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Merger Blackout Period in
Indonesia - A Regulatory and
Practical Perspective ^{P1}

Merger Blackout Period in Indonesia - A Regulatory and Practical Perspective

General Overview of Merger

As a basic understanding of the concept of a merger from a legal perspective, under Law No. 40 of 2007 on Limited Liability Companies - as most recently amended by Law No. 6 of 2023 on the Enactment of Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation as a Law ("**Company Law**") - merger means a legal action taken by one or more companies in order to merge with another existing company, which causes the transfer of assets and liabilities of the dissolving company (or companies) by operation of law to the surviving company and thereafter the legal entity status of the dissolving company (or companies) ceases to exist by operation of law.¹

Based on the above concept and the Company Law, the main principles of a merger are as follows:

1. the assets and liabilities of the dissolving company (or companies) shall pass, by operation of law, to the surviving company;
2. the dissolving company (or companies) will cease to exist, by operation of law, without a prior liquidation process as of the merger effective date; and
3. the shareholders of the dissolving company (or companies), by operation of law, shall become shareholders of the surviving company.²

Merger Effective Date

Please note that under the Company Law, the merger becomes legally effective in accordance with the following conditions:

1. If the merger involves an amendment to the surviving company's articles of association which requires the Ministry of Law and Human Rights ("**MOLHR**")'s approval, the merger effective date shall be the date of MOLHR approval for the amendment or a later date if specified in the MOLHR approval;

¹ Article 1 number 9 of the Company Law.

² Article 122 of the Company Law.

2. If the merger involves an amendment to the surviving company's articles of association which does not require MOLHR's approval, the merger effective date shall be the date of MOLHR's acceptance of notification of the amendment to the surviving company's articles of association; **or**
3. The merger effective date shall be a particular date agreed by the merging companies in the deed of merger, which will be stated in MOLHR's approval or acceptance of notification.³

In practice, the merging companies shall agree a particular date in the deed of merger, which will also be given in MOLHR's approval or acceptance of notification as the effective date of the merger. This date will follow the signing date of a merger deed (commonly one to two months after).

Through this approach, the companies have time to mitigate any issues that may arise related to the licensing adjustment process of the surviving company, which can only be processed after the signing of the merger deed but must be completed before the merger effective date (should there be any issues). Please note that if the licensing adjustment process cannot be completed before the merger effective date, a blackout period may arise. In this situation, the surviving company should not conduct any business activities on behalf of the dissolving company (or companies) as with the licensing adjustment process incomplete, there may be a risk of the relevant authority determining that the surviving company does not have a proper license to do so ("**Merger Blackout Period**").

Overview of Merger Blackout Period

In the case of a merger, as a general concept under Indonesian Law, licenses are non-transferable. Thus, the licenses of the dissolving company (or companies) should either (i) be surrendered and then reapplied for by the surviving company or (ii) on a case-by-case basis, the surviving company may request the relevant authorities permit it to use the valid license of the dissolving company until expires (especially for licenses that are processed manually outside the Online Single Submission Risk-Based Approach System ("**OSS-RBA System**") as maintained by the OSS Administrator) and then apply for a new license. In the process of license adjustment, there are several authorities that require the surviving company to include the MOLHR's approval and/or notification for the merger ("**MOLHR Letter of Merger**") as part of the license application documents. This means that the process of the license adjustment can only be conducted after the issuance of the MOLHR Letter of Merger.

Please note that under the Indonesian Investment Coordinating Board (*Badan Koordinasi Penanaman Modal* or "**BKPM**") Regulation No. 4 of 2021 on the Guidelines and Procedures for Risk-Based Business Licensing and Investment Facilities ("**BKPM Regulation No. 4/2021**"), the surviving company in the event of a merger of business entities is obliged to adjust/update data in the OSS-RBA System through the merger menu. This process must be carried out after the Deed of Merger has been signed and the MOLHR Letter of Merger has been received in order to continue the business of the dissolving company (which will be continued by the surviving company).⁴

In relation to the above, the Merger Blackout Period must be carefully managed to reduce the time gap after the merger becomes effective and the relevant licenses are obtained by the surviving company. During the Merger Blackout Period, ideally, the surviving company should not run the dissolving company's business due to the associated risk detailed previously. This risk

³ Article 26 of the Company Law.

⁴ Article 62 of BKPM Regulation No. 4/2021.

should be minimized (especially for licenses that are processed manually outside the OSS-RBA System) by agreeing a merger effective date that falls after the date of the MOLHR Approval/Notification Letter of Merger and having a detailed licensing adjustment plan. Early communication and/or consultation with the relevant authorities is highly recommended.

The merger process in the OSS-RBA System only covers merging the business licensing data of merging companies. The process specifically structured to absorb the business licensing and project data of dissolving companies.

The system will automatically show the list data of business activities of the dissolving company to be selected by the surviving company. This selection process means that the surviving company can select the business data activities to be carried out due to the merger. Once the selected business activities have been ticked, the OSS-RBA System will issue a Merger Business Identification Number (*Nomor Induk Berusaha- “NIB Merger”*). This NIB Merger will show the list of business activities of the surviving company along with the selected business activities of the dissolving company to be used commercially.

For the several business activities which may require a standard certificate and business license, depending on the business risk, these will ideally change from the dissolving company's to the surviving company's name. It is also applied for several business activities which may require Business License to Support the Business Activities (*Perizinan Berusaha Untuk Menunjang Kegiatan Usaha- “PB UMKU”*).

In our experience, there are some notable challenges in processing a merger in the OSS-RBA System, given below:

- a. the effective date of merger does not appear in the system;
- b. not all business licensing data of the dissolving company appears in the list;
- c. the system shows the list data of business activities of the other company;
- d. the NIB Merger output does not show the list of business activities of the dissolving company; or
- e. PB UMKU does not automatically show the name of the surviving company.

The above issues may create challenges to the commercial start of the surviving company as it may be determined that the surviving company does not have the proper NIB Merger and business license. In a worst-case scenario, the surviving company may be subject to administrative sanctions until the deficient NIB Merger is revoked. As we recommended above, to avoid any delay to commercial activities, the surviving company should conduct early and proper communication and/or consultation with the BKPM as the relevant authorities.

In some cases, NIB Merger issues will need to be escalated to and dealt with by the OSS IT team. The timeframe to resolve system issues this way varies depending on the case in question, which needs to also be considered when planning a merger.

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