Omnibus Law
Legal Insight

A New Indonesian Investment Policy

After the issuance of Law Number 11 of 2020 concerning Job Creation ("**Omnibus Law**"), the Government has now issued a series of implementing regulations for the Omnibus Law which can be divided into 45 Government Regulations and 4 Presidential Regulations encompassing various sectors. **Dentons HPRP is conducting a study of each of the implementing regulations for the Omnibus Law and will issue our results for each policy in each business sector.** The first regulation we reviewed is Presidential Regulation Number 10 of 2021 concerning Investment Business Fields ("**PR 10/2021**"). PR 10/2021, which will come into effect on 4 March 2021, replaces Presidential Regulation No.44 of 2016, which was known as the Indonesia Negative Investment List ("**2016 DNI**").

The Positive List

In contrast to the Negative List in 2016 DNI, PR 10/2021 contains what might be called a Positive List. The Positive List is different in nature from the current Indonesian investment regime for foreign investors in particular. Previously, 2016 DNI played the role of an entry point bible, telling potential investors which business fields in Indonesia were closed or restricted or open with certain requirements to foreign investment. In PR 10/2021, the government has changed the nature of the DNI to a Positive List whereby all sectors are considered open for investment, except for business sectors that are (i) open with certain requirements and sectors that are declared strictly closed to investment and (ii) open only for the Central Government. It would be safe to assume at this point that the government is trying its best to introduce Indonesia as an investment-friendly country so as to boost its overall economy.

According to a study made by PwC predicting changes in the global economic order, Indonesia is likely to be in the world's top 5 largest economies by 2030[1].

Under the Omnibus Law, 6 (six) business sectors are closed to investment, a reduction from 20 (twenty) business sectors. The 6 (six) business sectors are **narcotics, gambling and/or casinos, harvesting of fish listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), utilization or harvesting of coral, chemical weapons, and chemicals that might damage the ozone layer.**

Meanwhile, the activities that are reserved **exclusively for the Central Government are those of a service nature (the regulation does not specify what this covers) or in the framework of strategic defense and security.** PR 10/2021 emphasizes that such activities cannot be carried out or performed in cooperation with other parties. According to the Omnibus Law, the activities are main weaponry systems, government museums, historical and ancient relics, operation of flight navigation, telecommunication/navigation aids for shipping and vessels. This signals that beyond these limits, the private sector may have the opportunity to cooperate with the Government.

[1] https://www.pwc.com/id/en/media-centre/pwc-in-news/2017/indonesian/pwc--indonesia-akan-menjadi-negara-dengan-perekonomian-terbesar-.html

Business Fields Open to Investment

Article 3 paragraph (1) of PR 10/2021 specifies 4 types of business fields that are open to investment, namely:

a) priority business fields;

b) allocated business fields or partnerships with Micro, Small, and Medium Enterprises (*Usaha Mikro, Kecil, dan Menengah*) ("**MSME**");

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

d) business fields that are not included in the three types of business fields above – in which all investors are allowed to invest.

Priority Business Fields

As an effort to attract more investment, the Government offers fiscal incentives and/or non-fiscal incentives for certain business fields set in PR 10/2021 as Priority Business Fields, consisting of 245 business fields:

Type of Tax Incentives	Number of Business Fields
Tax Allowances	183
Tax Holiday	18
Investment Allowances	44

The Priority Business Fields list set out in PR 10/2021 are business fields based on the following criteria:

a) a national strategic program or priority,

b) capital intensive,

c) labor-intensive,

d) high technology,

e) pioneer industry,

f) export or import substitution oriented, and/or

g) oriented toward research, development, and innovation activities.

Fiscal incentives are tax incentives, which include tax allowances, tax holidays, or investment allowances, as well as customs and excise incentives in the form of exemption from import duties on imported machinery, goods, and material for industrial development and investment. Non-fiscal incentives include ease of business licensing and other facilities under the provisions of laws and implementing regulations.

Allocation of business fields for cooperatives and MSME and allocation of business fields on condition of partnership with cooperatives and MSME

To protect MSME businesses, the Government is maintaining a policy of reserving certain business for cooperatives and MSME or for Large Scale Business under a scheme of partnership with cooperatives and MSME. However, the list has been reduced from 145 business fields to 88 business fields or 163 KBLI codes.

The list of the business fields allocated for cooperatives and MSME is based on the following **criteria**:

Business Fields Allocated for Cooperatives and MSME	Business Fields Allocated for Large Scale Businesses in partnerships with Cooperatives and MSME
a) business activities that do not use technology or use basic technology; b) business activities that have specific processes, are labor-intensive, or are part of a special inherited cultural heritage; and c) businesses with capital not exceeding Rp10,000,000,000 (ten billion Rupiah) excluding land and building for business premises.	a) it includes business fields that are mostly undertaken by cooperatives and MSME; and/or b) a business sector to support the supply chain for Large Scale Businesses.

Large Scale Business is defined under Law No. 20 of 2008 on MSME, as amended by the Omnibus Law, as a productive economic enterprise carried out by a business entity with a net worth or annual sales proceeds greater than a Medium Enterprise, which includes national state-owned or private enterprises, joint ventures, and foreign businesses carrying out economic activities in Indonesia.

In relation to foreign investment, article 7(1) of PR 10/2021 clearly states that foreign investors may only perform business activities in a large scale business with an investment value of more than Rp10,000,000,000 (ten billion Rupiah), excluding land and building for premises. What this means for a foreign investment company (PT PMA) is that a PT PMA is categorized as a Large Scale Business and is therefore unable to enter the businesses listed as exclusively for cooperatives and MSME. However, PT PMA may enter the business under the list of business fields allocated for Large Scale Business in partnerships with cooperatives and MSME by establishing a cooperation with cooperatives and MSME. While this is not new, the 2016 DNI and its accompanying set of regulations have been adopting this requirement, the new term Large Scale Business is newly incorporated into the provisions under the PR 10/2021 to add more clarity for PT PMA.

Further, excluded from this category, are investment activities carried out indirectly/portfolio transactions carried out through domestic capital markets.

Incentive for Technology-based Start-Up Companies

One of the main highlights of this PR 10/2021, technology-based start-up companies located in the special economic zone are excluded from the minimum investment for PT PMA, which more than Rp10,000,000,000 (ten billion Rupiah), excluding land and building for premises. This is a large positive step for the Indonesian government as an effort to draw more investors to invest in technology.

More Business Fields that are removed from List of Business Fields with Certain Requirements

The need for companies with certain business fields to meet certain requirements under PR 10/2021 will not apply to:
a) investment activities which are carried out indirectly/portfolio transactions which are carried out through domestic capital markets; and
b) businesses domiciled in a special economic zone (*kawasan ekonomi khusus*).

In addition to new exemptions from conditions to invest, the Government offers more relaxation in the list of Business Fields that are Open with Certain Requirements, including foreign ownership limitations, which list has been reduced from 350 (three hundred and fifty) business fields to only 46 (forty-six) business fields. This decrease is the realization of the Government's hope of boosting the amount of foreign investment in Indonesia and an attempt to increase Indonesia’s score in the "ease of doing business" index.

However, this change in investment policy implemented by the government does not simply mean that foreign investors can now engage in all business fields.

Below as an example of the changes to the business fields is the removal of palm plantations (KBLI Code 01262) from the List of Business Fields with Certain Requirements and the List of Business Fields Allocated for Cooperatives and MSME:

Business Field	Limitation	2016 DNI	PR 10/2021
Palm Plantation breeding (KBLI Code 01262)	Business Fields Allocated for Cooperatives and MSME	Palm Plantation breeding with an area of less than 25 hectares	N/A
	Business Fields with Certain Requirements	Palm Plantation nurseries with an area of less than 25 hectares, with certain requirements: a. 95% maximum foreign investment; b. mandatory 20% plasma plantation	N/A
Palm Plantation farming (KBLI Code 01262)	Business Fields Allocated for Cooperatives and MSME	Palm Plantation farming with an area of less than 25 hectares	N/A
	Business Fields with Certain Requirements	Palm Plantation farming with an area of less than 25 hectares, with certain requirements: a. 95% maximum foreign investment; b. mandatory 20% plasma plantation	N/A

So, what does that mean for oil palm plantation businesses, for example? Given the above, specifically for new businesses, this could mean that it may be open for 100% foreign ownership. However, despite the change, plantation business in general is subject to certain requirements which may be governed in other existing regulations or further implementing regulations which are still underway. For example, under the Omnibus Law, plantation companies are obliged to facilitate local community plantations with an area of 20% of the land originating from (i) other areas of use that are outside the right to cultivate (*hak guna usaha*); and/or (ii) areas originating from the release of forest areas.

How does it apply, though, for an existing business?

Exclusion from Foreign Ownership Limitation

Article 6 paragraph 4 of PR 10/2021 narrows down certain criteria for business entities that fulfil the following grandfather clause criteria to be excluded from the foreign ownership limitation set under PR 10/2021:

a) an investment that was approved in certain business fields before the enactment of PR 10/2021, as stated in the business license, unless the restriction provisions referred to in the PR 10/2021 are more profitable for the businesses; and/or

b) investors who acquire special rights based on an agreement between Indonesia and the country of origin of the investor.

As much as we understand that the above exclusion is made as a form of 'grandfather clause' for previous business licenses, we view that the unclear phrase of "*will be more profitable for the businesses*" might lead to varying interpretations for an investor.

For example, if we go back to the oil palm plantation business as a case study, PR 44/2016 limits foreign shareholding to a maximum of 95% or for distribution business which currently are limited to a maximum of 67%. At a first glance, the criteria stipulated in point (a) above may seem to show that (i) an oil palm plantation company that had already obtained a plantation business license before the effective date of PR 10/2021 must still adhere to a 95% maximum or it may be interpreted as allowing an increase in the foreign shareholding to 100%, or (ii) distribution businesses must still adhere to a 67% maximum or again it may be interpreted as allowing an increase in the foreign shareholding to 100%.

Another notable example is the removal of retail trade from the list. The retail trade sector which originally could only be carried out by investors with a 100% composition of domestic capital as stated in **2016 DNI**, but now in PR 10/2021, the retail trade sector is reserved for cooperatives and MSME with certain commodities as stated in item 48 of Annex II PR 10/2021.

However, since such particular business sectors are not regulated under PR 10/2021, would it be safe to assume that now such particular business sector is open for 100% foreign ownership since, from the view of a business actor, 100% foreign ownership will be viewed as "*more profitable for the businesses*"?

This could mean that the government must give more clarity concerning the so-called grandfather clause introduced in PR 10/2021.

Synergy with other ASEAN Investment Policies

Unfortunately, unlike the 2016 DNI which specifically imposed a higher maximum shareholding for foreign investment by investors from the member countries of the Association of Southeast Asian Nations, PR 10/2021 does not specifically mention the synergy with other ASEAN investment Policies.

Hopefully, upon the change of the abovementioned policy, the investment climate will be more favorable to the investment trends nowadays.

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