

Job Creation Act

Legal Insight

Amendment to the Investment List Regulation and the Risk-Based OSS System Introduced

As a follow up to the enactment of Law No. 11 of 2020 concerning Job Creation (the “**Job Creation Act**”), the Government of Indonesia has endeavored to issue further implementing regulations. Among the implementing regulations are, a regulation on investment business fields or commonly known as the Positive List as drawn up in Presidential Regulation No. 10 of 2021 concerning Investment Business Fields (“**PR 10/2021**”), which replaced Presidential Regulation No. 44 of 2016, which was known as the Negative Investment List (“**2016 DNI**”), and Government Regulation No. 5 of 2021 on Risk-Based Business Licensing (“**GR 5/2021**”).

(Our previous article with regard to PR 10/2021 can be accessed [here](#) and with regard to the Risk-Based Assessment Regulation in GR 5/2021 can be accessed [here](#))

Following the enactment of PR 10/2021, several objections were conveyed by certain social organizations, specifically towards the investment in alcoholic beverage manufacturing, which was opened with certain conditions in PR 10/2021. As a quick response and to accommodate such criticism, the Government of Indonesia enacted the Presidential Regulation No. 49 of 2021 concerning Amendment to PR 10/2021 (“**PR 49/2021**”) at the end of May 2021. In the new regulation, the Government not only strictly regulated the alcohol beverages industry, but also took the momentum to change certain business fields and activities that were previously listed in PR 10/2021.

Business fields and activities are generally identified using code numbers from the Indonesian Standard Industrial Classification/ *Klasifikasi Baku Lapangan Usaha Indonesia* (“**KBLI Code**”) used as a main factor to identify investment requirements under PR 10/2021 and license requirements under GR 5/2021.

With regard to the business licensing application system, following the issuance of GR 5/2021, the Investment Coordinating Board recently issued Circular Letter of the Minister of Investment/Chairman of the Investment Coordinating Board Number 17 of 2021 on the Assignment of the Operation of Business Licensing into the Operation of Risk-Based Business Licensing Through the OSS System (“**Circular 17/2021**”) which was then followed up by the issuance of Circular Letter of the Minister of Investment/Chairman of the Investment of Coordinating Board Number 18 of 2021 on Amendment of Circular 17/2021 (“**Circular 18/2021**”). In Circular 17/2021, the Minister of Investment/Chairman of the Investment Coordinating Board announced the soft launching of the Online Single Submission application system for risk-based business licensing (“**Risk-Based OSS System**”), which was intended to be launched on 2 August 2021. In addition, under Circular 17/2021 and Circular 18/2021, new KBLI Codes will be included in the newly launched Risk-Based OSS System.

Below are the highlights:

A. Business Fields Closed for Investment

Pursuant to PR 10/2021, in principle, all business fields in Indonesia will be open for investment, except for the business fields which are: (i) declared strictly closed to investment; or (ii) open only for the Central Government (“**Business Fields Closed for Investment**”).

As a response to the criticism on opening up investment in manufacturing alcoholic beverages as was previously done in PR 10/2021, the Government of Indonesia has added 3 (three) business fields related to alcoholic beverages manufacturing into the list of business fields which declared strictly closed to investment under PR 49/2021. Hence, as well as the fields already closed to investment are: (i) narcotics; (ii) gambling and/or casinos; (iii) harvesting of fish listed in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); (iv) utilization or harvesting of coral; (v) chemical weapons; and (vi) chemicals that might damage the ozone layer, the Government of Indonesia has also closed to investment several more KBLI codes: Alcoholic Beverage Manufacturing (KBLI 11010), Manufacturing of Beverages Containing Alcohol-Wine (KBLI 11020), and Manufacturing of Beverages Containing Alcohol-Malt (KBLI 11031).

Nevertheless, the business fields which open only for the Central Government remain the same, namely business fields which are those of a service nature or in the framework of strategic defense and security.

B. Business Fields Open for Investment

The Government has added activities with 3 (three) KBLI code numbers (Wholesale in Alcoholic Beverages (importer, distributor, and sub-distributor) (KBLI 46333), Retail in Alcoholic Beverages (KBLI 47221), Street Retail in Alcoholic Beverages (KBLI 47826)) to the business fields which are open for investment under PR 49/2021 with certain requirements for strict control and supervision; , namely (“**Business Fields with other Requirements**”). As a snapshot, the classification of business fields which are open for investment have now become as follows:

	PR 10/2021	PR 49/2021
Priority business fields:		
1. Tax Allowances	183 business fields with 183 KBLI codes	183 business fields with 183 KBLI codes
2. Tax Holidays	18 business fields with 49 KBLI codes	16 business fields with 63 KBLI codes
3. Investment Allowances	44 business fields with 44 KBLI codes	44 business fields with 44 KBLI codes
Allocated business fields or partnerships with Micro, Small, and Medium Enterprises (<i>Usaha Mikro, Kecil, dan Menengah</i>) (“ MSME ”)	89 business fields with 163 KBLI codes	106 business fields with 181 KBLI codes
Business fields with requirements:		
1. for domestic investors;	46 business fields with 46 KBLI codes	37 business fields with 41 KBLI codes
2. with special permits;		
3. with foreign ownership limitation		
4. business fields that are strictly limited and supervised under the regulation regarding the control and supervision of alcoholic beverages	-	3 KBLI codes
Business fields that are not included in the three types of business fields above – in which all investors are allowed to invest		2

(“Business Fields with Requirements”)

We highlight that the amendment to the business fields with requirements of foreign ownership limitation includes Courier Activities (KBLI 53201) and Postal Activities (KBLI 53100). Historically, certain postal service and courier activities, Universal Postal Services (KBLI 53101), Commercial Postal Services (KBLI 53102), and Courier Agent Activities (KBLI 53202), were given a maximum of 49% of foreign ownership requirement under the previous 2016 DNI. These activities were then removed from the list when the new investment list under PR 10/2021 was issued except that Courier Agent activities (KBLI 53202) become open for investment but with a requirement to have partnership with MSME. But the Government decided to return to the foreign ownership limitation to courier activities with a maximum of 49% of foreign ownership but under a different KBLI, Courier Activities (KBLI 53201). While new business fields have been added to the list of Business Fields with Requirements, certain businesses have been removed from the list. This include Postal Activities (KBLI 53100) which was previously subject to 49% maximum foreign ownership and currently is removed from the list.

However, please be advised that it should not be taken for granted that removal of a business field from the list can be interpreted as now open for 100% foreign ownership or as free from any requirement to obtain certain licenses/approvals. This matter should be carefully assessed as certain requirements may be governed in other separate existing regulations or future implementing regulations.

C. Exemptions under PR 49/2021

Continuing the previous 2016 Negative List and PR 10/2021, the PR 49/2021 retains the provision on exemptions from investment known as the “Grandfather Clause”. The “Grandfather Clause” provides exemptions for investments which were made and approved as determined in their respective business licenses prior to PR 10/2021 and PR 49/2021 being issued, leading to greater certainty for investors. Both PR 10/2021 and PR 49/2021 includes exemptions from the application of the new investment rules for:

- i. investment in certain business sectors which were approved prior to the Presidential Regulations being issued (as stipulated in the relevant business license), unless the foreign ownership limitation under the relevant Presidential Regulation is more favorable to the investment;
- ii. investment with prerogative rights (subject to agreement between Indonesia and the investor’s state); and
- iii. investment related to change of foreign ownership limitations in events of merger, acquisition, or consolidation under the same business sectors.

The “Grandfather Clause” can be a complex matter for existing foreign investment companies to navigate while pursuing any plan to restructure their businesses. As an illustration, if a foreign investment company intends to expand its business to include other business activities, will the foreign investment company be required to adjust to the maximum foreign shareholders for the relevant business field under PR 49/2021? The answer should be assessed carefully and a thorough legal analysis made as each case may produce a different outcome.

D. Announcement of Risk-Based OSS System

Recently, on 9 August 2021, the Investment Coordinating Board have finally officially announced the official launching of the Risk-Based OSS System. The Risk-Based OSS System, which is a result of an adjustment of the previous OSS system to the new concept of risk-based business licensing introduced by GR 5/2021, will also include new KBLI Codes which were yet to be included in GR 5/2021.

As indicated in the letter, the new KBLI Codes consist of 353 KBLI Codes in addition to the 1,702 business fields with 1,349 KBLI Codes determined in GR 5/2021. These new codes are expected to be ready to be applied at the end of August 2021.

What this means is there will be more clarity for certain business actors in applying for business licenses relevant to their businesses in the business application system.

E. Conclusion

While the business fields of manufacturing alcoholic beverages as mentioned in Section A are now entirely closed, certain business activities in the alcoholic beverages trading is still open for investment but with strict control and supervision. On the bright side, the Government has expanded investment opportunities in other business fields with new additions under the priority business fields and reduced the number of business fields under the list of Business Fields with Requirements. In the meantime, the support for MSME has been made stronger by adding 11 new KBLI codes allocated to business fields for MSME and adding 8 new KBLI codes in which large companies are required to enter into partnership with MSMEs.

However, there is still certain gap under PR 49/2021, particularly with regard to the application of the “Grandfather Clause”, which may lead to complexity for existing foreign investors in restructuring their businesses. Adding to this complexity is the usage of the newly introduced Risk-Based OSS System. Our past experience with the existing OSS System suggests that how the system interpreted the “Grandfather Clause” was an issue. We expect that the Government has fixed this issue and laid a smooth path in the implementation of Risk-Based OSS System.



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