

Indonesia - Impacts of the Omnibus Law on Foreign Investments

In application of Law 11/2020 known as Omnibus Law, Presidential Regulation 10/2021 of February 2, 2021 ("PR 10/2021" or Positive Investment List) modifies the rules applicable to investments in Indonesia and provides incentives for certain business sectors in order to stimulate investments in the archipelago.

Regulation PR 10/2021 repeals and replaces presidential regulations no.44 / 2016 known as Negative Investment List and 76/2007. PR 10/2021 refers to the Indonesian Industrial Classification Code ("KBLI") and adds specificities according to certain KBLIs.

For clarification, business sectors are now classified according to the following typology, by increasing degrees of access to foreign investors:

1. Business sectors closed to foreign investors;
2. Business sectors reserved for cooperatives and / or VSEs / SMEs;
3. Business sectors partially open to foreign investors;
4. Business sectors open to foreign investors; and,
5. Priority business sectors open to investors including foreign investors.

It should also be noted that special provisions apply for activities carried out in special economic zones. Details will have to be provided by the Regulator to determine these adjustments.

1. Business sectors closed to foreign investors

PR 10/2021 restricts certain business sectors to foreign investors in two reserved areas:

- (i) Business sectors prohibited or which can be carried out only by the public authorities (cf. art. Article 12 of Law 25/2007 relating to investments, as amended by PR 10/2021), which correspond to activities reserved by States; and,
- (ii) Business sectors restricted to foreign investors (. Annex III of PR 10/2021).

In comparison with the previous Negative Investment List, the following business sectors are now closed to foreign investors:

- (i) Coffee processing industry under geographical indication (KBLI 10761);
- (ii) Industry of Rendang (national dish) (KBLI 10750);
- (iii) Traditional cosmetics industry (KBLI 20232); and,
- (iv) Industry of raw materials used in the preparation of traditional medicine (KBLI 21021);

2. Business sectors reserved for cooperatives and / or VSEs / SMEs

PR 10/2021 reaffirms foreign investment conditions relating to the minimum investment (ie. more than 10 billion rupiah or approx. 580 thousand Euros) and the investment vehicle (limited liability company with foreign capital or PT PMA). It should be noted that arrangements will be made for the activities carried out in the special economic zones.

Consequently, a company with foreign capital is by definition excluded from the category of cooperatives, VSEs or SMEs ("SMEs"): Business sectors reserved for SMEs are therefore closed to foreign investors.

However, foreign investors can enter into an agreement with SMEs to carry out some of these activities. This measure aims to protect the local content of supply chain in Indonesia.

The list of the 89 activity sectors reserved to SMEs is included in Annex II of PR 10/2021. In comparison with the previous Negative Investment List, some business sectors have been included in this list, notably in the automotive industry components sector, ortourism for the rental of villas, guest rooms, "budget" hotels and 1 star hotels.

3. Business sectors partially open to foreign investors

Like its predecessor, PR 10/2021 lists Business sectors whose capital may be partially owned by foreign investors.

A simplification is however noted, since from now on a single limit threshold is envisaged, fixed in principle at 49% of foreign investment for the business sectors concerned (against a multiplicity of the thresholds under the aegis of the Negative Investment List).

Another novelty is the possibility for certain business sectors to open their capital to foreign investors upon the occurrence of:

- (i) public offering (eg. newspaper, magazine and newsletter publishing company (KBLI 58130) which may call on the capital market for a maximum of 49% foreign capital);
- (ii) a need for development or commercial expansion (eg. in the audiovisual sector, some companies can open their capital to 20% foreign capital (KBLI 60102 and 60202));

The list of business sectors partially open to foreign investors is included in Annex III of PR 10/2021.

It should be noted that certain sectors have been partially opened to foreign investors, in particular in the transport and defense sector, under the authorisation of the supervisory ministry.

4. Business sectors open to foreign investors

As an exception to the business sectors listed above, all other business sectors should be open to foreign investors, for example:

- (i) Within the energy sector:
 - The operation of power plants;
 - The operation of geothermal power plants of more than 10 MW;
 - Operation and maintenance of electrical installations;
 - Construction and support services for oil & gas;
 - The production of batteries for electric vehicles;
- (ii) Within the distribution sector:
 - Retail businesses with an area of 400 to 2000m²;
 - The distribution of products not affiliated with a production;
 - Storage;
- (iii) In the medical sector:
 - The distribution of medical equipment; and,
 - Private hospitals.

- (iv) In the digital sector:
 - Market-place;
 - Digital services;

- (v) In the tourism sector: hotels classified above 2 stars.

5. Priority Business sectors open to investors including foreign investors

A major contribution of PR 10/2021, 245 business sectors are now considered as priority sectors for the Indonesian economy.

Investors involved in such sectors will be able to benefit from tax, operational and/ or support incentives from the Indonesian public authorities. It should be noted that PR 10/2021 does not precisely contain the content of these incentive measures, which will have to be defined by the relevant ministries.

Annex I of PR 10/2021 lists the activity sectors benefiting from incentive measures and distributing them according to the measures to which they may be subject:

- (i) Business sectors giving right to tax deductions, which include, for example:
 - Power plants worth less than IDR 100 billion;
 - The geothermal exploration sector;
 - Certain sectors of tourism; including hotels rated 4 and 5 stars in certain geographic areas;
 - Certain agricultural and agrifood sectors;
 - The mining sector, under certain operational conditions;
 - Certain activities of the textile industry;
 - Certain activities of the chemical industry;
 - Certain activities of the cosmetics;
 - Certain activities of the pharmaceutical industry;
 - Certain activities of the electronics industry;
 - Certain activities of waste management;
 - Certain activities sectors;

- (ii) Business sectors giving entitlement to tax credits, which include, for example:
 - Certain activities of the metallurgical industry;
 - Certain energy sectors (eg. oil & gas);
 - Certain petrochemical sectors;
 - Certain activities of the chemical industry;
 - Certain activities of the pharmaceutical industry;
 - Certain activities of the robotics industry;
 - Certain activities of the automotive, rail and aeronautical industries;
 - activities
 - Certain activities sectors;

- (iii) Business sectors giving right to investment credits, which include, for example, certain sectors of food and certain textiles industry sector.

It should be noted that other business sectors can benefit from such incentives according to upcoming dedicated sectorial regulations.

6. Terms of application of PR 10/2021

PR 10/2021 entered into force on March 2, 2021. It should be noted that the regulation will only be applicable to future investment projects: the conditions of previous investments should not be challenged by the new provisions.

However, they will allow companies to conduct necessary restructuring to take advantage of more favorable conditions pertaining to PR 10/2021.

Indeed, PR 10/2021 details the conditions of its application in the event of a merger, acquisition or consolidation of companies.

Please note, however, that the implementation of the new conditions of PR 10/2021 within the centralised licensing system, or online Single Submission System, is yet to be applied and is expected to be ready no sooner than June 2021.

Also, if the reform shows an opening of the Indonesian market to foreign investors, we can only advise caution in establishing an investment project before the second half of 2021.

This call for caution is motivated in particular by the following elements:

- The need to compare the conditions of PR 10/2021 with the applicable upcoming sectorial regulations, which are likely to limit foreign investment;
- The case of the alcohol production sector, which was to be opened in certain geographical areas cf. Annexure III of PR 10/2021, but of which the President of the Indonesian Republic informed that these provisions would be subsequently repealed less than 15 days after its promulgation; and,
- The application of the conditions of PR 10/2021 by the decentralised administrations.

We strongly advise to consult the competent authorities upstream of any investment project and we will closely monitor the applications of PR 10/2021.

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