CHALLENGES AND OPPORTUNITIES FOR THE INDONESIAN SECURITIES TAKEOVER REGULATIONS: GENERAL FRAMEWORK AND ANALYSIS FROM DUTCH LAW AND THEORETICAL PERSPECTIVES

Yozua Makes
CHALLENGES AND OPPORTUNITIES FOR THE INDONESIAN SECURITIES TAKEOVER REGULATIONS: GENERAL FRAMEWORK AND ANALYSIS FROM DUTCH LAW AND THEORETICAL PERSPECTIVES

Yozua Makes

Abstract

This article examines question of the extent to which the rules in Indonesia concerning takeover of a public listed company: (1) facilitate efficient exchange of shares in the capital market with fair protection for all stakeholders in a takeover transaction pursuant to Good Corporate Governance (GCG) principles; and (2) accommodate principles and protection provided in the securities laws of more developed jurisdictions. These issues are addressed by analyzing the current Indonesian legal framework from the perspective of fairness and efficiency in the securities regulations and corporate governance principles. A comparative discussion of laws and regulations in Indonesia and the Netherlands follows. The article highlights several important findings from which the Indonesian legal system can learn from the Dutch law. First of all, the common practice of takeover of a public company in Indonesia is mostly conducted through acquisition of that company, which then leads to a mandatory offer. However, in the Netherlands, the initial step is more often that the prospective controller issues a public offer first, which then leads to the acquisition. Therefore, rules on mandatory tender offer have been more often applied in Indonesia, while in the Netherlands, the general rule on public offer holds higher importance. Furthermore, differences in market structure, business cultures, and practices might explain why several concepts and rules of offer under Dutch law are not relevant to the practice in Indonesia, as in the case of a hostile (unfriendly) offer, which has yet to occur in Indonesia, while in the Netherlands, this type of offer has gradually gained more practice. After describing these differences, it was found that there are several lessons that Indonesia can learn from the Dutch legal system on corporate governance and securities regulations. Firstly, there is a need to adopt a more substantive approach to information disclosure, rather than a mere formal screening. Secondly, there is a need to

---

1 The author is a founding partner of Makes & Partners Law Firm, a Jakarta-based law firm providing legal services in areas of corporate finance, mergers and acquisitions, capital markets and foreign investments. At present he is a Ph.D. candidate in a dual doctoral degree program between University of Indonesia and University of Maastricht, focusing his research on securities takeover regulations. He is an alumnus of the Faculty of Law at University of Indonesia, the University of California at Berkeley (Boalt Hall School of Law), the Asian Institute of Management, and Harvard Business School.
incorporate more protection for stakeholders, but with due observance of the Indonesian business and legal culture. Finally, there is also the need to strengthen both administrative and judicial authority to supervise capital market activities to ensure a fair, orderly, and efficient capital market.

Table of Contents

1. Introduction .............................................................................................................2
2. Securities Regulation in Indonesia – History and Legal Framework .....................9
   2.1. Historical development ....................................................................................9
   2.2. General legal framework .............................................................................13
3. Securities Takeover Regulations in Indonesia ......................................................15
   3.1. General company law ..................................................................................16
   3.2. Securities regulations ..................................................................................23
   3.3. Other relevant regulations ...........................................................................47
4. Perspectives from the Dutch Law .........................................................................54
   4.1. General information on the Dutch securities regulations .................................54
   4.2. Lessons learned for Indonesia ......................................................................57
5. Indonesia’s Securities Takeover Regulations from the Perspectives of Efficiency and Fairness Theory .....................................................................................................76
   5.1. Fairness and efficiency theory ......................................................................76
   5.2. The application in securities takeover regulations ..........................................81
6. Final Remarks .......................................................................................................88

1. **Introduction**

There is increasing attention given to the importance of takeovers with regard to supporting Indonesia’s economic growth. Indonesia has experienced a significant increase in takeovers in its capital market either through asset or share acquisition, which is one of the contributing factors and a stimulus to the positive trend of the Indonesia Stock Exchange (ISX) composite share price index.² The number and

² There are no comprehensive data on takeover deals available in Indonesia; hence information regarding takeovers is limited to companies listed on the ISX, or those deals that are announced publicly as required under the capital market regulations. In recent years, takeovers of companies listed on the ISX have been driven mainly by the mining and retail sectors. Other industries also active in takeover deals are telecommunications and banking.
value of takeovers affect the dynamics of the capital market. A takeover is one of the most influential corporate actions that drive capital market activities because it reflects the economic fundamentals and market perception of the issuer. An inefficient “market for corporate control” would discourage optimal corporate growth, and cumulatively in the long run, would result in a more stagnant capital market. However, the benefit of the expected growth must be fairly allocated among the relevant actors, including the public and minority shareholders, as well as other stakeholders. Therefore, to support healthy growth of the market, securities regulations must facilitate transactions in the capital market by providing balance between fairness and efficiency.

This article examines the question of the extent to which the rules in Indonesia concerning takeover of a publicly listed company:

---

3 See the Merger and Acquisition (M&A) wave and its relationship with the economy of a country (i.e. the US) in William J. Carney, MERGERS AND ACQUISITIONS CASES AND MATERIALS 3-5 (Foundation Press, 2000).

4 Indonesia’s economic performance has itself attracted investors and encouraged investment. From June 2010 to June 2011, significant deals and transactions have been announced involving property, plantation and mining sectors which include, among others: acquisition of PT Berau Coal Energy and PT Bumi Resources (affiliated with Bakrie Group) by Vallar Investment UK Limited with a total transaction value of US$ 1.3 billion; acquisition of PT Duta Pertiwi TBk, PT Sinar Mas Wisesa and PT Sinar Mas Teladan (affiliated with Sinar Mas Group) by PT Bumi Serpong Damai TbK with a total transaction value of US$ 440 million; and acquisition of PT Domas Agro Inti Prima and PT Sawitmas Agro Perkasa (affiliated with Domba Mas Group) by PT Bakrie Sumatera Plantation TbK with a total transaction value of US$ 310 million. During the same period, Indonesia witnessed more than 34 deals with total value of approximately US$ 8.9 billion. These acquisitions were conducted either by the acquisition of shares or assets of another company.


6 For reference of the general economic structure of acquisition, see William J. Carney, supra note 3, at 21.
(1) facilitate efficient exchange of shares in the capital market with fair protection for all stakeholders in a takeover transaction pursuant to Good Corporate Governance (GCG) principles; and

(2) accommodate principles and protection provided in the securities laws of more developed jurisdictions.

The first part of the question will be addressed by analyzing the current Indonesian legal framework from the perspective of fairness and efficiency in securities law and corporate governance principles. A comparative discussion of laws and regulations in Indonesia and the Netherlands will address the second part of the question.

From a comparative perspective, there are several reasons why the Netherlands was chosen as a benchmark country. One reason is that the foundation of Indonesian company law is based on the Dutch company law following the colonial era, during which time the Netherlands was recognized as a pioneer of the stock exchange. However, over time many driving forces have influenced the shape of each country’s securities law and GCG principles. Both Indonesia and the Netherlands are concerned about corporate scandals in the United States (US) that prompted countries around the world to reconsider how corporate governance practices should be handled. Specifically in Indonesia, an even more determining factor was the country’s economic downturn during the 1997-1998 Asian financial crisis, for which

---


many experts argued that failure of corporate governance was a primary cause. Meanwhile, the corporate governance system in the Netherlands has witnessed important changes following a debate about the maintenance of defensive measures against takeovers in the first half of the 1990s. Another important factor in the Dutch takeover regulations is the introduction of the European Union (EU) Takeover Directive, which aims at creating a harmonized level playing field for the capital market throughout Europe to support the region’s economic integration. It is thus interesting to assess how these two countries, which share a common legal origin, have developed their rules on the takeover of public companies.

However, in order to have a proper comparison, there is a need to give attention to the difference between both countries in corporate structure, which also shapes the characteristics and objectives of the securities rules and corporate governance principles. The corporate pattern in Indonesia is still dominated by concentrated ownership in the hands of limited number of conglomerates that control market capitalization. In this case, the protection of minority shareholders versus majority or controlling shareholders becomes even more vital, compared to countries with dispersed ownership. On the other hand, the ownership structure in the Netherlands is one of the most dispersed in continental Europe, although not as dispersed as those of the US or the United Kingdom (UK). This difference in market

9 Jaron van Bekkum, Steven Hijink, Michael Schouten and Jaap Winter, Corporate Governance in the Netherlands, 3-5, (Netherlands Comparative Law Association, 1 October 2009).

10 See Dirk Van Gerven, ed, COMMON LEGAL FRAMEWORK FOR TAKEOVER BIDS IN EUROPE 4-8 (Cambridge University Press, 2008).


12 See Marc Goergen, Marina Martynova, and Luc Renneboog, supra note 8, at 261-267. See also John C. Coffee, “The Future as History: The Prospects for Global Convergence in Corporate
structure creates a different “structural barrier” to takeovers in each of the two jurisdictions, and may in turn also affect the differences in the “technical barriers” (such as defensive tactics by the target company’s management)\textsuperscript{13} in the event of a takeover deal.

The tension between fairness and efficiency in securities regulations has been examined from a theoretical perspective in the law and economics scholarship.\textsuperscript{14} The debate on corporate governance has also raised this issue, because of the different nature of company law and corporate governance on the one hand (which embraces \textit{fair} protection of not only shareholders but also stakeholders) and securities law on the other hand (which aims at facilitating \textit{efficient} market exchange among shareholders).\textsuperscript{15} Furthermore, Indonesia’s constitutional ideology underlying economic activities is also relevant to the discussion, i.e., in accordance with Article 33 paragraph (4) of the 1945 (Amended) Constitution, one of the principles guiding the national economy is “just efficiency” \textit{(efisiensi berkeadilan)}.\textsuperscript{16} All of these are


\textsuperscript{14} For philosophical discussion, refer to Louis Kaplow and Steven Shavell, Fairness versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice 1-5, (Harvard Law and Economics Discussion Paper No. 411 March 2003), Available at SSRN: http://ssrn.com/abstract=391060 (last access 10 February 2012).


\textsuperscript{16} Various scholars consider the inclusion of the word “efficiency” in the Indonesian Constitution to represent a “neo-liberal” approach to the national economy that violates the spirit of kinship \textit{(kekeluargaan)} and mutual support \textit{(gotong-royong)} on which the founding fathers of Indonesia were focused when envisioning the most appropriate economic system for Indonesia. For a compilation of discourses, see Sri Edi Swasono, \textit{INDONESIA DAN DOKTRIN KESEJAHTERAAN SOSIAL}:

\textsuperscript{2} Governance and its Significance,” \textit{93 (3) NORTHWESTERN UNIVERSITY LAW REVIEW} 641, 669-675 (1999).


\textsuperscript{6} Various scholars consider the inclusion of the word “efficiency” in the Indonesian Constitution to represent a “neo-liberal” approach to the national economy that violates the spirit of kinship \textit{(kekeluargaan)} and mutual support \textit{(gotong-royong)} on which the founding fathers of Indonesia were focused when envisioning the most appropriate economic system for Indonesia. For a compilation of discourses, see Sri Edi Swasono, \textit{INDONESIA DAN DOKTRIN KESEJAHTERAAN SOSIAL}:
contemplated within Law Number 8 of 1995 on Capital Market (“Law 8/1995”),
pursuant to which the objective of the law and regulatory institutions is to create an
orderly, fair, and efficient (teratur, wajar, dan efisien) capital market in the interest of
shareholders and society as a whole.

It is important to first define what is meant by “acquisition” and “takeover.”
The term “acquisition” is commonly used in corporate finance for the purchase of
shares and/or assets in a company from another party by an acquirer which results in a
change of control in the target company (in the case of share acquisition) or a change
in ownership of assets. In various jurisdictions other than Indonesia, such as in the US
and UK, the term “takeover” is commonly used to describe the acquisition of a
controlling interest in a public company. There is no agreed upon formal English
translation of the similar Indonesian term “pengambilalihan” as set out in Law No. 40
Year 2007 regarding Company Law (“Law 40/2007”) and Government Regulation
No. 27 Year 1998 regarding Company Merger, Consolidation, and Acquisition (“GR
27/1998”). One may note that the word commonly used in Indonesia is “acquisition”;
however the term is also occasionally translated as “takeover.” In this article the
terms “acquisition” and “takeover” are used interchangeably in reference to acquiring
a controlling interest in a company or its assets.

Further, some clarification has to be made of the practice of takeovers in each
country before carrying out a clear comparison between laws in Indonesia and the
Netherlands. The common practice of takeover of a public company in Indonesia is
generally conducted first through acquisition of shares in the company, which then
leads to a “mandatory offer”. However, in the Netherlands, as in other jurisdictions in

DARI KLASIKAL DAN NEOKLASIKAL SAMPAI KE THE END OF LAISSEZ-FAIRE, 12, (Perkumpulan
Prakarsa, 2010).

17 In practice, the rule covered by Bapepam Regulation No. IX.H.1 on “Pengambilalihan
Perusahaan Terbuka” is translated into “Takeover of Public Company”.
Europe, the initial step is generally that the prospective acquirer first issues a “public offer,” which then leads to the acquisition. Therefore, rules on “mandatory tender offer” in Indonesia have been more frequently applied, while in the Netherlands, the general rule on “public offer” (which covers both “mandatory tender offer” and “voluntary offer”) holds higher importance. Further, different business cultures and practices might account for the fact that a hostile (unfriendly) offer has yet to be practiced in Indonesia, while in the Netherlands, this type of offer has gradually gained more practice.

After examining these differences, several lessons are found that Indonesia can learn from the Dutch legal system regarding corporate governance and securities regulation. With regard to corporate governance structure, the main tension is between the shareholder-oriented approach and the stakeholder-oriented approach, in which Indonesia can learn from the Dutch protection of minority shareholders and high emphasis placed on the role of employees in takeovers. Further, regarding securities regulation, it is important for the law to ensure that there is no leakage of information resulting from strategic behavior of the market participants, which may be detrimental to the public interest. In doing so, not only Indonesia’s Capital Market and Financial Institution Supervisory Agency (Bapepam-LK), but also the judiciary can play a role in ensuring a fair, orderly, and efficient capital market.

As a final introductory note, this article is structured as follows. This first section summarizes the main issues as well as their importance. The second section will provide an overview of the underlying legal and institutional framework in Indonesia, which serves as an introduction to the rules and institutions being discussed in the subsequent section. The third section will discuss the laws and regulations concerning general acquisition and takeover of publicly listed companies.
in Indonesia. The fourth section discusses which part of Indonesia’s securities takeover regulations can be improved from the perspective of Dutch law. The fifth section focuses on theoretical analysis of Indonesia’s securities takeover regulations. The final section concludes with normative findings.

2. Securities Regulation in Indonesia – History and Legal Framework

2.1. Historical development

The Indonesian capital market has been in existence since the Dutch colonial period and was reestablished in 1952 after the country gained its independence. However, the capital market in Indonesia started to become active only in the nineteen eighties when certain Indonesian companies began to pursue public listing more actively following the financial sector deregulation which started in 1987. Law 8/1995 sets out the basic legal system for a modern capital market to develop. Despite its modernized system, however, the Indonesian capital market has been relatively exposed to external shocks and did not manage to sustain the shock of the 1997 Asian financial crisis. In 1997, Indonesia felt the heavy impact of the Asian financial crisis.

18 Jasso Winarto, ed., PASAR MODAL INDONESIA REFLEKSI LIMA TAHUN SWASTANISASI BEJ, 12, (Pustaka Sinar Harapan, 1997). After the static development of the stock exchange, in 1987 the Indonesian government implemented the 1987 December Policy (Pakdes 87) which relaxed the requirements for initial public offerings (IPOs) and foreign participation in the stock exchange. The following year also saw extensive financial sector deregulation for both the banking and capital market industries which enabled more issuers and investors to participate in the market.

19 The most recent example is the 2008 global financial crisis which also affected the Indonesian capital market, including slowing down the country’s growth rate and delaying several companies’ plans to launch initial public offerings (IPOs) due to market uncertainty. In October 2008, the composite share price index (Indeks Harga Saham Gabungan or IHSG) of the Indonesia Stock Exchange (Bursa Efek Indonesia) or IDX fell sharply, forcing IDX to suspend trading for several days. The suspension started on 08 October 2008 (when the IHSG dived 10.38% to the level of 1,451.669 points) and lasted until 13 October 2008.
financial crisis, which even led to a multidimensional political and social crisis. What started out as a currency crisis in Thailand’s Baht eventually reached Indonesia as a systemic risk with the peril of losing foreign exchange reserve, which was further exacerbated by excessive demand for the US Dollar.\textsuperscript{20} By 1998, Indonesia’s GDP had contracted by 13 percent and the inflation rate reached 58.5 percent. Most sectors recorded negative growth. The construction sector was the worst hit, contracting by 36.5 percent, followed by finance (-26.6 percent) and trade (-18 percent).\textsuperscript{21} By mid-December 1997, the stock market composite share price index had fallen from a high of over 740 in July 1997 to 339; while the 270 listed entities had an aggregate market capitalization of Rp 134 trillion (US$15 billion), compared with 265 listed entities six months earlier with an aggregate market capitalization of Rp 260 trillion (US$106 billion). In short, the crisis had “halved the value of the securities listed in the JSX in rupiah terms and reduced it to one-seventh of its value in US dollar terms.”\textsuperscript{22}

Despite its collapse during the 1997 Asian financial crisis, the Indonesian capital market has enjoyed significant growth since then, particularly since 2004. From a composite index of 100 in 1982, the Indonesia Stock Exchange (IDX) reached 1,000 by the end of 2004, and eventually 3,821 by the beginning of 2012. Presently, the IDX is acknowledged by the international market as one of the best performing stock markets in the world. The Indonesian government also recognizes the


\textsuperscript{21} Saud Husnan, \textit{supra} note 25, at 2.

importance of the capital market as a key pillar in supporting Indonesia’s economic
growth, the country’s 2025 long term vision and development plan, and its policy of
the four-track (pro-poor, pro-growth, pro-job, and pro-environment) strategy
approach.  

The 1997 crisis has led to a new method of capital market regulation that
focuses more on promoting the principles of good corporate governance
(GCG). Notwithstanding Indonesia’s modern capital market system at that time,
failure in corporate governance is believed to be a key reason to explain why
Indonesia suffered so badly from the 1997 crisis, compared to other Asian countries.  

Certain studies consider weak corporate governance to have exacerbated the external
shock of the monetary crisis into a prolonged financial turmoil. For example, a survey
conducted by Booz-Allen in 1998 on East Asia gave Indonesia the lowest score on its
corporate governance index of 2.88, below Singapore (8.93), Malaysia (7.72), and
Thailand (4.89).  

Also, prior to 1997, McKinsey & Co had claimed that most of the
companies listed in the Indonesian capital market were overvalued due to poor
corporate governance. They found that ninety percent of the Indonesian public
companies’ market values were determined by growth expectation, and only ten
percent consisted of current earnings stream. In contrast, most company values of
public companies in developed countries were defined 30% by growth expectation

23 This was mentioned in the speech of the President of the Republic of Indonesia at the
opening day of the stock market in 2011, 03 January 2011, and during subsequent dialogues with
stakeholders of the capital market.

See “Presidential Speech, The Opening of the Trading Day at the Indonesian Stock Exchange
03 January 2011,” http://www.presidenri.go.id/index.php/pidato/2011/01/03/1553.html (last access
17 January 2011) and “Dialogue with the Stakeholders of the Indonesian Capital Market, 03 January
2011”, http://www.presidenri.go.id/index.php/pidato/2011/01/03/1555.html (last access 17 January
2011).

24 Benny Simon Tabalujan, Why Indonesian Corporate Governance Failed – Conjectures
Concerning Legal Culture, COLUMBIA JOURNAL OF ASIA LAW, 141, 147-158 (Spring 2002).

and 70% by current earnings stream, with the latter a better indicator of the true performance of a company.\textsuperscript{26} Johnson, Boone, Breach, and Friedman offer country-level evidence which suggests that weak legal institutions concerning corporate governance, particularly investor protection mechanisms, was an essential missing factor that worsened the stock market decline during the 1997 Asian financial crisis.\textsuperscript{27} In countries with low investor protection, net capital inflows were more sensitive to negative events that adversely affect investor confidence. In such countries the risk of expropriation increased during crises, in addition to lower expected returns on investment, which made collapses in currency and stock values more likely.\textsuperscript{28}

While there are issues peculiar to each market structure with respect to corporate governance, there is a general feature of unsatisfactory corporate governance across East Asia. Capulong, Edwards, Webb and Zhuang identified that the main feature of corporate governance weakness in the region was due to “highly concentrated ownership structure, excessive government intervention, underdeveloped capital markets, and weak legal and regulatory framework for investor protection.”\textsuperscript{29} The highly concentrated ownership structure, the majority of which is family-based, hinders the effective protection of shareholders. They argue that the high degree of concentration in the ownership structure “may have left the insiders with excessive power to pursue their own interests at the expense of minority

\textsuperscript{26} See “McKinsey Investor Opinion Survey on Corporate Governance, April 2000, in Sofyan Djalil, \textit{supra} note 34, p. 4.


\textsuperscript{28} Johnson \textit{et al}, \textit{supra} note 36, at 141-143.

\textsuperscript{29} Saud Husnan, \textit{supra} note 25, at 45-46.
shareholders, creditors, and other stakeholders.” During the post-1997 crisis in Indonesia, the National Committee on Governance Policy (Komite Nasional Kebijakan Corporate Governance or KNKCG, now the KNKG) was established under the Coordinating Ministry of Economy in 1999, and is the relevant main agency concerning GCG policies applicable in Indonesia. The KNKG is guided by the five pillars of GCG essential to improving corporate governance practices in Indonesia, which are: (1) transparency, (2) accountability, (3) responsibility, (4) independence, and (5) fairness.

2.2. General legal framework

The enactment of Law 8/1995 was the first attempt to establish a modern legal foundation for the Indonesian capital market in response to the global market and more sophisticated development of the global capital market industry. Replacing the previous Law 15/1952, its enactment was also in keeping with the country’s strategy to improve its economic growth and modernize the economy, as another major law, Law No. 1 of 1995 on Limited Liability Company (“Law 1/1995”), was also enacted during the same period (later updated and replaced by Law 40/2007). Two government regulations were enacted to equip Law 8/1995 with operational procedures, namely Government Regulation No. 45 of 1995 on the Operation of

30 Saud Husnan, supra note 25, at 2.

31 The National Committee on Corporate Governance Policy (Komite Nasional Kebijakan Corporate Governance or KNKCG) was established in 1999 through Decree of the Coordinating Minister of Economy, Finance, and Investment Number: KEP/31/M.EKUIN/08/1999. The Committee was changed into the National Committee on Governance Policy (Komite Nasional Kebijakan Governance) in 2004 pursuant to the Decree of the Coordinating Minister of Economy Number KEP-49/M.EKON/11/TAHUN 2004.

32 Komite Nasional Kebijakan Governance, PEDOMAN UMUM GOOD CORPORATE GOVERNANCE INDONESIA, 3, (Komite Nasional Kebijakan Governance, 2006).
Capital Market Activities (“PP 45/1995”) and Government Regulation No. 46 of 1995 on Capital Market Investigation (“PP 46/1995”). Reform and improvement of securities regulations has been accomplished through technical regulations enacted by Bapepam-LK, the Indonesian securities regulator. The application of Law 8/1995 will still be deemed relevant in the present context, even in the aftermath of the 1997 crisis. It is important to note that Law 8/1995 serves as the “lex generalis” or general legal framework for activities in the capital market. Market participants who want to engage in Indonesian capital market activities (as issuers or investors) must also pay attention to other relevant “lex specialis” laws that govern each specific sector or industry, for example antitrust, foreign investment company, banking, telecommunication, or mining.

Law 8/1995 brings about at least four major contributions. Firstly, it establishes a strong basic framework for capital market activities, including the instruments, the market players, and the supporting institutions. Secondly, Law 8/1995 sets out the foundation for GCG principles which promote the protection of public shareholders, the most important one being the disclosure principle. Thirdly, Law 8/1995 introduces novel legal concepts that can be considered breakthroughs in the Indonesian legal system, such as “trust” adopted from the common law system and misappropriation of inside information. All of these are in keeping with the basic principle of an “orderly, fair, and efficient” (teratur, wajar, dan efisien) capital market.33

Fourthly, Law 8/1995 establishes the independent and adaptive institution of the Capital Market Supervisory Authority, Bapepam (now Bapepam-LK, the Capital

33 Article 7 paragraph (1) of Law 8/1995 states that the stock exchange is established to implement a securities market that is orderly, fair, and efficient.
Market and Financial Institution Supervisory Authority) which has been playing an effective role as regulator of the market. Over time, Bapepam-LK has become a strong regulator of the capital market industry that gives guidance, enacts, regulates, conducts supervision on day-to-day market activities, institutes investigations (both administrative and criminal), and imposes sanctions. In December 2005, Bapepam was merged with the Directorate General of Financial Institutions and became Bapepam-LK which also has the authority to supervise the insurance and pension fund market.\textsuperscript{34} Further, in November 2011, the Indonesian Parliament enacted Law Number 21 of 2011 concerning Financial Service Authority (Law 21/2011) pursuant to which Bapepam-LK will be merged with the supervisory role over the banking industry previously held by the Central Bank to create a sole financial supervisory body: the Indonesian Financial Service Authority (FSA) (\textit{Otoritas Jasa Keuangan}, or OJK). This is to provide function-based, integrated, and more independent supervisory activities in the financial sector. Previously, Bapepam-LK was under the Ministry of Finance, which might be considered as reducing its independence in several contexts.

3. Securities Takeover Regulations in Indonesia

The takeover of a publicly listed company in Indonesia is subject to at least three legal regimes. \textit{Firstly}, takeover is another form of acquisition under the basic company law, applicable to both privately held and publicly listed companies.\textsuperscript{34} Pursuant to Decree of the Minister of Finance KMK 606/KMK.01./2005 on 30 December 2005, Bapepam was merged with the Directorate General of Financial Institutions to become Bapepam-LK and also supervise the insurance and pension fund market. However the name Bapepam-LK is still frequently shortened to “Bapepami” in common usage.
Secondly, with regard to the securities regulations applied to publicly listed companies, the Indonesian regulations as enacted by the parliament, the government, and the Bapepam-LK, are applicable. Thirdly, in addition, it is important to address other applicable particular and industry-specific regulations.

3.1. General company law in Indonesia

In general, the statutory framework for conducting business through the form of a limited liability company is set out in Law No. 40 of 2007 on the Limited Liability Company ("Law 40/2007") and various implementing regulations such as Government Regulation No. 27 of 1998 on Mergers, Consolidation and Acquisition of Limited Liability Companies ("GR 27/1998"). By way of background: Law 40/2007 replaced the previous Law 1/1995, however, prior to the enactment of Law 1/1995, for almost 150 years, the Indonesian Commercial Code ("ICC") had prevailed. The ICC dates back to 1847, at the time when Indonesia was under the colonial rule of the Netherlands, and the Netherlands East Indies Code of Commerce was promulgated.\(^{35}\)

The ICC and Law 1/1995 do not provide a specific definition of an "acquisition." However, a definition of acquisition can be found in Article 1 point 3 of GR 27/1998, which states that an acquisition is a legal action taken by a legal entity or an individual person to acquire all or most of the shares in a company resulting in the change of control of the company. A similar provision is also found in article 1

\(^{35}\) The ICC was a translation of "Wetboek van Koophandel, Staatsblad" 1847:23, which still prevailed as law even after the independence of Indonesia in 1945 pursuant to the Transitional Provision on the 1945 Constitution of Indonesia. In 1963, the Circular Letter of the Supreme Court No. 3 of 1963 states that the Indonesian Civil Code (as the basis for the Indonesian Commercial Code) is no longer legally binding and serves only as guidance for judges to apply law. See Wahyono Darmabruta, HUKUM PERDATA, 57, (Jakarta: Setio Acnees, 2001), and Sri Soesilowati Mahdi, Surini Ahlan Sjarif, and Akhmad Budi Cahyono, HUKUM PERDATA (SUATU PENGANTAR), 13, (Gitama Jaya, 2005).
point 11 of Law 40/2007 which defines acquisition as a legal action taken by a legal
entity or individual person to acquire shares in a company resulting in the change of
control of the company. Nonetheless, Soebagjo argues that acquisition can be in the
form of a transfer of substantial assets, which also gives the same effect of change of
control. This is especially true if the acquisition of assets not only involves
acquisition of hard assets but also involves, among others, business and employees of
such acquired assets which then leaves the seller to lose its right to control the sold
“assets” to the buyer of the assets. Therefore, certain procedures for an acquisition of
assets are the same that apply to a transfer of shares. Law 1/1995 provides the rules on
transfer of shares in Articles 49 through 52. Law 40/2007 develops the same
requirements with minor revisions and additions.

The following are the general elements of acquisition in Indonesia pursuant to
the company law:

1. Acquisitions can be conducted by acquiring shares which have been issued
   and/or are to be issued by the company through the company’s board of
directors or directly by the shareholders.

2. Acquisitions may be conducted by legal entities or by individuals.

3. Such acquisition results in the passing of control over the company.

4. In the event an acquisition is conducted by a legal entity in the form of a
   company, prior to commencement of acquisition, the board of directors of the
   acquiring company shall obtain a resolution of a general meeting of
   shareholders (GMS) at which a quorum for attendance is present and the

36 The same definition of “acquisition” was also regulated under the previous company law,
Law No. 1 of 1995, Article 103 paragraph (2).

37 Felix Oentoeng Soebagjo, HUKUM TENTANG AKUISISI PERUSAHAAN DI INDONESIA, 136,
(Pusat Pengkajian Hukum, 2006).
requirements for adoption of a resolution of a GMS are fulfilled as provided in Article 89 (regarding quorum).

5. In the event that an acquisition is conducted through the board of directors, the acquiring party must announce the acquisition plan to the board of directors of the target company.

6. The boards of directors of the target company and the acquiring company with the approval of their respective boards of commissioners shall compile a draft acquisition plan containing at least:
   a. name and domicile of the acquiring company and the target company;
   b. the reasons and explanations of the board of directors of the acquiring company and the board of directors of the target company;
   c. the financial reports for the most recent financial year of the acquiring company and the target company;
   d. procedures for valuation and conversion of shares of the target company into exchange shares if payment for the acquisition is to be made by shares;
   e. the number of shares to be acquired;
   f. preparation of funding;
   g. pro forma consolidated balance sheet of the acquiring company after the acquisition, prepared in accordance with generally accepted accounting principles in Indonesia;
   h. method of settlement of rights of shareholders who do not agree to the acquisition;
i. method of settlement of the status, rights and obligations of members of the board of directors, board of commissioners, and employees of the target company;

j. estimate of the period of implementation of the acquisition, including the period for granting a power of attorney from the shareholders to the company’s board of directors to assign shares;

k. draft of any amendment of the articles of association of the company resulting from the acquisition.

7. In the event of shares being acquired directly from the shareholders, the provisions contemplated above do not apply.

8. A direct acquisition is subject to the provisions of the articles of association of the target company concerning the transfer of rights over shares and contracts made by the Company with other parties.

By law, the articles of association of a company must specify the method of transferring rights over shares in accordance with the provisions of applicable laws and regulations.\footnote{See Article 55 and 56 of Law 40/2007. A company’s articles of association are basically an agreement among the shareholders that serves as the constitution of the company, and hence the content is governed contractually among them. All Indonesian company articles of association must conform with requirements of the company law and be submitted to the Ministry of Law and Human Rights for approval. Over time, model provisions were developed for basic concepts, including transfer of shares. The following is an example of a standard provision regarding transfer of shares:}

**Transfer of Rights over Shares**

1. A transfer of share shall be based on a transfer deed signed by the transferor and the person who receives the transfer or their legal representative.
2. The transfer deed as meant in paragraph 1 and its copy shall be submitted to the Company.
3. The shareholder who wants to transfer its share must first offer them in writing to the other shareholders by mentioning the price and requirements of sales and notifying the Board of Directors in writing of the offering.
4. The other shareholders are entitled to purchase the shares offered within a period of 30 (thirty) days after the offer in accordance with the proportion of the total shares that they owned.
5. The company is obligated to guarantee that all shares offered in paragraph (3) are purchased with the appropriate price and paid in cash within period of 30 (thirty) days as of the offering.
notarial deed. The Board of Directors record the day and date of such transfer of rights over the shares in the shareholder register or the special register,\(^{39}\) and by no later than 30 (thirty) days from the recordation date of the said transfer of rights, the Minister (of Law and Human Rights) must also be informed of the change in the composition of the shareholders of the company in the shareholder register.\(^{40}\) If the notification is not made within the given time frame, the Minister has the authority to reject the application for approval or notification of the change in shareholding composition and names of the shareholders the company.\(^{41}\)

Further, the articles of association may provide requirements concerning transfers of rights over shares, including: (a) mandatory prior offer to holders of a particular class of shares or the other shareholders, in the form of a pre-emptive right; (b) mandatory prior approval from the company’s organs (i.e. GMS, board of directors).

---

6. If the Company cannot guarantee the implementation of provisions as meant in paragraph (5), the Shareholder may offer and sell/transfer shares to the employees before offering the shares to other person with the same price and requirements.

7. The shareholder who offers its shares as meant in paragraph (3) shall be entitled to revoke the offering at the end of the period meant in paragraph (4) of this article.

8. The obligation to offer the shares to other shareholders is only required to be done once.

9. A transfer of share rights shall only be permitted if all requirements in the Articles of Association have been fulfilled.

From the day of summons of the General Meeting of Shareholders until the meeting day, transfers of shares are not permitted.

\(^{39}\) According to Article 50 paragraph (1) and (2) of Law 40/2007, the Board of Directors is obligated to make and keep the shareholder register, which at a minimum contains the: (a) name and address of the shareholders; (b) amount, number, date of acquisition of shares held by the shareholders; and the classification in the event that more than one classification of shares has been issued; (c) amount paid-up for each share; (d) name and address of any individual or legal entity having a pledge over the shares or as the fiduciary guarantee of the fiduciary over shares, and the acquisition date of pledge on share or registration date of the fiduciary security; and (e) description of any payment of shares in a form other than cash. In addition, apart from the shareholder register, the Board of Directors is obligated to make and keep a “special register” containing information regarding the shares of the members of the Board of Directors and the Board of Commissioners, together with their families, in the Company and/or other Companies, as well as the date the acquisition of such shares.

\(^{40}\) See Article 56 paragraph (3) of Law 40/2007.

\(^{41}\) See Article 56 paragraph (4) of Law 40/2007.
directors and/or board of commissioners\textsuperscript{42}); and/or (c) mandatory prior approval from the competent authority in accordance with provisions of any other applicable regulations that may pertain to specific situations. These requirements do not apply in cases where the transfer of shares is caused by assignment of rights by operation of law (i.e. merger, consolidation, or spin-off), except the mandatory approval in (c) above, when in regard to inheritance.\textsuperscript{43}

As briefly mentioned above, one essential and commonly found feature in a company’s articles of association is the pre-emptive right provision, which is the obligation to transfer shares to the existing shareholders of the company prior to transferring to a third party.\textsuperscript{44} In the event that the articles of association require a selling shareholder to offer his/her shares to holders of shares with a particular classification or the other shareholders, and within a period of 30 (thirty) days from the date the offer is made, such other shareholders prove not to purchase, then the selling shareholder may offer and sell his/her shares to a third party. Any selling shareholder who is compelled to offer shares is entitled to withdraw the offer after the lapse of the 30 (thirty)-day period. This obligation is only required to be carried out once.\textsuperscript{45}

\textsuperscript{42} Article 1 point 2 of Law 40/2007 defines “Company Organs” as the General Meeting of Shareholders, the Board of Directors, and the Board of Commissioners. The option as to which organ needs to approve such transfer will be governed in the respective articles of association. In keeping with their shared legal origins, the management of Indonesian companies, like their Dutch counterparts, is split between a board of managing directors and board of “supervisory directors” called “commissioners” in Indonesia.

\textsuperscript{43} See Article 57 of Law 40/2007 (as a revision of Article 50 of Law 1/1995).


\textsuperscript{45} Article 58 of Law 40/2007.
With regard to the requirement to obtain approval from a company organ, the decision on a transfer of rights over shares which needs the approval of a company organ must be given in writing within a period of not more than 90 (ninety) days from the date the company organ receives the request for approval for the transfer of rights.\(^{46}\) If the period has lapsed and the company organ has not given a written statement, the company organ shall be deemed to have approved the transfer of rights over the shares.\(^ {47}\)

The company law also provides a rule regarding the quorum in the GMS for purposes of acquisition. A GMS for approving an acquisition may only be held if in the meeting at least ¾ (three quarters) of the total number of shares with voting rights are present or represented in the GMS and the resolution shall be lawful if approved by at least ¾ (three quarters) of the number of votes cast. However, Law 40/2007 further provides that the articles of association may specify a higher quorum to be present and/or a greater requirement for adoption of the GMS resolution.\(^ {48}\)

The company law defers to the procedures concerning transfers of rights over shares traded on capital markets as stipulated in the laws and regulations concerning the capital market.\(^ {49}\) For example, specific to the acquisition of a public company, a significant change in Bapepam Regulation No. IX.H.1. 2011 (discussed further below) is that a public company to be acquired (target company) is not obligated to obtain approval from the GMS, unless such approval is otherwise required by other laws and regulations specific to the company’s line of business. This rule was made in

\(^{46}\) Article 59 paragraph (1) Law 40/2007.

\(^{47}\) Article 59 paragraph (2) Law 40/2007.

\(^{48}\) Article 76 of Law 1/1995 and Article 89 of Law 40/2007.

\(^{49}\) Article 56 paragraph (5) of Law 40/2007.
order to avoid doubt between applicability of provisions in Law 40/2007 and Bapepam-LK policy. Thus, although the general company law is applicable to both privately held and publicly listed companies, nonetheless publicly listed companies are also further subject to securities regulations which may either prescribe additional requirements or set aside provisions in the company law.

3.2. **Indonesian Securities regulations**

*Basic concepts and definitions*

Takeover of a public company in Indonesia is governed under Bapepam Regulation No. IX.H.1, which has been updated and reenacted in various versions. This regulation was first enacted in the Decree of Head of Bapepam No. Kep-04/PM/2000 dated 13 March 2000 on the Takeover of Public Companies (hereinafter referred to as “Bapepam Regulation No. IX.H.1 2000”), and then amended and replaced by the Decree of Head of Bapepam No. Kep-05/PM/2002 dated 3 April 2002 on the Takeover of Public Companies (hereinafter referred to as “Bapepam Regulation No. IX.H.1 2002”). A significant change was made when a further amendment was enacted by Bapepam-LK,\(^50\) by virtue of the Decree of Head of Bapepam-LK No. Kep-259/BL/2008 dated 20 June 2008 on the Takeover of Public Companies (hereinafter referred as the “Bapepam Regulation No. IX.H.1 2008”) due

---

\(^{50}\)The letters “LK” are an abbreviation of “lembaga keuangan” or “financial institutions” which were added after Bapepam was granted the authority to supervise not only the capital market but also non-bank financial institutions, the latter of which were previously under auspices of the Directorate General of Financial Institutions (DGFI), Ministry of Finance. Both Bapepam and DGFI were under the structure of the Ministry of Finance, and therefore, the Minister decided to merge these two supervising authorities by Decree of Ministry of Finance No. 606/KMK.01/2005 dated 30 December 2005, as amended by Decree of Minister of Finance No. 466/KMK/.01/2006 dated 31 July 2006 on the Organization and Work Structure of Capital Market and Financial Institutions Supervisory Authority (Bapepam-LK).
to pressure exerted from various parties, in particular investors and legal advisors. Various new instruments were introduced in this Bapepam Regulation No. IX.H.1 2008, the most important of which was the mandatory selling requirement. The takeover regulation is also related to the tender offer regulation, first governed under Decree of Head of Bapepam No. Kep-10/PM/2000 on Tender Offer dated 13 March 2000 (hereinafter referred to as “Bapepam Regulation No. IX.F.1 2000”) and further amended by Decree of Head of Bapepam No. Kep-04/PM/2002 on Tender Offer dated 3 April 2002 (“Bapepam Regulation No. IX.F.1. 2002”).

Bapepam-LK recently updated these two regulations, by issuing: (i) the Decree of Head of Bapepam No. 264/BL/2011 dated 31 May 2011 on the Takeover of Public Companies (hereinafter “Bapepam Regulation No. IX.H.1 2011”) amending Rule No.IX.H.1 2008; and (ii) the Decree of Head of Bapepam No. 263/BL/2011 dated 31 May 2011 concerning Voluntary Tender Offer (hereinafter referred to as “Bapepam Regulation No. IX.F.1 2011”) amending the Rule IX.F.1 2002. These rules now clearly differentiate the procedures and requirements for a mandatory tender offer (triggered by a takeover of a public company) and for a voluntary tender offer. Therefore Regulation IX.H.1, which covers the conduct of a mandatory tender offer, no longer refers to Regulation IX.F.1 which covers the voluntary tender offer procedure.

The amendment of Regulation IX.H.1 is to clarify several provisions deemed uncertain by market participants, while the amendment of Regulation IX.F.1 is to harmonize the rule with the new mandatory tender offer procedures which were drastically revised in 2008 by Regulation IX.H.1. A significant change in Regulation IX.F.1 is regarding the determination of a voluntary tender offer price which is now in line with Regulation IX.H.1. The new Bapepam Regulation IX.F.1 2011 also incorporates procedures stipulated in Regulation IX.F.2 regarding Guidelines on the
Form and Content of a Tender Offer Statement and Regulation IX.F.3 concerning Guidelines on the Form and Content of Statement of a Target Company and Other Persons with Regard to a Tender Offer; therefore these two latter regulations are no longer applicable.

Bapepam Regulation No. IX.H.1. 2000, No. IX.H.1. No. 2002, No. IX.H.1. 2008, and No. IX.H.1. 2011 set forth a similar definition of a takeover. Takeover means “an activity, either directly or indirectly, that causes any change in a company’s control”. There are three essential elements that may be derived from this definition, i.e.: (1) an activity (or action), (2) the activity (or action) can be exercised either directly or indirectly, and (3) the activity (or action) causes a change in company control. The definition should also cover a general (voluntary) public bid made by a company to a certain target company, but since a general (voluntary) public bid in Indonesia is very uncommon, in practice so far it has been used to describe “acquisition” or takeover of a public company. The provisions concerning (voluntary) public bid are set forth in a different regulation, i.e. Bapepam Regulation No. IX.F.1 (of 2002 and 2011). Only in 2011, pursuant to the Bapepam Regulation No. IX.F.1 and No. IX.H.1 of 2011, was there a harmonization of Indonesian law regarding takeover rules and procedures, which has been reflected in the subsequent mandatory offer and voluntary tender offer.

In the above definition, the concept of “control” is key to determining a takeover in Indonesia. Bapepam Regulation IX. H.1. 2002 defined “company controller” as any person who (1) owns 25% (twenty five percent) of a company’s shares or more, unless that person could prove that he does not control the company, or (2) any person who directly or indirectly has the ability to control a company by: a) determining the designation and resignation of directors and commissioners; or b)
making any changes in the company’s article of association. This was a change from
the previous Bapepam Regulation IX.H.1. 2002, in which the threshold was set at
20% (twenty percent). Meanwhile, Bapepam Regulation IX. H.1. 2008 and 2011
define “company controller” as any person who owns 50% (fifty percent) of a
Company’s paid-up shares or more, or any person who directly or indirectly has the
ability to determine in any way whatsoever the management and/or policy of the
public company.

Based on the above, there are two ways of determining a company controller,
i.e., through the formal shareholding composition (quantitative approach) and the
actual control of the company (qualitative approach). Firstly, from the perspective of
the formal shareholding composition (quantitative) threshold, there was an increase in
the threshold from 20% (twenty percent) or more, to 25% (twenty five percent) or
more, and then to 50% (fifty percent) or more shareholding in the company. This is to
make the rule conform with Law 40/2007 which sets a 50% (fifty percent) threshold
limit for acquisition. New regulations have always increased the threshold for
takeover, arguably also to limit application of subsequent requirements (for
disclosure, mandatory tender offer, etc.) that might be burdensome for companies if
their corporate actions constitute a takeover. The increase of the threshold was due to
pressure from stakeholders, particularly issuers and public companies since the
number was considered too low for triggering takeover provisions. If an activity is
considered to be a takeover, there are several procedures (including corporate
approvals, Bapepam-LK approvals, and mandatory tender offer requirements) that
must be accomplished to complete the deal. These procedures can be very costly,
although the action may not actually affect control of a company.
Under the 2002 Regulation, there is a caveat for the 25% (twenty five percent) threshold, namely the act constitutes a takeover, “unless the person could prove that he does not control the company”. This means the burden was on the acquirer to prove that the shares to be acquired will not give him control. This caveat no longer exists after the threshold was increased to 50% (fifty percent) or more under the 2008 and 2011 Regulation.

Secondly, the qualitative approach is by determining who actually has de facto control of a company without regard to the formal shareholding composition. The 2002 Regulation is already broad in its definition, being “any person that directly or indirectly has the ability to control a company in the manner of: (a) determining the designation and resignation of member of the board of directors and commissioners; or (b) making any changes in the Company’s Article of Association.” However, the 2008 and 2011 Regulation makes the definition even more broad with the provision of “any person that directly or indirectly has the ability to determine in any way whatsoever the management and/or policy of the public company.” The discussion on this subject is relevant to another essential element of a takeover, i.e. that takeover is “a direct or indirect activity.” The 2002, 2008, and 2011 Regulation attempt to adopt the concept of the “ultimate controller,” a person who does not necessarily own the shares of a company, but can control, determine, and greatly influence the decisions of the company.

There are several definitions of a “person” as governed under the 2000, 2002, 2008, and 2011 versions of Regulation IX.H.1., who can be determined to be a controlling person that consequently is compelled to make a mandatory offer. A


52 See point 1.d. Bapepam Regulation IX.H.1 of 2011.
person can be a natural person, a company (*perusahaan*), a legal entity, a partnership, an association, or any organized group. Natural person refers to an individual. A company can be of any form recognized by law—including a limited liability company—that seeks profit; a legal entity can be a either local legal entity, foreign company, cooperative, a state owned legal entity (*badan hukum milik negara*), or the government (through the minister of finance), and an organized group can be in the form of a conglomerate group or a business family.

**Mandatory offer**

When a transaction is considered a takeover, the party that takes over is required to conduct a tender offer. According Bapepam Regulation No. IX.F.1 2002, tender offer means “an offer through the mass media to acquire equity securities by purchase or exchange with other securities.” However, pursuant to the most recent amendment of Bapepam Regulation No. IX.H.1 2011, a mandatory tender offer no longer refers to Bapepam Regulation No. IX.F.1 which is exclusive to voluntary

---

53 There are many examples of type of private and public companies in various jurisdictions. For example, in Holland: *besloten vennootschap* (BV) (private) and *naamloze vennootschap* (public); in France: *Société à responsabilité limitée* (SARL) (private) and *Société Anonyme* (S.A.) (public); in Germany: *Gesellschaft mit beschränkter Haftung* (GmbH) (private) and *Aktiengesellschaft* (A.G.) (public); in UK: private company and public company.

54 See Law 25 of 1992 on Co-operative. This legal entity is a form of community economic movement based on the principle of sharing (*kekeluargaan*).

55 An example of this is the State Owned Legal Entity (*Badan Hukum Milik Negara*) introduced in several state-owned academic institutions, and the Upstream Oil and Gas Executive Agency (BPMIGAS).

56 An example is State-Owned Enterprise pursuant to Law 19 of 2003 on State Owned Enterprise.

57 Bapepam Rule IX.H.1. describes an organized group as parties who are in concert to make plan, deal, or decide to cooperate to reach certain objectives.

58 See point 1(e) of Bapepam Regulation No. IX.F.1 2002.
tender offers (discussed further below). As contemplated in the 2000, 2002, 2008, and 2011 Regulation No. IX.H.1, in the event of a company takeover, the new controller of the company must conduct a mandatory tender offer for all remaining shares of the company. The shares that must be purchased by the new controller are the shares owned by shareholders prior to the announcement date of the proposed tender. However this requirement comes with several exceptions. Under Bapepam Regulation IX.H.1. of 2011 the following shares are excepted from the mandatory tender offer: 59

a. shares owned by a shareholder that has conducted the takeover transaction (that leads to mandatory tender offer requirement) together with the new controller of the company;

b. shares owned by any other person that has already received an offer with similar terms and conditions from the new controller of the company;

c. shares owned by any other person who, at the same time, also conducts a mandatory or voluntary tender offer for shares of the same company;

d. shares owned by substantial shareholders; 60 or

e. shares owned by other controllers of that company.

The mandatory tender offer requirement also does not apply to a takeover as a result of certain legal actions. Bapepam Regulation IX.H.1. 2008 and 2011 provide that the following actions do not trigger the mandatory tender offer requirement:

59 See point 3.a.2 of Bapepam Regulation IX.H.1. of 2011. These provisions have also been incorporated in the previous Bapepam Regulation IX.H.1. of 2002 and 2008.

60 Bapepam Regulation No. IX.F.1. point (1) describes Substantial Shareholder as any Person that directly or indirectly owns at least 20 % (twenty per cent) of the voting rights of a company’s issued shares.
a. marriage or inheritance;
b. purchasing or acquiring the target company shares, in the amount up to 10% (ten percent) of the outstanding shares with valid voting rights, within 12 (twelve) months;
c. exercising the duty and authority given by a state or governmental body or institution, based on law;
d. direct purchasing of shares owned and/or held by a state or governmental body or institution as a result of item c above;
e. any legally binding court decision or verdict;
f. merger, spin off, consolidation, or exercise of shareholder liquidation proceeding;
g. grant in the form of shares without any agreement to obtain any compensation in any form;
h. a certain debt guarantee that has been stated in the debt agreement; also a debt guarantee in the case of a company restructuring that has been ordered by a state or governmental body or institution, in accordance with law;
i. acquisition of shares as a result of exercising Regulation No. IX.D.1 and Regulation No. IX.D.4;\(^61\)
j. acquisition of shares due to policies of state or governmental institutions;
k. if the tender offer violates other laws and regulations; and
l. acquisition of shares from the exercise of a tender offer according to Regulation No. IX.F.1, conducted not as an obligation pursuant to this regulation (voluntary tender offer).

\(^61\) Regulation IX.D.1 governs pre-emptive right while Regulation IX.D.4 concerns capital increase without pre-emptive right.
Creeping Purchase Rule

As mentioned above, a transaction is excluded from the mandatory tender offer requirement if conducted gradually within the period of one year, with certain limits. This is called the “creeping share purchase rule.” The 2000 and 2002 Regulations state that the mandatory tender offer requirement does not apply to the purchase or acquisition of shares of a target company within a twelve month period, in the amount of up to 5% (five percent) of the outstanding shares with valid voting rights. Meanwhile, the 2008 and 2011 Regulations has increased the 5% (five percent) threshold to 10% (ten percent) of the outstanding shares with valid voting rights. This means an annual purchase of shares of up to 10% (ten percent) does not trigger a mandatory tender offer.62

The argument for the creeping share rule is that during the period when a party is gradually increasing share ownership, the other shareholders (particularly public shareholders) have sufficient time to know of the action and consider the situation and their response. Bapepam Regulation No. X.M.1. on the Disclosure of Information regarding Certain Shareholders,63 obligates a shareholder of a public company that owns more than 5% (five percent) of the shares of the company to disclose its identity, the price paid for the shares, and its intention for buying the shares.64 Since

---

62 Suppose A is one of the shareholders of PT XYZ, Tbk, holding 21% (twenty one percent) of its shares. Within each of the following three years, A bought 10% (ten percent) of the shares of the company from other shareholders of the company, until at the end of the third year, the final shareholding composition of A was 51% (fifty one percent). As a holder of 51% (fifty one percent) of shares of the company, A would become a controlling shareholder, through its share ownership creeping upwards at the rate of 10% (ten percent) per annum.

the disclosure of information is compulsory, the other shareholders can monitor the shareholding composition of the company by reviewing the public announcements made by the company. Therefore there is no reason for them to be surprised that the company has a new controller.\textsuperscript{65} The other shareholders may sell their shares during that period if they do not agree with the new controller of the company.

\textit{Free Float Shares (in a Mandatory Offer)}

Free float shares are shares retained by public investors in the stock exchange following a mandatory tender offer. Float shares do not include the following: (1) shares owned by the founders, board members, acquirers, or employees, which have control element, (2) shares owned by persons with controlling interest, (3) shares owned by the government, (4) shares owned via a Foreign Direct Investment (FDI) route, (5) strategic stakes by private persons, (6) shares owned by associated/group companies (cross-holdings), or (6) locked-in shares and shares which would not be sold in the open market in the normal course. In short, float shares are those available for (daily) trading in the stock exchange.

Bapepam Regulation IX.H.1. 2008 introduced a new rule to maintain the availability of float shares in the event of a takeover that triggers a mandatory tender offer. This is stipulated in point 3, point 4, and point 5 of the rule as follows:


\textsuperscript{65} See Hadiputranto and Oktavinanda, \textit{supra} note 78, at 52-53.
3. in the event a tender offer pursuant to this regulation (thus, a mandatory tender offer) results in share ownership of the new controller of more than 80% (eighty percent) of the paid up capital of a public company, the new controller shall be obligated to transfer back shares of the public company to the public such that at least 20% (twenty percent) of the paid up capital of the public company shall be owned by at least 300 (three hundred) parties within the time period of 2 (two) years upon the completion of the tender offer.

4. In the event that a takeover results in a new controller owning more than 80% (eighty percent) of the paid up capital of the public company, the new controller shall be obligated to transfer back shares of the public company to the public such that at least the percentage of shares publicly owned at the commencement of the tender offer shall be owned by at least 300 (three hundred) parties within the time period of 2 (two) years.

5. The obligation of the controller to transfer the shares as mentioned in point (3) and point (4) above does not apply if the public company, after the takeover, conducts corporate action which results in the fulfillment of the requirements set out in point (3) and point (4) above.

The 2008 Regulation introduces an obligation to resell if, after the tender offer, more than 80% (eighty percent) of the shares are owned and, within two years, to ensure that 20% (twenty percent) of the shares of the company are float shares, publicly held by at least 300 parties. The reason for this rule is to increase market liquidity and provide opportunity for public investors to own shares of the company.⁶⁶
Another alternative to comply with the regulation is to conduct corporate action pursuant to point (5). Such corporate action may include right issues or issuance of new shares through private placement. In that event, there is no obligation to release the shares back to the market because the new shares are available for public trading.

Another reason why Bapepam-LK established this rule is to prevent the use of tender offer as a means to “go private,” or delisting of a company from the stock exchange, which can also adversely affect market liquidity and market capitalization of the Indonesian Stock Exchange (ISX).  

This is relevant to the requirement under Bapepam Regulation No. IX.F.1. which states that if, as a result of a tender offer, the company can no longer fulfill the requirements to be listed in the stock market in which its shares are traded, the offeror of the tender offer shall be obligated to purchase all shares offered by all parties except the substantial shareholders. This means, if the tender offer leaves only small number of shares available in the market that do not fulfill the requirements for public trading, the remaining shares must be bought by the offeror and the company must apply for delisting.

The free float share requirement has raised strong concerns from market players. An acquirer who has conducted a tender offer will be forced to dump the shares in the market at a very low discounted price if it cannot sell the shares within the two-year period. This will affect the price of the shares held by the shareholders, especially the controlling shareholders. This reasoning was cited by the Malaysian Central Bank, Bank Negara, in July 2008 when it revoked an approval it had earlier given to Malayan Banking Berhad (“Maybank”) to acquire a controlling stake in PT

---


67 Two examples of “go private” transactions in the Indonesian capital market are PT Sari Husada Tbk in December 2006 and PT Aqua Golden Mississippi Tbk in September 2010.
Bank Internasional Indonesia Tbk. (“BII”), an Indonesian bank listed on the ISX. Bank Negara came to the conclusion, based on the information submitted by Maybank, that the twenty percent requirement could make Maybank suffer losses from the mandatory sell down two years after the tender offer. In addition, this “dumping” of shares can overcrowd the market with shares released in a same period, and therefore can affect the ISX composite index. The sell down can drag the ISX composite index to a lower point and thus can affect the price formulation of the ISX in general.

Further analysis indicates that the Indonesian capital regulatory authority might never want to approve the delisting to be conducted by the listed company. This is in keeping with the sell down obligation that tries to prevent going private. At present, a “go private” transaction is still governed by general law (lex generalis), such as Law 40/2007 (notably Article 37 paragraph (1), (2), (3), and (4)), Bapepam Rule IX.H.1. (takeover of public companies), and Bapepam Rule IX.E.1. (affiliated transaction and conflict of interest transaction). Additional rules are also provided in Regulation of the Jakarta Stock Exchange (BEJ) No. 1. on Delisting and Relisting in the Stock Exchange. In short, to go private and delist from the stock exchange is highly discouraged by the authority.

As a response to this problem, Regulation IX.H.1. 2011 stipulates the conditions under which Bapepam-LK can prolong the time period for re-float of shares, as follows: 68

1. The Composite Share Price Index (IHSG) at the Indonesian Stock Exchange (IDX) falls more than 10% (ten percent) over a period of 3 (three) consecutive

trading days;

2. The stock exchange where the shares are listed is closed;

3. Trading in the stock exchange is suspended;

4. The occurrence of a natural disaster, war, riot, fire, or strike that significantly affects the business of the company

5. The price of the shares during the period of resale is not or never was equal or higher than the price of the mandatory tender offer; and/or

6. The new controller has attempted to re-transfer the shares without success.

Offer Price

Another main issue in the Indonesian regulation concerning mandatory offer is the formulation of price. Bapepam Regulation IX.H.1. 2000 does not distinguish between the price for direct and indirect takeover. However the general rule is that the price is determined by the highest share price within a certain period. Bapepam Regulation IX.H.1. 2002, which has adopted the same approach, improved this rule by providing the following requirements, differentiating between a direct and indirect takeover, in determining the price of the tender offer: 69

a. In the event that the company takeover is directly exercised over shares of the target company that are unlisted and not traded in the stock exchange, the price of the tender offer must be at least the same as the price of the exercising price of the company takeover or the regular share price determined by an independent appraiser, whichever is higher.

69 See point 8 of Bapepam Regulation IX.H.1. of 2002.
b. In the event that the company takeover is directly exercised over shares of the target company that are listed and traded in the stock exchange but within 90 (ninety) days have been idle or temporarily suspended, the price of the Tender Offer must be at least the same as the highest share price within the last 12 (twelve) months prior to the last trading day or the day it is temporarily suspended, or the same as the exercising price of the company takeover, whichever is higher.

c. In the event that the company takeover is directly exercised over shares of the target company that are listed and traded in the stock exchange, the price of tender offer must be at least the same as the highest share price within the last 90 (ninety) days prior to the required date of publication, or the same as the exercising price of the company takeover, whichever is higher.

d. In the event that the company takeover is indirectly exercised over shares of the target company that are not listed and not traded in the stock exchange, the price of the tender offer must be at least the same as the regular share price determined by an independent appraiser.

e. In the event that the company takeover is indirectly exercised over shares of the target company that are listed and traded in the stock exchange but within the past 90 (ninety) days have been idle or temporarily suspended, the price of the tender offer must be at least the same as the highest share price within the last 12 (twelve) months prior to the last trading day or the day trading was temporarily suspended.

f. In the event that the company takeover is indirectly exercised over shares of the target company that are listed and traded in the stock exchange, the price
of tender offer must be at least the same as the highest share price within the last 90 (ninety) days prior to the required date of publication.

Both Bapepam Regulation No. IX.H.1. 2008 and 2011 adopt a new approach of setting the price as follows.\footnote{See point 4.c. of Bapepam-LK Regulation IX.H.1. of 2011 and point 12 of Bapepam-LK Regulation IX.H.1. of 2008.}

a. In the event that the company takeover is directly exercised over shares of the target company that are unlisted and not traded in the stock exchange, the price of the tender offer must be at least the same as the price of the exercising price of the company takeover or the regular share price determined by an independent appraiser, whichever is higher.

b. In the event that the company takeover is directly exercised over shares of the target company that are listed and traded in the stock exchange but within 90 (ninety) days or more prior to the required announcement or prior to the required negotiation announcement have been idle or temporarily suspended, the price of the tender offer must be at least the same as the average of the highest share price within the last 12 (twelve) months prior to the last trading day or the day trading was temporarily suspended, or the same as the exercising price of the company takeover, whichever is higher.

c. In the event that the company takeover is directly exercised over shares of the target company that are listed and traded in the stock exchange, the price of tender offer must be at least the same as the average of the highest share price within the last 90 (ninety) days prior to the required date of publication, or
prior to the required announcement of negotiation, or the same as the exercising price of the company takeover, whichever is higher.

d. In the event that the company takeover is indirectly exercised over shares of the target company that are not listed and not traded in the stock exchange, the price of the tender offer must be at least the same as the regular share price determined by an independent appraiser.

e. In the event that the company takeover is indirectly exercised over shares of the target company that are listed and traded in the stock exchange but within 90 (ninety) days or more prior to the required announcement of the rule or prior to the required negotiation announcement have been idle or temporarily suspended, the price of the tender offer must be at least the same as the average of the highest share prices within the last 12 (twelve) months prior to the last trading day or the day trading was temporarily suspended.

f. In the event that the company takeover is indirectly exercised over shares of the target company that are listed and traded in the stock exchange, the price of the tender offer must be at least the same as the average of the highest share prices within the last 90 (ninety) days prior to the required date of announcement, or prior to the required negotiation announcement.

Pursuant to the comparison above, the 2008 and 2011 versions of Regulation No. IX.H.1 introduce a new mechanism for setting the share purchase price in a mandatory tender offer triggered by a takeover. The present rule states that the price is the higher of (a) the average of the highest daily trading prices on ISX within the 90 day period before the announcement of the tender offer or the negotiation and (b) the takeover price. Under the 2002 Regulation, the price was the higher of (a) the highest
trading price on ISX within the 90 day period before the negotiation announcement and (b) the takeover price.

There are at least two significant changes in the new rules. Firstly, in relation to the announcement date, as mentioned in the previous sub-chapter, the announcement date under the 2008 Regulation can be made either at the commencement of negotiation that may result in a takeover or the completion of the takeover deal. This affects the price of the tender offer and therefore, acquirers must decide strategically when to announce the deal, and how it would affect the tender offer price. Secondly, the 2008 Regulation adopts the “average highest price” instead of the “highest price,” which is one major amendment that market players advocated. The use of highest price made the price very fragile from inside information which was leaked to the market to create an artificially high price for the tender offer. This does not mean that the 2008 Regulation could eliminate this problem, because information is difficult to contain. However, in such event, the price of the tender offer is determined by the average highest price, and therefore the impact of leaked information can be distributed by averaging.

Meanwhile, according to Bapepam Regulation IX.F.1. 2011, the minimum price of a voluntary tender offer is to be the highest of the following:

1. The highest voluntary tender offer price offered by the same party within 180 days prior to the announcement;

2. The average highest price at the stock exchange, trading within 90 (ninety) days prior to the announcement, in the event that the tender offer is exercised over shares and/or warrants that are listed and traded in the stock exchange;
3. The average highest price within 12 (twelve) months prior to the last trading day of such shares, if the shares and/or warrants are not traded in the exchange within the last 90 (ninety) days prior to the announcement;

4. A reasonable price determined by an appraiser, if the shares and/or warrants are not listed in the stock exchange;

If the object of the tender offer are debt securities that can be exchanged for shares, the price must be higher than the price of the securities upon issuance.

**Timing and procedures**

The first action to be taken in relation to a takeover of a public company and its subsequent mandatory tender offer requirement is to determine when to disclose the process to the general public. It is important to note that provisions concerning timing are strictly regulated for mandatory offer (Bapepam Regulation IX.H.1) but not for voluntary offer (Bapepam Regulation IX.F.1). The emphasis placed on regulation of the mandatory offer may be due to the fact that the practice of takeover in Indonesia has been mostly by a prior acquisition which triggers a mandatory offer, while (voluntary) public offers are not common. Information is crucial because the public will react to the takeover (plan), which will consequently affect the price of the shares traded in the market. If the public considers the takeover plan positively, the price of the shares of the target company may increase. Conversely, if the public considers the takeover to be a bad move for the company, the price of the shares may go down. Therefore, the decision to disclose the takeover plan significantly impacts the price of the shares; and this will also affect the price of the mandatory tender offer, as will be discussed further below.
Bapepam Regulation IX.H.1. 2008 and 2011 stipulate that disclosure at the start of the negotiation is not mandatory, as follows: “a prospective candidate for new controller making any negotiation, which may result in a company takeover, may report to the target company, Bapepam, exchange(s) where the target company’s subject shares will be listed, and the public.” In the event that a prospective candidate has announced the plan to conduct a takeover at the start of a negotiation, the 2002, 2008, and 2011 Regulation—without any substantial amendment—provide as follows:

1. Mandatory tender offer must commence at the latest 180 (one hundred eighty days) after the announcement;
2. Every material development in the negotiations must be reported on a regular basis to all parties mentioned in the provision, the report of which must be submitted at the latest at the end of the second day of such a development;
3. The information to be reported and announced include, among others:
   a. The estimated number of shares and the name of the company to be taken over;
   b. The identity of the prospective acquirer, which includes the name, address, telephone, fax, line of business, and the purpose of the takeover;
   c. The method and process used in the takeover; and
   d. The substance of the negotiation concerning the takeover.

Prior to the enactment of the 2008 Regulation, market players long questioned the reasoning for making a mandatory announcement of a takeover at the start of the negotiation under the 2002 Regulation. How is the “start” of a negotiation to be
determined? The regulation did not explain if a short verbal conversation between a director of the prospective company with a director of a prospective target company constitutes “the start of negotiation,” or whether it had to be done in a more formal way, such as a signed memorandum of understanding.

The 2008 and 2011 versions of Bapepam Regulation IX.H.1 introduce more flexibility on the timing of a takeover announcement. As the provision regarding the announcement at the start of the negotiation is made optional rather than mandatory, a prospective controller may announce a mandatory offer upon completion of the acquisition of a controlling interest. Both the 2002 and the 2008 Regulation IX.H.1 stipulate that a tender offer must commence no later than the end of the second business day after the company takeover takes place and must be performed in accordance with the Bapepam Regulation concerning Tender Offer (Bapepam Regulation No. IX.F.1). A tender procedure is initiated by submitting the Announcement of Proposed Tender Offer to Bapepam-LK, and the complete procedure will be further described below. Therefore at the latest upon the completion of a takeover deal, the new controller is obligated to disclose the transaction to Bapepam and consequently the general public. The difference is that under the 2008 Regulation, a prospective controller may choose between announcing the deal at the start of the negotiation for the takeover or at any time up to or upon completion. The strategic decision of the timing of the takeover announcement by the new controller is crucial because it will determine public response and the price of the shares.

This flexibility enables the acquirer to choose whether to announce the mandatory tender offer at the negotiation stage or up until completion of the takeover. The acquirer must then bear in mind the effect of their disclosure strategy on the price of shares in order to obtain the best value. For instance, if the acquirer announces the
takeover and subsequent plan of mandatory tender offer at the negotiation stage, the period upon which the share price of mandatory tender offer will be then calculated (locked) based on such date, and it will be easier for the acquirer to predict and determine the tender offer price. However, if the announcement of a mandatory offer is made only after the completion of a takeover this may suddenly increase the share price sharply which in turn may increase the price of the mandatory tender offer shares pursuant to the regulation. Therefore, the acquirer must carefully determine when to disclose the information.

In the exercise of a tender offer, the new controller is obligated to comply with the following:

1. Submitting an announcement on the disclosure of information for mandatory tender offer along with supporting documents to Bapepam-LK and the target company, no later than one day after the announcement of the takeover;
2. Submitting any amendment/additional information of the announcement on the disclosure of information for mandatory tender offer within 5 (five) days after Bapepam-LK grants the request to include such amendment/addition;
3. Announcing the disclosure of information for mandatory tender offer in one nationwide newspaper no later than 2 (two) working days after Bapepam-LK issues a letter authorizing the announcement;
4. Conducting the mandatory tender offer within the period of 30 (thirty) working days commencing one day after the announcement;
5. Settling the mandatory tender offer transaction in cash, no later than 12 (twelve) working days after the end of the tender offer period; and
6. Submitting the report of the mandatory tender offer to Bapepam-LK no later than 5 (five) working days after the settlement of the transaction.

The procedures for voluntary tender offer are simpler than for mandatory tender offer. The statement of voluntary offer becomes effective 15 (fifteen) days after all required documents are submitted and received by Bapepam-LK or 15 (fifteen days) after the last amended date submitted by the offeror. The voluntary offer shall commence at the latest 2 (two) days after the statement of voluntary offer becomes effective, and it shall last for at least 30 (thirty) days and can be extended to 90 (ninety) days.

*Anti Takeover Defense*

Regulations concerning anti-takeover measures are relevant to discuss in the event of a hostile takeover, i.e., a public offer proceeding without the consent of the board of directors of the target company. Hostile offers have not been traditionally common in Indonesia, because most takeover deals have been preceded by acquisition which then led to a mandatory tender offer. However, in the event of voluntary tender offer, pursuant to Bapepam-LK Regulation IX.F.1 2011, a statement to support or to discourage a voluntary offer may be made by: (a) the target company, (b) affiliate of the target company, (c) a competing offeror, or (d) those who take part in the deal as the ones that disclose information or express professional opinion. In addition, the board of directors or board of commissioners of the target company can also issue a written statement only if there is evidence that the information contained in the Offer Statement is incorrect or deceiving. Both of these types of statements must be
published in two nationwide newspapers, at least 10 days before the end of the voluntary tender offer period. There is also a general prohibition against the target company carrying out any deal or activity that might frustrate the voluntary tender offer during the offer period, but there is no concrete list of what would constitute such action.

The Role of the Supervisory Authority

The competent supervisory authority of the Indonesian capital market is Bapepam-LK, which as mentioned earlier, will soon be replaced by OJK. During its administration, Bapepam-LK has played an effective role in supervising the capital market. With regard to administrative authority and criminal investigative role over market participants, there is no significant change made by shifting authority from Bapepam-LK to OJK. Law 21/2011 on OJK mostly revises the governance structure (i.e. nomination and accountability) to establish regulatory independence.

Firstly, as part of its administrative authority, Bapepam-LK can commence administrative inquiry to maintain the integrity of the market, namely by requesting information from market participants, gathering and collecting documentary evidence, and instructing that market participants take certain actions to settle conflicts in the market. If a market participant fails to comply with the rules set out by Bapepam-LK, the institution has the power to impose administrative sanctions. With specific reference to takeover, Bapepam-LK holds the power to approve or not to approve the public offer (either mandatory or voluntary offer), and supervise all information disclosure during the process. Bapepam-LK also supervises the setting up of the offer
price, and subsequent obligations (including squeeze out and sell down obligations). Therefore, Bapepam-LK has an important role in every step of a takeover.

Secondly, with regard to administrative sanctions, Bapepam-LK can impose the following measures (Article 102(2) of Law 8/1995): (1) written warning, (2) monetary fine, (3) limitation of business activities, (4) suspension of business activities, (5) revocation of business license, (6) annulment of approval, and (7) annulment of registration.

Thirdly, with regard to criminal proceedings, Bapepam-LK, pursuant to article 101(3) can serve in the role of criminal investigator with the authority: (1) to receive reports, notices, or complaints regarding potential criminal activities, (2) to investigate the validity of reports regarding crimes in the capital market, (3) to investigate certain individuals considered to be alleged perpetrators of crimes, (4) to subpoena, request statements, and gather information or collect evidence regarding crimes, (5) to conduct investigations in any place deemed to have stored evidence on accounts, statements, or any document, and to seize them to serve as evidence of crime, (6) to request expert statements, and (7) to commence and terminate the investigation procedure.

3.3. Other relevant regulations

A takeover will also be subject to relevant legal regimes other than the basic company law and securities regulations. There are foreign investment restrictions if the shareholders are foreign entities, which are governed under the foreign investment law and sector-specific regulations. A takeover deal is also subject to competition law. And another important dimension is the application of employment law.
Foreign direct investment in Indonesia (direct as opposed to portfolio investment through the capital market) is regulated by Law No. 25 of 2007 on Investment ("Law 25/2007") and its implementing regulations issued by the Investment Coordinating Board, or BKPM. As the appointed regulator of direct investments in Indonesia, BKPM has mainly focused on the efforts of the government to attract foreign investors and build an international economic environment.

Recently the government issued Presidential Regulation No. 36 of 2010 which determines what business sectors are open or closed to foreign investors and, if it is open, up to what extent Foreign Direct Investment ("FDI") is permitted (also known as the “Negative List”). The new Negative List is the first and most important regulation that any foreign investor who is contemplating investment in Indonesia must consult and it is renewed every 3 (three) years. If the business of the companies in the contemplated merger and acquisition ("M&A") falls under the list of business fields that are closed to foreign investment as provided in the Negative List, then the foreign investor cannot invest in such business field in Indonesia. However, if the business falls under the list of fields which are “conditionally” open to foreign investment, then investment is permitted but the contemplated M&A involving foreign investors is limited by the restriction in ownership of shares as stated in the Negative List. In order to allow foreign ownership of shares, a purely Indonesian-owned domestic company ("PMDN company") will be required to convert its status to a “foreign investment company” ("PMA company") within the framework of the Investment Law. Below are examples of specific permitted FDI investments:
a. Banking: maximum foreign ownership is 100% (one hundred percent)

b. Finance companies: maximum foreign ownership is 85% (eighty five percent)

c. Insurance: maximum foreign ownership is 80% (eighty percent)

Most private foreign investments in Indonesia are administered and supervised by BKPM, which *inter alia* administers the application of the Negative List to foreign investment approvals. Most matters relevant to M&A transactions must be reported to and will require obtaining approval from the Chairman of BKPM.

In addition, Bapepam-LK regulates publicly listed companies. Unlike a private company, unless specifically provided for under a separate regulation, a publicly listed company has no restriction on ownership of shares if such investment involves foreign portfolio investors and not strategic foreign investors. The reasoning is that portfolio investment involves no intention to control the company, and aims only to gain financial benefits (both dividends and capital gains) for passive investors.

However, in practice there was uncertainty when a tender offer obligation contradicted the Negative List ownership requirements. One controversial case was in 2008 (but prior to the enactment of Bapepam Regulation IX.H.1. 2008) in which a takeover was subject to limitations because it was deemed to violate a foreign investment restriction. A similar case occurred earlier in 2006, when a tender offer

---

71 This case involves the takeover of PT Indosat, Tbk., a state-owned and publicly listed company, in which Qatar Telecom (QTEL) became its indirect controller after acquiring two of Indosat’s shareholders, Indonesia Communications Limited (ICLM) and Indonesia Communications Pte. Ltd. (ICLS). According to the then prevailing Negative List, Presidential Regulation No. 77 and 111 of 2007, foreign capital participation in a fixed telecommunications network was limited to 49% and foreign capital participation in cellular telecommunications was limited to 65%. The common perception was that portfolio investment in the capital market was not subject to FDI limitation. QTEL became an indirect controller of 40.81% of Indosat, and therefore could conduct a tender offer for all shares retained by the public in the stock exchange. However, because of the political interest and intervention in this case, the mandatory tender offer in the stock exchange was allowed to increase QTEL’s share ownership only up to 65%, pursuant to the foreign investment restriction. This was a compromise made to resolve foreign investment and securities regulations.
was restricted because there was potential conflict with a mining contract signed by the government.\textsuperscript{72}

\textit{Competition law}

Certain provisions of Law No. 5 of 1999 on the Ban on Monopolistic Practice and Unfair Business Practices (“Law 5/1999”) deal specifically with M&A, including in the capital market. Essentially, pursuant to Article 28 of Law 5/1999, M&A in Indonesia is prohibited if it results in monopolistic or unfair trade practices. Therefore, all efforts must be made to ensure that any contemplated M&A transaction does not give rise to a monopolistic or unfair trade/business practice. In addition, Law 5/1999 uses the market share standard as the parameter for ascertaining the presumption of a monopoly (if a business player has more than a 50% market share), for ascertaining the presumption of an oligopoly (if a group of business players has more than a 75% market share) and for determining the dominant position (if a business player has more than a 50% market share or a group of business players have more than a 75% market share, unless the dominant position is not abused). The Indonesian competition authority, the KPPU (Komisi Pengawas Persaingan Usaha) is responsible for supervising market competition and anti-competitive behaviour in

\textsuperscript{72} This example is regarding the acquisition of a 75.66\% stake in Inco Limited Canada (Inco Ltd), a controlling shareholder of PT Inco International Nickel Indonesia Tbk. (Inco) by Companhia Vale do Rio Doce (CVRD) in 2006. The minority shareholders of Inco asked Bapepam-LK to instruct CVRD to commence a tender offer for the remaining shares held by the public. The request was justifiable and in accordance with Bapepam Regulation IX.H.1. 2002 (which was applicable at that time). However, Bapepam-LK did not approve the request for tender offer, because according to Inco’s mining contract (Contract of Work or CoW), at least 20\% (twenty percent) of the shares of Inco must be owned by the Government, a local company, or the general public. If CVRD conducted a tender offer and accomplished buying all shares of the minority shareholders, then CVRD, a foreign investment company, would hold more than 80\% (eighty percent) of the shares of Inco, and this would violate the CoW. Bapepam Regulation IX.H.1. 2008 has already clarified the issue by stipulating a provision that a mandatory tender offer is excluded if the performance violates other laws and regulations.
Indonesia.

In July 2010, the Indonesian government issued Government Regulation No. 57 of 2010 on the Merger or Consolidation and Acquisition of Enterprise Share which may Result in Monopolistic Practices and Unfair Business Competition (“GR 57/2010”) followed by new KPPU Rules i.e. KPPU Rule No 10 of 2010, No 11 of 2010 and No. 13 of 2010 (collectively, “New KPPU Rules”) as the mandate of the Antimonopoly Law, wherein there are certain new provisions related to the consultation and pre-notification requirements for M&A transactions which replaced previous provisions.

Pursuant to the previous KPPU rules, there was a pre-notification process that was purely voluntary for the parties involved in an M&A. Under the New KPPU Rules the voluntary pre-notification has been replaced with the requirement for a consultation procedure and a more stringent requirement of a 30-day post-notification after completion of the contemplated deal.

GR 57/2010 and the New KPPU Rules state that such post-notification requirement must be fulfilled by the company conducting an M&A transaction in which:

a. the total value of assets of the companies concerned is more than 2.5 trillion Rupiah; or

b. the total turnover of the companies concerned is more than 5 trillion Rupiah;

Furthermore, it is also regulated in GR 57/2010 that a Bank conducting an M&A transaction is required to submit the post-notification of such transaction to the KPPU if the total value of assets of the bank concerned is more than 20 trillion Rupiah.
Noncompliance with this requirement will give rise to the imposition of administrative penalties.

In light of the above, KPPU will conduct an assessment after receiving such post-notification and determine whether the M&A transaction violated the Antimonopoly Law using the following criteria:

a. concentration of market;
b. market entry barriers;
c. potential for unfair trade behavior;
d. efficiency; and/or
e. bankruptcy.

While the opinion of KPPU is not binding on companies, pursuant to Article 47, Paragraph 2.E of the Law 5/1999, KPPU has the authority to cancel an M&A transaction if such transaction has elements of monopolistic or unfair trade practices. Moreover, the Law 5/1999 may cover foreign entities which are not doing business in Indonesia but have entered into agreements with Indonesian entities that may result in monopolistic or unfair trade practices in Indonesia. Hence, it would be advisable for foreign investors contemplating an M&A transaction to conduct and file a consultation prior to the completion of a contemplated transaction with KPPU to avoid risk of cancellation of the transaction by the KPPU.

Employment law

Law No. 13 of 2003 on Employment (the “Law 13/2003”) provides the framework for the rights of the employee and the employer in the context of M&A.
Basically, since M&A is related only to the change in ownership or control over a company, it shall not in any way affect the employee’s status. In this regard, there are two possibilities in respect of an employee’s continuance in the company with the new controlling shareholders in an acquisition, i.e. the working period of the employment will be either prolonged or renewed. In the event of a renewal of employment, the employee will be terminated from the previous company (before it was merged or acquired) and then re-hired by the surviving company under new terms and conditions.

If an employee does not wish to maintain his or her employment with the surviving company, then he or she has the right to refuse the new employment. Thus the employee can resign from the company and is entitled to receive a special severance payment, long service payment package and/or other compensation (such as unused annual leave or housing allowance, if any) as set forth in Law 13/2003, Article 163(1). It is to be noted that Law 13/2003 does not specify the percentage of ownership that would trigger these entitlements but simply refers to a “change of ownership”. Further, Law 13/2003 is also silent as to whether the change of control is only direct or also including indirect change of control (if a higher level shareholding acquisition). There is a risk that the employees or their union (if any) will take the position that ‘any’ change of ownership will qualify under Article 163(1) even where there is less than 50% (fifty percent) change in shareholding. However, any substantial change in management and employment policies will also trigger Article 163(1) although the new shareholder is not a controlling shareholder, as this will directly or indirectly affect the employees.

Moreover, under Article 163 paragraph (2) of Law 13/2003, the employers (both the acquirer and the target company) also have the right to terminate or maintain
employment in the event of a change in a company’s status (i.e., from a purely domestic owned company to a company with foreign share ownership), a merger or a consolidation, subject to the payment of severance and long service payment as set forth in Article 163(2).

In addition to the above, the rights of employees in M&A transactions are also governed by the provisions relating to M&A transactions in a collective labor agreement entered into by and between the company and the company’s labor union. In the event of inconsistency between the provisions of the Law 13/2003 and the collective labor agreement, the provisions that are more favourable to the employees shall prevail.

4. Perspectives from the Dutch Law

One of the methods to analyze whether Indonesia’s securities regulations have adopted rules according to best practices is to conduct a comparative study with rules as applied in more developed jurisdictions. For that purpose, the securities regulations in the Netherlands can serve as a benchmark. This is for several reasons already mentioned in the first section above, considering that the Indonesian legal system originated from the Dutch colonial era, and therefore there are still many commonalities in various aspects of the countries’ corporate and securities legal structure.

4.1. General overview of the Dutch securities regulations

Previously, the Dutch securities law recognized many types of self-regulation
During the 1990s, although many of these have been replaced by statutory regulations. At present, the central law for the Dutch securities regulation, including for public offers, can be found in the Act on Financial Supervision (Wet op het financieel toezicht; "AFS") which came into effect on 1 January 2007, and decrees issued under this Act (e.g., Besluit openbare biedingen Wft, the Decree on public offers). The AFS compiles all the rules and requirements that apply to the financial markets and their supervision. The extensive system of supervision of financial institutions that exists in the Netherlands (supervision of banks, insurers, collective investment schemes, etc.) is therefore governed under the AFS and implementing regulations based on this Act. There are also the Competition Act, the Works Council Act, and the SER-Merger Code of 2000 which apply to takeover deals.

The AFS also includes provisions to implement the EU Takeover Directive, as incorporated in the AFS since 28 October 2007 and also Art. 2:359A of the Dutch Civil Code (BW), the EU Prospectus Directive, the EU Market Abuse Directive and the EU Transparency Directive. The Dutch public takeover law is applied when a public offer is made or being prepared on securities of a Dutch limited liability company which is allowed to trade on the regulated Dutch markets.\footnote{M.C.A. van den Nieuwenhuijzen, FINANCIAL LAW IN THE NETHERLANDS, 197, (2010).} Regulated Dutch markets are the Eurolist Amsterdam, the Euronext Amsterdam Cash Market and the Euronext Amsterdam Derivatives Market.\footnote{Marco Nieuwe Weme, \textit{et al.}, HANDBOEK OPENBAAR BOD, 28, (2008).} The AFS does not apply to a public bid on shares with no voting rights, with the exception of non-voting depository receipts of shares.\footnote{For extensive review of the Dutch corporate governance system, see Van Bekkum, Hijink, Schouten and Jaap Winter, \textit{supra} note 9.}

It is important to have an overview of the EU Takeover Directive. The main
The purpose of the Takeover Directive is the harmonization of corporate law in Europe.\textsuperscript{76} The Takeover Directive attempts to create equal protection of shareholders and stakeholders to the same level within the EU region. Harmonization minimizes the practice of companies picking the country with the weakest rules, which could trigger a “race to the bottom” among member states to attract companies.\textsuperscript{77} In particular, the EU Takeover Directive aims to safeguard minority shareholder rights in public bid situations. In addition to this, recent developments surrounding public bids in the Netherlands, including the offer for ABN AMRO bank, have caused the Dutch Government to seek to impose stricter regulations on public offers.

With regard to the supervisory body of the financial market, the competent authority in the Netherlands is the Authority for the Financial Markets (\textit{Autoriteit Financiële Markten} or AFM). AFM has been responsible for supervising the operation of the financial markets since 1 March 2002, which includes savings, investment, insurance and loans. AFM is the successor of the STE (the Securities Board of the Netherlands, or \textit{Stichting Toezicht Effectenverkeer}), which supervised all of the participants in securities trading. Following the “Review of the supervision of the financial market sector” (\textit{Herziening van het toezicht op de financiële marktsector}) carried out by the Ministry of Finance, AFM aims to conduct function-based, instead of sector-based, supervision. Therefore, while prudential supervision is the responsibility of the Dutch Central Bank, supervision of market conduct is governed by AFM.\textsuperscript{78}

\textsuperscript{76} Marco Nieuwe Weme, \textit{et al.}, \textit{supra} note 93, at 13.

\textsuperscript{77} Marco Nieuwe Weme, \textit{et al.}, \textit{supra} note 93, at 13.

\textsuperscript{78} Prudential supervision addresses the question of whether participants in the financial markets can rely on their contracting parties being able to meet their financial obligations. The Dutch Central Bank (\textit{De Nederlandsche Bank}) is, after the merger with the Pensions and Insurance Board
4.2. Lessons learned for Indonesia

Types of offer

In the Netherlands, AFS does not provide a definition of takeover. However, AFS Article 1:1 provides a definition of a public bid, namely: “an offer as referred to in Section 217(1) of Book 6 of the Dutch Civil Code, made by means of a public announcement, or an invitation to make an offer for securities, whereby the offeror has the intention to acquire these securities”\(^79\). This definition shows that a takeover refers to the acquisition of securities and does not refer to a change of substantial assets of the company. Further, under the Dutch law, there are a number of different public offers, which are summarized below:

Firstly, there is the full offer, which is an offer made in an announcement that contains the price that is offered (or stock that is traded), and aims at acquisition of all securities of the target company.\(^80\) Full offer is the most common kind of public offer issued in the Netherlands. A full offer stipulates the offered consideration and is aimed at the acquisition of all issued and outstanding shares of the class to which the offer relates. The public offer is made and announced for securities when the offeror has the intention to acquire such securities.\(^81\) In this regard, there are also several


\(^{80}\) Marco Nieuwe Weme, *et al.*, *supra* note 93, p. 23.
types of offer. There is the cash offer, in which cash is offered for the securities of the target company.⁸² There is also an exchange offer, in which securities are offered in exchange for the securities of the target company. The offeror is usually required to issue new securities to make this kind of offer. If this is the case all requirements for such an issue have to be met (e.g., the prospectus rules, etc.).⁸³

Secondly, there is the tender offer, which is not an offer in the strict sense, but rather an invitation by the bidder to owners of securities of the target company to offer their securities to the bidder for consideration to be fixed by themselves. This offer is restricted to acquisitions of less than 30% of the voting securities of the target company.⁸⁴ The offeror invites the shareholders to sell their shares for a price set by each of the tendering shareholders. A tender offer stipulates the number or percentage of shares to be acquired by the offeror and is addressed to all holders of the (class of) shares to which the offer relates.⁸⁵ The tender offer is also uncommon in the Netherlands. Since its introduction, the only successful tender offer was issued by Bergson Holdings N.V. on a part of the ordinary shares of Hunter Douglas N.V.

There is also a partial offer, which is an offer for securities to acquire no more than 29.99% (less than 30%) of voting rights. This offer is an easier way to buy a substantial amount of securities than by normal trading (although block trading is also an option).⁸⁶ A partial offer is a public offer stipulating the offered payment to acquire

---


⁸² van den Nieuwenhuijzen, *supra* note 92, at 201.

⁸³ van den Nieuwenhuijzen, *supra* note 92, at 201.

⁸⁴ van den Nieuwenhuijzen, *supra* note 92, at 201.

⁸⁵ Calkoen, van der Stelt and den Engelsman, “The Netherlands Takeover Guide”.

only a part of the issued and outstanding shares of the class to which the offer relates. The main conditions for issuing a partial offer are that the offer may not result in the acquisition of more than 30% of the issued share capital of the target company for a period of one year starting from the acceptance of the tendered shares; and that the offer be unconditional and irrevocable. The offeror cannot make a public offer for additional shares beyond 30% of the capital of the target company during the one year period. Partial offerings are mainly issued in order to:

1. acquire a substantial interest in a target company for strategic considerations against a purchase price per share, which should be at the same level as the stock exchange rate;
2. explore the willingness of target shareholders to sell their shares; and
3. intervene in a public offer of a competitor of the offeror.

However both the partial offer and tender bid are rare and hardly ever used in the Netherlands.88

Meanwhile, the common practice of takeover of a public company in Indonesia is mostly conducted through acquisition of that company from the controlling shareholder, which then leads to a “mandatory offer.” However, in the Netherlands, as in other jurisdictions, the initial step is usually that the prospective controller issues a general public offer first, which then leads to the acquisition. Therefore, rules on mandatory tender offer in Indonesia have been more often applied, while in the Netherlands, the general rule on “public offer” (included in

87 Calkoen, van der Stelt and den Engelsman, *supra* note 101, at 1-3.

88 Weme, van Solinge, ten Have, and van den Bergh, *supra* note 93, at 23 – 24.
which is the “mandatory tender offer”) holds greater importance. This is evident in Indonesia, as the rule on takeover (which covers mandatory tender offer) has received more attention and been amended more often than the rule on tender offer. In addition, different business cultures and practices might be the reason that several definitions of offer under the Dutch law are not applicable in comparison with Indonesian law. This is evident in the case of a hostile (unfriendly) offer, which has yet to be practiced in Indonesia, while in the Netherlands, this type of offer has gradually gained more practice. The different definitions of “takeover” and “offer” between the Indonesian and the Dutch legal systems describe the differences in meaning and practice of takeover between the two jurisdictions.

The distinction between a hostile offer and a friendly offer might not be very applicable in the Indonesian context. However, it is important to have a brief description under the Dutch law, since the practices are common. An unfriendly offer is an offer that is not supported by the board of the target company and is therefore resisted by the target company. The target company may initiate or activate “anti-takeover devices”. 89 If a public offer is issued without the consent of the board of managing directors of the target company, the public offer can be qualified as a hostile (unfriendly) offer. Hostile offers have not been traditionally common in the Netherlands. More recently, however, hostile offers have been successfully concluded. A public offer without notice was prohibited under the old law. However, since 28 October 2007, it is possible for an offeror to announce a bid without consulting with the board of the target. On the other hand, in a friendly offer, the board of the target company agrees on the terms of the bid with the offeror and will

89 van den Nieuwenhuijzen, supra note 92, at 201-202.
announce its support for the offer. Finally, there is also a “competing offer,” which is a bid made while another bid has been announced or is still outstanding. A competing offer can be either friendly or unfriendly. If the competing offer has been offered on request of the board of the target company because of an unfriendly bid the competing offer is called a “white knight.”

Mandatory takeover

As mentioned earlier, the common practice of takeover in Indonesia is via acquisition of the public company, which then triggers the mandatory offer requirement. In such case, an offer becomes mandatory if it causes a change of “control,” hence the definition of control is very significant in Indonesia. Mandatory offer due to change of control is also recognized under the Dutch law, but this is with due observance of the fact that full public offer is the more common practice in the Netherlands.

In the Netherlands, the European takeover directive does not give a definition of control. An answer as to what (effective) control means in the Netherlands is found in rules governing the mandatory bid in the AFS. Under Dutch law, a person is deemed to have effective control if that person has directly or indirectly assumed 30% or more of the voting rights in a Dutch limited liability company with its seat in the

90 van den Nieuwenhuijzen, supra note 92, at 201-202.
91 van den Nieuwenhuijzen, supra note 92, at 201-202.
92 Weme, van Solinge, ten Have, and van den Bergh, supra note 93, at 23 – 24.
93 See Article 5:70 WTF and Article 1:1 WTF. See also Asser/Maeijer, Van Solinge, & Nieuwe Weme, ASSER 2-II* DE NAAAMLOZE EN BESLOTEN VENNOOTSCHAP, 626 (2009).
Netherlands whose shares or certificates are traded on the regulated market.\textsuperscript{94} Most other European countries also have their threshold at around 30 – 33 1/3 \%.\textsuperscript{95} Potential voting rights (convertible bonds and short calls) do not count towards the 30\% threshold.\textsuperscript{96}

There is also the possibility of obtaining a kind of indirect control over the company, which might still meet the 30\% threshold. This is possible when a shareholder of a company also acquires shares in another company that has shares in the company in which the shareholder also has a stake. In this way, if the shareholder has effective control of the first company, and it also obtains control of the voting rights of the second company, such shareholder would control more than 30\% of all voting rights, and thus take effective control.\textsuperscript{97} The general principle in Dutch law provides that the person gains effective control when it surpasses the 30\% quantitative threshold or more of all voting rights in its possession. It is irrelevant whether someone exercises “actual” control of a company. If that person has 30\% of all voting rights, that person gains the status of having effective control by Dutch law. This is different from the Indonesian regulation which also introduces a qualitative approach to determine control.

The idea of the mandatory offer requirement is to provide protection for minority shareholders (mostly the public) to exercise their pre-emptive in the publicly listed company. While Indonesia has introduced this concept since 2000, the Netherlands also applied the mandatory offer requirement in 2007. This means

\textsuperscript{94} van den Nieuwenhuijzen, \textit{supra} note 92, at 201-202.


\textsuperscript{96} Asser/Maeijer, Van Solinge, & Nieuwe Weme, \textit{supra} note 117, at 626.

\textsuperscript{97} Weme, van Solinge, ten Have, and van den Bergh, \textit{supra} note 93, at 501.
Indonesia was earlier in providing more advanced regulation in order to protect the public shareholders in capital market activities. In fact, Indonesian regulations still provide more advanced protection because they apply not only the quantitative approach of a shareholding threshold, but also a qualitative requirement for control.

*Acting in concert*

Another interesting issue is the concept of “person” under Indonesian law and how it compares to “acting in concert” pursuant to the EU Takeover Directive. This is relevant to define when a party (which can consist of a group of parties) possesses indirect control of a company. Indirect control can be either in the form of the shareholding structure as briefly discussed above, or control over a company by a group of persons acting in concert. If one person has made an agreement with one or more other shareholders regarding the governance of the company, they can be considered as effective controlling shareholders. The mandatory offer requirement also applies if a controlling interest is obtained jointly with “persons with whom he acts in concert.” Art. 1:1 of the AFS provides a definition of persons making agreements on how to act, i.e.: natural persons, legal persons or companies collaborating under a contract with the aim to acquire predominant control in a public limited company or, if the offered company is one of the collaborators, to frustrate the success of an announced public takeover bid for that company. The following categories of natural persons, legal persons or companies are deemed in any case to act in joint consultation:

98 Weme, van Solinge, ten Have, and van den Bergh, *supra* note 93, at 497.
1. legal persons or companies which together form part of a group as referred to in Section 24b of Book 2 of the Dutch Civil Code; and

2. natural persons, legal persons or companies and the enterprises controlled by them.

There are several types of agreement that can fall under the definition. It may be an explicit or an implicit agreement and does not have to be of a permanent nature. Legal entities and their subsidiaries or legal entities that form part of the same group are deemed to act in concert. Further, it is also important to assess the objective of the cooperation in order to determine whether a certain agreement can be qualified as acting in concert.

Under the Indonesian regulation, there are several definitions of a “person” as governed under the 2000, 2002, 2008, and 2011 Bapepam Regulation no. IX.H.1. A person can be a natural person, a company (perusahaan), a legal entity, a partnership, an association, or any organized group. Natural person refers to an individual. A company can be of any form recognized by the law –including a partnership or limited liability company– that seeks profit. A legal entity can either be a local legal entity, foreign-owned company, cooperative, a state owned legal entity (badan hukum milik negara), or the government (through the minister of finance). And an organized group can be in the form of a conglomerate group or a business family.

The concept of “person” and “acting in concert” is closely related to the definition of control for mandatory offer. Both Indonesian and Dutch securities regulations have already recognized this idea, but this issue becomes more significant

---

99 See Calkoen, van der Stelt, and den Engelsman, supra note 101, at 2; and Allen & Overy Bulletin, supra note 101, at 1-3.
in Indonesia because of the concentrated ownership structure. Therefore, the
securities authority, Bapepam-LK, needs to play a more active role in assessing the
ownership of the shareholders.

Employee engagement

Pursuant to the Works Council Act, the offeror and the target company may
need to seek consultation with the works council before a takeover deal, both of
which are bound by the rule of confidentiality. Prior to the initial announcement, the
target company must also notify the trade union pursuant to the obligation under the
SER-Merger Code to protect the interests of the employees. The SER Merger Code
applies to M&A involving a company or group of companies established in the
Netherlands regularly employing 50 employees or more (or to companies with less
than 50 employees pursuant to a collective bargaining agreement (collectieve
arbeidsovereenkomst or “CAO”).

The SER Merger Code is relevant to the process of acquisition and/or
takeover, especially with regard to employee consultation, which is an important part
of any acquisition or divestment process of a Dutch company. According to the SER
Merger Code, when negotiations reach a stage that justifies the expectation that an
agreement can be reached, both the trade unions involved, if any, and the Social
Economic Council (Sociaal-Economische Raad or “SER”), must immediately be
notified (on a confidential basis) of certain detailed information regarding the
transaction. In practice, after the initial announcement about the acquisition, the

---

100 See Calkoen, van der Stelt and den Engelsman, supra note 101, at 4; Houthoff Buruma
News Update, supra note 101, at 5.
offeror and target company must notify the trade unions, if any, and provide them with a statement concerning the rationale for the transaction and the future consequences of the transaction.\textsuperscript{101} This notification must also be sent to the SER Merger Committee. The consultations with the works council and the trade unions should take place at such a time that the advice of both may still have a material influence on the decision of the board of managing directors of the target company.\textsuperscript{102}

In addition, if there is a dispute as to whether the information provided is adequate, the Dispute Committee for the SER Merger Code (\textit{Geschillencommissie Fusiegedragsregels}) will decide upon request by the companies concerned or the trade unions. However, the SER Merger Code does not have binding legal effect. Therefore, in the event of violation, the Dispute Committee for the SER Merger Code can issue only either a public statement concerning the non-observance of the SER Merger Code or a warning.\textsuperscript{103}

The engagement of employees demonstrates a great distinction between Indonesian and Dutch law in a takeover deal. There is no requirement for employee consultation in the process of takeover in Indonesia. This is evidence that Indonesian company law is less oriented to a stakeholder-approach, compared with the Netherlands. However, since decisions under the SER Merger Code are not legally binding, the employee consultation rule is therefore more of a market-based approach to govern securities transactions.

\textsuperscript{101} See Calkoen, van der Stelt and den Engelsman, \textit{supra} note 101, at 4; Houthoff Buruma News Update, \textit{supra} note 101, at 5.

\textsuperscript{102} See Calkoen, van der Stelt and den Engelsman, \textit{supra} note 101, at 4; Houthoff Buruma News Update, \textit{supra} note 101, at 5.

\textsuperscript{103} See Calkoen, van der Stelt and den Engelsman, \textit{supra} note 101, at 4; Houthoff Buruma News Update, \textit{supra} note 101, at 5.
Dutch and Indonesian laws are similar in so as far as procedural matters and disclosure obligations are concerned. One difference is that under Dutch law, there is an obligation to give public notice of the intention to make a public takeover offer.\textsuperscript{104} When the offeror and the target company reach a (conditional) agreement on the making of an offer, they will be required to make an initial public announcement regarding the offer.\textsuperscript{105} Such public notice is optional under Indonesian law, i.e., at the negotiation stage the parties may choose to disclose the proposed takeover, in order to secure the price from volatility risk.

After the initial approval, there is a further requirement to make a full public announcement, which is then followed by approval from AFM after reviewing the offer documents. The information that must be submitted and approved is contemplated in appendices A to F of the AFS implementation decree. The information required is generally consistent with the requirements as set out in most EU jurisdictions. The approval of AFM is given after all the offer documents are deemed satisfied. The offer must commence within six business days after AFM’s decision to approve the offer documents has been informed to the offeror.\textsuperscript{106} The decision of AFM can be submitted to judicial review in the administrative court.

In addition, there is also an obligation as promptly as possible to disclose “price-sensitive information” pursuant to the Market Abuse Directive. Disclosure of information can be delayed if it serves a justified interest, insofar as it will not result

\textsuperscript{104} See Article 31 WOR; Article 3, 4, 8 SER Besluit Fusiegedragsregels.

\textsuperscript{105} Van Gerven, supra note 10, at 311-330.

\textsuperscript{106} See Article 31 WOR; Article 3, 4, 8 SER Besluit Fusiegedragsregels.
in misleading the public and confidentiality is maintained.\textsuperscript{107} Accordingly, an issuer is obligated to publish price-sensitive information that is concrete and that directly concerns the legal entity, company or institution to which the securities pertain, which has not been publicly disclosed and whose public disclosure might significantly affect the price of the securities or the price of derivative securities. Furthermore, an issuer that makes a public takeover bid must observe the requirements set forth in Chapter IIIA of the Decree on the Supervision of Securities Transactions 1995 (Besluit toezicht effectenverkeer 1995, Bte). The EU Market Abuse Directive has been integrated into the Dutch takeover rules, which then cover wide-ranging issues of abuse of inside information, insider regulations, and market manipulation (“Takeover Rules”).

In general, the disclosure requirements under the Indonesian securities regulations have also incorporated the general principles contained in the Dutch securities regulations. The issue is with enforcement to ensure that there is no leakage of confidential information prior to public disclosure, and that all public information must be disclosed in a manner to create a fair and balanced playing field for the market participants.

\textit{Determining the price in the case of a mandatory offer}

In the Netherlands, the mandatory offer shall be made pursuant to an “equitable price.” A price is considered “equitable” if it equals the highest price that was, in the year preceding the announcement of the mandatory public offer, paid for securities of the same category or class by the offeror or by the persons with whom

\textsuperscript{107} Van Gerven, \textit{supra} note 10, at 311-330.
the offeror is acting in concert. For a period of one year following the announcement of the public bid, the bidder may not acquire any shares under conditions more favorable than those offered in the public bid. If no such bids have been previously made, the offer price must be equal to the average of the quoted share price in that 12 month period.

As already mentioned above, Indonesian law introduced the mandatory offer rule earlier than the Dutch regulation. Since then, Indonesia has changed the price formula from the “highest price” to “average highest price” in order to mitigate the effects of price volatility caused by information asymmetry commonly recognized in the Indonesian market. The Dutch law, on the other hand, the “highest price” principle still applies. It can be argued that in this regard, Indonesian law provides a better and more efficient rule concerning the offer price.

The role of the supervisory authority

In the Netherlands, the AFM is the supervisory body for public offers for securities. The AFM regulates and supervises compliance with the Takeover Rules, and has competence to oversee a public offering when the Dutch takeover code is applied. In monitoring the function of the securities markets, the AFM focuses on the following criteria: (1) transparency; (2) disclosure; and (3) procedure. The AFM takes an active role in supervising public offers and has the authority to issue instructions or public warnings and to impose administrative sanctions, including penalties, in the event that either the offeror or the target breaches the Takeover Rules. The AFM has also published a number of policy guidelines and interpretative statements as to the scope and application of the Takeover Rules. The main power of the AFM is that the
offer requires its approval. The offeror is only allowed to make a public offer after
the offering document has been approved by the AFM as stated in Art. 5:74 AFS.  
This gives the AFM the power to suspend a public offer until they are sure that all the
requirements have been properly met, especially how the offer is going to be paid. A difference between the AFM and most other similar European authorities is that the
AFM is not empowered to approve (or disapprove) all disclosures throughout the
whole takeover process. This way, rumor of a takeover might be leaked to the market
without an official announcement which has been approved by the AFM. Although
they do not have these powers the AFM can still use the general powers as provided
in Art. 5:61 AFS. The AFM also has the power to relieve an offeror of some of its
obligations (Art. 5:81(3) AFS).

Apart from AFM, there is also the Enterprise Chamber of the Amsterdam
Court of Appeals (the “Enterprise Chamber”), or the “ondernemingskamer”, which is
part of the judiciary. The Enterprise Chamber settles disputes regarding the
requirement to carry out mandatory offers, i.e., whether such obligation exists
following an acquisition, or regarding the determination of a “fair price” in a
mandatory offer. The AFM has no competence to hear disputes that may arise if the
target company uses protective devices against a hostile takeover attempt.
Competence for these kinds of disputes lies with the Enterprise Chamber. The
Enterprise Chamber has competence to decide cases concerning squeeze-out and sell-

108 van den Nieuwenhuijzen, supra note 92, at 199-200.
109 van den Nieuwenhuijzen, supra note 92, at 199-200.
110 van den Nieuwenhuijzen, supra note 92, at 199-200.
111 van den Nieuwenhuijzen, supra note 92, at 199-200.
112 Weme, van Solinge, ten Have, and van den Bergh, supra note 93, at 907.
out procedures (Art. 5:70 FSE). They also hear cases based on the wide ranging investigation procedure (Book 2, Title 8). This procedure allows an offeror that holds at least 10% of the target company’s shares to request the Enterprise Chamber to investigate whether there are reasonable grounds to doubt that there are proper policies and management at the target company. With this, an injunction may be requested until the court has given its verdict. This procedure was popular in the last decade where it was used by activist investors, such as hedge funds, to timely make the board powerless and try to change the balance of power in their own favor. The decisions of the AFM can also be challenged and appealed to the administrative law division of the Rotterdam District Court, or to the Appeals Board for Trade and Industry (College van Beroep voor Bedrijfsleven).

The AFM is obligated to ensure the secrecy of any information it gains as part of its supervisory role. When breaching the rules about the disclosure of information in the offer process there are a number of civil and administrative sanctions that the AFM may impose, including:

1. to give instructions;
2. to appoint a trustee;
3. to determine that the auditor or actuary no longer provides the required safeguards to issue the statements meant in this act in relation to that financial undertaking.

---

113 van den Nieuwenhuijzen, supra note 92, at 201.
114 van den Nieuwenhuijzen, supra note 92, at 205.
115 van den Nieuwenhuijzen, supra note 92, at 215.
116 Article 5:25 and 1:75 AFS.
117 Article 1:76 AFS.
4. to give a public warning and obligation to make public a given fine or penalty;\textsuperscript{119}
5. to set the amount of a fine;\textsuperscript{120} and
6. to withdraw a license;\textsuperscript{121}

Criminal sanctions may also be imposed in case of violation of disclosure requirements. This is in case there is a violation of the Economic Offenses act.\textsuperscript{122} Art. 1:23 provides that in general civil actions that find their legal validity under private law but are contrary to the rules set forth under or pursuant to the AFS cannot be effected, except as provided by the AFS\textsuperscript{123}. There is the possibility to appeal actions or decisions of the AFM. Because of the fast changing markets, appeals go directly to the highest administrative court, so no further appeal is possible.\textsuperscript{124}

A number of other statutory rules also apply during a public takeover, including the insider trading provisions of the Securities Act and the provisions of the listing rules (the Euronext Rules) of the stock exchange of Euronext Amsterdam (Euronext), when an offeror is offering shares as part of the consideration.

It is important to compare the role of Bapepam-LK to that of the AFM. One problem often raised has been with regard to institutional independence because Bapepam-LK was still under the authority of the MoF. Only recently has Indonesia

\textsuperscript{118} Article 1:79 AFS.
\textsuperscript{119} Article 1:79, 1:80, 1:94, 1:97 and 1:99 AFS.
\textsuperscript{120} Article 1:81 AFS.
\textsuperscript{121} Article 1:104 and 1:105 AFS.
\textsuperscript{122} van den Nieuwenhuijzen, supra note 92, at 198.
\textsuperscript{123} See for instance Article 5:52 AFS.
\textsuperscript{124} van den Nieuwenhuijzen, supra note 92, at 205.
finally introduced an independent Financial Service Authority (FSA) pursuant to Law 21/2011. Previously, although Bapepam-LK was already empowered with extensive authorities to approve and supervise takeover deals, public offers, and information disclosure, there was still a problem in practice. For example, there is still little practice of Bapepam-LK to impose sanctions on market manipulation, abuse of information, or insider trading. There has also not been any criminal prosecution regarding these types of offenses, not only in takeover deals, but in capital market transactions in general. Moreover, one lesson that Indonesia can learn from Dutch law is the engagement of a special tribunal/chamber to resolve capital market and other disputes regarding the financial system. The existence of the Enterprise Chamber, or the Appeals Board for Trade and Industry (College van Beroep voor Bedrijfsleven) demonstrates that the enforcement of securities regulations requires not only administrative proceedings, but also judicial proceedings to ensure due process and legal certainty.

**Anti Takeover Defense**

Hostile offers have been concluded occasionally in the Netherlands. A public offer without notice was prohibited under the previous rule. A hostile offeror was obligated to consult with the target for a period of 7 days. During such time, there was a restriction not to reveal the bid price, although in practice the prospective hostile offeror often had to reveal an indicative price. However, since the enactment of AFS, it is possible for an offeror to announce an offer without consulting with the board of the target, and there is more compliance with the requirement of disclosure without delay for price-sensitive information.
The EU Takeover Directive also provides rules regarding measures that can be taken by a public company against a hostile takeover. The Dutch government has opted to retain the public companies’ freedom to decide whether or not they wish to (temporarily) defend themselves against unsolicited takeover approaches. Therefore, Dutch law still allows technical defenses as incorporated into the public company’s articles of association to frustrate a public bid. In principle, a public company is free to implement anti-takeover measures, although recent cases seem to indicate that there are limitations to exercise this right. Following the EU Takeover Directive, the Dutch law has also adopted the anti-takeover defense of the “breakthrough rule”\textsuperscript{125} while opting out of the “board neutrality rule” which was also introduced by the Directive.\textsuperscript{126} The breakthrough rule sets aside restrictions on the transfer of securities and on voting rights, which might hamper the shareholders in tendering their shares. The rule applies only to restrictions contained in the articles of association, and not statutory rules.

The basic idea of any anti-takeover measure, in the event of hostile takeover, is to even the balance of power between shareholders and management facing a takeover bid. This might not be applicable in the context of Indonesia at this time. It has been described above that the corporate structure in the Indonesian market places higher importance on the alignment of differing interests between controlling and minority shareholders, while the difference in interests between the shareholders and the boards (prevalent in a hostile takeover) is not currently an issue in Indonesia.

\textsuperscript{125} The breakthrough rule has been implemented in the Netherlands through Art. 2:359c BW.

\textsuperscript{126} A. Haan-Kamminga, "SUPERVISION ON TAKEOVER BIDS: A COMPARISON OF REGULATORY ARRANGEMENTS," 301 (2006). The “board neutrality rule” as contained in Article 9 of the EU Takeover Directive is basically an obligation for the board to obtain prior approval of the shareholders before commencing any action that might result in the frustration of the bid. There is an exception for this rule, however, namely when the board seeks alternative bids (also known as the “white knight”).
There has not yet been any case of a hostile takeover in Indonesia, and as such there is no immediate need to apply advanced rules such as the prohibition of poison pills, breakthrough rule, or the board neutrality rule. Those rules protect shareholders from board actions in companies with dispersed share ownership which inhibits shareholder control over management. Indonesian companies, however, generally have a majority or controlling shareholder or shareholders that maintain control over management. The phenomenon of a company’s management acting on its own behalf and in its own interest in a takeover is less likely to occur. Therefore in Indonesia the potential for conflict is mainly between majority and minority shareholders. If, in the future, public companies with dispersed share ownership appear in Indonesia, then measures to protect shareholders from board actions might become more relevant in Indonesia as well. There is currently only one rule in Bapepam Regulation IX.F.1 that limits the board from issuing statements unless there is an allegation of misleading information during the process of a voluntary tender offer.

*Squeeze-out and sell-out*

The Netherlands has applied the squeeze-out rule since 1988, i.e., that a majority shareholder holding at least 95% of the outstanding share capital with voting rights of a limited liability company (NV – naamloze vennootschap) or private company with limited liability (BV – besloten vennootschap met beperkte aansprakelijkheid) can ask the Enterprise Chamber to issue an order that the remaining shareholders surrender their shares to the majority shareholders. Group companies can combine their shareholding and bring an action together. The Enterprise Chamber will determine the date and fair price for the shares. It is possible
to appeal to the Supreme Court, however only in matters concerning violation of the mandatory offer procedures. Conversely, the minority shareholder can also bring an action before the Enterprise Chamber to ask the Court to compel the majority shareholder that holds at least 95% of the outstanding share capital with voting rights to acquire the minority shareholders’ shares.  

Indonesian law does not recognize the squeeze-out and sell-out rules. One reason is because enforcement of securities regulations still lies with Bapepam-LK’s administrative authority, and it is not equipped with a strong judicial authority such as in the Netherlands. However, it is also due to differing policy objectives. Instead of compelling the sale or purchase of minority shares, Indonesia applies the “free float rule” which prevents the acquisition of 100% of a public company’s shares, in order to ensure that a mandatory offer does not result in the publicly listed company going private. While there is no evidence that a mandatory offer following a takeover results in all shares being acquired by the controlling shareholders, Bapepam-LK wants to maintain the liquidity of the capital market by setting regulatory obstacles to prevent a company from going private. Therefore, the purpose and objective of the rules are different between Indonesia and the Netherlands.

5. Indonesia’s Securities Takeover Regulations from the Perspectives of Efficiency and Fairness Theory

5.1. Fairness and efficiency theory

127 Van Gerven, supra note 10, at 311-330.
Pursuant to Law 8/1995, the objective of the Law and the regulatory institutions (including Bapepam-LK as the regulator, the stock exchange as the marketplace, and other self-regulatory organizations) is to create an orderly, fair, and efficient (teratur, wajar, dan efisien) capital market for the interest of the shareholders and society as a whole. The idea can be linked to the basic constitutional principle underlying economic activities in Indonesia, that is according to Article 33 paragraph (4) of the 1945 (Amended) Constitution, one of the principles guiding the national economy is “just efficiency” (efisiensi berkeadilan). Fairness and efficiency have been the central theme of the study of law, legal systems, and justice. The tension between fairness and efficiency has also been the central philosophical theme in the law and economics scholarship. A normative judgment regarding the Indonesian securities takeover regulations needs to set a balance between the two principles.

Fairness, in its simplest sense, can be reached if all parties (members of the society) agree to distribute certain (primary) goods and balance their rights and obligations upon those goods. On the other hand, the pursuit of efficiency also has

---

128 Various scholars consider that the inclusion of the word “efficiency” in the Indonesian Constitution to represent a “neo-liberal” approach to the national economy that violates the spirit of kinship (kekeluargaan) and mutual support (gotong-royong) on which the founding fathers of Indonesia were focused when envisioning the most appropriate economic system for Indonesia. For a compilation of discourses, see Sri Edi Swasono, INDONESIA DAN DOKTRIN KESEJAHTERAAN SOSIAL: DARI KLASIKAL DAN NEOLASIKAL SAMPAI KE THE END OF LAISSEZ-FAIRE, 12, (Perkumpulan Prakarsa, 2010).

129 The theoretical and hypothetical conditions for which the most “fair” result will occur in the consensus are the “original position” and the “veil of ignorance.” See John Rawls, A THEORY OF JUSTICE, 102, 108, (Harvard University Press, 1999). The most accepted view of efficiency among economic models is that of allocative efficiency, one which distributes resources that render the highest value cumulatively. The philosophical idea of allocative efficiency was set by Pareto by introducing the concept of “Pareto Efficiency,” a degree of efficiency obtained when, given a set of alternative allocations of goods or outcomes, a change from one condition to another that makes one party’s situation better-off does not make another party’s situation worse-off. A less stringent criteria is set out under the auspice of “Kaldor-Hicks Efficiency,” according to which it is difficult to achieve a Pareto efficient level, and therefore an efficient outcome can be reached as long as there is sufficient compensation from those that were made better-off to compensate those that are made worse-off.
an important position in the study of law.\textsuperscript{130} Fairness considers issues of substantive justice and distribution, efficiency looks to the securing of mandated ends at the lowest cost.\textsuperscript{131} While the idea of a “just” or fair legal system is a common concept, the notion of an “efficient” or “rational” law is rare especially in Indonesian jurisprudence. Pursuing efficiency (in terms of joint welfare) might not always be consistent with the advancement of fairness, as allocative efficiency may be deemed to run counter to distributive justice. Kaplow and Shavell put forward the argument that ascribing importance to any notion of fairness (other than one concerned solely with the distribution of income) may sometimes lead to a conflict with the Pareto-efficiency principle.\textsuperscript{132}

This philosophical debate of fairness-efficiency is then reflected in the debate on the structure of the corporate governance system. There are at least three specific issues to which the fairness-efficiency nexus is relevant to consider: stakeholder engagement, the protection of minority shareholders, and the disclosure principle.

\textit{Firstly}, with regard to stakeholder (vs. shareholder) engagement: the question as to whether the corporate governance system of a company needs to be concerned only about the interests of its shareholders or also to include other stakeholders can be traced back to the classical idea of Adam Smith’s invisible hand. In the classical model, the objective of a firm is only to maximize the wealth of its shareholders, which is expected to result in a Pareto efficient condition in the economy as a whole.


\textsuperscript{132} Kaplow and Shavell, \textit{supra} note 155, at 1.
Pursuing shareholders’ interests is what is required for the efficient use of resources, and therefore corporate governance must be solely devoted to investor protection. In this model, any fairness and distributive consideration (for instance to banks, creditors, or employees) must be directed through means other than corporate governance. Alternative models are of course found in several non-common law countries. In Germany, for example, the corporate governance practice observed is that firms do not have a duty to pursue solely the interests of shareholders. The co-determination system in large corporations enables employees to have an equal number of seats on a supervisory board of the company which is ultimately responsible for the strategic decisions of the company. In Japan, managers do not have a fiduciary responsibility only to shareholders. The legal obligation of Japanese directors is such that they may be held liable for gross negligence in performance of their duties, including the duty to supervise.

Company law in general, in its economic function, is to limit the “value-reducing forms of opportunism among the constituencies of the corporate enterprise,” namely between: (1) managers and shareholders, (2) among the shareholders, and (3) between the shareholders and the related stakeholders of the corporation, such as creditors and employees. These opportunistic behaviors arise because there is a separation of function of ownership and control, which is basically the main feature of a corporation. This separation problem was first coined in the seminal article of Berle and Means in 1932 and further scrutinized by Jensen and


134 Franklin Allen and Douglas Gale, Id, at 2-4.

135 Konrad Zweigert and Hein Kotz, AN INTRODUCTION TO COMPARATIVE LAW, 4, (Oxford University Press, 1998).
Meckling as the conflict of interest between the principals (shareholders) and their agents (managers).\textsuperscript{136}

On the other hand, there are also securities regulations aimed at facilitating efficient market transactions, so that the object (securities) can be traded freely and orderly among the market participants. The main instrument to ensure efficient market transaction is information disclosure. Information plays an important role in an efficient market. Specifically in a financial market, Fama argues that allocative efficiency is defined as one in which prices always fully reflect available information.\textsuperscript{137} This model presupposes that economic actors, when making decisions, are fully rational and completely informed with an unlimited amount of information.\textsuperscript{138} Thus investors will not be able to gain any above-the-market return through either fundamental or technical analysis.\textsuperscript{139} Therefore, new information disclosed to the public heavily affects the price formation and the value of a share.

The objective of securities regulations is more limited than company law which also encompasses the protection of minority shareholders and stakeholders. While company law has accommodated the principle of fairness in addition to facilitating efficient conduct among the corporate organs (through the required


\textsuperscript{138} Fama, \textit{Id}, at 383. The early theory on price formation in the capital market rested upon the Efficient Market Hypothesis (EMH), in which the market efficiently dealt with all the information on a given security and is reflected immediately in the price. Based on this financial economic model, all relevant information is fully and immediately reflected in a security's market price. The three forms of the EMH include the following: weak form (stock prices reflect all past information in prices), semi-strong form (stock prices reflect all past and current publicly available information), and strong form (stock prices reflect all relevant information, including information not yet disclosed to the general public, such as insider information).

\textsuperscript{139} Fama, \textit{Id}, at 383.
approval of the minority shareholders and other stakeholders in certain activities), securities regulations are only aimed at ensuring efficient market conduct through disclosure.\textsuperscript{140} This apparent tension between the two legal regimes is relevant when assessing Indonesian securities takeover regulations.

5.2. \textit{The application in securities takeover regulations}

There are various ways to conduct a takeover: (1) private and direct contract between the acquirer and a small number of (controlling) shareholders; (2) via purchase of shares on the market; and (3) by way of a general and public offer to all the shareholders of the target company (a tender offer). However, the essence of an acquisition or takeover is the change of control within a company. Therefore, Davies and Hopt use the term “control transaction” to define any transaction in which a person or entity (the acquirer) attempt, through offers made to the company’s existing or current shareholders, to acquire sufficient voting shares in a company to give the offeror control over the company.\textsuperscript{141} Davies and Hopt also provide two distinctions to differentiate a “control transaction” from other forms of change in a company’s corporate control. Firstly, there is the absence of a corporate decision since the transaction is initiated by the acquirer, compared with for example the issuance of new shares whereby it is a corporate decision. Even in an acquisition directly through the shareholders, the company has no say/role at all as to the result of the transaction.

\textsuperscript{140} van der Schee, \textit{supra} note 15, at 28.

\textsuperscript{141} Paul Davies and Klaus Hopt, \textit{supra} note 5, at 225.
Secondly, there is the presence of a new actor -the acquirer- as an external party that will take over control of the company.\footnote{Paul Davies and Klaus Hopt, \textit{supra} note 5, at 226.}

There are some different settings in which an acquisition may take place, e.g., involving (1) no controlling shareholder; (2) a controlling shareholder; and (3) the impact of non-shareholders.\footnote{Paul Davies and Klaus Hopt, \textit{supra} note 5, at 225.} However, in all of these settings, the underlying legal issue of a takeover remains the same: where is the \textit{locus of decision-making} regarding a takeover deal? This issue reflects the central tension of a takeover: the basic principle of free transferability of shares versus recognition that such transfer, especially one which involves transfer of control, has various consequences for the target company and related parties. This \textit{locus} can either be based solely upon the shareholders or jointly with the board members. The \textit{locus} issue is also relevant in the protection of the public shareholders, for which there must be a mechanism enabling the public shareholders to voice their concern regarding the takeover and remedial or grievance process if the final decision is not in line with the opposing shareholders’ concern.

Let us first assume there is no controlling shareholder, or the ownership is dispersed among the shareholders. This is often the corporate structure in the US or in the UK.\footnote{Most comparative discussions regarding takeover, especially between the US and the European System, link takeover with the ownership structure within the jurisdiction. See for example Simon Deakin and Giles Slinger, \textit{Hostile Takeovers, Corporate Law, and Theory of the Firm}, (ESRC Centre for Business Research, University of Cambridge Working Paper No. 56, June 1997). See also Allen Ferrell, \textit{Why Continental European Takeover Laws Matter}, in Guido Ferrarini, \textit{et al}, \textit{REFORMING COMPANY LAW AND TAKEOVER IN EUROPE} (Oxford University Press, 2004); John C. Coates IV, \textit{Ownership, Takeovers, and EU Law: How Contestable Should Europes Corporations Be?} in in Guido Ferrarini, \textit{et al}, \textit{REFORMING COMPANY LAW AND TAKEOVER IN EUROPE} (Oxford University Press, 2004).} In such a case, since the ownership is widely dispersed, the shareholders
cannot influence the company. The *de facto* control is not within the shareholders, but within the boards; and therefore the change of control will occur from the target board to the acquirer. In this structure, the incentive of the board members might be different from those of the shareholders. The takeover might be value enhancing, but it would threaten the jobs of the board members and/or the senior management officers, so they might block such a transaction, or at least make the target company less attractive. Conversely, the takeover might be value-decreasing from the shareholder’s perspective, but the board members insist on going forward with the plan because they are promised better remuneration by the new acquirer, or even they themselves are the acquirer with financial support from an external investor (also known as a Management Buyout (MBO)).

The final say regarding the decision to sell the ownership of course rests upon the shareholders as the owner of the target company. However, the board members who deal with the day-to-day operation of the company can strongly influence their decisions because they have better information regarding the company (information asymmetry problem).

Secondly, there is also a setting where the company control is at the hand of small percentage of shareholders (or a group of shareholders), also known as the “block-holder.” The acquirer is likely to come to an agreement with the block-holder first and decide whether, and on what terms, to make a general offer to the non-controlling shareholders only once such an agreement has been made. In this case, the issue is not so much regarding the agency problem between the board and the

---

145 See Deakin and Slinger, *Id*; Ferrell, *Id*.

146 Paul Davies and Klaus Hopt, *supra* note 5, at 227.

147 Paul Davies and Klaus Hopt, *supra* note 5, at 227.

148 Paul Davies and Klaus Hopt, *supra* note 5, at 229.
(minority) shareholders, but instead between the majority shareholders (as the controlling entities of the company) and the minority shareholders. The controlling shareholder may sell the company to an acquirer who is “less respectful” of the interests of the minority shareholders, and this affects their treatment. In addition, the controlling shareholder may engage in rent-seeking activities, or “looting,” for example, by transferring assets out of the company, siphoning off profits to escape creditors, and propping up troubled firms in a group using loan guarantees by other listed group members. “Tunneling” occurs when a controlling shareholder transfers wealth from a company where he has a lower right to cash flow to another company where he has a higher right to cash flow. If prevalent, such activities may have serious adverse consequences, as it can hinder equity market growth and overall financial development. Illicit profit transfers may also reduce the transparency of the entire economy by clouding accounting numbers, which complicates any inference about the condition of firms. The issue here is to protect the minority (hence public) shareholders by devising an “exit strategy” mechanism for them upon a change of control of which they do not approve, including by way of mandatory tender offer as will be further discussed below.

With regard to the above, there is a need to protect minority shareholders through the mandatory offer rule. In a general theoretical sense, the mandatory bid/tender offer rule obligates a shareholder who has taken over more than a given percentage of the shares with voting rights of a listed company (and therefore acquired control over the company) to extend an offer for all the remaining shares

149 Paul Davies and Klaus Hopt, supra note 5, at 229.


151 Simon Johnson, Id., at 22-27.
with voting rights at a fair price (commonly the highest price or an average of highest prices paid for the same shares in a certain period). As a result, the public/minority shareholders get the opportunity to exit at a fair price. The mandatory tender offer rule aims to ensure minority protection as well as efficient allocation of control. According to Geens and Clottens, “the full-bid requirement causes the bidder to internalize all the external effects that result from the extraction of private benefits. This not only improves the competitive position of a value-enhancing bidder but even places all bidders on an equal footing”.

As a result, the controlling shareholder will not sell the shares unless it is paid a control premium. The mandatory tender offer rule then compels the offeror to pay that premium on all shares held by the public, thereby preventing value-reducing transactions while also promoting a redistribution of wealth from the offeror to the public shareholders. This makes the price for corporate control more expensive (and might deter efficient bidding and create inefficient allocation of resources), but the public shareholders have greater protection. The tension between efficient allocation of resources and fair redistribution of wealth is clearly represented in this rule.

Finally, another takeover issue concerns the protection of the non-shareholders with an interest in the outcome, also known as the “stakeholders.” Two important stakeholders who will be greatly affected by a takeover transaction are employees and creditors of the target company.


153 Koen Geens and Carl Clottens, Id., at. 2-3.
In general, rules that protect the interests of the stakeholders can take various forms, including: (1) an obligation to disclose the information regarding the deal (be it by regulation or by contractual arrangement, such as in a loan agreement); and (2) mandatory consultation prior to the takeover deal. Specifically with regard to the employees, the extent of their involvement depends on their role in corporate decision-making, i.e., whether they are closely engaged with the board, such as by way of a labor union/representation on the board.

Having discussed all of the above theoretical framework, and after careful comparison with the Dutch legal system, it can be concluded that the following are normative assessments regarding Indonesian securities takeover regulations:

(1) Indonesian securities takeover regulations have developed and evolved following the local and real needs of the Indonesian market. For example, there is a need to protect minority shareholders because of the concentrated market structure; while the potential for tension between the interests of the board of directors and the shareholders in the event of hostile takeover is not imminent. There is no need at this time to devise a complicated anti-takeover defense measure, for instance.

(2) The method conducted to carry out takeover is mostly in the form of prior acquisition, followed by a mandatory offer. As a result, the rules on mandatory offer in Indonesia are well-developed, and can even be considered more developed than those of the Dutch legal system. For instance, the price setting method in Indonesia is better developed and ensures more fairness and responsiveness to market volatility and risk of information leakage. This can
be seen from the “average highest price” rule adopted in Indonesia, compared to the “highest price” rule adopted in the Netherlands.

(3) With regard to the disclosure requirement, Indonesia has adopted extensive procedures to ensure that all important information is submitted accordingly to Bapepam-LK, and consequently disclosed. The requirements and accordingly the procedural steps are not less advanced compared to those of the Netherlands. What Indonesia can learn further is the adoption of a more general approach, in addition to the detailed procedural process, to accompany the technical rules and give more discretion to Bapepam-LK to have more freedom in exercising its authority. In the EU, an example is the existence of the EU Market Abuse Directive, which provides better guidance on “price-sensitive information,” compared with Indonesia’s Law 8/1995. Therefore, the disclosure rules would be not only with regard to form and formality, but also become more in regard to substance.

(4) The need to incorporate stakeholders has been accommodated in Dutch law through employee consultation, while this does not yet exist in Indonesia. However, even the Dutch law applies the law through the non-legally-binding instrument of the SER Merger Code, and can only be enforced through market power. If Indonesia is to apply similar rule, it must take into account the business and legal culture regarding the basic relationship between employers and employees.
The enforcement of company law and securities law need to be carried out through administrative and judicial measures. The administrative measures require a strong and independent financial authority. In this case, Bapepam-LK needs to learn from AFM which is an independent body with authority to supervise the market in the Netherlands. This can overcome the limitations of Bapepam-LK in supervision of politically-connected groups or companies which results in its failure to investigate cases of information misappropriation. In addition, there is a need to establish a special chamber of the Indonesian judiciary to deal with complex and sophisticated corporate and securities issues such as a refusal of Bapepam-LK to issue an approval, and the price for a mandatory offer.

6. Final Remarks

Based on the above analysis, we note the following important findings in which the Indonesian legal system can learn from the Dutch. First of all, the common practice of takeover of a public company in Indonesia is conducted through acquisition of that company, which then leads to a “mandatory offer.” However, in the Netherlands, as in other jurisdictions, the initial step is more often that the prospective controller issues a “public offer” first, which then leads to the acquisition. Therefore, rules on mandatory tender offer have been more often applied in Indonesia, while in the Netherlands, the general rule on “public offer” (which includes both “mandatory tender offer” and “voluntary offer”) holds greater importance. Furthermore, different business cultures and practices might explain why several definitions of offer under the Dutch law are not relevant in Indonesia, such as in the case of a hostile (unfriendly) offer, which has yet to be practiced in Indonesia,
while in the Netherlands, this type of offer has gradually gained more practice. After describing these differences, it was found that there are several lessons that Indonesia can learn from the Dutch legal system on corporate governance and securities regulations. *Firstly*, there is a need to adopt a more substantive approach to information disclosure, beyond form and formality. *Secondly*, there is a need to incorporate more protection for stakeholders, but with due observance of the Indonesian legal culture. *Finally*, there is also a need to strengthen both administrative and judicial authority to supervise capital market activities, to ensure a fair, orderly, and efficient capital market.