Global Public M&A Guide - Indonesia

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*This content was last reviewed around June 2022.*

# Overview

## 1. Overview

[Last updated: 1 June 2022, unless otherwise noted]

Indonesia is characterized by strong domestic consumption that has helped it to weather the global economic slowdown. Indonesia's capital markets authority, known as the Financial Services Authority (*Otoritas Jasa Keuangan* or the "OJK") (previously known as the Capital Market and Financial Institutions Supervisory Agency (*Badan Pengawas Pasar Modal dan Lembaga Keuangan* or the "Bapepam-LK")), has introduced rules to strengthen its supervisory and enforcement capacity over Indonesia's capital markets and to promote sound and transparent capital markets. The OJK's actions in rearranging the regulatory framework could bolster the investment climate, particularly in the capital markets sector.

# General Legal Framework

## 2. General Legal Framework

[Last updated: 1 June 2022, unless otherwise noted]

Indonesia's jurisprudence is based on the European civil law system. Ongoing regulatory changes mean that careful consideration is required of the issues that arise in mergers and acquisitions.

Indonesian law is constantly changing and many provisions in laws, are not always clear. In addition, there will most likely be amendments to existing laws and regulations or new laws and regulations in the near future.

**2.1 Practice and regulatory procedure**

The practices, procedures and policies of the relevant Indonesian government agencies, including the Ministry of Law and Human Rights, Bank Indonesia, the OJK and the Capital Investment Coordination Board (*Badan Koordinasi Penanaman Modal* or the "BKPM") through the Online Single Submission ("**OSS**"), and in some cases, the Business Competition Supervisory Commission (*Komisi Pengawas Persaingan Usaha*) are as important in consummating a transaction as the Indonesian laws governing M&A.

Company Law and M&A regulations

The current Company Law was enacted in July 2007 and was partially amended by Law No. 11 of 2020 on Job Creation Law ("**Job Creation Law**") and sets out a statutory framework for the combination of businesses conducted through limited liability companies. The Company Law promotes fair competition and the protection of minority shareholders in particular. It also considers the interests of the company, its employees and society.

Capital Markets Law

Where a merger or acquisition proposal involves a public company, the companies involved are also required to comply with the general requirements of Law No. 8 of 1995 on Capital Markets ("**Capital Markets Law**") and the regulations of the OJK.

The OJK issues new regulations on a regular basis as the capital market sector continues to mature. The regulations can be accessed through the OJK's website at <http://www.ojk.go.id>.

Since 31 December 2012, the functions, duties, and authorities of Bapepam-LK have been assumed by the OJK. Existing laws and regulations relating to public companies and the capital markets remain valid as long as they do not conflict with or have not been replaced by the regulations issued by the OJK.

Other laws

For M&A involving certain sectors/industries, public companies are also required to comply with the specific laws and regulations governing those sectors/industries, e.g., banking, insurance, broadcasting and telecommunications.

**2.2 Types of transactions**

The Company Law succinctly defines and differentiates between the concepts of merger, consolidation, spin-off and acquisition.

A merger is a lawful act executed by one or more companies to merge with an existing company(ies), which causes the dissolution of the merging company(ies) but the continuing existence of the surviving company.

A consolidation is a lawful act executed by two or more companies to fuse together, forming a new company, followed by the dissolution of both (or all) of the consolidating companies.

A spin-off is a lawful act whereby either:

all of the assets and liabilities of a company are transferred by law to two or more companies and the transferring company is dissolved by law; or

a part of the assets and liabilities of a company are transferred by law to one or more companies and the transferring company still maintains its existence.

An acquisition is a lawful act executed by a legal entity in the form of a company or other entity, or by an individual, to take over all or a majority of a company's shares, whether existing or newly issued, which may cause a change in the control of the company. The Company Law does not define the meaning of "control" but it is reasonable to assume that the term refers to the capacity to determine, directly or indirectly, in any way, the management or policies of the company concerned.

Acquisitions that do not fulfil the criteria of size and control fall outside the acquisition requirements and procedures set out in the Company Law. Where there is a change in control through the issuance of new shares by a company, this will be considered a change in control initiated by management.

**2.3 Public company considerations**

Where one or more public companies are involved in a merger, consolidation, spin-off, acquisition or other corporate action, then in addition to complying with the Company Law, the Investment Law and other relevant laws, the more extensive corporate and disclosure requirements of the Capital Markets Law must be followed. The regulations issued by the OJK and the Indonesia Stock Exchange (the "IDX") to regulate the merger, consolidation, spin-off or acquisition of public companies also need to be followed.

There will be circumstances where the Capital Markets Law is not entirely clear, and thus further case-by-case clarification or confirmation with the OJK would be required.

Apart from the normal takeover route, there are other avenues through which investors can acquire a shareholding, including:

Acquisition of a shareholding through a rights issue;

Acquisition of a shareholding through a private placement (non pre-emptive rights issuance)

Acquisition of a shareholding through a debt-to-equity swap

**2.4 Foreign investment restrictions**

As discussed above, public companies are regulated by the OJK (in addition to public companies, the OJK also supervises the bank and non-bank financial institutions sectors). Investors, especially foreign investors, should consider restrictions regulated by BKPM.

Unless specifically provided under separate regulations, there are, in theory, no limitations on the percentage of shares that can be held by foreigners in public companies as "indirect or portfolio investment". There is no specific definition of "indirect or portfolio investment", but the understanding is that this is a "non-controlling" investment. The extent of a shareholding will depend on issues such as whether there is a larger Indonesian single shareholder and whether the foreign shareholder can control the public company. In 2021, the positive investment list was introduced as a replacement for the 2016 negative investment list. The general principle of the positive investment list is that a business sector is open to 100% foreign investment unless it is subjected to a specific type of limitation. Detailed advice based on the latest market practice and policy is required. Please note that there are some limitations in other business sectors apart from those listed in the positive investment list, and thus specific advice should be obtained.

# Before a Public Takeover Bid

## 3. Before a Public Takeover Bid

[Last updated: 1 June 2022, unless otherwise noted]

**3.1 Shareholding in listed companies**

The following table describes the spectrum of “control” of public companies in Indonesia that investors should consider:

|  |  |
| --- | --- |
| **Shareholding Ownership** | **Key rights under the Company Law (subject to stricter provisions in the articles of association)** |
| One share | * The right to file a lawsuit against the company if the shareholder has been harmed by actions of the company which it considers unfair and with no reasonable grounds, as a result of resolutions of the general meetings of shareholders, board of directors' meetings and/or board of commissioners' meetings of the company; * The right to request the company to purchase its shares at a fair price if the shareholder disagrees with certain actions taken by the company which cause losses to the company or the shareholder; * The right to access and inspect the register of shareholders, special register, minutes of general meetings of shareholders, circular resolutions, financial documents and other documents of the company; and * The right to request the dissolution of the company on the grounds that it is impossible to continue the company's operations. |
| At least 10% of the issued shares with voting rights | * The right to request that a general meeting of shareholders be convened; * The right to file a lawsuit on behalf of the company against the board of directors, the board of commissioners, a member of the board of directors or a member of the board of commissioners; and * The right to request that an examination be conducted into the company if there is "reason to suspect" that the company has committed an unlawful act which is detrimental to the shareholders or to third parties, or that the board of directors or the board of commissioners of the company have committed unlawful acts that are detrimental to the company, the shareholders or third parties. |
| At least more than 50% of the issued shares with voting rights | * The right to appoint members of the board of directors and the board of commissioners; and * The right to approve an increase of paid up and issued capital. |
| At least 66.7% of the issued shares with voting rights | * The right to approve amendments to the articles of association of the company; * The right to approve an increase of the authorized capital; and * The right to approve a buyback or repurchase of shares and a reduction of capital of the company. |
| At least 75% of the issued shares with voting rights | * The right to approve the submission of a bankruptcy petition to the court; * The right to approve the dissolution of the company; and * The right to approve the transfer or encumbrance of all or more than one-half of the company's net assets in one accounting year, either in one or in a series of transactions. |

**3.2 Purchase of minority stakes**

If a share purchase does not result in a change in the control of a public company, the sale and purchase process may be carried out in the regular, cash or negotiated markets on the IDX. The parties who intend to sell and/or purchase shares should instruct brokers that are registered members at the IDX to do so, whereby the settlement of the transfer will be done through the C-BEST System in the Indonesian Central Securities Depository (*Kustodian Sentral Efek Indonesia*).

Under the Capital Markets Law and OJK Regulation No. 11/POJK.04/2017 on Reporting of Share Ownership in Public Companies ("**Regulation 11/2017**"), with regard to the ownership and the changes of ownership of shares in a public company (i) each director or commissioner of the public company holding any shares, directly or indirectly, in that public company; or (ii) each individual, company, joint venture, association or organized group that has direct or indirect ownership of a minimum of 5% of the paid up capital in the public company ("**Reporting Party**"), must report to the OJK no later than 10 calendar days after the transaction date. Please note that there is no shareholding threshold for the directors and commissioners. Consequently, even if a director or commissioner only owns 1% shares in the public company, the obligation to make a disclosure under Regulation 11/2017 will apply. A report must also be submitted after there is a change of at least 0.5% of the paid up capital in the Reporting Party's share ownership of the public company, either in one transaction or a series of transactions. However, this is not the case for directors or commissioners, as they need to submit a report if there is any change of share ownership (even one share). Regulation 11/2017 allows the foregoing reporting to be made by a proxy. In such a case, the reporting must be done by the proxy within five days of the date on which the transaction takes place.

Regulation 11/2017 provides a template to report shareholdings to the OJK. The report must include the following information:

Name, address and nationality of the Reporting Party

Name of the public company whose shares are owned by the Reporting Party

Number and percentage of shares, both before and after the transaction

Number of shares purchased or sold

Sale or purchase price

Date of transaction

Purpose of transaction

Status of ownership, i.e., direct or indirect

Under Regulation 11/2017 and based on our discussions with officials of the OJK on a no-name basis, if a direct/registered shareholder is not the ultimate beneficial owner of the shares, both the direct/registered shareholder and the ultimate beneficial owner of the shares must submit reports to the OJK. The submission of the report by the registered owner will not eliminate the obligation of the ultimate beneficial owner to submit its report and vice versa. In addition, if the ultimate beneficial owner holds the shares through various layers of entities, each entity must also submit reports to the OJK even though all of these reports are duplicative as they disclose the same share ownership.

**3.3 Insider trading**

Indonesian insider trading regulations are contained in Articles 95 to 99 of the Capital Markets Law and are quite restrictive. Generally, Indonesian insider trading regulations provide that individuals who obtain insider information due to their positions or professions, or due to business relationships with a public company, are considered to be insiders for a period of six months after the relationship ceases. "Insider information" means any material information of a price-sensitive nature that an insider has and that is not yet available to the public.

Insiders in possession of insider information are prohibited from buying or selling securities of the public company, or of other companies engaged in transactions with the public company. The following individuals will be considered as insiders with respect to insider trading:

Commissioners, directors or employees of a public company.

Principal shareholder(s) of a public company (shareholders directly or indirectly holding 20% shares of the public company).

Individuals who, due to their position, profession or business relationship with a listed or public company, are able to obtain inside information.

Parties who, within the six months before the relevant date, fell into one of the above categories.

If an insider wishes to sell its shares while holding insider information, this can only be done if the buyer has the same information. OJK Rule No. 78/POJK.04/2017 on Securities Trading That is Not Prohibited for Insiders ("**OJK Rule 78**") exempts off-the-exchange securities transactions between an insider in possession of insider information and a party who is a non-insider, so long as:

All insider information must be disclosed to the party who is a non-insider.

The party who is a non-insider cannot use the insider information other than for the purpose of transactions with that particular insider.

The party who is a non-insider must make a written statement (sign a confidentiality agreement) that all the insider information obtained will be kept confidential and will not be used for purposes other than the proposed securities transaction with the relevant insider.

The party who is a non-insider cannot trade in (i) the relevant public company’s securities or (ii) the securities of other companies engaged in transactions with the public company, for a six-month period from the date the party who is a non-insider obtains that insider information, other than with the relevant insider.

Insiders and other parties conducting transactions that are exempted under OJK Rule 78, must submit a report to the OJK concerning the transaction within 10 calendar days after the completion of the transaction.

# Effecting a Takeover

## 4. Effecting a Takeover

[Last updated: 1 June 2022, unless otherwise noted]

**4.1 Triggering a "Takeover"**

Under OJK Regulation No. 9/POJK.04/2018 dated 27 July 2018 on Takeovers of Public Companies, ("**Regulation 9/2018**"), a "takeover" of a public company is defined as an action directly or indirectly causing changes to the controller(s) of the public company. The controller of a public company is defined as the party(ies) that:

owns more than 50% of the total issued and paid up share capital, directly or indirectly; or

has the ability to directly or indirectly determine, in any manner whatsoever, the management and/or the policies of the public company.

Regulation 9/2018 provides examples of documents or information evidencing control of the management of public companies. These documents or information include:

an agreement between the shareholders that provides a shareholder with more than 50% of the voting rights in the public company

a document that provides, or information that shows, the authority of a shareholder to regulate the financial and operational policies of the public company based on the articles of association or an agreement

a document that provides, or information that shows, the authority of a shareholder to appoint or dismiss most members of the Board of Directors and the Board of Commissioners

a document that provides, or information that shows, that a shareholder has the majority voting rights in the Board of Directors and Board of Commissioners meetings, and hence controls the public company

a document that provides, or information that shows, other authority that indicates control over the public company

Any actions that result in a change in the controller(s) of a public company will trigger a mandatory tender offer. An increase in an investor's shareholding, where the investor is already considered to be in control of a public company, does not constitute a change in control requiring a tender offer to be made (please see below).

**4.2 Takeover to be followed by mandatory tender offer ("MTO")**

Unless the takeover falls under an exemption, it must be followed by an MTO for all of the remaining shares, except for the:

shares owned by the selling shareholder(s);

shares owned by another party(ies) that the acquirer has offered to purchase under the same terms and conditions;

shares owned by other parties that are also undertaking a (different) tender offer on the shares of the  target company (a competing tender offer);

shares owned by the principal shareholder(s), i.e., shareholders directly or indirectly holding 20% shares of the public company; and

shares owned by other controlling shareholders of the target company.

The MTO process (submission of MTO statement to OJK, information disclosure, etc.) must start within two working days after the takeover announcement and must be implemented in accordance with Regulation 9/2018. The timeline for an MTO is as illustrated below.

**4.3 Requirement to divest**

Under Regulation 9/2018, if, as the result of the MTO being made after the takeover, the new controller owns more than 80% of the total paid-up capital of the target company, the new controller must, within two years after the completion of the MTO, transfer some of its shares to the public so that at least 20% of the total paid-up capital of the target company are owned by the public.

Regulation 9/2018 also stipulates that if, as a result of the takeover, the new controller owns more than 80% of the total paid-up capital of the target company, the new controller must, within two years after the completion of the MTO, transfer to the public at least the same amount of shares as it purchased during the MTO so that these shares are owned by the public.

The distinction between these two scenarios is that, in the first, the new controller does not obtain more than 80% in the initial takeover. In the latter scenario, the new controller does obtain more than 80% in the initial takeover.

**4.4 Voluntary tender offers**

A tender offer could be made without acquiring an initial controlling stake in a public company. Under OJK Regulation No. 54/POJK.04/2015 on Voluntary Tender Offers, a voluntary tender offer ("VTO") is defined as an offer made through the mass media to acquire equity securities through the purchase or exchange of other securities. Aside for acquiring shares, this VTO provision is also relevant for a "go private" process, which is discussed below.

# Timeline

## 5. Timeline

[Last updated: 1 June 2022, unless otherwise noted]

The following is a typical indicative timeline for a takeover of a public company if an MTO is triggered.

|  |  |  |
| --- | --- | --- |
| No. | Actions | Indicative Timing |
| 1 | Closing of the takeover – Causes change of control in the public company. | D Day |
| 2 | Takeover announcement - The new controller (the acquirer) announces the takeover in at least one Indonesian daily newspaper with national circulation (or, if the new controller is also a public company, the IDX's website) and submits to the OJK information which contains:   * the number of acquired shares, price per share, the total purchase price, name of the shareholders from whom shares are being acquired, if the shares are acquired from specific shareholder(s)/off-market, and the new controller's total ownership; * the details of the new controller, including name, address, phone number, email, line of business, board compositions, capital structure and the line of business (if the new controller is a legal entity); * the purpose of the takeover (i.e., the purpose of controlling the target company); * a statement that the new controller is an Organized Group, if applicable; * the beneficial owner of the party who conducted the takeover, if such party is not the beneficial owner; * the affiliation between the controlling shareholder and the target company, if applicable; and * the details regarding the approval from the relevant authority, if applicable. | D + 1 Business Day ("**BD**") = Y |
| 3 | Request to undertake the MTO - The new controller (the acquirer) submits cover letter, the text of the announcement of the disclosure of information about the MTO, including the necessary supporting documents, to the OJK and the target company.  The text announcement should contain at least the following information:   * background of the takeover * information on the shares, covering:   description of the number and percentage of the acquired shares;  the number and percentage of the target company's shares which are owned, directly or indirectly, by the new controller, including options to purchase or the right to obtain dividends or any other benefits and also the power to use the voting rights in the target company's general meetings, name of the shareholders from whom shares are being acquired (if the shares are acquired from specific shareholder(s)/off-market), the takeover price, total takeover value and date of the takeover   * information on the new controller, covering:   if the takeover is conducted by an individual, the name, address, nationality and affiliation relationship with the target company (if any)  if the takeover is conducted by a party other than an individual, the establishment date, address, telephone number, email, business activity, capital structure, composition of the board of directors and board of commissioners, composition of the shareholders, beneficial owner, affiliation relationship with the target company (if any) and the explanation regarding the approval and requirements from the relevant authority (if any)   * details of the target company covering the name, address, telephone number, email and business activity * the agreements or activities between the principal shareholder or the existing controller and the new controller that have material impact, if any * terms and conditions of the MTO, covering:   the purchase price along with the explanation on how it is calculated  the MTO period  the payment terms  the purchase mechanism  the explanation regarding the approval and requirements determined by the Government which must be satisfied with respect to the MTO, if any   * a list of names and addresses of institutions and/or capital market supporting professions that are involved in the MTO * other material information:   the details on the law suit regarding the takeover, if any  the statement that the new controller has sufficient funds to complete the MTO and information on the source of such funds  the development plan for the target company;  any other material information so that the disclosure of the information on the MTO is not misleading | Y + 2 BD |
| 4 | OJK approval – The OJK approves the request of the new controller (the acquirer) to announce and commence the MTO.  Note:   * During the assessment by OJK, the new controller (the acquirer) must provide any documents/information requested by the OJK within five business days. * The prevailing regulations do not regulate how long the OJK has to make comments on the disclosure of information on the MTO. | X |
| 5 | MTO announcement – The new controller (the acquirer) announces the disclosure of information on the MTO in a daily newspaper with national circulation (or the IDX's website1).  The MTO announcement must include the same information as the text announcement described in row 3 above. | X + 2 BD = A |
| 6 | Commencement of the MTO – The MTO must start at the latest one day after the MTO announcement. | A + 1 Calendar Day ("CD") |
| 7 | MTO period – The MTO must be open for a fixed period of 30 days. | A + 31 CD |
| 8 | Settlement period – The MTO settlement must be completed within 12 days after the end of the MTO period at the latest. | A + 43 CD = S |
| 9 | Report to the OJK – The new controller (the acquirer) reports the result of the MTO to the OJK after the settlement is completed. | S + 5 BD |

1 This can only be done if the new controller is also a public company.

**5.1 Indicative timeline for a mandatory public takeover offer in Indonesia**

Click here to view diagram for [Indonesia](https://resourcehub.bakermckenzie.com/en/-/media/global-public-ma-handbook/files/2022-version/timeline_indonesia_2022.pdf?sc_lang=en)

# Takeover Tactics

## 6. Takeover Tactics

[Last updated: 1 June 2022, unless otherwise noted]

While takeovers through a VTO are possible, they are not common in Indonesia since Indonesian public companies generally have a controlling shareholder (who controls the majority of the shares and may not be willing to sell their shares in the VTO). The more common takeover process would be to negotiate directly with the existing controlling shareholders to acquire the controlling stake in the public company. Unless exempted, these would then be followed by an MTO for all the remaining shares (as described in 4.2 above). A new feature that was introduced under Regulation 9/2018 is that no MTO is required where the control is acquired due to a takeover that has been disclosed in the IPO prospectus of a public company, where the closing must be completed no later than one year after the registration statement for the IPO becomes effective. Therefore, it is possible under Regulation 9/2018 for an acquirer to avoid an MTO if the takeover is properly disclosed in the target company's IPO prospectus.

# Squeeze-out of Minority Shareholders after Completion of the Takeover

## 7. Squeeze-out of Minority Shareholders after Completion of the Takeover

[Last updated: 1 June 2022, unless otherwise noted]

Unlike many jurisdictions, in a public company takeover in Indonesia, the acquirer does not have a right to squeeze-out or compulsorily acquire shares from minority shareholders.

# Delisting

## 8. Delisting

[Last updated: 1 June 2022, unless otherwise noted]

For a delisting or "go private" in Indonesia,  OJK Rule No. 3/POJK.04/2021 on Implementation of Capital Market Activities ("**OJK Rule 3/2021**") requires the following considerations to be addressed:

There are three types of go private, namely (i) voluntary go private, (ii) go private due to an order from OJK, and (iii) go private due to a request from IDX.

A "go private" process must not contravene the public company's articles of association and the prevailing provisions of the Capital Markets Law. Going private can only be done following a resolution of a general meeting of shareholders at which only independent shareholders can vote, i.e. the main shareholder seeking to take the public company private cannot vote.

The process must not harm public investors, particularly with respect to determining the price. The share purchase/buyback process must be smooth and emphasis must be placed on the public interest.

The implementation of a go private plan (after being approved by the independent shareholders) will be done in accordance with (i) OJK Rule No. 54/2015 through a voluntary tender offer process ("**Voluntary Tender Offer**") or (ii) OJK Rule No. 30/2017 through share buyback ("**Share Buyback**").

In general, there cannot be more than 50 shareholders after going private but the OJK may have discretion to increase this. In one precedent, the OJK agreed to increase the threshold to 300 shareholders on a discretionary basis.

Going private also includes a delisting from the IDX. In order to go private, the voluntary delisting rules of the IDX must be complied with, e.g. once the Voluntary Tender Offer or Share Buyback is implemented, the company should request the delisting of its shares from the IDX.

The result of the general meeting of shareholders resolving to go private must be reported to the OJK and announced to the public at the latest at the end of the second working day after the general meeting of shareholders approves the "go private" process, under, among other things, OJK Regulation No. 31/POJK.04/2015 on Disclosure of Material Information or Facts by Issuers or Public Companies.

Please note that different requirements and mechanisms will apply for a go private that is based on an order from OJK, or request from IDX.

You may also refer to Baker McKenzie's [Global Guide to Take-Private Transactions](https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQJsWJiCH2WAWHb%2FPDBPVvgoynF5xh3j3s&amp;nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQbuwypnpZjc4%3D&amp;attdocparam=pB7HEsg%2FZ312Bk8OIuOIH1c%2BY4beLEAeuDFUqE5GaTc%3D&amp;fromContentView=1), which covers some of the noteworthy features and requirements applicable to take-private transactions.

# Private investment in public equity - PIPE

## PIPE

[Last updated: 1 June 2022, unless otherwise noted]

Please refer to Baker McKenzie's [Global PIPE Guide](https://insightplus.bakermckenzie.com/bm/attachment_dw.action?attkey=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQJsWJiCH2WAVSwlzHifk1Y4A4d%2BBG8qtI&amp;nav=FRbANEucS95NMLRN47z%2BeeOgEFCt8EGQbuwypnpZjc4%3D&amp;attdocparam=pB7HEsg%2FZ312Bk8OIuOIH1c%2BY4beLEAevPtp6Dbiv5k%3D&amp;fromContentView=1) for the features and requirements applicable to PIPE transactions.

# Contacts

## 9. Contacts within Baker McKenzie

Iqbal Darmawan in the Jakarta office is the most appropriate contact within Hadiputranto, Hadinoto & Partners\* for inquiries about public M&A in Indonesia.

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