Client Update: Investment Law

March 2021

The new "positive investment list" has finally been issued, replacing the "negative investment list"

Overview

On 2 February 2021, the President of Indonesia issued Presidential Regulation No. 10 of 2021 on Investment Business Activities (**New Investment Reg**) as one of the implementing regulations to Law No. 11 of 2020 on Job Creation (commonly known as the **Omnibus Law**). The New Investment Reg revokes and replaces Presidential Regulation No. 44 of 2016 on List of Closed Business Fields and Open Business Fields with Requirements in the Investment Sector (**Old Investment Reg**), informally referred to as the "negative investment list", and Presidential Regulation No. 76 of 2007 on Criteria and Requirements for the Formulation of Closed and Conditionally Open Business Fields in the Investment Sector.

The New Investment Reg, informally referred to as the "positive investment list", comes into force on 4 March 2021.

Key Findings

- The "positive investment list" (set out in the Attachments to the New Investment Reg) does not entirely remove foreign investment restrictions from all business fields. However, the restrictions have been significantly reduced from 350 business fields to only 46 business fields.
- A major breakthrough brought about by the New Investment Reg is that many major business sectors can now be 100% foreign-owned (see the table at the end of this Client Update on key major sectors that have opened up). Together with the promise of facilitating "priority" sectors with fiscal and non-fiscal benefits, there are good grounds for optimism that investment will now be more attractive in Indonesia.
- Although the New Investment Reg is scheduled to take effect from 4 March 2021, the Online Single Submission platform (**OSS**) is still being developed to accommodate the many changes to the investment regime. We must therefore wait and see whether the changes brought about by the New Investment Reg can be immediately implemented after its effective date.
- Investors will still be required to pay close attention to the relevant sectoral regulations that may restrict foreign ownership, even though such restrictions do not appear in the New Investment Reg.
- In the past, only incremental or nominal liberalisation would usually be made to the Indonesian investment regime once every five to ten years (and at times would also result in new restrictions). With the huge sweep of the recent Omnibus legislation (and the New Investment Reg in particular), we have a fundamental and truly significant opportunity for foreign parties to establish or invest and grow their businesses in Indonesia.
- Many foreign investors currently co-invest with local investors (in such forms as joint ventures, early stage private equity style investments and nominal local shareholding structures), some through loans (convertible bonds, and other instruments) and having existing options or other contractual rights in place in relation to the local interests. There may now be significant opportunities to restructure, up-scale and convert such local interests into equity, representing the foreign parties' actual investment (both in terms of equity and voting).

Key Provisions

The New Investment Reg introduces the greatly anticipated move through the Omnibus Law to replace the "negative investment list" with a "positive investment list", originally signalled through various amendments made to Law No. 25 of 2007 on Investment (**Investment Law**). Under the New Investment Reg, all business fields are generally open (subject to certain criteria) to investment unless they are: (i) specifically stated to be closed to investment; or (ii) relate to certain activities that can only be carried out by the Indonesian central government.

Below we explore the available investment fields a little more closely.

1. Closed business fields

The following six business fields (referred to in the amended Investment Law) are closed to investment:

(a) type I narcotics cultivation and manufacturing;

(b) all forms of gambling and/or casino activities;

(c) catching fish species listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);

(d) using or taking coral and coral reefs for various purposes;

(e) chemical weapons manufacturing; and

(f) industrial chemical and ozone-depleting industries.

2. Open business fields

Business fields that are open to investment are divided into the following four categories:

(a) "priority" business fields;

(b) business fields that are allocated exclusively to, or require partnerships with, Cooperatives and Micro, Small, and Medium Enterprises (**MSMEs**);

(c) business fields that are open with certain requirements/conditions; and

(d) business fields that are not included in the above three business field types.

"Priority" business fields

To stimulate investment in certain business fields, 245 "priority" business fields have been identified under Attachment I of the New Investment Reg. Business fields such as software development are now eligible for tax allowances, whereas digital economy businesses (such as hosting activities) are eligible for tax holidays. Specific industries (such as certain clothing industries) are eligible for an investment allowance (being the deduction of certain elements of net income in the income tax calculation, for new investment or business expansion).

Priority business fields are also entitled to receive fiscal and/or non-fiscal incentives, as further discussed below.

Fiscal incentives are granted in the form of tax incentives (i.e. tax allowances, tax holidays, and investment allowances) and import duty exemptions. The form of available tax incentive depends on the specific business field itself, and is set out against the different priority business fields listed in Attachment I. Import duties are provided for the import of machinery (including goods and materials) used for industrial construction or development.

Non-fiscal incentives are provided in various forms, including facilitating the issuance of business licenses, the provision of supporting infrastructure for businesses, as well as facilitation of the immigration and manpower engagement processes. We understand that investors can apply for these incentives through OSS.

Given the novelty of the New Investment Reg, at this stage there is no track record of the above incentives being obtained and applied in practice.

Please see the table below for the incentives applicable to some of the key business fields that have increased their foreign ownership percentages.

Business fields that are allocated for or require partnership with MSMEs and cooperatives

Similar to the Old Investment Reg, certain business fields are also allocated exclusively for, or require partnership with, MSMEs or cooperatives. However, the New Investment Reg takes the additional step of setting out the following criteria for those business fields that have been allocated exclusively to MSMEs and Cooperatives:

(a) business activities that do not use technology or use simple technology;

(b) business activities that have a specific process, are labour intensive, and have special and hereditary cultural heritage; and/or

(c) business capital for activities does not exceed Rp10 billion (excluding land and buildings for the business premises).

The 51 business fields that fulfil the above criteria are listed in Attachment II of the New Investment Reg.

Attachment II of the New Investment Reg also lists 38 business fields for large scale enterprises (thereby making foreign investment (PMA) companies also eligible) that require "partnership" with cooperatives and MSMEs. The stated criteria for such business fields is that they are:

(a) mostly engaged in by cooperatives and MSMEs; and/or

(b) encouraged to enter into large-scale supply chain businesses.

As indicated in the relevant law on MSMEs, the anticipated partnerships can be in the form of sub-contracts, franchises, distribution or agency arrangements.

Open business fields with requirements/conditions

The enactment of the New Investment Reg significantly increases the number of business fields that are available for foreign investment. Whereas the old "negative investment list" identified around 350 business fields that were open with requirements/conditions, the current list only identifies 46 business fields with requirements/conditions.

However, certain business fields remain restricted under their sectoral regulations. Therefore, it is important to be aware that while business fields that are **not** listed in the Attachments to the New Investment Reg are generally open to foreign ownership, investors should still pay close attention to the relevant sectoral regulations, because they may impose additional foreign ownership restrictions. Examples of this can be found in the following sectors:

- Mining sector – Mining companies with a majority foreign ownership are required to gradually divest such foreign ownership in accordance with the current mining legislation.
- Banking and financing (financial services) sectors – Legislation in these sectors issued by the relevant regulators (the Financial Services Authority (**OJK**) and Bank Indonesia) still determines the relevant permissible foreign ownership levels.

Recent inquiries we made with Investment Coordinating Board (BKPM) officials indicate that at the time of writing this Client Update in early March 2021, the OSS has yet to be updated to implement the changes brought about by the New Investment Reg, mainly due to the fact that the system is still under development. This issue also relates to the change in the 2020 Indonesian Industrial Business Classification Codes (*Kode Baku Lapangan Usaha Indonesia*, **KBLI Codes**), where businesses are still unable to adjust their business fields to reflect the 2020 KBLI Codes.

Exemptions for special economic zones and technology-based start-ups

For businesses established in designated "special economic zones", the New Investment Reg provides exemptions from the foreign ownership limitations and conditions set out in the list of business fields open with requirements/conditions. This means that businesses established in special economic zones are generally open to investment without the stated requirements/conditions, unless specifically regulated otherwise.

Further, although the New Investment Reg generally maintains the minimum investment value requirement of more than Rp10 billion (excluding land and buildings) for foreign investment companies, there is no minimum investment value requirement for foreign investment "technology-based start-ups" established in special economic zones.

Key major sectors opened up

The significant reduction in restricted business sectors in the New Investment Reg has led to many sectors benefiting from the changes. Examples of key sectors that have lifted foreign investment ownership restrictions include:

<table>
<tr><th rowspan="2">Sector</th><th rowspan="2">Business Field</th><th rowspan="2">Old Investment Reg</th><th colspan="2">New Investment Reg</th></tr>
<tr><th>Foreign Ownership</th><th>Priority</th></tr>
<tr><td rowspan="4">Telecommunications and Technology</td><td>61921 - Internet service providers</td><td rowspan="3">67%</td><td rowspan="13">Fully open</td><td rowspan="4">N/A</td></tr>
<tr><td>61100 - Fixed telecommunications network providers</td></tr>
<tr><td>61200 - Mobile telecommunications network providers</td></tr>
<tr><td>63122 - E-commerce/web portals</td><td>49% (unless investment is more than Rp100Billion)</td></tr>
<tr><td rowspan="5">Health</td><td>86103 - Hospitals</td><td>67% and 75% for ASEAN investors</td><td rowspan="4">N/A</td></tr>
<tr><td>46693 - Wholesale of Pharmaceutical Raw Materials</td><td>Closed</td></tr>
<tr><td>46693 - Healthcare equipment distribution (49% to 100%)</td><td>49%</td></tr>
<tr><td>86109 - Main clinic: with specialists</td><td>67% or 70% for ASEAN investors</td></tr>
<tr><td>21012 - Pharmaceutical products for humans (finished drug manufacturing)</td><td>85%</td><td>Tax allowance</td></tr>
<tr><td>Distribution</td><td>00000 - Distributors not affiliated with production</td><td>67%</td><td>N/A</td></tr>
<tr><td rowspan="3">Energy and Mineral Resources</td><td>35101 - Electricity generation >10 MW</td><td>95% or 100% if Public Private Partnership</td><td rowspan="3">N/A</td></tr>
<tr><td>43211 - Electricity installation maintenance and operation</td><td>95%</td></tr>
<tr><td>09100 - Oil and gas construction (platforms)</td><td>75%</td></tr>
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Sector	Business Field	Old Investment Reg	New Investment Reg	
			Foreign Ownership	Priority
	09100 - Onshore and offshore oil and gas drilling services	100% domestic investment (onshore) and 75% foreign ownership (offshore)		
Construction services	00000 - Construction implementation services using high technology or high risk	67% and 70% for ASEAN investors		N/A
	00000 - Construction consultancy services using high technology or high risk			
Transportation	52291 - Freight forwarding services	67%		N/A
	52211 - Carrying out and operation of terminals for land transportation passengers	Closed		
Plantations and Agriculture	01262 - Palm oil - seed plantations of at least 25 hectares	95%		N/A
	Agriculture of certain fruits and vegetables	30%		
Others	93112 - Golf courses	67% or 70% for ASEAN investors	Fully open	Tax allowance

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We will continue to monitor any future regulatory developments and will report them in new Client Updates as soon as they occur.

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If you would like to discuss any aspect of this update, please feel free to contact us.

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