Abstract

Acquisition has been extensively regulated in the Indonesian Company Law and various implementing regulations. In general acquisition denotes a purchase of all or substantial shares of a company resulting in transfer of control of the company. However, the regulatory concept of share purchase transaction in acquisition has developed into the concept of corporate control transaction. This paper observes to what extent the Indonesian corporate legislation regulates the corporate control transaction, in particular in the securities or capital market regulations.

Key words: Control, Acquisition, Open Company, Tender Offer

I. Introduction

Acquisition is a common practice in corporate restructurings and sometimes deals with complicated arrangements embracing such as tax, valuation and employment issues. In Indonesia acquisition are extensively regulated in a number of corporate regulations, such as Company Law and Government Regulation No. 27 of 1998 on Merger, Consolidation and Acquisition of Limited Liability Company (Government Regulation 27 of 1998). Generally speaking, acquisition is no longer viewed as a share sale and purchase transaction only, but it also embraces a corporate control transaction in the broader senses. This paper is aimed at briefly analysing the concept of corporate control transaction from the point of view of the Indonesian laws.
II. The Regulatory Concept Acquisition and Corporate Control Transaction

The regulatory concept of acquisition was firstly introduced by the former Indonesian Company Law contained in Law No. 1 of 1995 (Company Law of 1995). Article 103 paragraph (2) of the Company Law of 1995 set forth that acquisition may be undertaken by way of acquiring all or substantial shares of a limited liability company (PT) which may result in transfer of control of the company. This conceptual understanding of acquisition is reinforced in Government Regulation 27 of 1998.\(^2\)

The definition of acquisition under the current Company Law as contained in Law No. 40 of 2007 (Company Law of 2007)\(^3\) is slightly different compared to the Company Law 1995 and Government Regulation 27 of 1998. Article 1 point (11) of the Company Law of 2007 defines acquisition as legal act undertaken by a legal entity or an individual to acquire shares of a company which results in transfer of control of the company. Based on the Company Law of 2007, the concept of acquisition is not necessarily related to the number of shares to be acquired as there is no longer wording “all or substantial part” of shares. Since the word “may” is also omitted in the wording “result in transfer of control”, the transfer of control is therefore a definite result or consequence of acquisition instead of indefinite result.

Given the above, transfer of control is closely related to an acquisition transaction and it is a key test to determine whether there is an acquisition or not in a share purchase transaction. However, the Company Law of 2007 and Government Regulation 27 of 1998 do not expressly provide for the scope of corporate control. For instance, the capital structure of PT X is as follows:

- **Authorised Capital**: Rp. 4,000,000,000
- **Issued and Paid-Up Capital**: Rp 1,000,000,000 with par value per share: Rp 1,000,000
- **Classification of Shares**: 250 Series A Shares and 750 Series B Shares
  - The holder of Series A Shares is fully entitled to nominate directors of PT X and any amendment to the articles of association

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\(^2\) Article 1 point (4) of Government Regulation 27 of 1998 defines acquisition as legal act undertaken by a legal entity or an individual to acquire either all or substantial part of shares of a company which may result in the transfer of control of the company.

\(^3\) The Company Law of 1995 is replaced by the Company Law of 2007.
of PT X is subject to the approval of the holder of Series A Shares.

<table>
<thead>
<tr>
<th>Shareholders</th>
<th>Number of Shares</th>
<th>Amount</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mr. A</td>
<td>250</td>
<td>Rp 250,000,000</td>
<td>Series A Shares</td>
</tr>
<tr>
<td>Mr. B</td>
<td>250</td>
<td>Rp 250,000,000</td>
<td>Series B Shares</td>
</tr>
<tr>
<td>Mr. C</td>
<td>250</td>
<td>Rp 250,000,000</td>
<td>Series B Shares</td>
</tr>
<tr>
<td>Mr. D</td>
<td>250</td>
<td>Rp 250,000,000</td>
<td>Series B Shares</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1,000</strong></td>
<td><strong>Rp 1,000,000,000</strong></td>
<td><strong>Series A &amp; B Shares</strong></td>
</tr>
</tbody>
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If 250 Series A Shares of Mr. A are purchased by Mr. X, it may be viewed that there is change of control of PT X although Mr. X merely purchases 25% shares of PT X from Mr. A. The entitlement of Mr. A to nominate directors and his veto right with regard to the amendment to articles of association is basically his corporate control and when he sells his Series A shares to Mr. X, such a share transfer will give rise to the transfer of his corporate control to Mr. X as the new holder of Series A shares.

Theoretically, corporate control can be distinguished as “de jure control” and “de facto control”. Under the Company Law of 1995 and Government Regulation 27 of 1998, an acquisition is deemed to occur when there is purchase of “all or substantial part” of shares of the target company. The Elucidation of article 1 point (3) of Government Regulation 27 of 1998 sets forth that “substantial part” refers to a number of more than 50% of the total shareholding in the target company or a certain number of the total shareholding which is larger than the other shareholding in the target company. The concept of control contained in the Company Law of 1995 and Government Regulation 27 of 1998 indicates that corporate control is viewed as “de jure control” which is related to the majority of shareholding. On the other hand, under the Company Law of 2007 an acquisition is not viewed as a result of purchase of “all or substantial part” shares of the target company, but it is deemed to occur when the share purchase results in the transfer of control. Although the reference “control” is not sufficiently clear, the concept of corporate control under the Company Law of 2007 basically refers to “de facto control” irrespective of the number of shares acquired.5

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III. Corporate Control Transaction of Open Company

The regulatory concept of corporate control transaction in the acquisition of open company as contained in the capital market regulations issued by the Supervisory Board of Capital Markets and Financial Institutions (BAPEPAM LK, formerly known as the Supervisory Board of Capital Markets or BAPEPAM) is much clearer. This regulatory concept was firstly introduced in Regulation No. IX.H.1 on Acquisition of Open Company as attached in Decree of Chairman of BAPEPAM No. KEP-04/PM/2000 dated 13 March 2000 (Regulation IX.H.1 of 2000). Under article 1 point (e) of Regulation IX.H.1 of 2000, the term “acquisition of open company” is defined as an act, either direct or indirect, which results in the change of the controller of open company. Given the above, acquisition does not necessarily mean purchase of shares of the target company.

In order to understand the reference “change of the controller” it is important to understand the concept of “the controller of open company”. The regulatory concept of “the controller of open company” has developed since the first introduction of this concept. Initially, it was defined as any party who has shares or equity securities of 20% (twenty per cent) or more or has capability of controlling the company, either directly or indirectly, by way of: (1) determining the appointment or dismissal of directors or

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5 It is also interesting to note that the concept of subsidiary company of state-owned company also refers to the corporate control instead of direct shareholding. Article 1 point (e) of Decree of Minister of State-Owned Companies No. KEP-117/M-MBU/2002 dated 31 July 2002 on Corporate Governance Practices in State-Owned Companies provides that subsidiary company of state-owned company is a limited liability company controlled by a state-owned company directly or indirectly through a subsidiary company by way of owning more than 50 (fifty per cent) shares with voting rights or owning 50% (fifty per cent) shares with voting rights or less than 50% (fifty per cent) shares with voting rights which fulfil the following requirements: (1) having more than 50% (fifty per cent) voting rights based on an agreement with other shareholders/investors; (2) having right to determine the financial and operating policies of the company based on the articles of association or agreement; (3) having capability of appointing or dismissing majority members of Board of Directors, Board of Commissioners/Supervisory Board; and/or (4) having capability of controlling majority votes in the meeting of Board of Directors and Board of Commissioner/Supervisory Board. This regulatory concept of subsidiary company of state-owned company reflects that it also embraces an indirect subsidiary company or sub-subsidiary company through corporate control.

6 Pursuant to article 1 point (7) of the Company Law of 2007 “open company” is public company or company conducting share public offering in accordance with the regulations on capital markets. The term “public company” under article 1 point (8) of the Company Law of 2007 is defined as company which fulfil the criteria in term of the number of shareholder and the paid-up capital in accordance with the regulations on capital market.
commissioners; or (2) amending the articles of association of such open company. This regulatory concept of "the controller of open company" was changed in the same Regulation as contained in Decree of Chairman of BAPEPAM No. KEP-05/PM/2002 dated 3 April 2002 (Regulation IX.H.1 of 2002). Regulation IX.H.1 of 2002 defined "the controller of open company" as (1) any party who has shares of 25% (twenty five per cent) or more unless such party can prove that it does not control the open company; or (2) the party who has capability of controlling the open company, either directly or indirectly, by way of: (a) determining the appointment or dismissal of directors or commissioners; or (b) amending the articles of association of such open company. Furthermore, Regulation IX.H.1 of 2002 was changed by the new generation of the same Regulation as contained in Decree of Chairman of BAPEPAM LK No. KEP-259/BL/2008 dated 30 June 2008 (Regulation IX.H.1 of 2008), where the regulatory concept of "the controller of open company" has been changed in term of the shareholding threshold and the corporate control. Article 1 point (d) of Regulation IX.H.1 of 2008 provides that the controller of open company, hereafter referred to as the "controller", is any party who has more than 50% (fifty per cent) of the total paid-up shares, or any party who has capability of determining, directly or indirectly, the management and/or the policies of open company by any means.

Having reviewed the regulatory concept of the "controller of open company" and the "acquisition of open company", it is understood that the acquisition of open company does not necessarily mean a direct the acquisition of shares of the target company, but it also embraces an "upstream acquisition". For instance A Limited and B Limited, overseas

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7 See article 1 point (d) of Regulation IX.H.1 of 2000.

8 See article 1 point (d) of Regulation IX.H.1 of 2002.

9 This regulatory concept of "the controller of open company" is also similar to the concept of the "controlling shareholder" of a bank as stipulated in article 1 point (3) of Regulation of Central Bank of Indonesia No. 8/16/PBI/2006 dated 5 October 2006 on Single Ownership of Banks in Indonesia which defines the controlling shareholder is a legal entity and or an individual and a group of business who: (a) has 25% or more of the shares issued by the bank and has voting right; (b) has 25% of the shares issued by the bank and has voting right, notwithstanding, it can be proven that it has exercised control of the bank directly or indirectly. The concept of control may also be compared with Rule 405 of the U.S. Securities Act of 1933 which provides that the term "control" (including the terms "controlling", "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.
companies, have respectively 25% of the total issued shares in PT X Tbk, an Indonesian publicly-listed company. Both A Limited and B Limited are wholly owned by C Limited, an overseas company, which is wholly owned by D Trust, an overseas trust. From the above structure it is clear that both A Limited and B Limited are directly controlled by C Limited and indirectly controlled by D Trust. In case the shares of C Limited is acquired by E Trust, an overseas trust, the indirect control of A Limited and B Limited will be transferred from D Trust to E Trust. From the Indonesian legal point of view, it should be analysed whether there is change of control of PT X Tbk as a result of the upstream acquisition. Although the shareholding of A Limited and B Limited collectively does not exceed the threshold of more than 50% of the total paid-up shares of PT X Tbk, such upstream acquisition may be considered as the acquisition of PT X Tbk so long as it is proven D Trust has indirect corporate control of PT X Tbk through A Limited and B Limited being owned by C Limited. In view of the regulatory concept of the controller of open company as contained in Regulation IX.H.1 of 2008, it must be tested whether D Trust or C Limited has capability of determining indirectly, the management and/or the policies of PT X Tbk through the shareholding of A Limited and B Limited in PT X Tbk. The above hypothetical case study may be described as follows:

Another case study can be taken eg. if A Limited purchases another 30% shares of PT X Ltd respectively 25% shares from B Limited and 5% shares from the public shareholders, it is questionable whether the 55% shareholding of A Limited in PT X Tbk as a result of such share purchases will be considered as acquisition of PT X Tbk in light of Regulation IX.H.1
of 2002. If it is analysed there is no change of the controller of PT X Tbk resulting from the above share purchases, given the ultimate beneficial owner of A Limited and B Limited is D Trust being the controller of PT X Tbk. Following such share purchases from B Limited and the public shareholders, the D Trust remains the controller of PT X Tbk, therefore such transactions are basically not the acquisition of PT X Tbk. However in such transactions, it is important to take into account certain BAPEPAM LK Regulations such as Regulation XI.C.1 on Securities Transactions which are not Prohibited for Insiders and Regulation X.M.1 on Information Disclosure on Certain Shareholders.10

IV. The Obligations Related to Acquisition of Open Company

Acquisition of an open company deals with complicated procedures in relation to disclosures and tender offer. Article 7 of Regulation IX.H.1 of 2008 provides that a prospective new controller having undertaken negotiation which may result in acquisition, may submit information to the company to be acquired, BAPEPAM LK and the Stock Exchange where the shares of the company are listed, and announce it to the public. In case the prospective new controller informs and announces such a negotiation, any progress of such negotiation must be regularly informed to the concerned parties as aforementioned at the latest on the second day as of the relevant progress.11 The above negotiation disclosure shall include information on (1) the approximate number of shares to be acquired and the name of the target company (the open company); (2) the identity of the acquirer including name, address, telephone, facsimile numbers, type of business and the

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10 Pursuant to article 1 (a) of Regulation XI.C.1 as attached in Decree of Chairman of BAPEPAM No. Kep-58/PM/1998 dated 2 December 1998, securities transaction among insiders of issuer or public company having the same inside information and undertaken outside the stock exchange is not a prohibited securities transaction as referred to in articles 95 and 96 of Law No. 8 of 1995 on Capital Markets (Capital Market Law). Furthermore, article 2 in conjunction article 1 of Regulation X.M.1 as attached in Decree of Chairman of BAPEPAM No. Kep-82/PM/1996 dated 17 January 1996 provides that any party having 5% or more paid-up shares of issuer or public company must report to BAPEPAM LK of its shareholding or any change of its shareholding within 10 days as of the transaction. In the case study above, if A Limited purchases another 5% shares of PT X Ltd from 1 public shareholder having 5% shares of PT X Tbk, such public shareholder is subject to the requirements of Regulation X.M.1.

11 See articles 7 and 8 of Regulation IX.H.1 of 2008.
purpose of the control; (3) the method and process of the acquisition negotiation; and (4) the negotiation materials for the proposed acquisition.12

It is interesting to note that the disclosure requirements prior to the acquisition as abovementioned seems to be discretionary, given it is said that the prospective new controller “may” submit the information to the concerned parties and announce it to the public. Such flexibility basically makes sense given a premature disclosure on the proposed acquisition may detrimentally affect the efficient market, particularly in the event the proposed acquisition is eventually cancelled for some reasons.13 In view of the Efficient Capital Market Hypothesis, price of a share of stock trading in the secondary market accurately reflects information relating to that stock, thus, changes in a stock’s price result from changes in information concerning that stock.14 Therefore, the information on an acquisition plan should certainly be disclosed at the right time to avoid any distortion in the market.

On the other hand, such negotiation disclosure is as a matter of fact mandatory instead of discretionary, as it is used as the milestone to commence the tender offer implementation and to determine the price of the remaining shares to be subsequently acquired from the public shareholder as further discussed below. Article 11 of Regulation IX.H.1 of 2008 expressly provides that the tender offer shall be commenced at the latest 180 days upon the negotiation disclosure as referred to in article 7 was made. It is not clear when the proposed acquisition or the negotiation should be disclosed to the relevant parties and to what extent the progress of negotiation should be disclosed. For instance, if a prospective new controller solicits an acquisition from a shareholder, but there is no indicative purchase price given it will be determined after the completion of preliminary due diligence. Will such a negotiation trigger the negotiation disclosure as referred to in article 7 of Regulation IX.H.1 of 2008? Hence, the disclosure timing is basically the discretion of the prospective new controller as the disclosing party. Interestingly, Regulation IX.H.1 of 2008 does not expressly provide for any sanction in case the Tender Offer is not commenced within the required timeframe.

12 See article 9 of Regulation IX.H.1 of 2008.


The aforementioned reflects that the information disclosure and the measures of public shareholder protection are of the essence in the proposed acquisition of open company. In comparison, the regulations on acquisition in other countries also have the same philosophical values. In Australia acquisition is governed in Chapter 6 of the Corporations Law having prime objectives derived from a report of the Company Law Advisory Committee, known as the Eggleston Committee after its chairman, Sir Richard Eggleston, which published a report on the disclosure of substantial shareholdings and takeovers in 1969. The objectives are currently provided for in section 731 of the Corporations Law in relation to the powers of the Australian Securities and Investment Commission (ASIC) and known as “the Eggleston Principles”, where ASIC is directed to have regard to the need to ensure that the shareholders and directors of the target company:

1. know the identity of a person who proposes to acquire a substantial interest in the company;
2. have reasonable time in which to consider any proposal under which a person would acquire a substantial interest in the company;
3. are supplied with adequate information to enable them to assess the merits of any proposal under which a person would acquire a substantial interest in the company.

In addition, ASIC must have regard to the need to ensure that:

4. as far as practicable, all shareholders of a company have reasonable and equal opportunities to participate in any benefits accruing to shareholders under any proposal under which a person would acquire a substantial interest in the company.

The fourth principle of the Eggleston Principles as aforementioned suggests the principle of “equality of opportunity for all shareholders” when there is a proposed acquisition.

In Indonesia following the acquisition of open company, the new controller has 2 major subsequent obligations ie:

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17 See article 2 of Regulation IX.H.1 of 2008.
1. announcing to the public and submitting to BAPEGAM LK notice in relation to the acquisition at the latest 2 working days as of the acquisition, of which includes (a) the acquired shares and the total shareholding; (b) its identity (name, address, telephone, facsimile numbers, type of business and the purpose of the control);

2. conducting tender offer for the remaining shares of such open company, excluding: (a) the shares owned by shareholder having undertaken such acquisition transaction with the new controller; (b) shares owned by other party having received offer with the same terms and conditions from the new controller; (c) shares owned by other party which at the same time conducting tender offer of shares of the open company; (d) shares owned the substantial shareholder (pemegang saham utama); and (e) shares owned by the other controlling shareholder of the open company.

The above obligations basically reflect the similar rationale as the Eggleston Principles. The mandatory tender offer specified in article 2 (b) of Regulation IX.H.1 of 2008 indicates that the acquisition of open company shall be subsequently followed by another acquisition of the remaining shares of the open company by way of tender offer. The rationale of this tender offer to the remaining shares owned by the other shareholders is basically similar with the principle of equality of opportunity for all shareholders when there is acquisition of open company.

As comparison with the U.S. securities regulation, tender offer and disclosure requirements for acquisitions in the U.S. are also strictly regulated. One of the most important pieces of securities legislation in the field of mergers and acquisition is the William Act which was passed in 1968. The William Act has four major objectives:

1. to regulate tender offers;

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18 Elucidation of article 1 of the Capital Market Law provides that term “substantial shareholder” (pemegang saham utama) is any party who directly or indirectly has at least 20% percent voting rights of the total shares with valid voting right issued by the company or smaller amount as determined by BAPEGAM LK.


2. to provide procedures and disclosure requirements for acquisitions;
3. to provide shareholders with time to make informed decisions regarding tender offers; and
4. to increase confidence in securities markets.

Notwithstanding, such mandatory tender offer may affect the eligibility of the target company as open company, if the other shareholders massively sell their shares to the new controller at the premium price. Such a circumstance occurred when PT Phillip Morris Indonesia acquired 40% shares of PT Hanjaya Mandala Sampoerna Tbk from certain shareholders affiliated to Sampoerna family in 2005. Consequently, PT Philip Morris Indonesia conducted the mandatory tender offer to the remaining shares owned by the public shareholders. Such a tender offer has caused the number of shareholders of PT Hanjaya Mandala Sampoerna Tbk significantly decreased in which the status of PT Hanjaya Mandala Sampoerna Tbk as publicly-listed company was legally affected.21 Pursuant to Listing Rule of the Indonesian Stock Exchange, the number of shareholders of a company listed on the Primary Board (Papan Utama) is at least 1,000 shareholders having securities account in the bourse member or if the company is listed on the Secondary Board (Papan Pengembangan), the number of shareholders is at least 500 shareholders having securities account in the bourse member.22

Unlike its predecessors, article 3 of Regulation IX.H.1 of 2008 has anticipated such a circumstance by setting out that if the tender offer causes the shareholding of the new controller is more than 80% of the paid-up capital of such open company, the new controller shall retransfer the shares to the public so that the public shareholding becomes at least 20% of the paid-up capital of the open company and consists of at least 300 persons at


22 See articles III.2.6 and III.3.7 Listing Rule I-A of the Indonesia Stock Exchange (IDX) as attached in Decree of Board of Directors of PT Bursa Efek Jakarta No. 305/BEJ/07-2004 dated 19 July 2004 on Rule Number I-A concerning Listing of Shares and Equity Securities Other than Shares Issued by Listed Company. Please note that the listing system on IDX recognises dual board system consisting of Papan Utama (Primary Board) and Papan Pengembangan (Secondary Board).
the latest within 2 years as of the completion of the tender offer. Furthermore, article 4 of Regulation IX.H.1 of 2008 also provides that if the acquisition of open company causes the shareholding of the new controller is more than 80% of the paid-up capital of such open company, the new controller shall retransfer the shares to the public at least in the percentage amount when the tender offer was undertaken and the shareholding consists of at least 300 persons at the latest within 2 years. No matter the retransfer of shares requirement imposed to the new controller, as a matter of fact it is not that easy to retransfer the shares to such a large number of shareholders. Article 20 (e) of Regulation IX.H.1 of 2008 stipulates that any contravention of articles 3 and 4 shall be subject to administrative fines without prejudice to the implementation of such obligations.

It is important to highlight that the mandatory tender offer shall be commenced at the latest the second days as of the acquisition by submitting the announcement text on the Tender Offer Plan to BAEPAM LK, where the process of tender offer shall be subject to Regulation IX.F.1 on Tender Offer as attached in Decree of Chairman of BAEPAM No. KEP-04/PM/2002 dated 3 April 2002 (Regulation IX.F.1).23 As previously mentioned, the negotiation disclosure is the milestone to commence the tender offer where pursuant to article 11 of Regulation IX.H.1 of 2002 the tender offer shall be commenced at the latest 180 as of the announcement on the negotiation process as referred to in article 7 of the same regulation. Given the above, the timing for such disclosure is very important in the acquisition of open company, particularly as it is used to determine the purchase price for the remaining shares to be acquired from the eligible public shareholders. The issue on price determination will be further discussed in the following chapter.

V. Pricing of Tender Offer

Pricing of tender offer is another key issue in the process of subsequent acquisition resulting from the acquisition of open company. The price used in the mandatory tender offer is a premium price, as the new controller having directly or indirectly acquired the target company intends to obtain control. Hence, corporate control targeted by the new controller is valuable and the new controller must pay for it in the form of a “control premium”. That is why a bidder conducting a tender offer always offers more

23 See article 6 of Regulation IX.H.1 of 2008.
(sometimes substantially more) per share than the target company’s per share trading price.\textsuperscript{24}

Article 12 of Regulation IX.H.1 of 2008 extensively regulates the pricing parameters of tender offer and broadly speaking, in determining the price of tender offer, it is important to firstly identify whether the shares of the open company are listed and traded on the stock exchange or not. Having identified the listing status of the shares, it should be further identified whether the acquisition of the open company has been made directly or indirectly.

In case the shares of the open company are listed and traded on the stock exchange, it is necessary to confirm whether the listed shares are actively traded on the stock exchange or not. This is to ascertain the benchmark which will be used for the pricing of the listed shares. If the trading of shares of the open company on the stock exchange are not active, meaning they are not traded on the stock exchange within 90 days or more prior to the disclosure announcement on the acquisition of open company as referred to in article 2 (a) of Regulation IX.H.1 of 2008 or the disclosure announcement on the negotiation as referred to in article 7 of Regulation IX.H.1 of 2008,\textsuperscript{25} or the trading of such shares are temporarily suspended by the stock exchange, the exercise price of tender offer shall be at least the average price of the highest price of daily trades on the stock exchange within the last 12 months backward calculated from the latest trading day or the suspension day. Alternatively, in case of direct acquisition of open company, the exercise price of tender offer may use the acquisition price depending on which one is higher.

If the shares are actively traded on the stock market, the exercise price of tender offer shall be at least the average price of the highest price of daily trades within the last 90 days prior to the disclosure announcements on the acquisition of the open company in compliance with article 2 (a) or the disclosure announcement on the negotiation of acquisition in compliance with article 7. If the acquisition of the open company has been directly undertaken, the alternative price of tender offer which may be used is the acquisition price depending on which one is higher.

Unlike the aforementioned, in term of the shares of the open company which are not listed and traded on the stock exchange, the exercise price of tender offer shall be at least the fair price determined by the valuer. But if the acquisition of open company has been directly undertaken, the exercise price


\textsuperscript{25} See footnote nos. 12 and 16 above.
of tender offer may also refer to the acquisition price so long as it is higher than the acquisition price.

The pricing method of tender offer as abovementioned can be described as follows:

Having reviewed the pricing method, the timing of disclosures is actually of the essence in determining the tender offer price for the shares which are listed and actively traded on the stock exchange. Article 12 (c) and (f) of Regulation IX.H.1 of 2008 with regard to the pricing of tender offer for shares which are listed and actively traded on the stock exchange, stipulates that price of tender offer is at least the average price of the highest price of daily trades on the stock exchange within the last 90 days prior to the disclosure announcement on the acquisition of the open company or the disclosure announcement on the negotiation process.
of the negotiation of acquisition. The alternative of disclosures which are used as the milestone to figure out the period of pricing may create a dispute on the pricing result.

Furthermore, although article 11 of Regulation IX.H.1 of 2008 provides that the implementation of tender offer must be commenced at the latest within 180 days as of the disclosure announcement of acquisition negotiation as meant by article 7 of the same regulation, it is likely that after the acquisition negotiation has been disclosed, the acquisition does not occur within such a period for some reasons. If it is the case, the period used to determine the exercise price as referred to in article 12 (c) and (f) of Regulation IX.H.1 of 2002 shall be adjusted accordingly and if the exercise price resulting from such mechanism is less than the exercise price using the mechanism provided in article 12 (c) and (f), the exercise price shall refer the pricing referred to in article 12 (c) and (f).\(^{26}\) This pricing method again reiterates the importance of premium control in the tender offer price.

In respect of the tender offer price referring to the trading price on the stock exchange, it is important to take into account if the shares of the open company are listed on more than one stock exchange. If it is the case, the tender offer price must also refer to the trading price on the relevant stock exchanges. It happened in the past, when the Jakarta Stock Exchange (JSX) and the Surabaya Stock Exchange (SSX) have not merged, in which at that time most open companies in Indonesia listed their shares on JSX and SSX.\(^{27}\) It is also interesting when an open company is dually listed on the overseas stock exchange and there is acquisition of such company in the jurisdiction of the overseas stock exchange. Certainly, the acquisition of such open company must also adhere to the regulations applicable in such jurisdiction.

VI. Tender Offer Process and The Exempts

Mandatory tender offer governed under Regulation IX.H.1 of 2008 is subject to the procedures specified in Regulation IX.F.1. However, the tender offer undertaken in light of Regulation IX.F.1 is not necessarily preceded by the acquisition of open company. In other words, a tender offer may be initiated by a party soliciting acquisition of shares of an open company

\(^{26}\) See articles 13 and 14 of Regulation IX.H.1 of 2008.

\(^{27}\) The Jakarta Stock Exchange as the surviving company in the merger process has changed its name into the Indonesian Stock Exchange.
instead of acquiring the remaining shares of the other shareholders subsequent to the acquisition of open company. In such a circumstance the pricing of tender offer shall be subject to article 11 of Regulation IX.F.1.

In the acquisition of PT Hero Supermarket Tbk by Nalacca B.V., wholly owned by Mulgrave Corporation B.V., both are Dutch companies, which are controlled by Dairy Farm Group, the tender offer price refers to the pricing method specified in article 11 of Regulation IX.F.1 namely: (1) the highest tender offer price which has been previously made by the same party within 180 before the announcement on tender offer plan as referred to in article 4 of Regulation IX.F.1; or (2) the highest trading price of the relevant securities (shares) on the stock exchange within the last 90 days before the announcement on tender offer plan as referred to in article 4 of Regulation IX.F.1. In this case, the tender offer was not preceded by the acquisition of PT Hero Supermarket Tbk, as Dairy Farm Group intended to acquire additional 9.36% shares of PT Hero Supermarket Tbk from the public to have more control over PT Hero Supermarket Tbk. Before the acquisition 9.36% shares of the target company, Dairy Group was already the controller of the target company through the shareholding of Nalacca B.V. of 28.31% shares and Mulgrave Corporation B.V. of 12.23% shares and Mulgrave Corporation B.V. had also exchangeable bonds which may be exercised with the 24.55% shares of PT Hero Pusaka Sejati in PT Hero Supermarket Tbk. Therefore, the total indirect shareholding of Dairy Group after the completion acquisition of 9.36% shares and the exercise of the exchangeable bonds would be 75% shareholding in PT Hero Supermarket Tbk.

The mandatory tender offer subsequent to the acquisition of open company and the disclosure announcement on the acquisition of open company as referred to in article 2 of Regulation IX.H.1 of 2008 are not applicable for the acquisition of open company resulting from the following occurrences:

1. Marriage or Inheritance;

28 See Tender Offer Statement of Nalacca B.V, as contained in the newspaper Bisnis Indonesia dated 3 October 2005, T4.

29 Please note the disclosure announcement referred to in article 4 of Regulation IX.F.1 is different from the disclosure announcements referred to in articles 2 (a) and 7 of Regulation IX.H.1 of 2008. This is the announcement on the tender offer plan which is made in at least 2 daily Indonesian newspapers (one of them must have national circulation) within 2 business days as of the submission of draft announcement to BAPEPAM LK.

30 See article 15 of Regulation IX.H.1 of 2008.
2. Acquisition of shares of the open company within each 12 months with the maximum amount of 10% of the total issued shares with the valid voting right;
3. The performance of duties and authorities of the governmental body or agency or the state based on laws;
4. Direct acquisition of shares owned by the governmental body or agency or the state based on laws;
5. The pronouncement or judgment of courts of law having final and binding effect;
6. Merger, spin off, consolidation or liquidation of the shareholder of the open company;
7. Donation (hibah) of the shares of the open company;
8. Enforcement of collateral for a certain loan based on loan agreement or loan security in connection with corporate restructuring of the open company determined by the governmental body or agency or the state based on laws;
9. The share acquisition resulting from the Right Issue as referred to in Regulation IX.D.1 or the Debt-to-Equity Swap referred to in Regulation IX.D.4;
10. The share acquisition as a result of the implementation of the policy issued by the governmental body or agency or the state;
11. The tender offer which will be conducted shall be contrary to the prevailing regulations;
12. The share acquisition as the implementation of tender offer based on Regulation IX.F.1 which is not in connection with the fulfilment of obligations of Regulation IX.H.1 of 2008.

Notwithstanding the above, it does not mean that under such circumstances there is no disclosure at all. Article 17 of Regulation IX.H.1 stipulates that in case of the acquisition of open company as a result of the occurrences specified in article 15, the new controller of the open company must disclose to the target company, BAPEPAM LK and the stock exchange and announce it to the public at the latest 2 working days as of the acquisition the following information: (1) identity; (2) the shares and the percentage of such shares before and after the completion of acquisition; and (3) the supporting proofs having legal effect. In case of the acquisition of open company as a result of direct acquisition of shares owned by the governmental body or agency or the state based on laws or the enforcement of collateral for a certain loan based on loan agreement or loan security in connection with corporate restructuring of the open company determined by the governmental body or agency or the state based on laws, the information
to be disclosed shall include: (1) affiliation relation, if any; (2) the reasons of acquisition; and (3) the plan of the acquirer of the target company.\[^{31}\]

In addition to the above exempts, pursuant to article 16 of Regulation IX.H.1 of 2008, the obligations referred to in article 2 of the same regulation are not applicable if the acquisition of the open company is indirectly made through another open company provided that the contribution of the target company to the income of the other open company is less than 50% at the time of acquisition based on the financial statement of the open company concerned.

In general, the milestone of tender offer in light of Regulation IX.H.1 of 2008 and Regulation IX.F.1 can be described as follows:

\[^{31}\] See article 18 of Regulation IX.H.1 of 2008.
VII. Conclusion

Based on the aforementioned, it can be concluded that the substance of acquisition is basically corporate control transaction. Such a corporate control does not necessarily stem from direct shareholding in a company, but it may also include indirect shareholding or other arrangements based on certain agreements or documents. Hence, any change of the controller of a company or any transfer of such control from the former controller to the new controller either by way of direct share purchase or other transactions or arrangements is considered as acquisition.

Although the regulatory concept of acquisition under the Indonesian Company of 2007 has referred to corporate control transaction, it does not expressly provide for the scope of corporate control. The regulatory concept of corporate control under the Indonesian corporate legislation can be found in the securities regulations, i.e. Regulation IX.H.1 of 2008 which defines the definition of “the controller of open company”. The similar definition can also be found in the definition of “the controlling shareholder” in a bank as stipulated Regulation of Central Bank of Indonesia No. 8/16/PBI/2006 on Single Ownership of Banks in Indonesia. In order to avoid any misunderstanding of the concept of acquisition, the Indonesian Company Law of 2007 or its implementing regulations should have clearly provided for the definition of “corporate control”.

With regard to the acquisition of open company, it is obvious that the Indonesian securities legislation recognises the principle of equality of opportunity for all shareholders when there is acquisition of open company. The disclosure requirements in the tender offer process are of the essence and the timing of such disclosure is key element in determining the tender offer price. Any party intending to acquire the control of open company, must strategically prepare the tender offer process as it will lead to certain legal and financial consequences. The statement that “if you fail to plan, you plan to fail” is in fact applicable for the acquirer of open company, where if the whole acquisition strategy is not well prepared, the acquisition may take place without satisfactory results.
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