MORFAI JOURNAL
Multidiciplinary Output Research For Actual and International Issue

MERGER ACQUISITION IN THE INDONESIAN CONTEXT

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Abstract

Merger and acquisition activities have been carried out not only in developed countries but also in Southeast Asia. In ASEAN countries investment activities carried out between countries reached US$ 4.4 billion in 2009, of which most were carried out in Singapore (46%), Indonesia (31%) and Thailand (13%) (KPPU, 2010). These three countries have various investment regulations, especially those related to mergers and acquisitions. This is important for maintaining competitive and efficient market activities. For regulations related to mergers and acquisitions, only 5 (five) ASEAN countries have competition laws, namely Indonesia, Singapore, Thailand, Vietnam and Laos. Merger and acquisition rules owned by each country vary from various aspects, be it the scope, nature of notification, financing, and related sanctions.

Keywords**: *Merger, Acquisition, M&A***

1. M&A PROCEDURES IN INDONESIA

In carrying out a merger or acquisition between two companies, it takes a process or stages that must be passed before the companies carry out the merger or acquisition. This is so that everything can go according to plan. The stage of conducting mergers and acquisitions in Indonesia is based on Law no. 40 of 2007 includes:

1. Fulfilling the Merger Requirements The merging conditions are regulated in the Company Law and Government Regulations. Carrying out mergers & acquisitions also means obtaining approval and taking into account the interests of relevant agencies, starting from the company, shareholders, employees, creditors and business partners, to the public. This is so that later there will be no things that could hinder the merger & acquisition process.
2. Preparing a Merger Plan All company directors who intend to consolidate or merge companies must prepare a merger & acquisition plan, which must be approved by the respective company's Board of Commissioners and Directors. At a minimum, the design that is made contains the following things:
    - The name of the company that intends to do a merger or acquisition.
    - Reasons and explanations regarding the proposed merger or acquisition by each director of a company that intends to carry out a merger or acquisition and the conditions for carrying out a merger or acquisition.
    - Procedures for converting shares of each company into shares of companies resulting from a merger or acquisition.
    - The changes that occurred between the two companies after the acquisition merger. In various cases of mergers and acquisitions, changes have occurred, for example regarding the articles of association.
    - Updated balance sheets and income statements for the last three years of companies intending to consolidate or combine.
    - Details of the determination of employee status.

- Arrangements regarding disputes that occur between shareholders and creditors.
- Management analysis on financial and operational issues related to all the companies concerned.
- Confirmation of the consolidated company regarding the transfer of rights and assumptions of all the obligations of the companies participating in the merger.
- There is an obligation to notify the shareholders of each company about important matters that need to be known.

3. Merger Approved by the General Meeting of Shareholders (GMS) Merger which has been approved by the Board of Commissioners of each company is then submitted to the GMS for approval. To approve the merger, a GMS shall be held at least three quarters of the total number of shares with voting rights present or represented and a decision is valid if approved by at least three quarters of the total votes cast. If the first GMS fails, a second GMS can be held with a quorum of at least two-thirds attendance, and if it fails again, it can submit a request to the Chair of the District Court to determine a new GMS quorum.
4. Drawing up of the Deed of Merger After each GMS approves the proposed merger plan, the draft is made into the Deed of Merger drawn up in front of a notary who is then notified to the Minister of Law and Human Rights to record. If there are changes to the articles of association, approval from the minister is required.
5. Announcement of Merger Results After all the previous stages have been completed, the results of the previous stages or processes must be announced by the company's Directors in 2 newspapers as well as to employees in writing. This announcement is made no later than 30 days from the effective date of the merger. This is so that third parties are aware that a merger has taken place. In this case the announcement is effective from the date of the Minister's approval of the amendment to the articles of association.

2. LEGAL ASPECTS OF M&A IN INDONESIA

In general, mergers and acquisitions in Indonesia are regulated under the following laws and regulations:

- Law No. 40 of 2007 concerning Limited Liability Companies (UU PT) and its implementing regulations. This law does not only discuss provisions regarding mergers but also regulates provisions regarding company separation. In addition, Law no. 40 of 2007 also pays attention to the interests of employees and contains procedures and procedures for carrying out mergers and acquisitions.
- RI Government Regulation No 27 of 1998 concerning Merger, Consolidation and Acquisition of Limited Liability Companies. This regulation also emphasizes the special protection of company interests, the protection of the interests of creditors, minority shareholders and company employees, as well as the interests of society and fair business competition.
- RI Government Regulation No 28 of 1999 concerning Mergers, Consolidations and Acquisitions of Banks. This regulation was made to regulate merger and acquisition activities carried out in the banking sector and is also regulated in the Decree of the Directors of Bank Indonesia Number 32/51/KEP/DIR dated 14 May 1999 concerning Requirements and Procedures for Mergers, Consolidations and Acquisitions of Commercial Banks.

Merger, Consolidation and Acquisition of Banks can be carried out on:

- the Bank's initiative concerned; or
- request from Bank Indonesia; or
- temporary special agency initiative in the framework of banking restructuring.

Bank Mergers, Consolidations and Acquisitions are carried out by taking into account the interests of the Bank, creditors, minority shareholders and Bank employees; and the interests of the people at large and fair competition in conducting Bank business. In PP RI No. 28/1999 also explains the procedures and requirements for mergers, consolidations and acquisitions in the banking sector.

- UU no. 25 of 2007 concerning Investment, Regulation of the President of the Republic of Indonesia no 39 of 2014 regarding closed business fields and open business fields with conditions in the investment sector, Regulation of the Head of the Investment Coordinating Board (BKPM) No. 5 of 2013 concerning Guidelines and Procedures Investment Licensing and non-Licensing as amended by Regulation Number 12 of 2013. These laws and regulations only apply to mergers and acquisitions involving foreign investment.
- PP RI No. 57 of 2010 concerning Consolidation of Business Entities and Acquisition of Company Shares which can Result in Monopolistic Practices and Unfair Business Competition. In general, PP RI No. 57 of 2010 concerning 4 (four) matters, namely the method of assessing mergers and acquisitions that lead to monopolistic practices and unfair business competition, limits on the value of notifications or notifications, procedures for submitting notifications, and consultations. Article 2 states that business actors are prohibited from Merging Business Entities, Consolidating Business Entities, or Acquiring shares of other companies which may result in Monopolistic Practices and/or Unfair Business Competition. This can happen if a business actor is suspected of:
  a) prohibited agreements;
  b) prohibited activities; and/or
  c) abuse of dominant position.

KPPU provides an assessment that has been legally effective and is suspected to have resulted in Monopolistic Practices and/or Unfair Business Competition, the assessment is carried out by using the following analysis:

a. market concentration;
b. barriers to market entry;
c. potential for anti-competitive behavior;
d. efficiency; and/or
e. bankruptcy.

- For M&A in other sectors, companies are required to comply with certain laws and regulations (eg, banking sector, insurance sector, broadcasting sector and telecommunications sector). This is due to the fact that certain industrial sectors have certain bodies that regulate M&A, such as financial and insurance companies regulated by the Ministry of Finance, banking is regulated by Bank Indonesia.

3. REGULATORY BODY RELATED TO M&A IN INDONESIA

3.1 BKPM

The Investment Coordinating Board (BKPM) is an investment service agency of the Government of Indonesia established with the aim of effectively implementing law enforcement against both foreign and domestic investment (BKPM Website, 2016). BKPM is tasked with making policies related to investment in accordance with the laws and regulations in Indonesia. Every time there are foreign or domestic investors who want to invest their capital must go through the terms and conditions set by BKPM. In M&A, BKPM is required to provide registration approval when there is a change in the investment plan

3.2 Bapepam-LK

Bapepam-LK is an institution under the Ministry of Finance of Indonesia which is tasked with fostering, regulating and supervising day-to-day capital market activities as well as formulating and implementing policies and technical standardization in the field of financial institutions (Wikipedia Bapepam-LK, 2016).

3.3 Financial Services Authority

The financial services sector is a complex and ever-changing industrial sector so that business actors must be able to survive and regulators must be able to keep up with the changes that occur. To reduce the risks that exist in this sector, the government realizes the importance of institutions that oversee the activities of the financial services sector. Therefore, the government established an independent agency OJK. The Financial Services Authority (OJK) is a state institution established under Law Number 21 of 2011 whose function is to organize an integrated regulatory and supervisory system for all activities within the financial services sector, both in the banking sector, capital markets, and the non-financial services sector. banks such as Insurance, Pension Funds, Financing Institutions, and other Financial Services Institutions (OJK Website, 2016). The assignment of the Ministry of Finance and Bapepam-LK to the OJK on 31 December 2012, while supervision in the banking sector shifted to the OJK on 31 December 2013. The establishment of the OJK is aimed at creating a stable financial system, increasing transparency, protecting consumer interests, and reducing fraudulent practices. It is hoped that the activities of the financial services sector will run effectively and efficiently.

3.4 KPPU

The Indonesian government is trying to maintain healthy competition among business actors in Indonesia. The Indonesian government established the Business Competition Supervisory Commission (KPPU), which is an independent government institution established to comply with the prohibition on monopolistic practices and unfair business competition. This commission has the right to take action in accordance with its authority on mergers and acquisitions that are suspected of causing monopolistic practices and unfair business competition and also has the right to cancel mergers and acquisitions if they are proven to have resulted in monopolistic practices and unfair business competition.•Ministry of Law and Human Rights Entities that are conducting a merger and wish to amend the articles of association must notify or obtain approval from the Minister of Law and Human Rights.

4. M&A TAX ISSUES IN INDONESIA

One of the objectives of mergers and acquisitions is to legally save taxes. The tax regulations regarding mergers and acquisitions were updated in 2008 because in previous years many companies had merged for the purpose of gaining tax advantages. The applicable tax regulations relating to business combinations, in the form of mergers and acquisitions, include (Karyadi and Irawati, 2015):

1. Regulation No. 36 of 2008 concerning Income Tax (Amendments to Regulation No. 7 of 1983)
2. Regulation No. 42 of 2009 concerning Value Added Tax (the result of an amendment to Regulation No. 8 of 1983)
3. Regulation No. 20 of 2000 concerning the acquisition of land or buildings (the result of an amendment to Regulation No. 21 of 1997). The taxation aspect also has an influence in determining what method will be used to enter into a business combination transaction. In the Tax Law No. 10 of 1994 it is stated that (Hendrian and Muktiyanto, 2011):
4. Article 4 Paragraph 1 Letter d Number 1: states that profits from the sale or transfer of assets including profits due to liquidation, merger, consolidation, expansion, splitting, or business acquisition are one of the tax objects.
5. Article 10 Paragraph 3: regulates the basis for imposing tax on business combinations. This article stipulates that "The acquisition or transfer value of assets transferred in the context of liquidation, merger, consolidation, expansion, splitting, or business acquisition is the amount that should be issued or received based on market prices, unless otherwise determined by the Minister of Finance." Broadly speaking, in a business combination there are 2 possible methods used, namely the By Purchase method and By Pooling of Interest.
6. By Purchase: Under this method, assets acquired by companies that carry out business combinations must be recorded and recognized at their market value. Therefore in this method there is a tax on intangible assets or goodwill.
7. By Pooling of Interest: Under this method, all assets, debts and rights of shareholders are recorded and recognized at book value. So in this method there is no tax imposition because there is no additional asset value. The permissible method of moving or transferring assets in the practice of mergers or acquisitions is the By Purchase method which is based on market value. Profits arising from business combination transactions, in the form of mergers and acquisitions, can be assessed, while losses arising from these transactions are claimed as a deduction from the company's income. Transfer or transfer of assets between companies based on book value (By Pooling of Interest method) is permitted but under the approval stated by the Director General of Taxes, where the company's proposed merger must pass a business objective test by the Director General of Taxes. Tax losses owned by the merging or merging companies cannot be automatically transferred to the surviving company. Generally, mergers and consolidations can be carried out on a tax-free basis (except VAT) provided certain conditions must be met, namely:
8. Transfer of assets must be recorded at book value and entity upon transfer
9. Approval for the merger or consolidation must be obtained from the Director General of Taxation (in practice this may be post transaction approval even if the principal approval is obtained before the transaction occurs)

10. Public accountants are required to submit reports on specified matters. The application is deemed to have been approved if there are no rejections within one month.

5. EMPLOYEE ISSUES ON M&A ACTIVITIES IN INDONESIA

When a company is about to conduct a merger and acquisition, employees are an important aspect that needs to be considered because employees can influence the smooth running of the merger and acquisition process. Almost all employees perceive mergers and acquisitions as a negative thing, so they will immediately feel uneasy when the company they work for announces that they will carry out a merger and acquisition. In Law no. 40 of 2007, employees are one of the parties whose interests must be considered in M&A. According to Article 127 of the Company Law, every plan to change ownership must be announced to all employees no later than 30 days prior to the summons for the General Meeting of Shareholders (GMS) in order to change ownership in the company.

Laws regarding employment are regulated in Law No. 13 of 2003. This law describes termination of employment (PHK) related to mergers and acquisitions in Article 163 (Republic of Indonesia, 2003):

1. Entrepreneurs can terminate the employment relationship with workers/laborers in the event of a change in status, merger, consolidation, or change in company ownership and the workers/laborers are not willing to continue the employment relationship, the workers/laborers are entitled to severance pay of 1 (one) time in accordance with the provisions Article 156 paragraph (2), compensation for tenure of service 1 (one) time as stipulated in Article 156 paragraph (3) and compensation for rights according to the provisions in Article 156 paragraph (4).
2. Entrepreneurs can terminate the employment of workers/laborers due to changes in status, merger or consolidation of companies, and employers are not willing to accept workers/laborers in their companies, so workers/laborers are entitled to severance pay in the amount of 2 (two) times the provisions of Article 156 paragraph (2), compensation for tenure of service 1 (one) time as stipulated in Article 156 paragraph (3), and compensation for rights according to the provisions in Article 156 paragraph (4).

6. CONCLUSION

Merger and acquisition activities have been carried out not only in developed countries but also in Southeast Asia. In ASEAN countries investment activities carried out between countries reached US$ 4.4 billion in 2009, of which most were carried out in Singapore (46%), Indonesia (31%) and Thailand (13%) (KPPU, 2010). These three countries have various investment regulations, especially those related to mergers and acquisitions. This is important for maintaining competitive and efficient market activities. For regulations related to mergers and acquisitions, only 5 (five) ASEAN countries have competition laws, namely Indonesia, Singapore, Thailand, Vietnam and Laos. Merger and acquisition rules owned by each country vary from various aspects, be it the scope, nature of notification, financing, and related sanctions.

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