



THE 3rd INTERNATIONAL CONFERENCE AND CALL FOR PAPER

"Legal Development in Various Countries"



IMAM AS SYAFEI BUILDING
 Faculty of Law, Sultan Agung Islamic University
 Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

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Reviewer:

Prof. Dr. H. Gunarto, S.H., S.E., Akt., M.Hum

Dr. Hj. Anis Mashdurohatun, S.H., M.Hum

Prof. Henning Glaser

Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM

Prof. Shimada Yuzuru

Prof. Associate Dr. Dr. Ahmad Zaharudin Sani

Editor:

Dr. Amin Purnawan., S.H., CN., M.Hum

Dr. Hj. Widayati., S.H., M.H

Dr. Hj. Sri Endah Wahyuningsih, S.H., M.Hum

Dr. H. Ahmad Khisni., S.H., M.H

M. Abdul Hadi., SE

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INFORMATION OF THE CONFERENCE AND CALL PAPER

WORLD CLASS ISLAMIC UNIVERSITY
UNISSULA
SULTAN AGUNG ISLAMIC UNIVERSITY

Welcome to Participants on International Conference

"LEGAL DEVELOPMENT IN VARIOUS COUNTRIES"

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. And focusing on the development of law in both developed and developing countries and its role in shaping a good future.

KEYNOTE SPEAKER:
Prof. Henning Glaser
Thammasat University, Thailand

IMAM AS SYAFEI BUILDING
Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

Organized by : Faculty of Law Sultan Agung Islamic University (UNISSULA) Semarang-Indonesia

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Nagoya University, Japan
2. Prof. Dr. Ruzian Markom
Universitas Kebangsaan Malaysia, Malaysia
3. Prof. Dr. I Gusti Ayu Rachmi, S.H., M.M
Sebelas Maret University, Indonesia
4. Assoc Prof. Dr. Ahmad Zaharuddin S.
Universitas Utara Malaysia, Malaysia
5. Dr. Anis Mashdurohatus, S.H., M.Hum
Sultan Agung Islamic University, Indonesia

Indonesia, September 05th 2017

WORLD CLASS ISLAMIC UNIVERSITY
UNISSULA
SULTAN AGUNG ISLAMIC UNIVERSITY

International Conference

5
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Faculty of Law, Sorbonne University
3. Prof. Dr. Ruzian Markom
Universitas Kebangsaan Malaysia, Malaysia
4. Prof. Dr. I Gusti Ayu Rachmi, S.H., M.M
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Universitas Utara Malaysia, Malaysia
6. Dr. Anis Mashdurohatus, S.H., M.Hum
Sultan Agung Islamic University, Indonesia

Organized by : Faculty of Law UNISSULA Semarang-Indonesia

IMAM AS SYAFEI BUILDING, Faculty of Law, Sultan Agung Islamic University
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

FACULTY OF LAW
Sultan Agung Islamic University

This Conference And Call Paper was held by the Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on:

Day: Tuesday

Date : September 5th 2017

Time : 08:00 - 15:00 pm

Place : Imam AsSyafei Building 3rd Floor

Faculty of Law, Sultan Agung Islamic University, Semarang, Indonesia

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“LEGAL DEVELOPMENT IN VARIOUS COUNTRIES”**

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PREFACE

Assalamu'alaikum, Wr. Wb

First of all, let's say Thanks to Allah, who has been giving us guidance, happiness, healthy, and mercy, so we can finish this conference proceeding without any obstacles. Praise and salutation upon our prophet Muhammad saw the last messenger, the best figure of this universe; the person who was able to save us from Jahiliyah era.

We would like to extend our thanks to the invited speakers: **Prof. Henning Glaser from Thammasat University, Prof. Shimada Yuzuru from Nagoya University, Hilaire Tegan, Ph.D from Sorbone University, Prof. Dr. I Gusti Ayu Ketut Rachmi Handayani, MM from SebelasMaret University, Dr. Zaharudin from Universiti Utara Malaysia, and Dr. Anis Mashdurohatun, S.H., M.Hum from Sultan Agung Islamic University.**

This is our third International conference and call for paper held by Faculty of Law, Sultan Agung Islamic University. This annual conference tries to gain any information and studies done by academician and practitioner to be discussed as guidelines to exchange and discuss views on the most important recent on Legal Development happens in both developed and developing countries and its role in shaping a good future, and to discuss the challenges and practical aspects in integrating competition law enforcement and guidelines to develop legal state in accordance with the diversity of all countries around the world. We hope this conference brings benefit for both participants and our faculty.

We are pleased to have your critique, suggestion and correction in order to make us better. Finally, we do thanks to all who helped this conference. May Allah guide us to always develop useful knowledge for human being.

See you in our fourth International and call for paper next year.

Wassalamualaikum, Wr. Wb

Semarang, September 5th 2017

Chairman of the Committee,



Dr. Anis Mashdurohatun, S.H., M.Hum
NIDN : 06-02105-7002

GREETING FROM THE DEAN OF FACULTY OF LAW

As-salamu'alaikum Wr. Wb.

Thank to Allah SWT is an absolute act that we must say after conducting the International Conference and Call for Paper by theme: “**Legal Development in Various Countries**” which is held by Faculty of Law, Sultan Agung Islamic University (UNISSULA) Semarang, on September 5th 2017.

This conference tries to reviews different theories of legal development in order to highlight their similarities and differences. In the end, as in contract theories, no monist view of legal development possesses the explanatory power needed to understand how law has come to be and where it may take us in the future. What we do have is a foundation built on at least two millennia of legal history. The intellectual starting point for this project is Nathan Isaacs' unfinished work on a cycle theory of legal development. His view of legal development takes issue with Henry Sumner Maine's thesis that development in advanced legal systems is progressive in nature. And, more importantly for the current undertaking, that this progression is linear in nature. Instead, Isaacs' review of thousands of years of Jewish legal development indicated that legal development perpetually progressed in cycles.


Therefore, to discuss more about legal development or law reform, Faculty of Law, Sultan Agung Islamic University is confidence to conduct a conference by the theme “**Legal Development in Various Countries**” focusing on the development of law in both developed and developing countries and its role in shaping a good future.

Finally, we thank to the presenters, article senders, and comittee who have contributed in this event, so that this international seminar ran well.

Wassalamu'alaikum Wr. Wb.

Semarang, September 5th 2017

Dean,



Prof. Dr. Gunarto, SH, SE, Akt, M.Hum
NIDN.062004670

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DOMESTIC COMPANY LAW "PMDN" AFTER SHARE PURCHASED (ACQUIRED) BY FOREIGN CITIZENS OR FOREIGN LEGAL AGENCIES

M. Irfan Islami Rambe

m.irfanislamirambe.sh@gmail.com

The Student of Law Doctoral Programme UNISSULA

Abstract

This paper discusses the legal status of Domestic Companies "PMDN" after the shares are acquired (Acquired) by foreign nationals or foreign legal entities.

Writing this paper using the method of literature review (library research).

Acquisition of shares acquisition on non-PMA companies by foreign nationals or foreign legal entities can be done with due regard to the articles of association and the Law of Limited Liability Companies. The acquisition of non-PMA companies must be able to pay attention to approvals or permits by the relevant agencies in this case BKPM, BPDPPM, BPDKPM, and pay attention to Presidential Regulation no. 39 of 2014 which in it regulates the amount of shares (% of shares) which may be owned by foreign citizens or foreign legal entities, as well as what forms of business are allowed to use foreign capital. The legal consequence of the acquisition is the transfer of rights and obligations of a company acquired to the acquirer in acquisition (acquisition) usually the acquirer has a size larger or smaller than the acquired party. With the greater acquisition of the acquirer in the Limited Liability Company is very influential with the control of limited liability company.

Keywords: Transfer of Shares, PMDN, PMA

1. Introduction

A. Background

Domestic Investment (PMDN) and Foreign Investment (PMA) become one of the important sources of financing for the developing region and are able to contribute substantially to development. The existence of foreign investment in Indonesia is very important and strategic in supporting the implementation of national development. This is because the national development of Indonesia requires a very large funding to be able to support the expected rate of economic growth.

Article 1 number 1 of Law no. 25 Year 2007 regarding Investment means capital investment is "all forms of investment activities, either by domestic investors or foreign investors to conduct business in the territory of the Republic of Indonesia". Then in Article 1 number 4 of Law no. 25 Year 2007 concerning Capital Investment regulates the parties who participate in Investors is "individuals or business entities that make investments that may be domestic investors and foreign investors".

In addition to generating direct foreign exchange for the state, direct investment activities result in highly influential benefits in improving Indonesia's domestic economy, because investment objectives Generally require foreign investors a variety of rules that can

support development objectives such as industrialization, import substitution and export growth.

Foreign capital investment mechanism in Indonesia based on Law no. 25 Year 2007 on Investment can be done in three ways, namely; through the establishment of a PMA company, through the purchase of shares and through restructuring. Of the three mechanisms, in fact the problem often arises is in terms of purchasing shares.

The purchase of shares of a non-PMA or Limited Liability Company by a foreign party or a PMA company may result in the status of the target company whose shares are converted into PMA. The buying and selling is done without any preparation or maturity plan from non-PMA companies which in turn will have an impact on the status of the non-PMA company. However, the sale and purchase of shares is certainly through a certain process in accordance with existing regulations. The sale and purchase of shares conducted by foreign parties to the Domestic Investment Company also covers other impacts on the sale and purchase of such shares.

The process of entry of foreign capital through the purchase of shares of a company in general must be through the provisions of Article 58 and Article 59 of Law no. 40 Year 2007 regarding Limited Liability Company. The provisions of Article 58 of Law no. 40 Year 2007 concerning Limited Liability Company related to the acquisition of shares of a company by foreign party or PMA company. While Article 59 of Law no. 40 of 2007 concerning Limited Liability Company regulates the approval of organ of a limited liability company.

Other problems arising from the purchase of shares of the Domestic Investment Company (PMDN) are related to the protection of minority shareholders. The voting rights of a minority shareholder are of course not proportional to the majority shareholder. Not always the minority shareholders have the same interests as the majority shareholder, but due to minor ownership of minority shareholders always set aside for their voting rights.

Problems arising from the purchase of shares of Domestic Investment (PMDN) companies by foreign parties of course become an interesting study so that in this case it is necessary and important to be studied to see how far the rules that exist can provide legal certainty in the process sale and purchase of shares of a Domestic Investment Company (PMDN) by a foreign party or foreign legal party.

B. Problem Formulation

The formulation of the problem that needs to be reviewed is the legal position of Domestic Company "PMDN" after the Shares are acquired (Acquired) by a foreign citizen or foreign legal entity

C. Purpose of Writing

To know the legal status of Domestic Company "PMDN" after its shares are acquired (Acquired) by foreign nationals or foreign legal entities.

2. Method of writing

Writing this paper using the method of literature review (library research).

3. Discussion

3.1. Domicile of Domestic Company "PMDN" after the Shares are Purchased (Acquired) by a Foreign Citizen or Foreign Legal Entity.

Purchase of Shares (Acquisition) of Limited Liability Company as Article 5 Paragraph (3) of Law no. 25 Year 2007 concerning Capital Investment explains that Domestic and Foreign Capital Investors in the form of Limited Liability Company can be done by taking part of shares at the time of establishment of a limited liability company or buying shares (some shares) and performing other ways in accordance with the provisions of legislation - invitation.

The acquisition of shares is better known as acquisition. The term acquisition comes from the English word acquisition or often also called take over. According to Munir Fuady, in the Law on Acquisition, takeover and LBO¹, the term acquisition is defined as taking over an interest in corporate control by another company. The legal dictionary² defines acquisition as a takeover of property.

Usually in the acquisition process, the acquirer has a larger size than the acquired party, which is meant by control, according to Abdul Moin, is a power in the form of power to (a) regulate the company's financial and operating policies, (b) appoint and dismiss management, and (c) obtaining a majority vote in the board of directors meeting.³

The shares acquired shall be of a significant nature to which the acquisition of such shares allows the person or legal entity which acquires them to control the expropriated Company, and if the acquired share is insignificant or the concerned person only becomes the majority shareholder of the company concerned the acquisition is not can be categorized as takeover or acquisition.

As for the type of business of the company or associated with marketing, acquisition can be differentiated into:⁴

- a. Acquisition or acquisition of a horizontal takeover intended to take over a competing Company directly which has the same product or service or has the same marketing area.
- b. Takeovers or Vertical Acquisitions are takeovers aimed at mastering a number of production and distribution links from upstream to downstream.
- c. Acquisitions or Acquisitions of a Conglomerate are acquisitions aimed at acquiring another Company that has no direct business link directly to the expropriated Perseoran.

¹ Munir Fuady, Hukum Tentang Akuisisi, Take Over dan LBO (Berdasarkan Undang-Undang Nomor 40 Tahun 2007), Bandung: PT Citra Aditya Bakti:2008, hal 3

² Marwan, M., dan Jimmy P, Kamus Hukum, (Surabaya: Reality Publisher, 2009), hal. 32

³ Ibid., hal. 9.

⁴ Iswi Hariyani Sefianto, cita yustisia, Marger, Konsolidasi, Akuisisi, & Pemisahan Perusahaan. (Jakarta: Transmedia Pustaka, 2011), hal. 25.

When viewed from the side of the subject who take the takeover, it can be distinguished on:⁵

- a. External Takeover is a takeover that takes place in two or more Companies and is not within 1 (one) holding company. An example is the takeover of PT H.M. Sampoerna, Tbk taken over by Philip Morris, Ltd.
- b. Internal Takeover is a takeover whereby both the expropriated Company and the Company to be acquired are in 1 (one) holding company. For example, the takeover of Bakrie & Brothers to PT. Indocopper Investama Corporation, where PT. Indocopper Investama Corporation is a subsidiary of PT Bakrie & Brothers.

When viewed in terms of object of takeover transactions, acquisitions or acquisitions can be distinguished as follows:⁶

- a. Acquisition of Shares, whereby a party who acquires or acquires a significantly underused company that allows the acquiring party to exercise control over the management of the target company. Therefore, in order to acquire such shares, a person or legal entity must become a majority shareholder in a Company.
- b. Asset Acquisition, whereby the asset is taken over by the company's assets with or without taking over all of the Company's target liability to a third party. As a counterweight to this acquisition, the acquirer provides a fair price in the same way as the stock acquisition.
- c. Combination Acquisitions, where the takeover is a combination of stock acquisition and asset acquisition. For example, the acquisition of 50% (fifty percent) of the target company's assets. Likewise with its counterparts, it may be paid partly in cash and partly by the takeover company's stock.
- d. Gradual acquisition, where the acquisition is not implemented at once. For example, the Target Company provides convertible bonds, while the takeover company becomes its buyer. In this case, in the first phase, the acquiring party provides funds to the target Company through the purchase of bonds (bonds). In the next stage, the bonds are exchanged for shares, if the performance of the Company to be taken over improves.
- e. Acquisition of Business Activities, where business activities taken over only business activities include business networks, production equipment, intellectual property rights and so forth.

From the classification of the object of the takeover transaction above, Law no. 40 Year 2007 regarding Limited Liability Company only recognizes the share takeover transaction as the only way that can be done in takeover mechanism.

3.2. Legal Form of Investment Company

The legal form of investment companies, in its development can only be classified into two forms, both from the type of Domestic Investment (PMDN) and Foreign Investment (PMA), namely:

⁵ Akuisisi & Proses Legal Due-Diligence Dalam Akuisisi Perseroan Terbatas <http://solusi-hukum.blogspot.com/> diakses pada tanggal 1 Agustus 2017

⁶ Akuisisi & Proses Legal Due-Diligence Dalam Akuisisi Perseroan Terbatas <http://solusi-hukum.blogspot.com/> diakses pada tanggal 1 Agustus 2017

a. Direct Investment

Direct Investment is direct investment ie investment by taking over shares or adding capital in an existing company or new company.⁷ Can also be interpreted direct investment is investment capital invested into certain business field and capital can be in the form of money, capital goods, know-how and knowledge.⁸

b. Indirect Investment

Indirect Investment is generally a short-term investment covering transaction activities in the capital market and in the money market. This investment is called short-term investment because in general, the sale or purchase of shares or currency in a relatively short period of time depends on the fluctuations in the value of shares and / or currencies they want to trade.

The difference between Direct Investment and Indirect Investment is as follows:⁹

- a. on Indirect Investment, the shareholders have no control over the management of the company everyday
- b. In Indirect Investment, risk is usually borne solely by shareholders so that it can not fundamentally sue the company that runs its activities.
- c. Losses on Investment are not immediate, generally not protected by international customary law.

3.3.Change of company status PMDN become PMA

In relation to the acquisition made by PMA after its shares are acquired by foreign citizens or foreign legal entities against non-PMA companies or whether or not the shareholders sell all shares to foreigners, in Law Number 25 Year 2007 regarding Investment and other laws and regulations.

Referring to the provisions contained in the Investment Law no. 25 Year 2007, then referred to as Foreign Investment, must meet the following elements Article 1 paragraph (3):

- a. Is an activity to invest
- b. To conduct business in the territory of the Republic of Indonesia
- c. Conducted by foreign investors,
- d. Using fully foreign capital as well as those that are in conjunction with domestic investors.

The existence of the elements of investing in both foreign and joint ventures made by foreigners gives a signal will be able to apply the acquisition of companies that are not PMA companies, and in clarifying also about obtaining companies that can be done by foreign citizens or foreign legal entities.

⁷ Kamus BI

⁸ Hukum Penanaman Modal : Macam-macam Penanaman Modal dan berbagai Bentuk Kerjasamanya, <http://kuliahade.wordpress.com/2010/11/15/hukum-penanaman-modal-macam-macam-penanaman-modal-dan-berbagai-bentuk-kerjasamanya/>, diakses tanggal 1 Agustus 2014

⁹ Ismail Suny, Tinjauan dan Pembahasan UU Penanaman modal Asing &Kredit Luar Negeri, (Jakarta: Penerbit Pradnya Paramita, 1972), hal.13.

The Article 5 paragraph (3) explains the form of investment can be done through several ways, including:

- a. Taking shares of shares at the time of establishment of a Limited Liability Company;
- b. Buying shares;
- c. Carry out other means in accordance with the provisions of the legislation.

Based on this understanding, it can be concluded that any Company in which there is Foreign Capital, without seeing the limit of the amount of capital can be categorized as PMA.

Based on the provisions contained in Article 23 of BKPM Head of Regulation no. 12 Year 2009, any occurrence of changes in the structure of capital investment must register investment to BKPM. In this BKPM Perkap, changes may include:¹⁰

- a. Change of Business or Production Field
- b. Changes in Investment
- c. Changes / Additions of Foreign Workers
- d. Changes in Stock Ownership of PMA Companies or PMDN or NonPMA / PMDN.
- e. JWPP Extension.
- f. Status Changes.
- g. Purchase of shares of PMDN and Non PMA / PMDN by foreign or otherwise.
- h. Merger.
- i. Company / Merger.

In adjusting the change of the status of the company into the provisions in accordance with Law Number 25 Year 2007 on Capital Investment, it is obliged that there is a principle permit for changes in capital investment, hereinafter referred to as the principle of change permission to amend the provisions stipulated in the principle license / previous.

Foreign investment and domestic investment may change:

- a. stipulations of business field including type and production capacity, and / or;
- b. equity participation in the company;
- c. project completion period.

The application for a license for the principle of changes in capital investment as referred to in Article 37 paragraph (1), using the change principle permit form as contained in Attachment IX, in the form of hardcopy or softcopy based on BKPM investor module and has the following requirements:¹¹

- a. record of license of investment principle applied for the amendment;
- b. record of Deed of Establishment and its amendment; completed with approval from the Ministry of Law and Human Rights;
- c. for change of business field (type / production capacity) equipped with:
 1. description of the activity plan, a description of the production process that includes the type of raw materials and is equipped with flow charts;
 2. recommendations from the relevant government agencies, when required.

¹⁰ Pasal 23 Peraturan Kepala BKPM No. 12 Tahun 2009 Tentang Pedoman dan Tata Cara Permohonan Penanaman Modal.

¹¹ Lampiran IX Peraturan Kepala Badan Koordinasi Penanaman Modal Nomor 12 Tahun 2009 Tentang Pedoman Dan Tata Cara Permohonan Penanaman Modal.

- d. for the change of participation in the company's capital (percent share of foreign share ownership) is completed by:
 - 1. shareholders' agreement on percentage change of shares between foreign and Indonesia in the company as set forth in the recording of the Minutes of General Meeting of Shareholders (GMS) / Circular Decisions signed by all shareholders and have been recorded (waarmerking) by Notary or declaration of Decision Meeting / Minutes of Meeting Meeting in the form of a Notary Deed, which meets the provisions of Article 21 and Chapter IV of Law Number 40 Year 2007 regarding Limited Liability Company, supplemented with evidence of new shareholders;
 - 2. chronological participation in the company's capital since the establishment of the company until the latest application;
 - 3. for open company (Tbk), the application shall be furnished with requirements in accordance with the prevailing laws and regulations in the capital market.
- e. for the change of the project completion period supplemented by the reason for the change;
- f. Investment Activity Report (LPKM) for the last period;
- g. Permit application of investment principle:
 - 1. submitted by company directors to PTSP BKPM, PTSP PDPPM, or PTSP PDKPM in accordance with their respective powers;
 - 2. applications not directly submitted by company directors to PTSP BKPM, PTSP PDPPM or PTSP PDKPM shall be accompanied by a power of attorney;
 - 3. the provision of power of attorney as referred to in item 2 is stipulated in Article 63.

Based on the application as referred to in paragraph (1) is issued, the license of the principle of changes in investment with a copy to the official of the Agency as meant in Article 34 paragraph (3) for foreign investment and Article 35 paragraph (4) for domestic investment. Permit to change principle of investment is issued not later than 5 (five) working days since receipt of complete and correct application.

3.4. Cover

The purchase of shares in a Limited Liability Company (acquisition) is basically aimed at taking over a share in the Company as Law no. 40 Year 2007 regarding Limited Liability Company where the legal act done by legal entity or individual to take over shares of the company resulting in the transfer of control over the company.

Acquisition of shares (acquisition) of limited liability company can be done by the acquisition by way of acquisition (acquisition) in Horizontal, Vertical, Conglomerate. Where such acquisition results in changes and legal consequences to a limited liability company.

The acquisition stage of a company wishing the Limited Company to be acquired must consider a minority shareholder, the acquisition can be done by a GMS Decision and the acquisition plan is approved by 3/4 (three quarter) of the total votes cast by the shareholders of the Limited Liability Company.

In the legal aspect of investment companies Law Number 25 Year 2007 stipulates on how to invest in Indonesia. And in this law also mention the forms of investment companies that are classified in Domestic Investment and Foreign Investment in a Limited Liability Company. PMDN and PMA investment can be done directly and indirectly. Acquisition of shares acquisition on non-PMA companies by foreign nationals or foreign legal entities can be done with due regard to the articles of association and the Law of Limited Liability Companies.

The acquisition of non-PMA companies must be able to pay attention to approvals or permits by the relevant agencies in this case BKPM, BPDPPM, BPDKPM, and pay attention to Presidential Regulation no. 39 of 2014 which in it regulates the amount of shares (% of shares) which may be owned by foreign citizens or foreign legal entities, as well as what forms of business are allowed to use foreign capital.

Whereas the Legal Status of a Non-PMA Company After the Acquisition has been Acquired by a Foreign Citizen or Foreign Legal Entity, Where is the legal status of PMA and Non-PMA (PMDN) Companies Procedurally there is no fundamental difference in the application of PMA on the establishment of a new company as well as the inclusion of PMDN companies that have existed before, because with the shift of a PMDN into a PMA, the PMDN should seek approvals like establishing a new company. Different only to the existing company, no need to register company (TDP and NPWP), but only require approval of the Minister in order to change the capital structure.

Legal Position of a Non-PMA Company after the Acquisition of the Acquired By a Foreign Citizen or Foreign Legal Entity causes a change in the status of a Limited Liability Company, which in accordance with the provisions of the Investment Law stipulates that FDI is capital owned by a foreign State, an individual foreign citizen , foreign business entities, foreign legal entities, and / or Indonesian legal entities that are partly or wholly owned by foreigners. In addition to the change of the status of a non-PMA Company to a PMA in this case the Limited Company which has been acquired shall also adjust and request approvals (principal licenses) as if establishing a new company for a PMA Company. Based on the provisions contained in Article 23 of Perka BKPM No. 12 Year 2009, any change of investment structure shall be obliged to register investment to BKPM such as: Change of Business or Production Field, Investment Change, Alteration / Addition of Foreign Workers, Change of Stock Ownership of PMA Company or PMDN or NonPMA / PMDN, JWPP Extension, Status Changes, Stock Purchases of PMDN and Non PMA / PMDN by foreign or otherwise.

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