

PwC Indonesia Legal Alert

September 2018 / No.4

OJK New Regulation on Takeover of Public Companies



OJK New Regulation on Takeover of Public Companies

On 27 July 2018, the Indonesian Financial Services Authority (“**OJK**”) issued OJK Regulation No. 9/POJK.04/2018 on Takeover of Public Companies (“**OJK Regulation**”). This OJK Regulation repeals and replaces Regulation No. IX.H.1 attached to Decree of Bapepam-LK No. Kep-264/BL/2011 on Takeover of Public Companies (“**Old Regulation**”).

This OJK Regulation addresses practical issues encountered in acquisition of public companies and regulates these matters more clearly, increasing protection for investors and upholding the fairness, transparency and accountability principles of the Indonesian capital markets in general.

Of all the key provisions introduced under this OJK Regulation, special attention is paid, among other things, to clarification of the definition of controlling shareholders and the applicability of the control threshold (which varies for different industries) for purposes of the takeover requirements, post-tender offer refloating requirements as well as new exemptions to the tender offer requirements.

1) *Definition of Controlling Shareholder*

This OJK Regulation defines "Controlling Shareholder" as a Party, that directly or indirectly: (i) holds more than 50% of the total issued shares with voting rights; or (ii) has the ability to determine, directly or indirectly, in any way the management and/or policy of the public company.

This new definition emphasizes that a Party indirectly holding more than the shareholding threshold is considered as Controlling Shareholder of a listed company, which was not clearly phrased in the Old Regulation. This ultimately clarifies the indirect control concept which was meant to be reflected by the Old Regulation.

This OJK Regulation also clarifies that the ability to determine, directly or indirectly, in any way the management and/or policy of the public company could be evidenced by, among others, any of the following documents and/or information. This clarifies the gap for an evidence of control by minorities.

- a. any agreements with other shareholders that allow it to have more than 50% voting rights
- b. any authority to determine financial and operational policy based on the listed company's articles of association or agreements
- c. any authority to appoint or dismiss a majority member of the board of directors and the board of commissioners who control the listed company through the board of directors and the board of commissioners
- d. any powers to dominate majority votes in the board of directors' and the board of commissioners' meeting allowing them to control the listed company;
- e. any other powers indicating control over the listed company

2) *Control Threshold*

Although there are no changes on the requirements applicable in a change of control situation, this OJK Regulation acknowledges that there are various control thresholds in various industries, and therefore clarifies that the control threshold applicable for purposes of the implementation of requirements for a new Controlling Shareholder shall refer to that regulated under this OJK Regulation particularly.

This would mean that, for a specific industry such as banking (which applies a 25% control threshold), a new 25% controlling shareholder of a listed Indonesian bank does not need to satisfy the requirements under this OJK Regulation, including not being required to carry out a mandatory tender offer after acquiring such 25% shares of the listed Indonesian bank.

This requirement clarifies the gap under the Old Regulation and would ultimately benefit those parties looking to acquire or structuring a takeover of a listed company engaging in those specific industries with lower control thresholds.

3) Mandatory Tender Offer (MTO) & Sell-Down Requirements

This OJK Regulation now allows a new Controlling Shareholder to appoint another Party to carry out the MTO requirement provided that more than 50% of the shares of such Party are held by the new Controlling Shareholder. Where another Party is appointed for such purpose, such Party will have to comply with the MTO procedures and requirements under this OJK Regulation.

This new provision would benefit a party looking to acquire a listed company in particular where such party does not plan to fund the MTO itself. Further this would offer more flexible structuring schemes of takeovers of listed companies.

Similar to the Old Regulation, this OJK Regulation also requires a new Controlling Shareholder to sell-down shares in excess of 80% of a listed company where those shares were acquired through an MTO, to sell-down to 80% within two years of the MTO, and retain a minimum public float. The key difference introduced is that OJK now does not allow any extension to the sell-down requirement. This OJK Regulation strictly requires new Controlling Shareholders to complete the sell-down requirement within two years of the MTO. Failure to comply with the sell-down requirement will be subject to the sanctions provided under this OJK Regulation.

It remains to be seen how OJK will strictly implement this looking at the sell-down challenges commonly found in practice. The aim of this requirement is enhanced minority protection and liquidity of the shares in the market, and ultimately, parties looking to acquire a listed company should anticipate and plan the sell-down requirement well in advance.

Further, under this OJK Regulation, there is no requirement for the shares to be held by at least 300 shareholders upon the sell-down completion. However, given the rules of the IDX, if the company is listed on the IDX, the listed company must still comply with the IDX free float requirement. It should also be noted that the IDX rules do not provide a period for listed companies to comply with the IDX free float requirement, and so implementation by IDX remains to be seen.

4) Changes in Exemptions

Under the Old Regulation, a takeover announcement and MTO requirements are clearly exempt in a situation where a change of control has resulted from a rights issue or an increase of capital without pre-emptive rights.

However, this OJK Regulation now introduces certain changes on the exemptions available particularly on rights issues or an increase of capital without pre-emptive rights situations. It now provides that the exemption only applies if the control is acquired as a result of an existing shareholder obtaining shares by exercising its rights in proportion to its shareholding. This would mean, if the control is acquired via a rights issue rather than a shareholder exercising its rights in proportion to its shareholding, it would be subject to the MTO requirements.

It also now provides that a change of control resulting from an increase of capital without pre-emptive rights in the context of a debt restructuring where the public company is in financial distress will be exempt from the takeover announcement and MTO requirements.

Given these changes, parties looking to acquire a listed company should anticipate these in structuring their takeover structure. It should also be anticipated that in a rights issue situation, the new exemption may discourage parties to carry out backdoor listings as it would trigger the MTO.

This Legal Alert is intended to give only a general overview. Please do not hesitate to contact us if you need more detailed advice, or have specific questions.

Contacts

Please feel free to contact our Legal Specialists.



Melli Darsa
Managing & Senior Partner
Melli Darsa & Co., Advocates & Legal Consultants
melli.darsa@id.pwc.com



Indra Allen Nasution
Partner
Melli Darsa & Co., Advocates & Legal Consultants
indra.allen@id.pwc.com



Kusumohadiani
Junior Partner
Melli Darsa & Co., Advocates & Legal Consultants
diani.kusumohadiani@id.pwc.com



Danar Respati Sunartoputra
Junior Partner
Melli Darsa & Co., Advocates & Legal Consultants
danar.sunartoputra@id.pwc.com



Vindy Olyvia
Senior Managing Associate
Melli Darsa & Co., Advocates & Legal Consultants
vindy.olyvia@id.pwc.com



We have moved!

Effective 20 August 2018 PwC Indonesia has moved to:



Our phone and fax numbers remain:

Tel: +62 21 521 2901

Fax: +62 21 5290 5555 / 5290 5050

www.pwc.com/id/newdirection

We look forward to welcoming you to our new office.

This content is for general information purposes only, and should not be used as a substitute for consultation with professional advisors.

PwC Indonesia is comprised of KAP Tanudiredja, Wibisana, Rintis & Rekan, PT PricewaterhouseCoopers Indonesia Advisory, PT Prima Wahana Caraka, PT PricewaterhouseCoopers Consulting Indonesia, and Melli Darsa & Co., Advocates & Legal Consultants, each of which is a separate legal entity and all of which together constitute the Indonesian member firm of the PwC global network, which is collectively referred to as PwC Indonesia.

© 2018 Melli Darsa & Co., Advocates & Legal Consultants. All rights reserved. PwC refers to the Indonesia member firm, and may sometimes refer to the PwC network. Each member firm is a separate legal entity. Please see www.pwc.com/structure for further details.