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Challenges and Opportunities for the Indonesian Securities Takeover Regulations: A Comparative Legal Analysis

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This article examines the extent to which the rules in Indonesia concerning the takeover of a publicly listed company: (1) facilitate an 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) uphold principles and protection provided by the securities laws of more developed jurisdictions. These issues are addressed by analyzing the prevailing securities regulations and GCG rules in Indonesia. 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 both European and Dutch takeover laws. First, Indonesia has been experiencing a trend toward a lower mandatory bid threshold requirement in order to facilitate a more active takeover market. The share percentage threshold for triggering a mandatory offer in Indonesia is lower than that of the Netherlands,

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although in Indonesia, control can be assessed by the degree of one's influence within the company's governance. In pricing the mandatory bid, the two countries adopt a different approach, but the Netherlands arguably adopts a more case-specific approach through the active involvement of its judiciary. Regarding disclosure of the control structure, the shareholding structure of the target company in the Netherlands is more advanced because it captures indirect structures, such as pyramid structures or cross ownership. Indonesia can also learn from its European counterpart in relation to the employee involvement in proceeding with a takeover deal. In the Netherlands, as in Indonesia, the employee does not have the authority to approve or disapprove a takeover; however, employees have the right to receive information, consultation rights, and a dispute settlement forum specifically for labor matters in the event of a change of corporate control. Indonesian law, on the other hand, prescribes that a takeover must take into account the employees' interests without setting out further detailed rules. Finally, the role of the judiciary in Indonesia must be improved in order to provide a fair, orderly, and efficient capital market.

I. INTRODUCTION

There has been increasing attention given to the importance of takeovers in supporting Indonesia's economic growth. Indonesia's capital market has experienced a significant increase in takeovers through asset and share acquisitions, which have contributed to and are stimulating the growth of the Indonesia Stock Exchange ("IDX") composite share price index.[1] Merger

[1] There is no comprehensive data on takeover deals available in Indonesia. Hence, information regarding takeovers is limited to companies listed on the IDX, or those deals that are announced publicly as required under the capital market regulations. In

activity in the United States, for example, shows that the number and price of takeovers affect the dynamics of its capital market.[2] A takeover reflects the business fundamentals and perception of the issuer, and may consequently affect the Indonesian stock market in general. An inefficient "market for corporate control"[3] would discourage optimal corporate growth and, in the long run, result in a more stagnant capital market.[4] At the same time, the benefit of the expected growth must be fairly allocated between both the controlling and the minority shareholders. Therefore, to support the healthy growth of the market, securities regulations must facilitate transactions in the capital market by balancing fairness and efficiency.

This article examines the extent to which the rules in Indonesia concerning takeover of a publicly listed company (1) facilitate *efficient* exchange of shares in the capital market with *fair* protection for all stakeholders in a takeover transaction pursuant to GCG principles; and (2) accommodate the principles and protection provided in the securities laws of more developed jurisdictions. This article will address the first part of the question 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, including the incorporation of the EU Takeover Directive, will address the second part of the question.

From a comparative company law perspective,[5] there are several reasons why this article uses Netherlands as a benchmark country. First, Indonesian company law is founded on Dutch company law following the colonial era.[6] However, since then many driving forces have influenced both countries' securities laws and GCG principles. Both Indonesia and the Netherlands are concerned about corporate scandals in the United States, and many countries have reconsidered how they should handle corporate

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recent years, takeovers of companies listed on the IDX have been driven mainly by the mining and retail sectors. Other industries also active in takeover deals are telecommunications and banking. The author would like to thank M. Ajisatria Suleiman for his assistance in completing this research.

[2] *See* WILLIAM J. CARNEY, MERGERS AND ACQUISITIONS CASES AND MATERIALS 2-5 (2000) (describing the merger and acquisition movement and its relationship with the U.S. economy).

[3] CARNEY, *supra* note 3, at 36.

[4] *See id*. at 36 (describing the general economic structure of acquisition).

[5] *See* Klaus J. Hopt, *Comparative Company Law*, 1162-91 (ECGI Working Paper Series in Law, Working Paper No. 77, 2006) (laying out the general framework of comparative company law).

[6] *Id.* at 1178. Before Indonesia enacted the first company law in 1995, the company law in the country was based upon the provisions of the Indonesian Commercial Code, also known as *Wetboek van Koophandel*, promulgated in 1847 during the Dutch colonial era. *See* BENNY S. TABALUJAN, INDONESIAN COMPANY LAW: A TRANSLATION AND COMMENTARY 18 (1997).

governance practices.[7] In Indonesia, a determining factor was its economic downturn during the 1997-1998 Asian financial crisis, which many experts argued was primarily due to the failure of corporate governance (policies).[8] Meanwhile, the corporate governance system in the Netherlands underwent important changes during the first half of the 1990s.[9]

One such change in Dutch takeover regulations was the introduction of the European Union (EU) Takeover Directive, which aims to create a harmonized playing field for the European capital markets in order to support the region's economic integration.[10] The Directive adopts rules, which have been transposed into Dutch law, that share similarities with, or can serve as a benchmark for, the Indonesian securities takeover laws. Therefore, due to both their common ancestry and the recent divergence of their laws, it is useful to assess how these two countries have developed their takeover rules.

To properly compare Indonesia and the Netherlands, this article will focus on the differences between the two countries' corporate structures because such differences demonstrate the characteristics of each countries' securities laws and corporate governance principles.[11] In Indonesia, the corporate structure is dominated by concentrated ownership in the hands of a limited number of business groups that control market capitalization.[12] In Indonesia and similar countries, the protection of minority shareholders rather than majority or controlling shareholders is more vital than in countries with dispersed ownership. Compared to that of Indonesia, the ownership structure in the Netherlands is one of the most dispersed, although it is not as dispersed as those of the United States or the United Kingdom.[13]

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[7] Marc Goergen, Marina Martynova & Luc Renneboog, *Corporate Governance Convergence: Evidence from Takeover Regulation Reforms in Europe*, 21 OXFORD REV. ECON. POL'Y 243, 261-67 (2002).

[8] *See infra*, notes 22, 25-27; *see also* Carolyn Currie, *Regulatory Failure in Emerging Market*, (UTS Sch. Fin. Econ. Working Paper No. 118, 2002) (discussing regulatory failure in financial crisis using the case of Indonesia).

[9] Jaron van Bekkum, Steven Hijink, Michael Schouten & Jaap Winter, *Corporate Governance in the Netherlands*, *in* INTERNATIONAL CONGRESS ON COMPARATIVE LAW 3-5 (2009).

[10] *See* COMMON LEGAL FRAMEWORK FOR TAKEOVER BIDS IN EUROPE 4-8 (Dirk Van Gerven, ed., 2008).

[11] *See generally* Rafael La Porta, Florencio Lopez-De-Silanes & Andrei Shleifer, *Corporate Ownership around the World*, 54 J. FIN. 471, 512 (1999) ("[I]t seems more likely that the existing ownership structures are primarily an equilibrium response to the domestic legal environments that companies operate in.").

[12] Erik P.M. Vermeulen, *Beneficial Ownership and Control: A Comparative Study, Disclosure, Information and Enforcement*, OECD (Mar. 2012), *available at* www.oecd.org/dataoecd/41/38/50068886.pdf (citing OECD-Indonesia policy dialogue on disclosure of beneficial ownership and control, Bali on 5 Oct. 2011, in which the author quoted S. Claessen, S. Djankov and L.H.P. Lang, *The Separation of Ownership and Control in East Asian Corporations*, 58 J. FIN. ECON. 81 (2000)); *see also*, Benny S. Tabalujan, *Family Capitalism and Corporate Governance of Family-Controlled Listed Companies in Indonesia*, 25 U. NEW S. WALES L.J. 486, 513 (2002).

[13] *See* Renneboog et al., *supra* note 8, at 261-67; *see also* John C. Coffee, *The Future as History: The Prospects for Global Convergence in Corporate Governance and its*

This article argues that in Indonesia there is a tension in the regulatory objective of takeover rules, i.e. facilitating a more active market and protecting the relevant parties (especially the minority shareholders), the business sustainability of the target company, and other stakeholders such as employees. In a broader framework, the academic debate on comparative corporate governance has also raised this issue, because of the different nature of company law and corporate governance on the one hand (which embraces *fair* protection of not only shareholders but also stakeholders) and securities law on the other hand (which aims at facilitating *efficient* market exchange among shareholders).[14] The objective of the Indonesian securities law regime is contemplated in Law Number 8 of 1995 on the 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 interests of shareholders and society as a whole.[15]

There is no formal agreed upon English translation of the Indonesian term "*pengambilalihan*" as used in Law No. 40 of 2007 ("Law 40/2007") and Government Regulation No. 27 of 1998 ("GR 27/1998"). While the word commonly is translated as "acquisition", in practice the term occasionally is translated as "takeover."[16] In this article the terms "acquisition" and "takeover" are used interchangeably to mean the procurement of a controlling interest in a company or its assets. In Indonesia, takeovers of public companies are a common practice. Generally, there first is an acquisition of company shares, which leads to an obligation to conduct a mandatory bid—namely, an offer to purchase the remaining shares held by the public shareholders (in Indonesia, the more common term is "mandatory tender offer").[17] It must be noted that a hostile (unfriendly) offer has yet to be practiced in Indonesia.

Significance, 93 NW. U.L. REV. 641, 669-75 (1999); Allen Ferrell, *Why Continental European Takeover Law Matters*, *in* REFORMING COMPANY AND TAKEOVER LAW IN EUROPE 561 (Guido Ferrarini et al. eds., 2004) (discussing the need for takeover laws in continental Europe); HIGH LEVEL GROUP OF COMPANY LAW EXPERTS, REPORT OF THE HIGH LEVEL GROUP OF COMPANY EXPERTS ON A MODERN REGULATORY FRAMEWORK FOR COMPANY LAW IN EUROPE (2002), *available at* http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf; HIGH LEVEL GROUP OF COMPANY LAW EXPERTS, REPORT TO THE EUROPEAN COMMISSION OF THE HIGH LEVEL GROUP OF COMPANY LAW EXPERTS ON ISSUES RELATED TO TAKEOVER BIDS (2002), *available at* http://europa.eu.int/comm/internal_market/en/company/company/news/hlg01-2002.pdf [hereinafter "The Winter Report"].

[14] See P.A. VAN DER SCHEE, REGULATION OF ISSUERS AND INVESTOR PROTECTION IN THE US AND EU: A TRANSATLANTIC COMPARISON OF THE BASICS OF SECURITIES AND CORPORATE LAW 26-36 (2011).

[15] Law 8/1995 art. 4 (Indon.).

[16] In legal practice, Bapepam Regulation No. IX.H.1 on "Pengambilalihan Perusahaan Terbuka" is translated as "Takeover of Public Company." Bapepam Regulation IX.H.1 (2011), *available at* http://www.bapepam.go.id/old/old/E_Legal/rules/Issuer/IXH1_NEW.PDF (providing an unofficial translation of the rule).

[17] In 2007, there were 16 takeover and mandatory tender offer (MTO) transactions that occurred in the stock exchange, but there were no Voluntary Tender Offers (VTO). In

The next section will provide an overview of the underlying legal and institutional framework in Indonesia, which is discussed in subsequent sections. The third section will discuss the laws and regulations for general acquisitions and takeovers of publicly listed companies in Indonesia. The fourth section discusses how Indonesia's securities takeover regulations can be improved from the perspective of European and Dutch law. In conclusion, this article finds that mandatory bids in Indonesia have been trending toward a lower threshold to facilitate a more active takeover market. The share percentage threshold for triggering a mandatory offer in Indonesia is lower than that in the Netherlands; however, in Indonesia control can be measured by the degree of influence within the company's governance structure. In pricing mandatory bids, each country has a different approach, although the Netherlands arguably adopts a more case-specific approach through the involvement of its judiciary. The shareholding structure of a target company in the Netherlands is more advanced because it captures indirect structures, such as pyramid structures or cross ownership. In addition, Indonesia can learn from its European counterpart about the involvement of employees in a takeover deal process. Although in the Netherlands, as in Indonesia, an employee does not have authority to approve or reject a takeover, employees do have the right to receive information, consultation rights, and a dispute settlement forum for labor matters in the event of a change in corporate control. In contrast, Indonesian law requires that a company take its employees' interests into account, although it does not provide detailed rules. Finally, the role of the judiciary in Indonesia must be improved to build a fair, orderly, and efficient capital market.

II. SECURITIES REGULATION IN INDONESIA – HISTORY AND LEGAL FRAMEWORK

A. Historical Development

The Indonesian capital market existed during the Dutch colonial period in 1912, and was reestablished in 1952 after Indonesia gained independence.[18] However, it did not become active until the 1987 financial sector deregulation, after which certain Indonesian companies more actively pursued public listings.[19] Law 8/1995 provides the basic legal system for a

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2008, there were nine takeover MTO deals and no VTO. In 2009, there were nine takeovers and MTOs for eight (8) issuers/public companies, as well as one VTO. In 2010, the market saw 10 (ten) takeovers and MTO transactions and no VTO. In 2011, there were 11 (eleven) takeover and MTO transactions, as well as 3 (three) VTO transactions. Data is available in Bapepam-LK Annual Report 2007, 2008, 2009, 2010, and 2011, all *available at*
http://www.bapepam.go.id/pasar_modal/publikasi_pm/annual_report_pm/index.htm.

[18] M. IRSAN NASARUDIN & INDRA SURYA, ASPEK HUKUM PASAR MODAL INDONESIA [LEGAL ASPECTS OF CAPITAL MARKETS IN INDONESIA] 66-73 (LKPMK & Fakultas Hukum UI, 2007) (Indon.).

[19] 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

modern capital market to develop. Despite its modernized system, however, the Indonesian capital market has been relatively exposed to external shocks.[20] In 1997, the Asian Financial Crisis ("AFC") impacted the Indonesian economy and created a multidimensional political and social crisis.[21] What started as a currency crisis in Thailand reached Indonesia as systemic economic risk.[22] This monetary crisis led to Indonesia's adoption of a free floating exchange rate to cope with increased demand for US dollars and, therefore, decreasing foreign exchange reserves, which made the Rupiah fall further.[23] In Indonesia, the banking industry was affected the most because of the revocation of 16 banks' licenses in November 1997, which created negative sentiment in the financial market.[24] The stock exchange could not escape from this collapse either: the composite price index (*indeks harga saham gabungan*, IHSG) fell from 740.8 in July 1997 to 339.5 in mid-December 1997 and market capitalization was reduced to one-seventh of its value as compared to July 1997.[25] The Crisis triggered social and political unrest in Indonesia, which toppled the ruling "New Order" regime and ushered in a new era characterized by a free market economy and democracy.[26]

After undergoing significant political, legal, and institutional reforms, the Indonesian capital market has proven to be resilient and has enjoyed significant growth, particularly since 2004. The 2008 global crisis temporarily

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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. *See id.* at 66-73.

[20] 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.

[21] Saud Husnan, *Indonesia*, *in* CORPORATE GOVERNANCE AND FINANCE IN EAST ASIA: A STUDY OF INDONESIA, REPUBLIC OF KOREA, MALAYSIA, PHILIPPINES, AND THAILAND 1 (Juzhong Zhuang, David Edwards, & Virginia Capulong, eds., 2000).

[22] *Id*.

[23] *Id.*

[24] *See* Benny S. Tabalujan, *Why Indonesian Corporate Governance Failed – Conjectures Concerning Legal Culture*, 15 COLUM. J. ASIAN L. 141, 142 (2002) [hereinafter Tabalujan, *Why Corporate Governance Failed*].

[25] *See* Mochammad Rosul, *The Capital Market in Indonesia's Economy: Development and Prospects, in* CAPITAL MARKETS IN ASIA: CHANGING ROLES FOR ECONOMIC DEVELOPMENT (Denis Hew & Donna Vandenbrink, eds., 2005); *see generally* Benny S. Tabalujan, *Corporate Governance of Indonesian Banks – The Legal and Business Contexts*, 3 AUSTRALIAN J. CORP. L. 67 (2001) (discussing the legal and business contexts of corporate governance in the Indonesian banking sector after the Asian Financial Crisis) [hereinafter, Tabalujan, *Indonesian Banks*].

[26] There has been extensive literature concerning the impact of the 1997 crisis on the Indonesian political reform. *See, e.g.*, Hal Hill & Takashi Shiraishi, *Indonesia After the Asian Crisis*, ASIAN ECON. POL'Y REV. 123 (2007) (reviewing the political impact of the 1997 crisis); Yuri Sato, *Overview of the Seven Years' Experiment: What Changed and What Matters?*, 43 THE DEVELOPING ECONOMIES 3 (2005) (discussing the changes brought on by the 1997 crisis).

affected the stock market, but it recovered quickly.[27] The Indonesian government recognizes that the capital market is a key pillar in supporting Indonesia's economic growth, the country's long-term vision and development plan for 2025, and its four-track (pro-poor, pro-growth, pro-job, and pro-environment) strategy.[28]

While the Indonesian capital market system was weak in 1997, Indonesia suffered more from the AFC than did other Asian countries because of its comparative failure in implementing corporate governance principles.[29] As a result, after the AFC the Indonesian securities regulatory regime adopted an approach that focused on promoting the principles of GCG. Certain studies believe that weak corporate governance turned the external shock from the monetary crisis into prolonged financial turmoil. For example, Benny Tabalujan did a survey on financial and economic literature that highlighted certain corporate governance problems in Asia, especially Indonesia, which contributed to the crisis.[30] Simon Johnson, Boone, Breach, and Friedman offer country-level evidence, which suggests that weak legal institutions concerning corporate governance, particularly investor protection mechanisms, were an essential missing factor that worsened the stock market decline during the 1997 Asian financial crisis.[31] In countries with few or weak investor protection mechanisms, net capital inflows were more sensitive to negative events that adversely affect investor confidence. In such countries, expropriation risks increased and expected returns on investment decreased during crises, which made collapses in currency and stock values more likely.[32] Stijn Claessens, Simeon Djankov, and Larry Lang also found concentrated ownership and extensive family control were very severe, particularly in Indonesia along with the Philippines and Thailand, which condition led to owners' excessive power to pursue their interests at the expense of minority shareholders, creditors, and other stakeholders.[33]

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[27] 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 Oct. 8, 2008 (when the IHSG dived 10.38% to the level of 1,451.669 points) and lasted until Oct. 13, 2008. *See* Tabalujan, *Indonesian Banks*, *supra* note 26, at 67. For statistics of market activity and share movement within the Indonesia Stock Exchange, please refer to http://www.idx.co.id/.

[28] This was mentioned in the speech of the President of the Republic of Indonesia on Jan. 3, 2011, when the stock market opened, and during subsequent dialogues with stakeholders of the capital market. *See* Dr. H. Susilo Bambang Yudhoyono, President, Republic of Indonesia, The Opening of the Trading Day at the Indonesian Stock Exchange (Jan. 3, 2011), *available at* http://www.presidenri.go.id/index.php/pidato/2011/01/03/1553.html); Dialogue with the Stakeholders of the Indonesian Capital Market (Jan. 3, 2011), *available at* http://www.presidenri.go.id/index.php/pidato/2011/01/03/1555.html).

[29] Tabalujan, *Why Corporate Governance Failed*, *supra* note 25, at 145.

[30] *Id.* at 150.

[31] Simon Johnson et al., *Corporate Governance in the Asian Financial Crisis*, 58 J. FIN. ECON. 141, 142-43 (2000).

[32] *Id*. at 141-43.

[33] *See generally* Claessen et al., *supra* note 13 ("The separation of ownership and

As a result, since the 1997 Asian Financial Crisis, the government has paid closer attention to reforming corporate governance rules and principles: the National Committee on Governance Policy (*Komite Nasional Kebijakan Corporate Governance* or KNKG) was established under the Coordinating Ministry of Economy in 1999 and governs Indonesian GCG policies.[34] The KNKG follows the five pillars of GCG, which are essential to improving corporate governance practices in Indonesia: transparency, accountability, responsibility, independence, and fairness.[35] Corporate governance reforms are contemplated in various statutes and procedures, including the general company law, securities regulations, banking laws, and public finance laws. In short, Indonesia has been striving to adopt fully corporate governance rules into its legal system.

B. General Legal Framework

The enactment of Law 8/1995, which replaced Law No. 15 of 1952 ("Law 15/1952"), was Indonesia's attempt to establish a modern legal foundation for its capital market, and was a response to the global market and the more sophisticated development of the global capital market industry.[36] Its enactment was in keeping with the national strategy to boost economic growth and modernize the economy, as another major law, Law No. 1 of 1995 ("Law 1/1995") on Limited Liability Companies, was also enacted during the same period. Law 1/1995 was later updated and replaced by Law No. 40 of 2007 ("Law 40/2007").[37] Two government regulations were enacted to equip Law 8/1995 with operational procedures: Government Regulation No. 45 of 1995 on the Operation of Capital Market Activities ("PP 45/1995") and Government Regulation No. 46 of 1995 on Capital Market Investigation ("GR 46/1995").[38] In addition, Law 8/1995 grants Bapepam-LK full authority to regulate the capital market, and Bapepam-LK since has reformed and improved Indonesian securities regulations through enacting technical regulations.[39] Law 8/1995

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control is most pronounced among family-controlled firms and small firms.").

[34] See KOMITE NASIONAL KEBIJAKAN GOVERNANCE, PROFILE, *available at* http://www.knkg-indonesia.com/KNKG/index.asp?ID=AB.PR (detailing the history of the National Committee on Governance and its establishment).

[35] KOMITE NASIONAL KEBIJAKAN GOVERNANCE [NATIONAL COMMITTEE ON GOVERNANCE POLICY], PEDOMAN UMUM GOOD CORPORATE GOVERNANCE INDONESIA [GENERAL GUIDELINES FOR INDONESIA GOOD CORPORATE GOVERNANCE] 3 (2006).

[36] Law 8/1995 (Indon.). Pursuant to its elucidation, "Regulation of the Capital Market under Law 15 of 1952, "The Emergency Law on the Securities Exchange" included in the Statues of 1951 and 1952 (Books 79 and 67, respectively), is considered inadequate in today's environment, it does not contain important capital market provisions, such as the adoption of the principle of full disclosure of material information in a Public Offering, and other essential public safeguards. In view of the rapid development of the economy and the globalization of business, the time is propitious for a new law on the capital market.

[37] *See generally* Law 40/2007 (Indon.) (concerning limited liability companies).

[38] Government Regulation No. 46/1995 (Indon.).

[39] At its inception in 1976, Bapepam supervised the market and served as the stock exchange simultaneously. In 1990, Bapepam's role as the stock exchange was

serves as the *lex generalis,* or the general legal framework, for all capital market activity. However, issuers and investors who want to engage in Indonesian capital market activities must also pay attention to relevant *lex specialis* laws that govern specific sectors or industries, such as antitrust, foreign investment, banking, telecommunications, and mining.

Law 8/1995 affects Indonesian capital market activities in four major ways. First, it establishes a framework for capital market activities by creating the instruments used by the participants, and defines the roles of the market players and supporting institutions.[40] Second, Law 8/1995 provides the foundation for GCG principles, which includes the disclosure principle, which protect public shareholders.[41] Third, Law 8/1995 introduces novel legal concepts to the Indonesian legal system, such as trusts,[42] misappropriating inside information,[43] which foster an "orderly, fair, and efficient" (*teratur, wajar, dan efisien*) capital market.[44]

Fourth, Law 8/1995 establishes a new framework for the independent and adaptive institution of the Capital Market Supervisory Authority, Bapepam, which is the market regulator.[45] As such, Bapepam guides, regulates, supervises and approves day-to-day market activities, commences investigations (both administrative and criminal), and imposes sanctions.[46] In December 2005, Bapepam was merged with the Directorate General of Financial Institutions to become Bapepam-LK, which also has the authority to

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terminated and since then it has acted only as the regulator, further reaffirmed in Law 8/1995. Ever since corporate governance reform began in Indonesia, Bapepam has issued new rules to meet this objective, including, but not limited to, improving disclosure requirements (Bapepam Regulation X.K.2 for financial reporting and X.K.6 for annual reporting), conflict of interest (Bapepam Regulation IX.E.1), material transactions (Bapepam Regulation IX.E.2), rights issue (Bapepam Regulation IX.D.1), takeovers and public bids (Bapepam Regulation IX.H.1 and IX.F.1). *See* History of Bapepam, Bapepam Online (Mar. 19, 2013), *available at* http://www.bapepam.go.id/old/profil/sejarah_bapepam.htm (providing a short history of the Bapepam).

[40] Law 8/1995 (Indon.) arts. 3-5 (providing rules and regulations dealing with the Bapepam); Law 8/1995 (Indon.) arts. 6-17 (covering the stock exchange, clearinghouse, and depository and settlement); Law 8/1995 (Indon.) arts. 30-42 (covering securities companies and investment advisors); Law 8/1995 (Indon.) arts. 43-54 (covering supporting institutions, such as custodians, shares administrators, and trustees).

[41] Law 8/1995 art. 1(25), 75 (Indon.).

[42] The limited inclusion of the concept of "trust" in the securities regulatory regime can be inferred from the inclusion of a system of trustees (arts. 50-54), collective custody (art. 56), and the ability to have a mutual fund collective investment contract (art. 21), which involves a custodian bank as the trustee. Law 8/1995 (Indon.).

[43] Law 8/1995 arts. 90-9 (Indon.).

[44] Law 8/1995 art. 7(1) (stating that the stock exchange is established to implement a securities market that is orderly, fair, and efficient).

[45] Law 8/1995 arts. 3-5, 43-54, 64-9 (Indon.).

[46] *Id.* art. 3(1).

supervise the insurance and pension fund market.[47] Further, in November 2011, the Indonesian Parliament enacted Law No. 21 of 2011 ("Law 21/2011") concerning *Otoritas Jasa Keuangan* (OJK), or the Financial Service Authority (FSA). Pursuant to Law 21/2011, FSA will become supervisor and regulator of the capital market and financial industry, the role currently held by Bapepam-LK, and the banking industry, the role currently held by the Central Bank. As a result, Bapepam-LK will be replaced by the FSA as soon as the institution is set up.

III. INDONESIAN SECURITIES LAW TAKEOVER REGULATIONS

The takeover of a publicly listed company in Indonesia is subject to at least three legal regimes. First, takeover is another form of acquisition under basic company law, applicable to both privately held and publicly listed companies. Second, for publicly listed companies, the securities regulations enacted by the parliament, government, and Bapepam-LK, are applicable. Third, there may be particular industry-specific or other regulations.

A. Indonesian General Company Law

Law No. 40 of 2007 on the Limited Liability Company ("Law 40/2007") and implementing regulations, such as Government Regulation No. 27 of 1998 on Mergers, Consolidation and Acquisition of Limited Liability Companies ("GR 27/1998"), provide the statutory framework for conducting business as a limited liability company. Before Law 40/2007 and its predecessor, Law 1/1995, the Indonesian Commercial Code ("ICC") had governed since 1847, when Indonesia a colony of the Netherlands and the Netherlands East Indies Code of Commerce was promulgated.[48]

Neither the ICC nor Law 1/1995 defines an "acquisition." However, GR 27/1998 art. 1(3) defines an acquisition as "a legal action taken by a legal entity or an individual person to acquire all or most of the shares of a company, resulting in a change of control of the company."[49] Law 40/2007 art. 1(11) defines acquisition as a "legal action taken by an entity, or an individual person, to acquire shares of a company resulting in a change of the controlling

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[47] On December 30, 2005, the Bapepam was merged with the Directorate General of Financial Institutions to become Bapepam-LK, and gained a supervisory role over the insurance and pension fund market. However the name Bapepam-LK is still frequently shortened to "Bapepam" in common usage. The organizational structure of the Bapepam-LK is *available at*
http://www.bapepam.go.id/bapepamlk/organisasi/index.htm.

[48] The ICC was a translation of "*Wetboek van Koophandel*, *Staatsblad"* 1847:23, which prevailed as law after Indonesia became independent in 1945 pursuant to the Transitional Provision in 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 applying the law. SRI SOESILOWATI MAHDI, SURINI AHLAN SJARIF & AKHMAD BUDI CAHYONO, HUKUM PERDATA [CIVIL LAW] (SUATU PENGANTAR [AN INTRODUCTION]) 13 (2005).

[49] GR 27/1998 (Indon.).

power of a company."[50] Nonetheless, Felix Soebagjo, a scholar specializing in Indonesian commercial law, argues that a transfer of substantial assets, which results in a change in control of a company, can also be an acquisition.[51] This is especially true of hard asset acquisitions that also involve the procurement of associated businesses and employees. In an asset transfer, the seller transfers the right to control the sold "assets" to the buyer of such assets. Therefore, certain procedures for an acquisition of assets are the same as those applicable to a transfer of shares.[52] Law 40/2007 provides the rules for share transfers, adopting Articles 49 through 52 of Law 1/1995 with some minor revisions and additions.[53]

Pursuant to Law 40/2007, an acquisition is described as a change of control[54] caused by acquiring shares that have been issued and/or to be issued by the company either: (1) through the company's board of directors, or (2) directly from the shareholders.[55] Any legal entity or individual can acquire enough shares of a company to become its controlling shareholder,[56] although such acquisition is subject to other regulatory requirements, such as restrictions on foreign ownership.[57] Standard legal procedures for share transfers apply to acquisitions through direct purchases from existing shareholders, such as share transfer procedures and any required third-party approvals.[58] However, when an acquisition is conducted through the board of directors, the transaction must adhere to an "acquisition plan" created by the prospective acquirer and jointly approved by the board of the target company.[59]

As stated above, standard share transfer rules apply to direct acquisitions from the existing shareholders; specific rules are contained in a company's articles of association. By law, the articles of association of a company must specify the method of transferring the rights over shares in accordance with the provisions of applicable laws and regulations.[60] The board of directors records the day and date of such transfer in the shareholder register

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[50] The same definition of "acquisition" was present in the previous company law, Law 1/1995 art. 103(2) (Indon.).
[51] FELIX OENTOENG SOEBAGJO, HUKUM TENTANG AKUISISI PERUSAHAAN DI INDONESIA [LEGAL ASPECTS OF CONSOLIDATION AND MERGER OF CORPORATIONS IN INDONESIA] 136 (Pusat Pengkajian Hukum, 2006).
[52] *Id.*
[53] Law 40/2007 arts. 48-62 (Indon.).
[54] Law 40/2007 art. 125(3) (Indon.).
[55] Law 40/2007 art. 125(1) (Indon.).
[56] Law 40/2007 art. 125(2) (Indon.).
[57] For example, Indonesia maintains a list that governs the maximum ownership in which a foreign entity can hold shares in an Indonesian company in various business sectors, pursuant to the Presidential Regulation regarding the negative investment list (the latest update of which is Presidential Regulation 36/2010 (Indon.).
[58] Law 40/2007 art. 125(8) (Indon.).
[59] Law 40/2007 arts. 125(5), (6) (Indon.) (mandating the need of an acquisition plan, and what must also be included in such a plan).
[60] Law 40/2007 art. 55 (Indon.).

or the special register,[61] and by no later than thirty days from the record date of the said transfer, 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.[62] If the notification is not made within the given time frame, the Minister "may reject the application for approval or the notification conducted based on the composition and the names of shareholders which have not been notified."[63]

A company's articles of association may prescribe requirements concerning transfers of rights over shares, including (a) mandatory prior offers to holders of a particular class of shares or other shareholders as a preemptive right;[64] (b) mandatory prior approval from the company's organs (i.e. GMS, board of directors and/or board of commissioners);[65] 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.[66] Although mandatory prior approval applies to inheritance cases, these requirements generally do not apply if the transfer of shares is caused by an operation of law.[67]

One essential and common feature in a company's articles of association is a preemptive right provision, known as the right of first refusal, which is the obligation of a seller to offer their shares to the existing shareholders of the company before transferring such shares to a third party.[68] According to the law, when the articles of association require a selling shareholder to offer his/her shares to holders of shares with a particular classification or to the other shareholders, the offer stands for thirty days from the date the offer is made.[69] If the other shareholders do not purchase the offered shares, the seller may offer and sell his/her shares to a third party.[70] The seller is entitled to withdraw the offer after the lapse of the thirty-day period.[71] In addition, the seller is only required to offer the shares to other

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[61] Law 40/2007 arts. 50(1)-(2) (Indon.).
[62] Law 40/2007 art. 56(3) (Indon.).
[63] Law 40/2007 art. 56(4) (Indon.).
[64] Law 40/2007 art. 57(1)(a) (Indon.).
[65] Law 40/2007 art. 57(1)(b) (Indon.); *see also* Law 40/2007 art. 1(2) (Indon.) (defining "company organs"). 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 a board of "supervisory directors" called "commissioners" in Indonesia.
[66] Law 40/2007 art. 57(1)(c) (Indon.)
[67] Law 40/2007 art. 57(2) (Indon.) (revising Law 1/1995 art. 50 (Indon.)).
[68] *See* David I. Walker, *Rethinking Rights of First Refusal*, 5 STANFORD JOURNAL OF LAW, BUSINESS, AND FINANCE, 1, 8-13 (1999); *see generally* Marcel Kahan, *An Economic Analysis of Rights of First Refusal* (New York University, Ctr. for Law & Bus., Working Paper No. CLB-99-009, 1999).
[69] Law 40/2007 art. 58(1) (Indon.)
[70] *Id.*
[71] Law 40/2007 art. 58(2) (Indon.).

shareholders prior to selling to a third party once.[72] Sellers also must obtain approval of either the directors or the commissioners, as specified in its articles of association. Such approval or refusal must be given within ninety days and, once the time period has lapsed, the board must be deemed to have approved the share transfer.[73]

Finally, Indonesian company law requires a quorum in the GMS. A GMS to approve an acquisition may be held only if at least three quarters of all shares with voting rights are present or represented, and the resolution will be lawful only if at least three quarters of the votes validly cast at the meeting approve it.[74] However, Law 40/2007 provides that a company's articles of association may require a higher quorum, a greater requirement for adoption of the GMS resolution, or both.[75] Specific rules apply to share transfers that are subject to securities regulations.[76] For example, in the acquisition of a public company, the target public company is not obligated to obtain approval from a GMS to be acquired, unless other laws and regulations specific to the company's line of business otherwise require such approval.[77] This rule was made to avoid doubt as to whether the provisions in Law 40/2007 or Bapepam-LK policy were applicable. Thus, although the general company law is applicable to both privately held and publicly listed companies, publicly listed companies are also subject to securities regulations that may prescribe additional requirements or set aside provisions in the company law.

B. Indonesian Securities Regulations

Basic Concepts and Definitions

Bapepam Regulation No. IX.H.1 governs takeovers of public companies in Indonesia is governed. Bapepam Regulation IX.H.1 was enacted in 2000, amended in 2002, 2008, and the current law is the 2011 amendment.[78] Regulation IX.H.1 is related to the tender offer rule, known as a voluntary public bid, which is governed by the 2011 amended version of Bapepam Regulation IX.F.1,.[79] The 2011 amendments of Regulation IX.H.1 and IX.F.1[80]

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[72] Law 40/2007 art. 58(3) (Indon.).
[73] Law 40/2007 arts. 59(1)-(2) (Indon.).
[74] Law 40/2007 art. 89 (Indon.).
[75] Law 40/2007 art. 89(1) (Indon.).
[76] Law 40/2007 art. 56(5) (Indon.).
[77] Bapepam Rule IX.H.1 art. 3(2)(b) (2011) (Indon.).
[78] Bapepam Regulation IX.H.1 was first enacted in the Decree of Head of Bapepam No. Kep-04/PM/2000 dated March 13, 2000 on the Takeover of Public Companies [hereinafter 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 April 3, 2002 on the Takeover of Public Companies [hereinafter Bapepam Regulation No. IX.H.1 2002]. A significant change was made by Bapepam-LK, by virtue of the Decree of Head of Bapepam-LK No. Kep-259/BL/2008 dated June 20, 2008 on the Takeover of Public Companies [hereinafter Bapepam Regulation No. IX.H.1 2008]. Various new instruments were introduced in this Bapepam Regulation No. IX.H.1 2008, the most important of which was the mandatory selling requirement.
[79] Bapepam Regulation IX.F.1 was first contemplated under Decree of Head of Bapepam No. Kep-10/PM/2000 on Tender Offer dated March 13, 2000 [hereinafter

make clear distinctions between the rules on takeovers and mandatory bids (Bapepam Rule IX.H.1 2011) and the rule on voluntary bids (Bapepam Rule IX.F.1 2011), although both regulations share similar principles.

Each version of Regulation No. IX.H.1 sets forth a similar definition of a takeover: Takeover means "an activity, either directly or indirectly, that cause any change in a [c]ompany's control."[81] Under this definition, the three essential elements of a takeover are: (1) there is 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 broad definition of an "activity" can cover any activity including a voluntary public bid. However, since there is no precedent for a voluntary bid causing a change of control of a company in Indonesia, the term "activity" has in practice meant a takeover resulting from share acquisitions.

In the above definition, the concept of "control" is a key factor in determining whether a takeover has occurred in Indonesia. Bapepam Regulation No. IX.H.1 (2002) defines "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 that directly or indirectly has the ability to control a Company in a manner of: a) determining the designation and resignation of directors and commissioners; or b) making any changes in the Company's Article of Association.[82]

This amended the previous Bapepam Regulation No. IX.H.1. (2000), in which the threshold for being a company controller was 20% ownership. Meanwhile, Bapepam Regulation No. IX.H.1 of 2008 and 2011 both define "company controller" as "any person who owns 50% 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."[83]

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 April 3, 2002 [hereinafter Bapepam Regulation No. IX.F.1 (2002)].

[80] Bapepam-LK 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 Bapepam Regulation 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 Bapepam Regulation No. IX.F.1 2011] amending the Rule IX.F.1 2002.

[81] *See, e.g.*, Bapepam Regulation No. IX.H.1 art. 1(e) (2002) (Indon.), Bapepam Regulation No. IX.H.1 art. 1(e) (2008) (Indon.), and Bapepam Regulation No. IX.H.1 art. 1(c) (2011) (Indon.).

[82] Bapepam Regulation No. IX.H.1 art. 1(d) (2002) (Indon.).

[83] Bapepam Regulation No. IX.H.1 art. 1(c) (2011) (Indon.); Bapepam Regulation No. IX.H.1 art. 1(d) (2008) (Indon.).

Based on the above, determining whether a shareholder is a company controller can be done through the formal shareholding composition, the quantitative approach, or the actual control of the company, the qualitative approach. First, if using the formal shareholding composition (quantitative) approach, there have been increases from twenty to twenty-five then to fifty percent in the ownership threshold. The increase of this threshold is intended to enhance market liquidity and provide wider access for investors acquiring shares in the Indonesian stock market.[84] The takeover regulation imposes requirements on any potential acquirer for disclosures, regulatory approvals, and mandatory tender offers, etc. that might be burdensome for companies if their corporate actions constitute a takeover. Therefore, from a potential acquirer's perspective, the threshold's increase allows more corporate takeover activity. The 2002 Regulation has a caveat for the twenty-five percent threshold; namely, the act constitutes a takeover, "*unless the person could prove that he does not control the company*."[85] Under this Regulation, the acquirer has the burden of proving that the shares to be acquired will not result in company control. This caveat was deleted after the threshold was increased to fifty percent or more under the 2008 and 2011 Regulations.

Second, the qualitative approach, unlike the quantitative approach, determines who has *de facto* control of the company without regard to the formal shareholding composition. The 2002 Regulation's definition of control encompasses "any person that directly or indirectly has the ability to control a company in the manner of: (a) determining the designation and resignation of members of the board of directors and commissioners; or (b) making any changes in the Company's Article of Association."[86] However, the 2008 and 2011 Regulations broaden the definition by adding the provision that "any person that directly or indirectly has the ability to determine in any way whatsoever the management and/or policy of the public company" is considered a company controller.[87] The discussion of qualitative control relates to the fact that a takeover can be a direct or indirect activity. By introducing the concept of "indirect control," all Regulations (2002, 2008, and 2011) have attempted to cover parties who are not necessarily registered as the company's shareholder but can still exercise control over the company. For example, the indirect control provisions may apply to an "ultimate controller"—a person who may not own shares, but can control, determine, and greatly influence the company's decisions, although the Regulations do not explicitly reference this concept.[88]

The 2000, 2002, 2008, and 2011 versions of Regulation IX.H.1 provide different definitions of a "person" who may be a controlling person that consequently is compelled to make a mandatory offer. A person can be "a

[84] Bapepam Regulation No. IX.H.1 consideration (a) (2008) (Indon.).
[85] Bapepam Regulation No. IX.H.1 art. 1(d) (2002) (Indon.) (emphasis added).
[86] *Id*.
[87] Bapepam Regulation No. IX.H.1 art. 1(c) (2011) (Indon.); Bapepam Regulation No. IX.H.1 art. 1(d) (2008) (Indon.).
[88] For a discussion concerning beneficial/ultimate ownership across jurisdictions, including Indonesia, *see* Vermeulen, *supra* note 13.

natural person, a company [*perusahaan*], a legal entity, a partnership, an association, or any Organized Group."[89] "Natural person" refers to an individual. Meanwhile, a company can be in any legally recognized profit-seeking form, including that of a limited liability company, and it can be either a local or foreign entity.

Mandatory Offer

When a transaction is considered to be a takeover, the party taking over the company is required to conduct a tender offer. Under 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."[90] Pursuant to the most recent amendments in Bapepam Regulation Rule No. IX.H.1 (2011), a mandatory tender offer no longer refers to Bapepam Regulation Rule No. IX.F.1 (2011), which pertains exclusively to voluntary tender offers (discussed further below). As contemplated in the 2000, 2002, 2008, and 2011 versions of Bapepam 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 No. IX.H.1 (2011), the following shares are excepted from the mandatory tender offer:

a) shares owned by shareholders who have made an Takeover transaction with the new Controller;
b) shares owned by other Parties who have obtained an offer with the same terms and conditions from the new Controller;
c) shares owned by other Parties who at the same time also conduct a Mandatory Tender Offer or Voluntary Tender Offer for the shares in the same Publicly-Listed Company;
d) shares owned by the Ultimate Shareholder; and
e) shares owned by the other Controller of the Publicly-Listed Company.[91]

The mandatory tender offer requirement does not apply to a takeover as a result of certain legal actions. The Bapepam Regulation No. IX.H.1 2008 and 2011 versions provide that the following actions do not trigger the mandatory tender offer requirement:

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[89] Bapepam Regulation No. IX.H.1 art. 1(b) (2008) (Indon.).

[90] Bapepam Regulation No. IX.F.1 art. 1(d) (2002) (Indon.).

[91] Bapepam Regulation No. IX.H.1 (3)(a)(2) (2011) (Indon.). These provisions have also been incorporated in the previous Bapepam Regulation No. IX.H.1 (2002) and Bapepam Regulation No. IX.H.1 (2008) (Indon.). *See also* Bapepam Regulation No. IX.F.1 art. 1(c) (2011) (describing "Substantial Shareholder" as any Person that directly or indirectly owns at least 20% of the voting rights of a company's issued shares).

1) The Takeover occurs due to marriage or inheritance;
2) The Takeover is performed by a Party who previously has no share in the Publicly-Listed Company and the Takeover occurs due to purchase or Takeover of the shares in the Publicly-Listed Company within every 12 (twelve)-month period, in a maximum amount of 10% (ten percent) of total outstanding shares with valid voting rights;
3) The Takeover occurs due to the performance of duties and authority of a government or state body or institution based on the laws;
4) The Takeover occurs due to the direct purchase of the shares owned and/or controlled by a government or state body or institution as the implementation of the provision as intended in point 3);
5) The Takeover occurs due to a court stipulation or decision having permanent legal force;
6) The Takeover occurs due to a merger, spin-off, consolidation, or liquidation of a shareholder;
7) The Takeover occurs due to a grant constituting a transfer or shares without any agreement to obtain compensation in any form whatsoever;
8) The Takeover occurs due to the existence of a certain debt guarantee stipulated in a loan agreement, and a debt guarantee in the context of the restructuring of the Publicly-Listed Company stipulated by a government or a state body or institution based on the laws;
9) The Takeover occurs due to share Takeover as the implementation of Regulation Number IX.D.1 and Regulation Number IX.D.4; [92]
10) The Takeover occurs due to the implementation of the policies of a government or state body or institution;
11) The Mandatory Tender Offer that, if implemented, will be contradictory to laws and regulation; and
12) The Takeover occurs due to the implementation of a Voluntary Tender Offer based on Regulation Number IX.F.1.[93]

Creeping Purchase Rule

A transaction is excluded from the mandatory tender offer requirement if it is conducted gradually within the period of one year, with certain limitations. This is called the "creeping share purchase rule." Under the 2002 Regulations, that the mandatory tender offer requirement does not apply to the purchase or acquisition of shares within a twelve month period, "in the amount of up to five percent of the outstanding shares with valid voting rights."[94] Meanwhile, the 2008 and 2011 Regulations increased the five percent

[92] Bapepam Regulation No.IX.D.1 governs pre-emptive rights, while Bapepam Regulation No.IX.D.4 governs capital increases without pre-emptive rights.
[93] Bapepam Regulation No. X.H.1 art. 15 (2008) (Indon.); Bapepam Regulation IX.H.1 art. 6(a) (2011) (Indon.).
[94] *See* Bapepam Regulation No. X.H.1 art. 11(b) (2002) (Indon.).

threshold to ten percent of the outstanding shares with valid voting rights.[95] As a result, an annual purchase of shares of up to ten percent does not trigger a mandatory tender offer.[96] However, since a shareholder of a public company who owns more than 5% of the shares is required to disclose its identity, the price it paid for the shares, and its intention for buying the shares,[97] the other shareholders should not be surprised if there is a change of control caused by a creeping purchase.

Free Float Shares (In a Mandatory Offer)

Free float shares are those retained by public investors in the stock exchange following a mandatory tender offer. Float shares are those available for daily trading in the stock exchange. Bapepam Regulation No. IX.H.1 (2008) introduced new rules regarding obligations to resell shares to maintain the availability of float shares in the event of a takeover that triggers a mandatory tender offer. Under the 2008 Regulations, when a takeover, or a mandatory tender offer following a takeover, results in the new controller owning more than 80% of the company's shares, the new controller must transfer or float at least 20% of the shares back to the public and the company must be owned by at least 300 parties within two years of the offer.[98] The company is exempt from this requirement if it carries out certain corporate actions that meet the regulatory objective.[99] Such corporate action may include a rights issue or an issuance of new shares through private placement, in which case there is no obligation to release the shares because new shares are available for trading, meeting the regulatory objective of making the shares available for the public.[100] This rule is expected to increase market liquidity and provide greater opportunity for public investors to own shares of the public company after a takeover.[101] In addition, Bapepam-LK may have established this rule to prevent the use of tender offers as a way to "go private" or delist a company from the stock exchange.[102]

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[95] *See* Bapepam Regulation No. X.H.1 art. 15(b) (2008) (Indon.); Bapepam Regulation IX.H.1 art. 6(a)(2) (2011) (Indon.).

[96] 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.

[97] Bapepam Regulation No. X.M.1 (1996) (Indon.) (regulating the disclosure of information of certain shareholders).

[98] Bapepam Regulation No. IX.H.1 arts. 3-4 (2008) (Indon.).

[99] Bapepam Regulation No. IX.H.1 art. 5(c) (2008) (Indon.).

[100] Bapepam Regulation No. IX.H.1 art. 5 (c) (2008) (Indon.).

[101] Mark Nelson & Ahmad Assegaf, *Indonesia Takeover Rules: Lower Thresholds, Fewer Deals*, ASIA L. (Sept. 2008), *available at* http://www.asialaw.com/Article/2004989/Indonesia-takeover-rules-lower-thresholds-fewer-deals.html?Print=true&Single=true.

[102] Decision to be voluntarily delisted in the stock exchange is a corporate decision that does not require Bapepam approval. There is also the possibility of delisting by virtue

The introduction of the new sell-down rule is legally and commercially problematic. An acquirer who is legally obligated to purchase shares because of a mandatory tender offer will be forced to sell the shares after two years. In addition, the acquirer will be forced to dump the shares in the market at a discounted price if it cannot sell them within the two-year period. This will affect the price of the shares held by the shareholders, which will disproportionately affect the controlling shareholders because of their high percentage ownership[103] This rule prompted the Malaysian Central Bank to revoke the approval it granted to the Malaysian-based Malayan Banking Berhad (Maybank) when it initiated a plan to acquire a controlling stake in PT Bank Internasional Indonesia Tbk (BII) because the forced sell-down requirement could decrease Maybank's investment value.[104] Maybank's approval was reinstated after Bapepam promised to relax the requirement if the sell-down would adversely impact BII's share price.[105]

In response, the 2011 updated version of Bapepam Regulation No. IX.H.1 (2011) stipulates the conditions under which Bapepam-LK can prolong the time period for the mandatory sell down of shares to relax the sell-down requirements. The time extension may be given if:

1) the Composite Share Price Index (IHSG) on the Stock Exchange decreases by more than 10% (ten percent) in 3 (three) consecutive exchange days;
2) the Stock Exchange on which the Publicly-Listed Company's shares are listed and traded is closed;
3) the trading of the Publicly-Listed Company's shares on the Stock Exchange is stopped;
4) natural disaster, war, riot, fire, and/or strike that significantly affect the business continuity of the Publicly-Listed Company;
5) the share price during the retransfer period is never equal to or higher than the price of the Mandatory Tender Offer; and/or
6) the new Controller has made efforts to retransfer the shares but the obligation as intended in letter a and/or letter b is not fulfilled.[106]

Offer Price

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of the order of the stock exchange. *See, e.g.*, IDX Rule I-I on Delisting and Relisting of Securities in Stock Exchange (2004) (Indon.).

[103] *See* Rachel Evans, *Indonesian Regulator Admits Takeover Mistakes*, ASIA L. (Dec. 2008), *available at* http://www.asialaw.com/Article/2068033/Channel/16959/Indonesian-regulator-admits-takeover-mistakes.html.

[104] Niluksi Koswanage, *Malaysia's Maybank Says Approval for BII Buy Revoked*, REUTERS (July 29, 2008, 12:44 PM), *available at* http://uk.reuters.com/article/2008/07/29/maybank-idUKWNA448920080729.

[105] Soo Ai Peng, *Update 1-Malaysia Maybank Says BII Deal Approval Reinstated*, REUTERS (Sept. 16, 2008, 1:53 PM), *available at* http://uk.reuters.com/article/2008/09/16/maybank-idUKKLR15263920080916.

[106] *See* Bapepam Regulation No. IX.H.1 art. 5(d) (2011) (Indon.).

Price formulation is another main issue in the Indonesian regulations on mandatory offers. The price of a mandatory offer is essential in takeover regulations because the public must receive the same price as that which the acquirer offered to the controlling shareholder. In principle, there is a general shift from determining offer price by the "highest price" to the "average highest price" approach. At first, Bapepam Regulation IX.H.1 (2000) does not distinguish between the prices for direct and indirect takeovers.[107] However, the general rule is that the price is determined by the highest share price within a certain period.[108] Bapepam Regulation IX.H.1 (2002), which has adopted the same approach, improved this rule by providing requirements differentiating between direct and indirect takeovers for determining the price of the tender offer.[109] Despite the distinction, both direct and indirect takeover will cause a mandatory tender offer, the price of which is set pursuant to the highest price within the last 90 days prior to the date of the announcement of the deal.

Bapepam Regulation No. IX.H.1 (2008) and (2011) significantly amended the previous regulations by adopting the average highest price rule.[110] The 2011 Regulation states that the price is the higher of (a) the average of the highest daily trading prices on the ISX within the ninety-day period before the announcement of the tender offer or the negotiation and (b) the takeover price. [111] This amends the 2002 Regulation, in which the price was the higher of (a) the highest trading price on ISX within the ninety-day period before the negotiation announcement and (b) the takeover price.[112] In 2011, Bapepam synchronized the rule concerning voluntary tender offers by adopting the average highest price approach. Therefore, the rules for mandatory and voluntary public bids use the average highest price of the traded stocks.[113]

There are at least two significant changes in the new rules. First, the announcement date under the 2008 Regulation can be made either at the commencement of negotiation that may result in a takeover or at 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 contemplate how it may affect the tender offer price. Second, the 2008 Regulation adopts the "average highest price" standard instead of the "highest price" standard. This approach reduces the price for a tender offer, which

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[107] *See generally* Bapepam Regulation IX.H.1 (2000) (showing that no distinction is made that differentiates by price regardless of whether there is a direct versus indirect takeover).
[108] Bapepam Regulation No. IX.H.1 art. 7 (2000) (Indon.).
[109] Bapepam Regulation No. IX.H.1 art. 8 (2002) (Indon.).
[110] *See* Bapepam Regulation IX.H.1 art. 12 (2008), which is further adopted in Bapepam Rule IX.H.1 art. 4(c) (2011) (Indon.).
[111] Bapepam Rule IX.H.1 art. 4(c) (2011) (Indon.).
[112] Bapepam Regulation IX.H.1 art. 8 (2002) (Indon.).
[113] Bapepam Regulation IX.F.1 art. 4(a)–(b) (2011) (Indon.) (setting the average price of the voluntary tender offer as the higher between the offeror's last bid, the average highest price at the stock changes ninety days prior to the announcement, the average highest price within twelve months prior to the last trading day of such shares, or a reasonable price determined by an appraiser).

arguably can encourage a more active takeover market since potential acquirers prefer lower prices. In addition, he highest price standard can reduce the chance of market manipulation to create an artificially high price for tender offers by leaking inside information. While information leakage is difficult to monitor in Indonesia, the tender offer price is determined by the average highest price and, therefore, averaging the highest price can disperse the impact of leaked information.

Negotiation and Timing

An important consideration with respect to the takeover of a public company and its subsequent mandatory tender offer requirement is when to disclose the process to the general public. Such information is crucial because the public will react to the takeover plan, and such reaction will affect the share price. If the public views the takeover plan positively, the share price may increase. Conversely, if the public views the takeover negatively, the price of the shares may go down. Therefore, the decision to disclose the takeover plan may impact the price of the shares as well as the price of the mandatory tender offer.

Pursuant to the 2000 and 2002 Regulations, when a potential acquirer commences takeover negotiations it must disclose the process even though the deal might fall through.[114] How is the "start" of a negotiation to be determined? The Regulations did not explain whether a short verbal conversation between a director of a prospective company and a director of a prospective target company constitutes "the start of negotiations," or whether it had to be done in a more formal way, such as the signing of a memorandum of understanding.

The 2008 and 2011 versions of Bapepam Regulation IX.H.1 introduced more flexibility into the timing of a takeover announcement. Since the provision regarding the announcement at the start of the negotiation is optional rather than mandatory,[115] a prospective controller may announce a mandatory offer upon the completion of an acquisition of a controlling interest. This flexibility allows the acquirer to choose whether to announce the mandatory tender offer during the negotiation stage or wait until the completion of the takeover. The acquirer must consider the effect of its disclosure strategy on the share price in order to obtain the best value. For instance, if the acquirer announces the takeover and subsequent plan of a mandatory tender offer at the negotiation stage, the share price of such mandatory tender offer will then be 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 tender offer is made only after the completion of a takeover, share price might increase sharply, which in turn might increase the price of the mandatory tender offer shares pursuant to the

[114] Bapepam Regulation IX.H.1 art. 3 (2000) (Indon.); Bapepam Regulation IX.H.1 art. 4 (2002) (Indon.).
[115] Bapepam Regulation IX.H.1 art. 7 (2008) (Indon.); Bapepam Regulation IX.H.1 arts. 2(a)-(d) (2011) (Indon.).

regulation. Therefore, the acquirer must consider when to disclose the information.

If a prospective candidate announces a plan to conduct a takeover at the start of a negotiation, every subsequent material development in the negotiations must be reported on a regular basis, and at the latest at the end of the second day after such a development occurs.[116] The mandatory tender offer must commence no later than the end of the second business day after the company takeover occurs, [117] or at the latest 180 days after the announcement.[118]

Anti-Takeover Defense

Regulations concerning anti-takeover measures are relevant to hostile takeovers, that is, public offers proceeding without the consent of the board of directors of the target company. Hostile offers have not been practiced in Indonesia because most takeover deals were preceded by share acquisitions that led to mandatory tender offers.[119] However, in the event of a voluntary tender offer, pursuant to Bapepam-LK Regulation IX.F.1 (2011), a statement supporting or discouraging a voluntary offer may be made by the target company, an affiliate of the target company, a competing offeror, or those who disclose information or express professional opinions.[120] In addition, the board of directors or board of commissioners of the target company can issue a written statement, but only if there is evidence that the information contained in the offer statement is incorrect or deceiving.[121] Both of these types of statements must be published in two nationwide newspapers at least ten days before the end of the voluntary tender offer period.[122] Finally, there is a general prohibition against the target company carrying out any deal or activity that might frustrate the voluntary tender offer during the offer period,[123] but there is no concrete list of what constitutes such action.

The Role of the Supervisory Authority

The competent supervisory authority of the Indonesian capital market is Bapepam-LK, which authority, as of December 31, 2012, has been transferred to OJK.[124] During its administration, Bapepam-LK has played an effective role in supervising the Indonesian capital market. With regard to

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[116] Bapepam Regulation No. IX.H.I. art. 4 (2002) (Indon.); Bapepam Regulation No. IX.H.I. art. 8 (2008) (Indon.); Bapepam Regulation No. IX.H.I. art. 2(b) (2011) (Indon.).
[117] Bapepam Regulation No. IX.H.1 art. 3 (2002) (Indon.); Bapepam Regulation No. IX.H.1 art. 6 (2008) (Indon.); Bapepam Regulation No. IX.H.1 art. 4(a)(4) (2011) (Indon.).
[118] Bapepam Regulation No. IX.H.I. art. 4, 7 (2002) (Indon.); Bapepam Regulation No. IX.H.I. art. 11 (2008) (Indon.); Bapepam Regulation No. IX.H.I. art. 4(d) (2011) (Indon.).
[119] *See supra* note 18 (regarding the number of takeover deals in Indonesia).
[120] Bapepam-LK Regulation IX.F.1 art. 3(a) (2011) (Indon.).
[121] *Id.*
[122] *Id*. art. 3(c).
[123] *Id*. art. 5(o).
[124] *Supra* text accompanying note 53.

administrative authority and criminal investigative role over market participants, there is no significant change made by shifting authority from Bapepam-LK to the OJK or the Indonesian FSA. Law 21/2011 concerning the OJK mostly revises the governance structure (i.e. nomination and accountability) to establish regulatory independence.[125] At present, the authority governing the capital market pursuant to the new OJK governance is no longer under the government's finance ministry; rather, OJK is an independent entity, the members of which are selected by the parliament. As a regulator, Bapepam-LK/OJK retains regulatory authority, administrative enforcement authority, and, to a certain extent, criminal investigation authority.

First, as part of its administrative authority, Bapepam-LK/OJK can commence an administrative inquiry to maintain the integrity of the market. It can do so by requesting information from market participants, gathering and collecting documentary evidence, or 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. Bapepam-LK/OJK has authority to approve both mandatory and voluntary public offers and its relevant requirements, such as price setting and the sell down rule,[126] and supervise all information disclosed during the process.[127]

Second, Bapepam-LK/OJK can impose the following administrative sanctions: written warnings, monetary fines, limitations on business activities, suspensions of business activities, revocations of business licenses, annulments of approval, and annulments of registration.[128] Third, pursuant to Law 8/1995 art. 101(3), Bapepam-LK, as transferred to OJK, can serve as a 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 a crime; (6) to request expert statements; and (7) to commence and terminate the investigation procedure.[129]

C. *Other Relevant Regulations*

A takeover is subject to legal regimes other than the basic company law and securities regulations. Shareholders that are foreign entities are governed under the foreign investment law and sector-specific regulations and

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[125] Law 21/2011 art. 1(1) (2011) (Indon.) (reaffirming regulatory independence and non-interference from any other institution).
[126] *See, e.g.*, Bapepam Regulation IX.H.1 arts. 3, 4 (2011) (Indon.).
[127] *Id.*
[128] Law 8/1995 art. 102(2) (1995) (Indon.).
[129] Law 8/1995 art. 101(3) (1995) (Indon.).

my face foreign investment restrictions. In addition, takeover deals are subject to competition laws and employment laws.

Foreign Investment Restrictions

Foreign direct investment in Indonesia is regulated by Law No. 25 of 2007 on Investment ("Law 25/2007") and its implementing regulations, which were issued by the Investment Coordinating Board ("BKPM") in accordance with its mandate. BKPM is the appointed regulator of direct investments in Indonesia, has focused mainly on government efforts to promote investment, as well as to regulate and resolve investment issues in Indonesia.[130]

Recently, the government issued Presidential Regulation No. 36 of 2010, which determines what business sectors are open or closed to foreign investors and, if open, to what extent Foreign Direct Investment ("FDI") is permitted—also known as the "Negative List".[131] The new Negative List is the first and most important regulation, which any foreign investor contemplating investment in Indonesia must consult.[132] If the companies participating in the contemplated merger and acquisition ("M&A") have business fields listed on the Negative List as being closed to foreign investment, the foreign investor cannot invest in such field in Indonesia. However, if the business is one that is "conditionally" open to foreign investment, investment is permitted but the contemplated M&A is limited by the restriction on share ownership as provided by the Negative List.[133]

Most private foreign investments in Indonesia are administered and supervised by the 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 require obtaining approval from, the Chairman of the BKPM. In addition, Bapepam-LK regulates publicly listed companies. However, unlike shares regulated under the foreign direct investment scheme, shares traded on the capital market are not classified by their holders, regardless of whether they are local or foreign parties.[134] However, in practice there has been uncertainty about when a tender offer obligation did not follow the Negative List ownership requirements.[135]

Competition Law

[130] Law 25/2007 art 28 (1) (2007) (Indon.) (on the role of BKPM in Indonesia's investment governance).
[131] Presidential Regulation 36/2010 app. I (Indon.) [hereinafter Pres. Reg. 36/2010].
[132] *See* Law 25/2007 art. 12 (Indon.).
[133] Law 25/2007 art. 12 (Indon.); Pres. Reg. 36/2010 arts. (1)-(2) (Indon.).
[134] Pres. Reg. 36/2010 art. 4 (Indon.).
[135] *See*, *e.g.*, Press Release, Indosat, Tender Offer Plan by Qatar Telecom (QTEL) Q.S.C. with Respect to Shares of PT Indosat TBK (July 2, 2008), *available at* http://www.indosat.com/template/media/editor/content/TENDER%20OFFER%20RELEASE.pdf; *see also Qtel to begin coordinated tender offer for PT Indosat TBK*, ARABIAN BUS. (Apr. 13, 2013), http://www.arabianbusiness.com/press_releases/detail/36012 (concerning the debate as to whether tender offer of Qtel is limited to only 65% pursuant to the negative investment list rule).

Certain provisions of Law No. 5 of 1999 on the Ban of Monopolistic Practices and Unfair Business Practices ("Law 5/1999" or "Antimonopoly Law") deal specifically with mergers and acquisitions. Pursuant to Article 28 of Law 5/1999, mergers and acquisitions are prohibited in Indonesia if they result 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 or business practice. Law 5/1999 uses the 50% market share standard as presumptive of a monopoly,[136] the 75% market share as presumptive of an oligopoly,[137] and 50% individual market share or 75% group market share as determinative of a dominant position, unless the party with the shares does not abuse their dominant position.[138] The Indonesian competition authority, the KPPU (*Komisi Pengawas Persaingan Usaha*), is responsible for supervising market competition and anti-competitive behavior in Indonesia.[139]

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"). GR 57/2010 provides the basic legal framework for competition laws applicable to M&A transactions. Since then, the KPPU has issued several rules ("KPPU Rules"), per the mandate of the Anti-Monopoly Law,[140] which contain amended provisions relating to the consultation and pre-notification requirements for M&A transactions. Previously, there was only a voluntary pre-notification process for the parties involved in an M&A. Under GR 57/2010 and the procedures under the KPPU Rules, the voluntary pre-notification process has been replaced with a required, pre-transaction consultation procedure and a more stringent thirty-day post-notification requirement after completion of the contemplated deal.[141]

GR 57/2010 states that such post-notification requirement must be fulfilled by a company conducting any M&A transaction in which the combined total value of assets of the companies concerned is more than 2.5 trillion Rupiah, or in which the combined total turnover of the companies concerned is more than 5 trillion Rupiah.[142] Furthermore, GR 57/2010 stipulates that a Bank conducting an M&A transaction is required to submit a post-notification of such transaction to the KPPU if the total value of assets of the bank concerned is more than 20 trillion Rupiah.[143] Noncompliance with this requirement will give result in the imposition of administrative

[136] Law 5/1999 art. 17(2)(c) (Indon.).
[137] Law 5/1999 art. 4(2) (Indon.).
[138] Law 5/1999 arts. 25(2)(a)-(b) (Indon.).
[139] Law 5/1999 arts. 30-37 (Indon.).
[140] For example, in 2010, the KPPU issued KPPU Rule No. 10 of 2010, No. 11 of 2010 and No. 13 of 2010. KPPU Rule No. 10/2010 and No. 13/2010 have been revoked and replaced by KPPU Rule 10/2011, as further amended by KPPU Rule 3/2012.
[141] GR 57/2010 arts. 5(1), 10 (Indon.).
[142] GR 57/2010 art. 5(2) (Indon.).
[143] *Id.* art. 5(3).

penalties.[144] As a result, after receiving such post-notification, the KPPU will conduct an assessment and determine whether the M&A transaction violates the Antimonopoly Law, using the market concentration, market entry barriers, potential for unfair trade behavior, efficiency, and/or bankruptcy criteria.[145]

While the KPPU's opinion is not binding, under Article 47(2)(e) of Law 5/1999, the KPPU has authority to cancel an M&A transaction if such transaction has elements of monopolistic or unfair trade practices.[146] Hence, potential acquirers contemplating takeover transactions should conduct and file a consultation with the KPPU prior to the completion of a contemplated transaction to limit the cancellation risk.

Employment Law

Law No. 13 of 2003 on Employment ("Law 13/2003") provides the framework for employee and employer rights during an M&A.[147] In theory, since an M&A is related only to a change in ownership of or control over a company, it does not affect the employees' status. In practice, an employee may continue working for the company after an acquisition if the post-transaction company prolongs or renews the employee's work contract. If the contract is renewed, the employee will be terminated from the company pre-transaction and re-hired by the surviving company under new terms and conditions.

If an employee does not wish to be employed by the surviving company, he or she has the right to refuse new employment. Thus, an employee can resign from the company and be entitled to receive a special severance payment, long service payment package, and/or other compensation, such as unused annual leave or housing allowance.[148] Law 13/2003 does not specify the ownership percentage that triggers these entitlements; rather, it refers to a change of ownership.[149] Further, Law 13/2003 is silent on whether the change of control is only direct, or whether it includes indirect changes of control.[150] There is a risk that the company's employees or their union will take the position that any change of ownership will qualify under Article 163(1) even if there is less than a fifty percent change in shareholding. However, even if a new shareholder is not a controlling shareholder, any substantial change in management and employment policies will trigger Article 163(1) because such changes will directly or indirectly affect the employees.

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[144] *Id.* art. 6.
[145] *Id.* art. 3(2).
[146] Law 5/1999, art. 47(2)(E) (1999) (Indon.). *See*, *e.g.*, Memorandum, Temasek Holdings, Temasek to Appeal to Indonesia Supreme Court, *available at* http://www.temasek.com.sg/Documents/userfiles/files/kppu_09may.pdf and is also *available at* http://www.kppu.go.id/docs/Putusan/putusan_temasek.pdf (Indon.) (discussing how Singaporean investment holding company Temasek's cross ownership of Indosat and Telkomsel was deemed to be anticompetitive behavior).
[147] *See generally* Law 13/2003 (Indon.).
[148] Law 13/2003 art. 163 (Indon.).
[149] Law 13/2003 art. 163(1) (Indon.).
[150] *Id.*

Moreover, under Article 163(2) of Law 13/2003, the employers of both the acquiring and target companies have the right to terminate or maintain employment in the event of a change in a company's status, merger, or consolidation, subject to the payment of severance and long service payment as provided by Article 163(2).[151] In practice, the rights of employees affected by M&A transactions are governed by collective labor agreement provisions entered into by and between the company and the company's labor union.[152] Transfers of corporate ownership do not affect the validity of a collective labor agreement because such agreements prevail until their date of termination.[153]

IV. COMPARATIVE ANALYSIS AND LESSONS LEARNED FOR INDONESIA

This article will use the Netherlands' securities regulations as a benchmark to analyze whether the Indonesian securities regulations have adopted rules according to best practices. Since the Indonesian legal system originated from the Dutch colonial era, the two systems share commonalities in their corporate and securities legal structures.

A. Laying Down the Foundation for Comparing Takeover Rules

To provide a proper comparative study from which solutions for improving Indonesia's takeover rules can be derived, this article will begin by analyzing the general legal and economic framework of takeovers.

An acquisition or takeover is characterized by the change of control within a company. Therefore, Paul Davies and Klaus Hopt use the term "control transaction" to define any transaction in which the acquirer attempts, through offers made to the company's existing or current shareholders, to acquire sufficient voting shares to give the offeror control over the company by appointing their "nominees to the board of that company."[154] Davies and Hopt differentiate a "control transaction" from other forms of change in a company's corporate control in two ways. First, a control transaction lacks a corporate decision because the acquirer initiates the transaction, unlike, for example, a merger, which is a joint corporate decision.[155] Second, a control transaction has an external party—the acquirer—that will take control of the

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[151] *Id.* art. 163(2).
[152] *Id.* art. 116-35. A collective labor agreement is a contractual relationship that forms the Indonesian industrial relations model that consists of, among others, employment contract, company policy, collective labor agreement, and the extensive involvement of the government in a tri-partite relationship with the company and the employees as a group.
[153] *Id.* art. 131(1).
[154] Paul Davies & Klaus Hopt, *Control Transactions*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 225, 225 (Reinier Kraakman et al. eds., 2nd ed. 2008).
[155] *Id.*

company,[156] which may give rise to competing interests among the acquirer, the existing shareholders, and the management boards of the target company. In practice, there are various ways to conduct a takeover, such as through private and direct contract between the acquirer and a small number of (controlling) shareholders, through the purchase of shares on the market, and by a general, public offer to all shareholders of the target—all of these methods face the same problem.

There are corporate structures under which a takeover may take place, including no controlling shareholder, a controlling shareholder, and the impact of non-shareholders.[157] With each of these structures, the underlying legal issue remains the same: where is the *locus of decision-making* regarding a takeover deal? In other words, who has the final say, and how does that decision impact affected parties who are not involved in the decision-making process? This issue reflects the central tension of a takeover, that the basic principle of free transferability of shares *versus* recognition that such transfer of control has various consequences for the target company and related parties.[158]

First, if there is no controlling shareholder or ownership is dispersed among the shareholders, the shareholders cannot influence the company.[159] The locus of decision-making of such a target company is not among the shareholders, but within the boards of management. In a company with this structure, a decision to change corporate control will be heavily influenced by the target board's incentives.[160] The boards may insist on going forward with the takeover deal or may block the transaction by making the target company less attractive because the deal might affect their jobs, i.e. they may be promised better remuneration or the deal might threaten their job stability.[161] Ultimately, the decision to sell rests with the shareholders who own shares of the target company. However, board members who deal with the day-to-day operations of the company can strongly influence shareholders' decisions because board members have better information regarding the company.[162]

Second, company control may be held by a small percentage of shareholders or a group of shareholders known as the "block-holder." The acquirer is likely to come to an agreement with the block-holder first and then decide whether, and on what terms, to make a general offer to the non-controlling shareholders.[163] In such a case, issues may arise between the majority shareholders, as the controlling entities of the company, and the

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[156] *Id.*
[157] *Id.* at 227-30.
[158] *Id.* at 230.
[159] Simon Deakin & Giles Slinger, *Hostile Takeovers, Corporate Law, and Theory of the Firm* 3-4 (ESRC Ctr. for Bus. Research, Univ. of Cambridge, Working Paper No. 56, 1997); Ferrell, *supra* note 14, at 561-63.
[160] Davies & Hopt, *supra* note 155, at 228.
[161] *Id.*
[162] *Id.* (describing this as an information asymmetry problem).
[163] *Id.* at 229.

minority shareholders. The controlling shareholder may sell the company to an acquirer whom the minority shareholders prefer less, and this decision may affect the minority shareholders' treatment.[164] In addition, the controlling shareholder may engage in rent-seeking activities, or "tunneling," 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.[165]

Since minority shareholders face such challenges, they should be protected by the mandatory tender offer rule. When corporate control changes from the controlling shareholder to the acquirer, the acquirer must extend an offer to the remaining shareholders at a price that includes the premium given to the previous controlling shareholder. As a result, the public/minority shareholders sell their shares at a premium price higher than that regularly traded in the market, although the setting of the premium price may vary across jurisdictions. Therefore, the mandatory bid rule distributes of wealth or control premium making what was exclusive to the controller enjoyed by all shareholders. This makes the price for corporate control more expensive, potentially deters efficient bidding and creates an inefficient allocation of resources, but gives public shareholders greater protection.[166] Koen Geens and Carl Clottens write, "[t]he full bid requirement causes the bidder to internalize [sic] 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."[167]

Finally, the protection of the non-shareholders with an interest in the outcome, or the "stakeholders," is another issue. Two important stakeholder classes who are greatly affected by takeover transactions are the employees and creditors of the target company. In practice, rules that protect the interests of the stakeholders can take various forms, including creditor protection,[168] or employee protection.[169] The extent of the employees' involvement depends on their role in corporate decision-making—whether they are closely engaged

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[164] *Id.*

[165] "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 they can hinder equity market growth and overall financial development. Simon Johnson et al., *Tunneling*, 90 AM. ECON. REV. PAPERS & PROC. 22, 22 (2000).

[166] Koen Geens & Carl Clottens, *One Share One Vote: Fairness, Efficiency and EU Harmonisation Revisited*, *in* THE EUROPEAN COMPANY LAW ACTION PLAN REVISITED, REASSESSMENT OF THE 2003 PRIORITIES OF THE EUROPEAN COMMISSION 145, 154 (Koen Geens & Klaus J. Hopt eds., 2010).

[167] *Id.* at 153.

[168] *See generally*, John Armour et al., *How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor, and Worker Protection*, 57 AM. J. COMP. L. 579 (2009) (analyzing new indexes to show that civil law systems are also able to change for and protect creditors along with other stakeholders).

[169] *See* Council Directive 24/2005/EC, consideration (13), (23), 2004 O.J. (L 142/12) (EC) [hereinafter The Takeover Directive].

with the board, potentially by having a labor union or a representative on the board.

This article will now analyze the Dutch legal system, which incorporates the EU Directive 2004/25/EC on Takeover Rules. In addition to the shared legal tradition between Indonesia and the Netherlands, the EU Takeover Directive that incorporates the mandatory bid rule is relevant because Indonesia adopts a similar approach.

B. *General Overview of Dutch Securities Regulations and the EU Takeover Directive*

During the 1990s, Dutch securities law recognized many types of self-regulation, although many of these have been replaced by statutory regulations. At present, Dutch securities regulations, including public offerings, can be found in the Act on Financial Supervision (*Wet op het financieel toezicht*; "AFS"), enacted on January 1, 2007, and decrees issued under this Act (e.g., *Besluit openbare biedingen*, Wft, the Decree on Public Offers).[170] The AFS compiles all the rules and requirements that apply to the financial markets and their supervision. The AFS supervises Dutch financial institutions, such as banks, insurers, and collective investment schemes. In addition, the Competition Act,[171] the Works Council Act,[172] and the SER-Merger Code of 2000,[173] all apply to takeover deals. The Dutch public takeover law applies when a public offer is made or being prepared for securities of Dutch limited liability companies that are allowed to trade on the regulated Dutch markets, such as the Eurolist Amsterdam.[174]

The AFS also includes provisions to implement the EU Takeover Directive, as incorporated in the AFS since October 28, 2007, and Article 2:359A of the Dutch Civil Code (BW).[175] EU Directive 25/2004/EC on Takeover Bids provides the common principles, general requirements, and minimum standard of rules that all members of the European Union must follow during takeover bids for publicly listed companies traded on a regulated market.[176] The EU Directive must be adopted by each member state by

[170] *Wet op het financieel toezicht [Act on Financial Supervision]*, Stb. 2012, p. 682 (Neth.) [hereinafter *AFS*].
[171] *Mededingingswet [Competition Act]*, Stb. 2011, p. 162 (Neth.).
[172] *Wet op de ondernemingsraden [Works Council Act]*, Stb. 2012, p. 666 (Neth.).
[173] Sociaal-Economische Raad [Social and Economic Council of the Netherlands], Fusiegedragsregels [Merger Code] (2000) (Neth.) [hereinafter SER Merger Code of 2000].
[174] M.J.G.C. Raaijmakers & P.A. van der Schee, *Takeover Bids and Anti-takeover Devices in the Netherlands*, *in* FINANCIAL LAW IN THE NETHERLANDS 195, 199-200 (Marcel C. A. Nieuwenhuijzen ed., 2010); *see AFS* § 5:70 (Neth.).
[175] BW s. 2.8.3. art. 2:359A.
[176] *See* Christian de Brauw et al., *The Netherlands*, *in* COMMON LEGAL FRAMEWORK FOR TAKEOVER BIDS IN EUROPE, *supra* note 11 (providing a general description of how the Netherlands instituted the Takeover Directive); *see generally* MARCUS PARTNERS, THE TAKEOVER BIDS DIRECTIVE ASSESSMENT REPORT, *available at*

implementing rules in accordance with each country's legal system.[177] In its Directive Recital, the regulatory objectives of the Directive are specifically contemplated, including legal certainty across EU member states or the harmonization of takeover rules, protection of the shareholder interests, especially minority shareholders, employees and other stakeholders, and the freedom and primacy of shareholders to prevent of management board actions against a bid.[178] The Directive aims to balance the freedom of shareholders with the long-term protection of the company.[179]

Several key principles of the Takeover Directive have been adopted by the Dutch legal system. First is the mandatory bid rule, which aims to protect minority shareholders by compelling the acquirer to offer an "equitable price" to the other shareholders.[180] Squeeze out and sell out rules are other major principles in the Takeover Directive.[181] Post-bid defensive measures, namely the "board neutrality rule" and the "break-through rule," introduced in the Takeover Directive are relevant in the Netherlands, especially in litigation on takeover bids.[182] High profile cases in the Netherlands such as Rodamco, ABN AMRO, Stork, and ASMI shape the guiding rule for the permissibility of defense measures against takeover bids.[183] Finally, the Directive recognizes the need to protect other stakeholders, including the target company's employees' rights by promoting their right to information and their right to issue an opinion.[184]

The Authority for the Financial Markets *(Autoriteit Financiële Markten* or "AFM") is the supervisory body of the Dutch financial market, and is responsible for approving all takeover bids in the Netherlands. Pursuant to Section 5:74 (1) of the AFS, "[n]o party may make a public takeover bid for securities admitted to trading on a regulated market that has been licensed in accordance with Section 5:26(1), unless by an offer document approved by the Authority for the Financial Markets . . . ."[185] Furthermore, the Dutch judiciary, the Enterprise Division of the Amsterdam Court of Appeal, has been playing an active role in developing the rules for takeovers. The Enterprise Division may decide whether to, extend the period of a mandatory bid after considering all relevant interests,[186] exempt the mandatory bid,[187] or order a takeover bid.[188] This Court can also, at the request of the target company, suspend the

http://ec.europa.eu/internal_market/company/takeoverbids/index_en.htm (describing the application of Directive 2004/25/EC (the "Takeover Directive")).

[177] P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW 26-27 (8th ed. 2004) (discussing the legal effect of a 'directive').

[178] *See* Directive 24/2005/EC.

[179] MARCUS PARTNERS, *supra* note 177, at 29.

[180] Directive 24/2005/EC, art. 5(1) (European Union).

[181] *Id.* art. 15-16.

[182] van Bekkum et al., *supra* note 10, at 33.

[183] *Id.* at 33-4.

[184] Directive 24/2005/EC art. 6 (1) and art. 9 (5).

[185] *AFS* s. 5:74(1) (Neth.).

[186] *AFS* s. 5:72(2) (Neth.).

[187] *AFS* s. 5:72(3) (Neth.).

[188] *AFS* s. 5:73(1) (Neth.).

exercise of voting rights of the new controlling shareholder, prohibit the new controlling shareholder from taking part in a general meeting of shareholders, order a temporary transfer of management of shares, or suspend or nullify a decision reached by a general meeting of the shareholders.[189] In addition, the Enterprise Division can order the new controlling shareholder to reduce its ownership if it violates the rule on market concentration or fair competition objectives.[190] If there is a dispute about setting a fair or equitable price for a mandatory bid, the Court can determine a price that is considered fair.[191]

C. Lessons from the European and Dutch Takeover Rules

A full assessment on the efficacy of the Indonesian takeover law from a comparative law perspective is best served by regime-specific comparison, in this case being the European and Dutch takeover regime. This article highlights several aspects that are worth comparing: the definitions of takeovers and public bids, the rules governing a mandatory bid, including pricing, disclosure of control structure, the engagement of stakeholders, and the role of the supervisory authority and the judiciary. Issues such as hostile takeovers and defensive mechanisms are less relevant because the Indonesian legal practice has never experienced such transactions.

Definition of "Bid"

First, this article will compare the terms that are used in the Netherlands and Indonesia regarding a takeover bid. In the Netherlands, the general offering rules recognize several different types of offers or bids, the most popular of which is the full offer.[192] In a full offer, the offeror makes an announcement, which contains the offer price or stock that is traded, that it aims to acquire all securities of the target company—that is, all issued and outstanding shares of the relevant class.[193] In general, the offeror may offer cash for the securities of the target company, but it can also conduct an "exchange offer" in which securities are offered in exchange for the securities of the target company.[194] The offeror is usually required to issue new securities to make an exchange offer. A full offer becomes a mandatory bid when there is a change of control of the company, which triggers the mandatory offer obligation.[195] AFS Section 1:1 defines a "public takeover bid" as "a bid for securities 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 a bid for securities, whereby the bidder has the intention to acquire these securities."[196]

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[189] *AFS* s. 5:73(2) (Neth.).
[190] *AFS* s. 5:73(3) (Neth.).
[191] *AFS* s. 5:80b (Neth.).
[192] WILLEM CALKOEN ET AL., NAUTA DUTILH, THE NETHERLANDS TAKEOVER GUIDE 1 (International Bar Association, 2008).
[193] *Id.* at 1-3.
[194] *Id.* at 2.
[195] *Id.*
[196] *AFS* art. 1:1 (Neth.).

An offeror can make a partial offer, which is an unconditional and irrevocable offer for securities to acquire no more than thirty percent of shares with voting rights, both issued and outstanding, and, therefore, there is no change of control.[197] This offer is an easier way for an offeror to buy a substantial amount of securities compared to normal trading, although block trading is also an option.[198] A partial offer may not result in the acquisition of more than thirty percent of the issued share capital of the target company, which would be a change of control and the offeror would be required to make a bid for all of the shares.[199]

Finally, there is the tender offer, which is an invitation to owners of securities of the target company by the bidder to offer their securities for a price to be determined by the existing shareholders themselves.[200] This offer is restricted to acquisitions of less than thirty percent of the voting securities of the target company.[201] A tender offer allows the offeror to invite the shareholders to sell their shares for a price set by each of the tendering shareholders. Furthermore, 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.[202] However, the tender offer is uncommon in the Netherlands:[203] since its introduction, the only successful tender offer was issued by Bergson Holdings N.V. for a part of the ordinary shares of Hunter Douglas N.V.[204]

Meanwhile, the takeover of a public company in Indonesia is commonly conducted through an acquisition of that company by the controlling shareholder, which leads to a mandatory bid obligation, or a "mandatory tender offer" ("MTO"). There are different procedures for conducting an MTO and conducting a general public offer, or a Voluntary Tender Offer ("VTO").[205] In practice, VTO transactions in Indonesia have not resulted in a change of control,[206] which is similar to the Dutch partial offer

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[197] CALKOEN ET AL., *supra* note 192, at 1-2.
[198] *Id.*
[199] *Id*. ("Partial offerings are mainly issued 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) to explore the willingness of target shareholders to sell their shares; and (3) to intervene in a public offer of a competitor of the offeror.").
[200] *Id.* at 2.
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *See* Karel Frielink, *Public Take-over Rules in the Netherlands and the Netherlands Antilles*, Karel's L. Blog (Jan. 11, 2006), http://www.curacao-law.com/2006/01/11/public-take-over-rules-in-the-netherlands-and-the-netherlands-antilles/ (discussing this transaction).
[205] MTO is governed under Bapepam Regulation IX.H.1 (2011) (Indon.), while VTO is governed under Bapepam Regulation IX.F.1 (2011).
[206] *See* BAPEPAMLK, ANNUAL REPORT PASAR MODAL (2011), *available at* http://www.bapepam.go.id/pasar_modal/publikasi_pm/annual_report_pm/index.htm (providing reports and statistics on transactions and corporate actions that have

scheme. Therefore, the shared legal practices between Indonesia and the Netherlands are relevant for mandatory bids (MTOs in Indonesia) and partial offers (VTOs in Indonesia), but the Dutch-style full offers and tender offers have never occurred in Indonesia.

Mandatory Bids

As mentioned above, takeovers in Indonesia are commonly done by acquisition of the public company, which triggers the mandatory bid requirement. In such cases, an offer becomes mandatory if it causes a change of "control." Hence, the definition of "control" is significant in Indonesia. Similarly, a mandatory offer due to change of control is recognized under Dutch law, although a change of control can occur in the Netherlands by launching a full offer, a practice that is not recognized in Indonesia. The mandatory offer requirements protect minority shareholders by preventing them from being expropriated through an unfavorable deal.[207] While Indonesia introduced this concept in 2000, the Netherlands enacted the mandatory offer requirement in 2007, after adopting the Takeover Directive.

The Takeover Directive does not define control, but AFS rules governing a mandatory bid provides guidance for the concept of effective control. 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, which is incorporated in the Netherlands and whose shares or certificates are traded on the regulated market.[208] Most other European countries have their threshold for the trigger of mandatory bid around 30 to 30 1/3% percent.[209] Compared to the thirty percent threshold in the Netherlands, the threshold in Indonesia has gone from twenty percent in 2000 to twenty-five percent in 2002, and increased to fifty percent after the enactment of Bapepam Regulation No. IX.H.1 in 2008.[210] This increase is attributed to the regulatory objective to increase takeovers in Indonesia.[211]

The change of control threshold can be achieved via indirect control of the company, which may meet the thirty percent requirement in the Netherlands. This is possible when a shareholder of a company acquires shares in a company that has shares of the company in which the shareholder also has a stake. Pursuant to AFS, a shareholder with indirect control is "any party that, either on its own or together with persons with which it acts in joint

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occurred on the IDX since 2005). I found that no VTO has ever resulted in a change of control.

[207] MARCUS PARTNERS, *supra* note 177, at 121-22 ("This rule protects minority shareholders by granting them both a right to sell their shares in the event of a change of control, and the benefit of the premium paid for the controlling stake.").

[208] *See AFS* s. 1:1 (defining "predominant control"); *AFS* s. 5:70 (stipulating the legal requirements that trigger mandatory bids under Dutch law).

[209] *Report on the Implementation of the Directive on Takeover Bids* 13-14 (Comm'n of the European Cmtys., Comm'n Staff Working Paper, No. 268, 2007).

[210] Bapepam Regulation IX.H.1 art. 1(d) (2000) (Indon.); Bapepam Regulation IX.H.1 art. 1(d)(1) (2002) (Indon.); Bapepam Regulation IX.H.1 art. 1(d) (2008) (Indon.).

[211] Bapepam Regulation IX.H.1 (2008), consideration (a) (Indon.).

consultation, acquires, either directly or indirectly, predominant control over a public limit company . . . shall make a public takeover bid . . . ."[212] The indirect action approach is recognized in the Indonesian regulation describing the definition of takeover as a form of direct or indirect action that causes change of control.[213]

Further, Dutch law limits control based on the quantitative threshold of thirty percent, while in Indonesia there is the possibility of changing corporate control based on the degree of influence in the company's management. If a person can influence the corporate management and policy, it is deemed to be a controller.[214]

In conclusion, while both Indonesia and the Netherlands recognize the mandatory bid requirement, the impact on its regulatory objectives, such as protecting minority shareholders, might be different. For example, the Indonesian regulations are less protective of minority shareholders because the control threshold is 50%, rather than the 30% threshold in the Netherlands. However, the Indonesian concept of assessing control based on the degree of involvement in the company's management can protect the minority shareholders, which is a concept not recognized in the Netherlands.

Determining the Price for a Mandatory Bid

The mandatory bid rule is intended to distribute the control premium to all shareholders. Therefore, the offer price must be higher than the publicly traded price. In the Netherlands, the mandatory offer shall be made pursuant to a "fair" or "equitable" price (*billijke prijs*).[215] The price is fair when it is "the highest price paid by the offeror or the persons with which it acts in joint consultation for securities of the same category or class as that to which the mandatory bid relates during the year preceding the announcement of the mandatory bid."[216] In other words, the offer price is determined by the highest price for which the offeror bought the same class of shares in the year prior to the action that triggered the mandatory bid obligation. The AFS states that the fair price shall be specified by decree if the offeror bought the shares for a price in excess of the fair price, or if the offeror did not acquire such shares within the year before the mandatory bid.[217] If the offeror has not bought shares before, the offer price is the average list price over the last year.[218]

As mentioned above, Indonesian law introduced the mandatory offer rule earlier than the Dutch regulation.[219] Since introducing this rule, Indonesia has changed the price formula from using the "highest price" to using the

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[212] *AFS* art. 5:70.
[213] Bapepam Regulation IX.H.1 art. 1(d) (2011) (Indon.).
[214] *Id.* art. 1(c).
[215] *AFS* s. 5:80a(1) ("A party obliged to make a public takeover bid shall do so at a fair price.").
[216] *AFS* s. 5:80a(2).
[217] *AFS* s. 5:80a(3).
[218] CALKOEN ET AL., *supra* note 192, at 2.
[219] *See* footnote 216 and accompanying text.

"average highest price" of the publicly traded shares on the stock market.[220] The formula change arguably facilitates a more active takeover market because it, allows the offeror to offer a lower premium price to the shareholders and thus makes takeovers less costly. Furthermore, by setting the price based on the average highest price within a certain period, any potential excess price due to volatility or a sharp increase of share price due to information leakage will be reduced.[221] In contrast, Dutch law, in accordance with the EU Takeover Directive, does not rely on the price movement in the stock market, but on the previous offer of the acquirer.[222]

Despite these different approaches, both the regulations in Indonesia and the Netherlands aim to offer a premium control price to the shareholders. The main difference between the two countries is the role of the judiciary in the Netherlands (see above discussion) in determining the equitable price, should any party object to the mandatory offer price.[223] This makes price setting more flexible and allows it to be assessed on a case-by-case basis because it is more adaptable to a creative legal structure that is designed to lower the mandatory offer price.

Disclosure Regarding Control Structure

The acquirer's identity and the deal structure are important issues that heavily impact investment decisions, especially those made by public shareholders. The EU Takeover Directive requires certain information to be disclosed in a takeover bid, such as the terms of the bid, the identity of the offeror, the financing of the takeover, and share classification.[224] Furthermore, the target company is subject to extensive disclosure requirements,[225] which address the control structure of the target company, such as the existing capital structure, the deviation from the standard of voting rights equal cash-flow (dividend) rights by virtue of share classification or any restriction on rights over shares, indirect shareholdings, and the power of the board members. According to Vermeulen, the disclosure of control and ownership information enables investors to make well-informed choices about their investments and discourages deviations from the standard "one-share-one-vote" rule.[226] This rule complements the already existing EU Transparency Directive,[227] which already provides a framework for periodical and transactional disclosure in general. Although disclosing information does not directly prevent the

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[220] *Compare* Bapepam Regulation IX.H.1 art. 8(b) (2002) (Indon.), *with* Bapepam Regulation IX.H.1 art. 12(b) (2008) (Indon.).

[221] There is no formal explanation regarding the role of average highest price approach in reducing market volatility, but this information was gathered after conducting discussions with Bapepam officials.

[222] Directive 24/2005/EC art. 5 (4).

[223] *See supra* page 52, regarding the role of the Dutch judiciary in deciding a dispute regarding fair price.

[224] *See* Directive 24/2005/EC art. 6 (giving the complete list of disclosure requirements mandated by the EU Takeover Directive).

[225] Directive 24/2005/EC art. 10.

[226] Vermeulen, *supra* note 13, at 29.

[227] Council Directive 109/2004/EC, 2004 O.J. (L 390/38) (EC) [hereinafter EU Transparency Directive].

controlling shareholder from expropriating the rights of the minority shareholder, as in the case of mandatory bid, Erik Vermeulen argues that disclosure and transparency are "crucial to effectively regulate the financial market, while at the same time, discouraging market manipulation and abusive tactics."[228]

The identity of the new controller may depend on the concept of "person" under Indonesian law and "acting in concert" as defined by the EU Takeover Directive. These concepts help identify when a party, which can consist of a group of parties, possesses indirect control of a company. Pursuant to the EU Takeover Directive, if one person has made an agreement with one or more shareholders regarding the governance of the company, they can be considered a single controlling shareholder.[229] This rule has been adopted by Dutch law, which adds the definition of "acting in concert."[230]

Disclosures of information can be seen from the perspective of the acquirer, the target company, and the bid itself. In Indonesia, Bapepam Regulation IX.H.1 (2011) aims to introduce better disclosure of information about control, and focuses more on the acquirer and the terms of the bid. For example, the terms of the mandatory bid are part of the information that the offeror is required to make available.[231] If the acquirer is a company, it must disclose its establishment, line of business, capital structure, board structure, and the identity of its shareholders, including the beneficial owner and any of its affiliates.[232] The rule defining a "person" also incorporates not only one entity, but also parties in an association or organized group, which can constitute a single controller.[233] There is no further explanation for what constitutes an "organized group," so the regulator has discretion when deciding whether to approve a bid.

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[228] Vermeulen, *supra* note 13, at 29.

[229] See Directive 24/2005/EC art. 2(d) (defining "'persons acting in concert' as "natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid.").

[230] *AFS* s. 1:1 (defining "persons acting in joint consultation" as "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 offeree 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: 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; 2) natural persons, legal persons or companies and the enterprises controlled by them.").

[231] Bapepam Regulation IX.H.1 art. 4(b) (2011) (Indon.).

[232] Bapepam Regulation IX.H.1 art. 4(b)(3) (2011) (Indon.).

[233] *See* Bapepam Regulation IX.H.1 art. (1)(b) (2011) (Indon.) (defining an "Organized Group" as a group of parties that make plans, carry out deals, and make a decision to cooperate in order to achieve a common goal).

After comparing the rules, Indonesian regulation may be improved by focusing on the disclosure requirements about the target company's control structure, which are found in Art. 10 of the EU Takeover Directive, but have not been incorporated into Indonesian law. The control structure of the target company, such as any deviation from the one-share-one-vote rule or the rule concerning shareholding structure, is not fully addressed in the Indonesian takeover regulations. Bapepam-LK has issued regulations concerning conflict of interest transactions,[234] which apply if the parties to a takeover potentially have conflicting economic interests. Recent amendments to Bapepam Rules on the annual reports of Indonesian publicly listed companies also address beneficial ownership disclosures.[235] However, complex control structures deserve more attention because they provide public shareholders with a more complete understanding that may influence their decision-making.

Stakeholder (i.e. Employee) Engagement

Regulations that address the role of employees in a takeover transaction are aimed at protecting employees as an integral part of the target company's stakeholders. Employee protection is incorporated into the EU Takeover Directive, as indicated by the right to be properly informed, or information rights,[236] and consultation rights in accordance with national law.[237] Application of these rights is governed under bid requirements,[238] disclosure obligations,[239] and information for and consultation of employee representatives.[240]

Under the national law of the Netherlands, the Social Economic Council of the Netherlands's *(Sociaal-Economische Raad* or "SER") Merger Code applies to the process of acquisition and/or takeover.[241] The SER Merger Code is applicable to takeovers that occur via a public bid.[242] Before a public announcement regarding a takeover is made, the employee association must be informed about the content of such a takeover announcement and, if the prior announcement conflicts with securities regulations, the notification must be made at the time of the public announcement.[243] In practice, after the initial announcement is made, the offeror and the target company must notify the employee association and provide them with a statement concerning the

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[234] *See* Bapepam Regulation IX.E.1 (2009) (Indon.).
[235] *See* Bapepam Regulation X.K.6 art 2(e)(10) (2006) (Indon.) (requiring companies to disclose the name of subsidiaries and association companies, and their information).
[236] *See* Directive 24/2005/EC consideration (13) ("[A]ppropriate information should also be given to the representatives of the company's employees or, failing that, to the employees directly.").
[237] *Id.* consideration (23).
[238] *See id.* art. 6(1) (requiring the boards of the offeree company and the offeror to notify the employees or their representatives of the bid); see *also id.* at 6(3)(i) (detailing what the bid information must contain).
[239] *See id.* art. 9(5) (requiring the boards to provide opinions concerning the takeover to the employees or their representatives).
[240] *Id.* art. 14.
[241] *See* SER Merger Code of 2000.
[242] *Id.* art. 5(1).
[243] *Id.* art. 3(a).

background for and the consequences of the transaction.[244] In addition, such notification must be sent to the Secretariat of the SER.[245] As part of the employees' engagement, the employees' associations are entitled to be part of the consultations about the deal,[246] and are entitled to express the employees' opinions.[247] Finally, the SER establishes an Adjudication Committee in the event of any employment dispute resulting from a merger or takeover plan.[248]

The level of engagement of employees reveals a distinction between Indonesian and Dutch law in takeover-transactions: Indonesian law does not have any requirement to consult the employees during a takeover. Indonesian general corporate law only provides that a takeover must consider the employees' interests, but do not provide detailed rules regarding this principle.[249] Meanwhile, Indonesian labor laws only deal with the employees' rights to receive compensation for employment termination.[250] There is no forum for employees to express their opinions regarding the deal itself. This lack of employee involvement shows that Indonesian company law is less stakeholder-oriented, compared with the Netherlands.

The Role of the Supervisory Authority and the Judiciary

There are two institutions in the Netherlands that are influential in ensuring the integrity of takeover: the supervisory body and the judiciary. The AFM is the supervisory body for public offers of securities. The AFM regulates and supervises compliance with the takeover rules, and has authority to oversee public offerings when the Dutch takeover code is applicable. All takeovers require AFS approval, which means that the offeror is only allowed to make a public offer if the AFM has approved the offering document.[251] This provision gives the AFM the power to suspend a public offer until it is sure that all requirements have been met, especially the payment terms.[252] The AFM is different from most other European authorities because it is not empowered to approve or disapprove all disclosures during the takeover process.[253] As a result, takeover rumors might be leaked to the market without an official announcement that such transaction been approved by the AFM.[254] Although the AFM does not have this power, it can still use its general powers

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[244] *Id.* art. 4(2); *see also*, CALKOEN ET AL., *supra* note 192, at 4 (summarizing requirements to notify trade unions, if any, during any acquisition or divestment process by issuing a statement regarding the rationale for the transaction, intentions regarding company policy, and social, legal, and economic consequences of the transaction).
[245] SER Merger Code art. 8(1).
[246] *Id.* art. 4(4).
[247] *Id.* art. 4(3).
[248] *See id.* art. 9 (creating the Adjudication Committee to deal with all disputes concerning the implementation of the Merger Code).
[249] Law 40/2007 art. 126(1)(a) (Indon.).
[250] Law 13/2003 art. 163(1) (Indon.).
[251] *AFS* s. 5:74(1); *see also* M.J.G.C. Raaijmakers & P.A. van der Schee, *supra* note 176, at 199-200.
[252] Raaijmakers & van der Schee, *supra* note 176, at 199.
[253] *Id.*
[254] *Id.* at 199-200.

as provided in Article 5:61 of the AFS.[255] Furthermore, the AFM has authority to relieve an offeror of some of its obligations.[256]

Aside from the AFM, the Enterprise Division of the Amsterdam Court of Appeals, or the "*Ondernemingskamer*," is part of the judiciary. The Enterprise Division settles disputes regarding the requirement to carry out mandatory offers, such as whether such an obligation exists after an acquisition,[257] the mandatory bid period,[258] or determination of a "fair price" in a mandatory offer.[259] An order from the Court can lead to heavy intervention in the governance of company, such as suspending the voting rights of the party with predominant control, prohibiting the new controller from attending a general meeting of the shareholders, nullifying a decision made at the general meeting of shareholders,[260] or ordering the controlling shareholder to reduce its percentage of stock.[261] There have been cases in which the Enterprise Division heard disputes about the legality of anti-takeover defenses.[262] In short, the Dutch court specializing in commercial matters has extensive authority to settle disputes related to takeovers and public bids in order to safeguard the market.

It is important to compare the role of the supervisory authority and the judiciary between the two countries. On one hand, the role of the judiciary in safeguarding the capital market in Indonesia has been limited, and there have been no adjudicated cases about takeover or public bid disputes. Therefore, case law concerning this field does not exist in Indonesia. On the other hand, Bapepam's role as the regulator of the capital market has increased throughout the years. Bapepam has discretion to carry out actions, such as extending the period for a mandatory bid,[263] and nullifying a general meeting of shareholders.[264] This discretion may become problematic because some

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[255] *Id.* at 200; *see also AFS* s. 5:61 (allowing the AFM to force a company to correct a notification if the company was initial incorrect).
[256] Raaijmakers & van der Schee, *supra* note 175, at 200; see *also AFS* s. 5:81 art. 3 ("On application, the Authority for the Financial Markets may grant a full or partial dispensation from the provisions laid down by or pursuant to Sections 5:74(1), 5:76(1) and (2), 5:78 or 5:79, if the applicant demonstrates that it cannot reasonably comply with those provisions and that the objectives which these sections seek to achieve are achieved in other ways.").
[257] *AFS* s. 5:72 (2)-(3), 5:73 (1)-(2).
[258] *Id.* art. 5:72(3).
[259] *Id.* art. 5:80b(1).
[260] *Id.* art. 5:73(2).
[261] *Id.* at art. 5:73(3).
[262] *See* Note, Danielle Quinn, *Dutch Treat: Netherlands Judiciary Only Goes Halfway Towards Adopting Delaware Trilogy in Takeover Context*, 41 VAND. J. TRANSNAT'L L. 1211 (2008) (detailing the merger of ABN AMRO and the Royal Bank of Scotland in which the Enterprise Division played a crucial role).
[263] *See, e,g.*, *Maybank Gets Extension Until June 2011 to Sell Down BII Stake*, THE EDGE (Dec. 4, 2010, 6:04 PM), http://www.theedgemalaysia.com/business-news/178082-maybank-gets-extension-until-june-2011-to-sell-down-bii-stake.html.
[264] *See, e.g.*, Arinto Tri Wibowo, *Saham Rights Issue CPRO Belum Tercatat Di BEI*, VIVA NEWS (Mar. 16, 2009, 7:49 PM),

actions, such as nullifying a general meeting of shareholders, arguably should be subjected to the judicial authority rather than the regulator, because a general meeting of shareholders itself is an act of corporate governance, not an administrative or licensing requirement.[265] Indonesia can learn from Dutch law and engage a special tribunal or chamber to resolve capital market and other disputes about the financial system. The existence of the Enterprise Division demonstrates that the enforcement of securities regulations requires not only administrative proceedings, but also judicial proceedings to ensure due process and legal certainty.

V. FINAL REMARKS

This article has discussed the rules governing takeovers in Indonesia. Indonesia has enacted rules that protect the public and minority shareholders, such as instituting a mandatory bid if a company reaches a certain threshold that indicates a change of control. Disclosure requirements have been the backbone of the Indonesian securities regulations and have been supervised by Bapepam-LK, which soon will transform into the independent FSA. In addition, there exist country-specific characteristics, such as the relationship between securities regulations and FDI requirements and the sell-down rule that preserves market liquidity.

Mandatory bids in Indonesia have been increasing to a higher threshold in order to facilitate a more active takeover market. The share percentage threshold above which a mandatory offer is triggered is lower in Indonesia than in the Netherlands. However, in Indonesia control can be assessed by the degree of one's influence within the company's governance as well as by share percentages. In pricing a mandatory bid, each country adopts its own approach, although the Netherlands adopts a more case-specific approach due to its judiciary's involvement. The Dutch disclosure rules are more advanced because they are aimed at capturing indirect structures, such as a pyramid structure or cross ownership. Indonesia can learn from the Netherlands counterpart about how to increase employee involvement during a takeover deal. Although in the Netherlands, as in Indonesia, the employees do not have authority to approve or disapprove a takeover, they are empowered by the right to receive information, the consultation right, and a dispute settlement forum specifically for labor matters in the event of a change of corporate control. Indonesian law, on the other hand, prescribes that a takeover must consider the employees' interests without setting out further detailed rules. Finally, the role

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http://analisis.news.viva.co.id/news/read/41035-saham_rights_issue_cpro_belum_tercatat_di_bei (Indon.); *Bapepam Nullifies Sale of Lapindo to Freehold*, Tempo Interactive (Nov. 11, 2006, 4:36 PM), http://www.tempointeractive.com/hg/ekbis/2006/11/22/brk,20061122-88206,uk.html.

[265] Pursuant to the Indonesian company law, and company law in general, a general meeting of shareholders is a governance body within a corporation in which shareholders can exercise their voting rights. It is not a regulatory or licensing requirement, which needs regulatory approval. Therefore, one may question the legality of annulment of such action by the regulator.

of the judiciary in Indonesia must be improved in order to provide a fair, orderly, and efficient capital market.