MERGER OF
A PUBLIC LISTED COMPANY IN INDONESIA©

INTRODUCTION

Recently, we read from the newspapers in Indonesia (Kompas and Jakarta Post) that Temasek Holdings, the Singaporean government's Investment Company ("**Temasek**"), has decided to release its indirect shares participation in PT. Bank International Indonesia, Tbk. ("**BII**"). Temasek through Fullerton Financial Holding Pte. Ltd. owns 56% shares in PT. Bank Danamon Indonesia, Tbk. ("**Danamon**") and 28% shares in BII. Both banks are two of the ten largest banks in Indonesia. Danamon ranks the fifth and BII is the sixth largest.

On 5 October 2006, the Governor of Bank Indonesia issued the regulation Number 8/16/PBI/2006 dated 5 October 2006 regarding *Kepemilikan Tunggal Pada Perbankan Indonesia* (also known as Single Presence Policy) (the "**SPP Regulation**") in order to establish a healthy and strong banking structure in Indonesia by consolidating the banking sector. Basically, the SPP Regulation bans an investor to become a controlling shareholder in more than one bank.

As of the SPP Regulation takes effect, the controlling shareholder has to adjust the structure of its shares participation by (i) transferring a part or all of its shares participation in one or more of its controlled bank to other party(ies), and therefore, the controlling shareholder shall only become a controlling shareholder in 1 (one) bank; or (ii) conducting merger or consolidation over its controlled banks; or (iii) setting up a holding company in the banking sector, by way of: (a) establishing a new legal entity as a bank holding company; or (b) designating one of its controlled bank as a bank holding company. This adjustment shall be conducted the latest before 31 December 2010.

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The decision of Temasek to sell its shares in BII has attracted public attention and rise various perception concerning merger, particularly the merger between 2 (two) banks which are also public companies. In order to render a proper perception, hereunder is a brief description regarding the procedure for a merger of a public listed company in Indonesia.

In general, merger is regulated in the Law No. 40 of 2007 (the "**Company Law**") and other implementation regulations. But if we talk about merger between BII and Danamon, then we also shall refer to the Government Regulation No. 28 of 1999 regarding Merger, Consolidation and Acquisition of Banks ("**PP No. 28/1999**"). Further, as both banks are public listed companies, it is important to consider the Capital Market Supervisory Board Regulation No. IX.G.1 regarding Merger or Consolidation of Public Companies (the "**Regulation No. IX.G.1**"), and other prevailing laws and regulations related to the capital market and the stock exchange where the shares of public companies are listed.

For conducting a merger, the involved companies shall convene an extraordinary general meeting of shareholders (the "**EGMS**") (with the valid quorum requirement as regulated in PP No. 28/1999, and also the relevant capital market regulations) to obtain approval upon the merger plan that has been prepared by its respective board of directors (the "**BoD**").

The merger plan shall describe, among others (i) the reason and explanation of the BoD of the companies participating at the merger as to why they intend to merge and the merger requirements; (ii) the continuity plan or the termination of business activities of the companies participating at the merger; (iii) the mechanism to settle the rights and obligations of the companies participating at the merger to the third party; and (iv) the mechanism to settle the rights of the disagreeing shareholders against merger.

For public listed companies, the merger plan shall also include a legal opinion from an independent legal consultant, that is registered with the Capital Market Supervisory Board. To provide such a legal opinion, the independent legal consultant shall conduct a legal due diligence, which covers among others: (i) the compliance of the company to the prevailing laws and regulations, including its articles of association; (ii) its material transaction with third parties; and (iii) the material assets of the company.

The BoD of the companies participating at the merger shall announce the summary of the merger plan in two daily newspapers in Indonesia, and announce it in writing to the employees of the respective companies 30 (thirty) days prior to the invitation of the EGMS. Public companies shall also circulate an Information Memorandum (*Surat Edaran*), incorporating the information contained in the merger plan to its respective shareholders.

From our experience, some crucial issues that have to be addressed become apparent. For example, to accommodate the rights of the disagreeing shareholders against merger, the respective company shall acquire the share participation of such disagreeing shareholders, which process is basically a contractual issue. Besides considering the limitation of the re-purchase shares permitted by a company, a public listed company must consider the material transaction issues, as regulated by the Capital Market Supervisory Board Regulation No. IX.E.2 regarding Material Transaction and the Change of Primary Business (the "**Regulation No. IX.E.2**"). Such acquiring shares fall under the Regulation No. IX.E.2 requirements, if the value of the transaction equals to or more than (i) 10% of the company revenues; or (ii) 20% of the equity.

In case of a material transaction, a public listed company shall appoint an independent party, registered with the Capital Market Supervisory Board and Financial Institution ("**Bapepam-LK**") to appraise the reasonableness of the transaction value and announce it in at least 1 (one) Indonesian language newspaper having a broad circulation. The company shall also provide the information regarding the material transaction to the shareholders and submit it to Bapepam-LK.

Another crucial issue for public listed companies is the handling of conflict of interest in the transaction, as regulated in the Capital Market Supervisory Board Regulation No. IX.E.1 regarding Conflict of Interest on Particular Transaction (the "**Regulation No. IX.E.1**"). In a merger process, the surviving company will obtain assets by law from the joining company. In case of BII and Danamon, the two companies are controlled by the same party, therefore

this transaction falls potentially under the Regulation No. IX.E.1. The conflict of interest in the transaction may arise if there is a difference between the company's economic interest with the personal interest of the directors, commissioners, the principal shareholders of the company or affiliated party of the directors, commissioners, or principal shareholders. To determine whether a transaction is classified as a conflict of interest transaction, the public listed company shall appoint an independent party registered with the Bapepam-LK to appraise such transaction.

In case of a conflict of interest transaction, such transaction shall be approved previously by its independent shareholders or their authorized party in the EGMS attended by the independent shareholders, which represent more than 50% (fifty percent) shares owned by the independent shareholders and shall be approved by independent shareholders, which represent 50% (fifty percent) shares owned by independent shareholders. Independent shareholders are shareholders that do not have any conflict of interest in relation to the merger and/or has no affiliation with the directors, commissioners or, principal shareholders, which have a conflict of interest with the merger.

In conclusion, from the legal point of view, conducting a merger is more complicated than the act of selling shares participation. But in carrying out business, we cannot avoid the must to address the commercial and financial aspects. However, conducting a merger may render significant benefit for the joining and surviving company.

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