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Indonesia's New 2016 Negative List

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On 18 May 2016, the Indonesian Government enacted Presidential Regulation No. 44 of 2016, which sets out the new negative investments list (the "**2016 Negative List**") and revokes the 2014 Negative List[1]. The 2016 Negative List has been issued following extensive discussions within the Indonesian Government and corporate sector. It is intended to help increase Indonesia's regional competitiveness and encourage greater foreign direct investment, whilst maintaining protections for domestic businesses of a certain size. As such, the 2016 Negative List is largely consistent with the 10th Economic Package announced by the Indonesian Government in February 2016.

From an investment perspective, the key categories that are relevant in the context of the 2016 Negative List are:

A. Business lines that are now open for 100% foreign ownership (subject to specified licensing/technical requirements in certain instances);

B. Business lines where 100% foreign ownership is not permitted, but where the level of permitted foreign investment has been increased;

C. Business lines that are reserved for investment by, or in partnership with, Domestic SMEs[2]; and

D. Business lines that are entirely closed to both foreign and domestic investment.

We have set out below a summary of the key revisions introduced by the 2016 Negative List.

A. Business lines in which 100% foreign ownership is now permitted

100% foreign ownership is now possible in a number of business lines where this was previously not permitted or specifically regulated. These are business lines that are not listed in the 2016 Negative List. According to the Indonesian Coordinating Ministry for the Economy, these business lines have been opened for investment on the basis that they either already face sufficient domestic competition or require advanced technology and/or greater funding. In some instances this is, however, subject to certain conditions. We have set out below the key examples of business lines where 100% foreign ownership is now permitted.

[1] Presidential Regulation No. 39 of 2014 on the List of Business Lines that are Closed for Investments and Business Lines that are Open with Limitations for Investments (the "**2014 Negative List**").

[2] Domestic Indonesian micro, small and medium enterprises and cooperatives as further detailed in Law No. 20 of 2008 on Micro, Small and Medium Businesses (the "**SME Law**") and Law No. 25 of 1992 on Cooperatives.

Business Line	2014 Negative List	2016 Negative List
Communication and Informatics Sector		
Certain e-commerce activities (in the form of marketplace, daily deals, price grabber and/or online classified ads model) involving investments of more than IDR100 billion	Not specifically stipulated in the 2014 Negative List	100%
Telecommunication equipment certification	Capped at 95%	100%
Energy and Mineral Resources Sector		
Biomass pellet industry for (renewable) energy	Partnership with Domestic SMEs required	100%
Healthcare Sector		
Business and management consultancy/hospital consultancy services	Capped at 67%	100%
Healthcare support services: (a) Medical equipment rental (b) Laboratory, medical check-up clinic	 (a) Capped at 49% (b) Capped at 67%	 (a) 100% (b) 100%
Manufacture of raw materials for medical pharmaceuticals	Capped at 85%	100%
Industrial Sector		
Crumb rubber	Closed	100%[3]
Public Works Sector		
- Toll road management - Non-hazardous waste management	Capped at 95%	100%
Trade Sector		
Cold storage	Capped at (i) 33% for Sumatera, Java and Bali and (ii) 67% for Kalimantan, Sulawesi, Nusa Tenggara, Maluku and Papua	100%
Distribution affiliated with production	Capped at 33%	100%
- Futures brokers - Direct selling through marketing networks	Capped at 95%	100%
Tourism and Creative Economy Sector		
Bars, cafes and operation of sports facilities (e.g. bowling arenas, gyms)	Capped at 49% (or up to 51% if in partnership with Domestic SMEs)	100%
Film studios, film processing laboratories, film dubbing facilities, film printing and/or duplication facilities	Capped at 49%	100%
Film shooting facilities, film editing facilities, film subtitling facilities, film production, cinema, recording studios, film distribution	Closed for foreign investments	100%
Restaurants	Capped at 51%	100%

3 Subject to (i) a specific license from the Ministry of Industry and (ii) requirements as regards sourcing its own raw materials, these may include minimum sourcing requirements from Domestic SMEs.

B. Business lines in which the permitted level of foreign ownership has been increased

The 2016 Negative List permits an increased level of foreign ownership in a number of business lines, where previously foreign investment was either prohibited, limited or not expressly permitted. The categories of business in which ASEAN investors are now entitled to a preferential higher cap on foreign ownership has also been expanded, as detailed below. We have set out below the key changes that the 2016 Negative List has implemented in this regard.

Business Line	2014 Negative List	2016 Negative List
Communication and Informatics Sector		
Certain e-commerce activities (in the form of marketplace, daily deals, price grabber and/or online classified ads model) with investments of less than IDR100 billion	Not specifically stipulated in the 2014 Negative List	Capped at 49%
- Fixed and mobile telecommunication networks - Telecommunication networks integrated with telecommunication services	Capped at 65%	Capped at 67%
Telecommunication services (e.g. internet service providers)	Capped at 49%	Capped at 67%
Energy and Mineral Resources Sector		
Examination and testing of high voltage electrical installation	Closed	Capped at 49%
Manpower Sector		
Professional training (e.g. computer courses, TOEFL/IELTS courses, speed reading courses, modelling courses)	Capped at 49%	Capped at 67%
Public Works Sector		
Construction consultancy services involving (i) advanced technology, (ii) high risk, and/or (iii) a value of more than IDR10 billion	Capped at 55% (regardless of the nature or value of the work)	Capped at 67% (or up to 70% for ASEAN investors)
Tourism and Creative Economy Sector		
- Golf courses - Travel bureaus	Capped at 49% (or 51% if in partnership with a Domestic SME)	Capped at 67% (or up to 70% for ASEAN investors)
Motels	Capped at 49% (or 51% if in partnership with a Domestic SME; or up to 70% for ASEAN investors)	Capped at 67% (or up to 70% for ASEAN investors)
Private museums	Capped at 51%	Capped at 67%
Meetings, incentives, conferences, and exhibitions (MICE) operations	Capped at 51%	Capped at 67% (or up to 70% for ASEAN investors)
Trade Sector		
Department stores (with retail space of 400 m2 to 2,000 m2)	Closed (in respect of department stores of less than	Capped at 67%[4]

4 Subject to (i) obtaining specific licenses from the Ministry of Trade and (ii) certain requirements (e.g. it must be located within a shopping mall and not be a stand-alone outlet).

Business Line	2014 Negative List	2016 Negative List
	2,000 m2)	
- Distribution (non-affiliated with production) - Warehousing	Capped at 33%	Capped at 67%
Transportation Sector		
- Passenger land transportation (inter-city and inter-province transport, rural transport, urban transport, in province intercity transport, cross-border transport) - Non-scheduled land transportation (taxis, tourism transport, certain area/destination transport)	Closed	Capped at 49%
- Supporting services for transport terminals - Air transportation supporting services (computer reservation system, ground handling and aircraft leasing) - Services activities related to airports - Freight forwarding services - Air cargo expedition services - General sales agencies for foreign airlines	Capped at 49%	Capped at 67%
Maritime cargo handling services	Capped at 49% (or up to 60% for ASEAN investors)	Capped at 67% (or up to 70% for ASEAN investors in specific ports)

C. Business lines reserved for, or subject to partnership with, Domestic SMEs

The 2016 Negative List has in fact increased certain limitations/restrictions that are applicable for certain business lines, by reserving these business lines for investment by, or in partnership with, Domestic SMEs. We have set out below examples of some of the key changes that the 2016 Negative List has implemented in this regard.

Business Line	2014 Negative List	2016 Negative List
Industrial Sector		
Cane sugar (white, refined and raw)	Foreign ownership capped at 95% (and subject to certain sugarcane plantation requirements)	Reserved for partnership with Domestic SMEs (on the basis of an '*inti-plasma*' scheme)
Public Work Sector		
Construction consultancy services that (i) use simple/medium technology, (ii) are low/medium risk and/or (iii) have a work value of less than IDR10 billion	Foreign ownership capped at 55%, regardless of its nature and/or work value	Reserved for Domestic SMEs
Construction implementation services that (i) use simple/medium technology, (ii) are low/medium risk and/or (iii) have a work value of up to IDR50 billion *Note that for construction implementation services that (i) use advanced technology, (ii) are high risk and/or (iii) have a work value of*	Reserved for Domestic SMEs if (i) use simple technology, (ii) are low risk and/or (iii) have a work value of up to IDR1 billion Foreign ownership of up to 67% if (i) use advanced technology, (ii) are high risk and/or (iii) have a work value of more than IDR1	Reserved for Domestic SMEs.

more than IDR50 billion, the foreign ownership limit is maintained at up to 67% (or up to 70% for ASEAN investors)	billion	
Trade Sectors		
Retail trading via mail or internet order (for goods under the categories of food, beverages, tobacco, pharmacy, cosmetics, laboratory devices, textiles, apparel and footwear, household and kitchen goods)	Closed for foreign investments	Subject to partnership with Domestic SMEs

There is no further explanation in the 2016 Negative List as to how partnership schemes with Domestic SMEs should be implemented or whether foreign ownership in the relevant business lines will be capped. As to the manner of implementation, the SME Law (as further implemented) does provide for a broad range of partnership schemes, that include sub-contracting, franchising, trading, distributorship and agency, profit sharing, cooperation, joint venture, outsourcing and other schemes of partnership, but further clarification from the Capital Investment Coordinating Board (the "**BKPM**") will be required on a case-by-case basis as to the permitted level of foreign ownership in such partnership arrangements.

D. Business lines closed to any domestic and/or foreign investment

The 2016 Negative List has maintained a list of business lines which are reserved for the government and in which any private investment, whether foreign or domestic, is prohibited. This is on the basis of Article 12(3) of Law No. 25 of 2007 on Capital Investment, which authorizes the Indonesian Government to prohibit investment in certain sectors due to Indonesia's national interests (for example, on national defense, health or environmental grounds). These business lines include the management of land terminals for passengers, casinos and the production of alcoholic beverages. The 2016 Negative List has added business activities relating to the distribution of sea coral and marine salvage to the closed list specified in the 2014 Negative List.

E. Other Key Changes

1) Streamlined Investment Process

The 2016 Negative List has removed the need to obtain specific recommendations from technical ministries/government institutions for a number of business lines, including within the agriculture sector (e.g. food crops - seeding an area of more than 25 hectares). These changes have been made with the intention of reducing the number of bureaucratic steps required, and we will be following closely the practical implications of these changes from a transactional perspective.

2) Simplified Categories

Certain closely-related business lines have been combined into single categories in the 2016 Negative List, in an effort to simplify the list. For example, numerous previously separate construction-related business lines have now been consolidated in a single "construction services" business line.

However, the 2016 Negative List leaves some uncertainty as to whether the BKPM would use its discretion to re-categorize business lines not currently specifically mentioned in the 2016 Negative List (and thus, assumed to be unrestricted or completely open to foreign investment) to fall within a sector subject to foreign investment restrictions and/or limitations. Such re-categorization would detract from the intended benefits of the simplified regulations.

F. What has not changed

The following provisions were provided for in the 2014 Negative List and continue to be maintained in the 2016 Negative List.

1) Grandfathering

The 2016 Negative List includes grandfathering provisions in order to minimize any uncertainty for existing investments and businesses:

- Any prior approved existing investment will not be affected where the 2016 Negative List has reduced the foreign ownership limit, unless such new provision in the 2016 Negative List is more favorable for such investment. This should include future business expansions in the same business line where the foreign ownership level has been reduced.
- Existing investments are also grandfathered in the event of a merger or an acquisition (but not a consolidation of companies) where the relevant companies are in the same business line.

2) Application of the 2016 Negative List to publicly listed companies

The 2016 Negative List stipulates that portfolio investments conducted through the Indonesian Stock Exchange are not subject to the 2016 Negative List. However, as with the 2014 Negative List, exactly what constitutes a "portfolio investment" is not specified and therefore there remains some uncertainty as to how this exemption will be implemented by the regulators. As a result, we would expect the current market practice as regards the applicability of the 2016 Negative List to publicly listed companies to be maintained.

3) Rights issues

The 2016 Negative List provides that if a domestic investor is unable to participate in a rights issue in an expanding business, then a foreign investor will be permitted to subscribe for the excess unallocated shares, thereby exceeding the prescribed permitted foreign ownership percentage, provided that within two years any shares in excess of the relevant ownership cap are divested by the foreign shareholder, either by way of (i) a sale to a domestic investor, (ii) a public offering or (iii) a share buy-back.

4) Ownership restrictions for certain business lines remain unchanged

The 2016 Negative List maintains the foreign ownership restriction and cap for certain sectors/business lines such as:

Sector	Business Line	Foreign ownership
Agriculture	Plantations with an area of more than 25 Hectares	Capped at 95%
Communication and Informatics	Telecommunication towers	Closed for foreign ownership
Financial	- Insurance - Venture Capital	Capped at 80% Capped at 85% (in each case subject to OJK regulations)
Health	Hospital services	Capped at 67% (or up to 70% for ASEAN investors)

G. Conclusions

The 2016 Negative List is regarded as a key part of the economic incentive packages introduced under President Joko Widodo's leadership, that are intended to increase foreign direct investment and Indonesia's competitiveness in the region. The opening of certain sectors to foreign investment in the 2016 Negative List, as well as other key changes, such as the streamlined investment process and simplified categories, are significant steps forward in this regard and are indicative of the intention of policymakers and lawmakers to achieve these goals.

In response to the 2016 Negative List, foreign investors should consider opportunities to, among others, (i) invest in the newly opened or relaxed sectors and/or (ii) increase their existing investments in sectors which have been further relaxed. We would recommend close consultation with the BKPM and/or the relevant technical ministry to ensure that issues are not encountered with any inconsistent implementation of the streamlined investment process or varying interpretations of categories that are not explicitly mentioned under the 2016 Negative List.

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