100 Lawyers and was nominated as Managing Partner of the Year by *ALB Indonesia* Law Awards 2018. He was recognised by *IFLR1000* 2018 as a Highly Regarded Lawyer and a leading lawyer in Banking, Competition, M&A, Project Finance and Real Estate Finance.

In the most recent 2019 *Asialaw Profiles* surveys and research, Luky Walalangi was among the five best lawyers. He was also recognised by *Chambers Asia Pacific* 2019 as a Leading Individual in M&A and Corporate and recognised by *IFLR1000* 2019 as a Highly Regarded Lawyer.

Siti Kemala Nuraida

Walalangi & Partners
(in association with Nishimura & Asahi)
Pacific Century Place, 19th Floor, SCBD Lot 10
Jl. Jenderal Sudirman Kav. 52–53
Jakarta 12190, Indonesia

Tel: +6221 5080 8600
Email: snuraida@wplaws.com
URL: www.wplaws.com

Siti Kemala Nuraida is an Indonesian qualified lawyer with more than five years of experience focused on banking and finance, multi-finance fintech and construction laws and regulations.

Prior to joining Walalangi & Partners, she worked as an intern in one of the most prestigious Singaporean law firms and as an associate in one of the biggest law firms in Indonesia.

While pursuing her law degree, she was active in several campus organisations such as the Students' Executive Body (Badan Eksekutif Mahasiswa) and Asian Law Students' Association (ALSA) where she served as Director of Local Chapter Universitas Indonesia. She also represented Universitas Indonesia's Law Faculty in a number of national debate competitions as a participant as well as adjudicator. After she graduated, she attended a six-month course at King's College, London, on Financial Risk, Stability, and Regulation.

During her years of practice, she has been involved in numerous deals and transactions relating to multifinance and fintech industries.

WALALANGI & PARTNERS
in association with NISHIMURA&ASAHI

Walalangi & Partners (W&P) was founded by Mr. Luky I. Walalangi, a highly regarded lawyer with nearly two decades of experience. W&P is a corporate firm focusing on M&A, Banking & Finance, Real Property, FDI, Antitrust, Debt & Corporate Restructuring, Capital Markets, Employment, General Corporate and TMT.

W&P is regarded by *IFLR1000* as a Recommended Firm and by *Asialaw Profiles* 2019 as a Recommended Firm in Real Estate, TMT, Banking & Finance and Corporate M&A. In the *ALB* 5th Annual ILA 2018, W&P was a finalist for Rising Law Firm and shortlisted for Banking, Real Estate & Construction Law Firm of the year.

Mr. Luky Walalangi is regarded as a Leading Individual in Corporate/M&A by *Chambers Asia Pacific*, as a Leading Lawyer by *IFLR1000* and as one of the Five Best Lawyers in Indonesia by *Asialaw Profiles*. *Asia Business Law Journal* lists him as one of the A-List: Indonesia's Top 100 Lawyers.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Financial Services Disputes
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com