



GETTING THE  
DEAL THROUGH 

# Foreign Investment Review 2018

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# Preface

## Foreign Investment Review 2018

Seventh edition

**Getting the Deal Through** is delighted to publish the seventh edition of *Foreign Investment Review*, which is available in print, as an e-book and online at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

**Getting the Deal Through** provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on France and Indonesia.

**Getting the Deal Through** titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com).

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

**Getting the Deal Through** gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.

GETTING THE  
DEAL THROUGH 

London  
January 2018

# Indonesia

Darrell R Johnson and Irwina Annisa

Soewito Suhardiman Eddymurthy Kardono

## Law and policy

### 1 What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Since 1967, Indonesia has long favoured foreign investment as one means to realise national economic development. In that year the Law on Foreign Capital Investment was adopted. In 2007 the Capital Investment Law (as defined in question 2) replaced the 1967 law in an effort to update and streamline capital investment in Indonesia.

There are now and have always been various conditions to foreign direct investment in Indonesia, whether set by regulation or policy, as the government of Indonesia (GOI) has sought to balance the development of Indonesia through large-scale foreign investment and the needs of micro, small-scale, medium-scale businesses and cooperatives.

The GOI exercises control over foreign investment through an array of methods. In Indonesia, the implementation of foreign investment is carried out under the supervision of the Capital Investment Coordinating Board (BKPM). All foreign direct investment must be approved by the BKPM, except for financial services (banks, insurance companies and securities companies and the like), which are under the supervision of the Financial Services Authority (OJK) and oil companies, which are under the supervision of the Special Task Force for Upstream Oil and Gas Business Activities and the Minister of Energy and Mineral Resources (MEMR).

The GOI also controls foreign investment through what is known as the negative investment list, or DNI. The first negative investment list was issued in 1987. The latest DNI is set forth in Presidential Regulation No. 44 of 2016 regarding the List of Business Fields That Are Closed and Business Fields That are Conditionally Open for Investment (the 2016 DNI). The DNI sets forth restrictions on and conditions to both foreign and domestic investment. Some business sectors are closed to foreign investment altogether and others are subject to conditions, such as maximum foreign ownership and minimum capitalisation. If a business sector is not on the 2016 DNI, it is 100 per cent open for foreign investment.

There are various other ways the BKPM and other government authorities regulate foreign investment activities. These may vary from laws and regulations to unwritten policies. Foreign investors need to be aware these regulations and policies may be imposed by BKPM and other governmental authorities regulating businesses in Indonesia. For example, even if BKPM approves a foreign investment, a special licence may still be required from a technical ministry. The GOI has made efforts to streamline the approval process by eliminating many special licences and placing technical ministry representatives within BKPM.

With regard to foreign currency controls in Indonesia, the Indonesian rupiah cannot be freely traded outside Indonesia's territory. Only an amount of less than 100 million rupiah can be freely taken physically out of Indonesia at any one time. Indonesian commercial banks are restricted from transferring Rupiah overseas, which must first be converted into foreign currency. Such transfers are controlled by Bank Indonesia (BI), Indonesia's central bank. BI Regulation No. 18/10/PBI/2016 regarding Monitoring of Foreign Exchange Flows Activities of Banks and Customers regulates the foreign exchange flows. If the amount transferred overseas exceeds BI's thresholds, there

must be supporting documents provided by the customer as the basis for the transaction. The transfer of foreign currencies from Indonesia in the amount of (i) more than US\$10,000 or its equivalent requires the sender to provide information regarding the identity of both the sender and the recipient, as well as the purpose of such transfer and (ii) more than US\$100,000 or its equivalent requires the sender to provide the bank with supporting documents as the basis for such transfer.

BI Regulation No. 18/18/PBI/2016 regarding Foreign Currency Transactions against Rupiah Between Banks and Domestic Parties provides that Indonesian nationals, legal entities and residents that purchase foreign currency in excess of US\$25,000 or its equivalent per month must provide information on underlying transaction that meets the requirements of the bank. The underlying transaction must relate to one or more of the following activities:

- domestic and overseas trading of goods and services;
- investment in the form of direct investment, portfolio investment, loan, capital and other investment, domestic and overseas; and/or
- extension of credit or financing by a bank in foreign currency or in rupiah for trading and investment activities, or both.

### 2 What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals on the basis of the national interest?

These are:

- Law No. 25 of 2007 regarding Capital Investment (the Capital Investment Law);
- Law No. 40 of 2007 regarding Limited Liability Company (the Company Law);
- Law No. 5 of 1999 regarding Prohibition on Monopoly Practices and Unfair Business Competition (the Unfair Competition Law);
- the 2016 DNI;
- Government Regulation No. 27 of 1998 regarding Merger, Consolidation and Acquisition of Limited Liability Company (GR 27/1998);
- Government Regulation No. 57 of 2010 Merger or Consolidation and Share Acquisition of Corporation that May Cause Monopoly Practices and Unfair Business Competition (GR 57/2010);
- Chairman of Central Statistics Body Regulation No. 95 of 2015 regarding Indonesian Business Fields Classification (the 2015 KBLI) as amended by Central Statistics Body Regulation No. 19 of 2017 regarding Indonesian Business Fields Classification (the 2017 KBLI) (the 2015 and 2017 KBLI are together referred to as the KBLI);
- Chairman of BKPM Regulation No. 13 of 2017 Regarding Guidelines and Procedures for Capital Investment Licensing and Facilities (BKPM Regulation 13/2017); and
- Chairman of BKPM Regulation No. 14 of 2017 Regarding Guidelines and Procedures for the Controlling of Capital Investment Implementation (BKPM Regulation 14/2017).

Please be informed that BKPM Regulation 13/2017 and BKPM Regulation 14/2017 were promulgated on 11 December 2017 and came into effect as of 2 January 2018. They repealed the following regulations:

- Chairman of BKPM Regulation No. 8 of 2015 as amended by Chairman of BKPM Regulation No. 18 of 2015 Regarding Procedures for the Application of Income Tax Facility for Capital

- Investment in Certain Business Fields and/or Regions (BKPM Regulation 8/2015 as amended);
- Chairman of BKPM Regulation No. 13 of 2015 as amended by Chairman of BKPM Regulation No. 19 of 2015 Regarding Procedures for the Application of the Granting of Corporate Income Tax Reduction Facility (BKPM Regulation 13/2015 as amended);
- Chairman of BKPM Regulation No. 14 of 2015 as amended by Chairman of BKPM Regulation No. 6 of 2016 Regarding Guidelines and Procedures for Capital Investment (BKPM Regulation 14/2015 as amended);
- Chairman of BKPM Regulation No. 15 of 2015 Regarding Guidelines and Procedures on Capital Investment Licensing and Non-licensing (BKPM Regulation 15/2015);
- Chairman of BKPM Regulation No. 16 of 2015 Regarding Guidelines and Procedures on Capital Investment Facilities (BKPM Regulation 16/2015); and
- Chairman of BKPM Regulation No. 17 of 2015 Regarding Guidelines and Procedures for the Controlling of Capital Investment Implementation (BKPM Regulation 17/2015).

Since BKPM Regulation 13/2017 and BKPM Regulation 14/2017 are new, please be advised that BKPM's unwritten policies included in this article are based on our experience in handling clients during the prior regulatory regime. While we believe that those unwritten policies are still representative for the purposes of this article, BKPM might adopt different policies under the new regime.

In brief, the Capital Investment Law and the Company Law both govern formation of new companies in Indonesia with foreign shareholders and the acquisition of existing companies by foreign entities or individuals. In the event of an acquisition of an Indonesian company by a foreign or an Indonesian entity, the Unfair Competition Law may be involved if anticompetitive effects may result from the transaction.

### **3 Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?**

The Capital Investment Law only covers foreign direct investment in Indonesia. Direct investment means that the capital investment activity is purposed to conduct business activity within the area of the Republic of Indonesia. The Capital Investment Law does not address foreign investment made through the capital market, and as noted above, financial services and the oil and gas industry are not covered by the Capital Investment Law and the regulations listed in question 2.

Foreign companies and individuals who wish to make a direct foreign investment in Indonesia must first obtain a capital investment registration (PPM) and later a business licence (IU) or obtain an IU directly from BKPM without the intervening step of a PPM. Article 10(4) of BKPM Regulation 13/2017 provides details on the lines of business required to obtain a PPM as follows:

- a line of business that requires time to construct a plant;
- a line of business that may obtain capital investment facilities;
- a line of business that may cause significant environmental pollution;
- a line of business that involves state defence, natural resource management, energy and infrastructure; and
- other lines of business in accordance with the provisions of sectoral laws and regulations.

Investors in lines of business that are not included in the above list and which do not need any construction time or import duty facilities must directly obtain an IU. To do so, they must establish an Indonesian limited liability company (PT), obtain a taxpayer registration number (NPWP) and possess office space. Examples of such businesses are management consulting, web portal and advertising.

All foreign capital investment in Indonesia must be implemented through an Indonesian limited liability company PT. A BKPM-licensed PT is commonly known as a foreign investment company (PMA company).

The 2016 DNI is an essential regulation to be observed by foreign investors that want to do business in Indonesia. The 2016 DNI lists

those activities that are closed to foreign investment or that are only open to investment under certain conditions. The DNI sets forth specific activities by reference to the business activities described in the KBLI.

The 2016 DNI lists those areas in which investment by both Indonesians and foreigners is prohibited or restricted. Article 3 of the 2016 DNI sets out that, if a particular line of business is not listed in the DNI, then it is open to 100 per cent foreign investment without any conditions. However, in practice, investors will need to confirm this with the BKPM and determine whether there are any conditions to 100 per cent foreign ownership. For example, 100 per cent foreign ownership is only permitted in the IT business sector if the investment level is at least 100 billion rupiah. Otherwise foreign investment is limited to a maximum of 49 per cent.

Protection for minority interests is available under the Company Law and is also set forth in the articles of association of the PMA company. Such protections may also be created by contract in a shareholders agreement or joint venture agreement executed between the shareholders of a PMA company. Such contractual protections must not violate or derogate the protections provided by the Company Law.

BKPM Regulation 13/2017 provides the procedures to obtain from BKPM the necessary licences to engage in business. It also sets out the procedure by which changes are made to the PMA company, such as a change in shareholders or business activity. BKPM Regulation 14/2017 requires the PMA company to conduct periodic reporting in connection with their capital investment activities.

### **4 How is a foreign investor or foreign investment defined in the applicable law?**

The Capital Investment Law provides definitions for both foreign investors and foreign investment.

Article 1 (6) of the Capital Investment Law defines a foreign investor as a foreign citizen, a foreign business entity or a foreign government conducting capital investment within the territory of the Republic of Indonesia.

Article 1(3) of the Capital Investment Law defines foreign capital investment as any capital investment activity to conduct business within the territory of the Republic of Indonesia by a foreign capital investor, whether using all foreign capital or in partnership with a domestic capital investor.

There are no other definitions for the above terms stipulated under prevailing laws and regulations.

Please note that under BKPM policy, a PMA company is itself treated as a foreign investor if it invests in any subsidiary, and that such subsidiary and any other subsequent subsidiaries, will also be treated as foreign investors. This rule has a direct bearing on the capitalisation of each company.

### **5 Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?**

There are no special rules for investments made by foreign SOEs and SWFs. However, the Capital Investment Law allows a foreign government to conduct a capital investment in Indonesia.

Pursuant to article 1(1) of Law No. 19 of 2003 regarding State Owned Enterprises (19 June 2003) (the SOE Law), an SOE is defined as a business entity, the capital of which is owned in part or by the state through a direct participation originated from separate state assets.

There is no definition of an SWF pursuant to prevailing laws and regulations.

### **6 Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?**

In general, the Ministry of Law and Human Rights (MOLHR) has the authority to review corporate activities in Indonesia, whether such activities are undertaken by a domestic or foreign investment company. The MOLHR must approve or be notified of a merger, consolidation or demerger of Indonesian companies or an acquisition of one company by another through a share issuance depending whether or not such merger, consolidation or acquisition causes the change to the PMA company's articles of association.

The BKPM is the government authority that oversees the activities of PMA companies generally. BKPM's approval must be obtained

if a PMA company changes its shareholders, wishes to sell or acquire shares in another Indonesian company, or wishes to expand its operations beyond a fixed percentage or add a new business line to that previously approved.

The Commission for the Supervision of Business Competition (KPPU) has authority over mergers, acquisitions, and consolidations that may result in unfair competition. There are optional and mandatory reporting requirements in such cases. Optional reporting can be done prior to the completion of the merger, consolidation or acquisition. KPPU will give its written opinion only if a written notification and consultation are requested. No written opinion will be given when the consultation is made verbally and any verbal opinion is not binding on the KPPU. Mandatory reporting must be carried out after the merger, consolidation or acquisition has been completed if the resulting asset value or sales value exceeds certain amounts by the surviving company or the acquiring company. This report must be filed within 30 days of the effective date of the merger, consolidation or acquisition.

The threshold for mandatory reporting is as follows:

- if the combined local asset value exceeds 2.5 trillion rupiah and 20 trillion rupiah for banks; or
- if the combined local turnover that exceeds 5 trillion rupiah.

The minimum thresholds mentioned above shall be calculated based on the total asset value or sales value of:

- the business entity resulting from the merger, or in the case of an acquisition, the acquiring business entity and the acquired business entity; and
- the business entity or entities that control or are controlled either directly or indirectly, by the business entity resulting from the merger, consolidation or the acquiring business entity and the acquired business entity.

In case of a share acquisition, the notification requirement only applies when there is a change of control. Control is triggered upon one of the following events:

- acquisition of the voting shares of at least 50 per cent; or
- acquisition of less than 50 per cent of the voting shares but with the ability to affect and determine the management of the company and the company's policy (ie, an effective change of control).

There are several business sectors that are subject to the approval of specific government authorities. For example, bank mergers and acquisitions, whether wholly or partly foreign owned, are subject to the approval of the OJK.

#### **7 Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?**

The BKPM has full discretion to approve or reject transactions that it concludes are not in accordance with the Indonesian capital investment regime, but BKPM cannot refuse approval if the proposed investment complies with Indonesian laws and regulations.

#### **Procedure**

#### **8 What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?**

The Capital Investment Law does not contain any threshold requirements that would trigger a review or application of the transaction law. If the investment involves a foreign shareholder, it is subject to BKPM review and approval under the laws and regulations as stated in question 2. Under the Company Law, an acquisition by a share issuance that results in a change in control of a company must be done in accordance with an acquisition plan that is widely published. The MOLHR does not approve the acquisition plan, and will not approve an amendment of the company's articles of association unless the amending resolution submitted by the notary confirms that the acquisition plan has been approved by the shareholders of such company without objection by the creditors of the acquired company.

GR 57/2010, elaborated upon in question 6, establishes threshold requirements for voluntary and mandatory notifications.

#### **9 What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees?**

There is no special requirement or procedure to obtain national interest clearance of a transaction. If an investment is permitted by the DNI, the procedure is to file an application for approval with BKPM.

To obtain BKPM approval, investors must file an application to obtain a PPM or IU from BKPM in accordance with its business criteria. The PPM can be obtained by submission to BKPM's online system of the application form and the required supporting documents. The information that must be given to accompany the PPM or IU application is:

- information regarding the identity of the prospective investors (individual and legal entity investors have different supporting documents required by BKPM); and
- information regarding the capital investment plan, including the business field corresponding to the KBLI and the 2016 DNI, the project location, estimate annual production and sales, the land area needed for the investment, the Indonesian and foreign manpower requirements, the investment plan, the capitalisation plan, the share participation in the PMA company and other information that may be requested by BKPM on a case-by-case basis.

To conduct the filing, the foreign investors must create an account in BKPM's online system (ie, the Electronic System on Investment Information and Licensing (SPIPISE) (<https://onlinespipse.bkpm.go.id/SignUpHukum.zul>). This process may be carried out by the prospective investors themselves or their representatives (ie, legal advisers or business consultants) through a power of attorney to be submitted online along with the other supporting documents.

Prior to the issuance of BKPM Regulation 13/2017, all investors were required to obtain a principle licence (IP) and later an IU. BKPM Regulation 14/2015 provided that the IP could be obtained before or after a PMA company is established as a legal entity. Such status is obtained when the PMA company's deed of establishment (ie, its articles of association) have been approved by the MOLHR. However, in practice, the notaries who execute deeds of establishment containing articles of association, and the MOLHR, followed the procedure in effect before the 2015 BKPM regulations were adopted, which required the BKPM to approve the proposed investment before investors could execute the PMA company's deed of establishment.

As of the promulgation of BKPM Regulation 13/2017, we believe that the same procedure will also apply for the PPM application. However, those companies that are required to obtain an IU directly must now form the PT PMA company first. It is unclear at present whether the MOLHR will accommodate this change.

Once the application and supporting documents have been submitted and approved, BKPM will issue the PPM or IU for the prospective PMA company. If necessary, the prospective investors may be required to conduct a presentation before the BKPM on their investment plan before BKPM will issue the PPM or the IU.

A PPM can be given in BKPM's discretion for a period of one to five years, depending on the type of business. The PMA company must complete its business preparation and obtain the PPM before that PPM period ends. In practice, the IP was given for one year and could be extended for one year. Rarely has the BKPM extended the IP beyond two years. We believe the same rules will apply to the PPM procedure.

An IU can be obtained directly if a PMA company fulfils the requirement stated in question 3 or if a PMA company that requires a PPM has completed its construction or preparation and will commence the production of goods. The IU approval procedure is almost the same as the PPM procedure. However, the PMA company must prove that it has fulfilled the required total investment stipulated by BKPM. The IU is valid as long as the PMA company is in operation or for a certain period if stipulated otherwise by BKPM.

BKPM may allow a PMA company to obtain an IU, even if the total investment has not been fulfilled. In this case, BKPM may issue a temporary IU with a specified term of one year for the PMA company to fulfill the total investment requirement and a one-time opportunity to extend such temporary IU. An application for the extension of the temporary IU must be submitted to BKPM within 30 days prior to the expiration date of the temporary IU. Once the PMA company has fulfilled the total investment requirement, it must apply for an IU and this must be done prior to the expiration of the temporary IU.

BKPM has its own format for the documentation submitted to obtain the PPM and IU, such as the form of the power of attorney, the application form and the final versions of the PPM and IU. These forms are available in the attachments of BKPM Regulation No. 13/2017. BKPM's online system allows the investors to complete the information directly on the online application form. There is no need to personally file the application. The purpose of the online system is to make the process more transparent. There are no fees payable to BKPM. Fees payable to the MOLHR are nominal.

Aside from the issuance of the PPM, BKPM Regulation 13/2017 also sets forth an alternate procedure in the form of a registration of a statement letter containing a compliance checklist. While BKPM Regulation 13/2017 is not clear, we believe this is another form of a PPM but one that is provided on a priority basis. This form of accelerated business licensing is a priority service for PMA companies conducting business within a free trade and free port area, a special economic area, an industrial area or a national tourism strategic area. Those PMA companies that have already obtained the following approvals or licences may submit a statement letter to BKPM that they will comply with the requirement to obtain the necessary documents to obtain an accelerated approval. The statement letter format is available in attachment LXXIX to BKPM Regulation 13/2017. Such documents are:

- a deed of establishment and MOLHR approval;
- a company registration certificate (TDP);
- a foreign manpower utilisation plan (RPTKA);
- a work permit (IMTA) for one or more foreign employees;
- a producer importer identification number (API); and
- customs access, formerly called a NIK.

The PMA company must commence construction within 90 working days after the approval of the statement letter by the Chairman of BKPM. The above statement letter is submitted simultaneously with the usual PPM application to a special online platform called the Electronic Integrated Business Licensing System (or Online Single Submission). Since BKPM Regulation 13/2017 has only recently been issued, we are not sure how this expedited system will work in practice.

#### **10 Which party (investor/target) is responsible for securing approval?**

If the PMA company has not been established, the prospective shareholders are responsible for securing the approval. If the PMA company has been established, the company, represented by its president director or other persons under its articles of association are responsible for obtaining its approval.

In completing the application form and submitting the supporting documents, the prospective shareholders or the established PMA company may be assisted by a third party as mentioned in question 9.

#### **11 How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?**

##### **Reviewing timeline**

BKPM Regulation 13/2017 states that it will take only two working days to obtain a PPM and five working days to obtain an IU, once a complete application and supporting documents are filed with the BKPM.

In practice, the timeline depends on which licence or approval is sought and whether there are other additional supporting documents required by BKPM or comments thereon. BKPM should approve the PPM application or an IU application in one or two weeks. The MOLHR should also approve the establishment of the limited liability company in one or two weeks. An application to change shareholders to increase the investment capacity and other changes after the PMA company has been established may take one to two weeks to obtain approval. As stated in question 2, BKPM has a policy to improve its services so that the issuance of its licences or approvals can be done within the stipulated time.

##### **Determining factors**

Normally, the completion of supporting documents submitted by the foreign investor is the most important factor in obtaining the required licences. Back and forth correspondence with BKPM regarding the additional supporting documents that must be filed by the foreign

investor or questions by BKPM will delay the licence process. BKPM may also require the foreign investor to comply with unwritten policies that can be cumbersome. It is important to comply with all requirements at the outset to minimise review and approval time. Foreign investors are well advised to carry out an independent consultation with the BKPM before submitting the application to learn whether there are any specific requirements for the proposed investment.

##### **Fast-track options**

Since 2015, foreign investors that fulfil certain criteria are able to obtain a principle licence, the previous name of the PPM, which was also sometimes called an 'investment licence', within three hours. The said criteria are as follows:

- a total investment of at least 100 billion rupiah; and/or
- Indonesian manpower of at least 1,000 persons.

By the promulgation of BKPM Regulation 13/2017, BKPM has made changes to the three-hour investment licence process by specifying the types of businesses eligible for three-hour business licensing.

##### **Businesses conducted within an industrial and national tourism strategic area**

PMA companies that conduct businesses within the above areas are eligible for the three-hour licensing to obtain the PPM if they fulfil the following requirements:

- a total investment of more than 100 billion rupiah; or
- Indonesian manpower of more than 1,000 persons.

Certain business are exempted from fulfilling the above requirements, if the following conditions are met:

- a PMA company in certain industries, areas or places that receive a facility under inland free trade agreements in accordance with regulations stipulated by the Minister of Industry;
- a PMA company in a certain industry that is part of a supply chain. Such a PMA company must convey a statement letter or memorandum of understanding to prove its status as a supplier of a product that will be used by the user company;
- a PMA company participating in the tax amnesty programme. This PMA company must enclose the tax amnesty statement letter issued by the Minister of Finance or any official appointed by the Minister; and
- any infrastructure projects or national strategic projects stipulated under laws and regulations.

The 'total investment' is the amount the applicants believe will be necessary for the PMA company to commence commercial production. The source of the total investment may consist of equity capital and loan capital.

The three-hour business licensing also includes the company's establishment and the investors and the PMA company can obtain the following documents at the same time: (i) the deed of establishment and the approval from the MOLHR; (ii) the NPWP; (iii) the TDP; (iv) the RPTKA; (v) the IMTA for the PMA company's foreign directors; (vi) the API-P and (vii) the customs access.

##### **Any infrastructure business in the field of energy and mineral resources.**

PMA companies conducting any infrastructure business in the field of energy and mineral resources may obtain the following licences under the authority of the MEMR within three hours:

- licences for the power plant business;
- licences for the electricity transmission business; or
- temporary licences for downstream oil and gas businesses that consists of: (i) a temporary business licence for the storage of petroleum, fuel oil, processed products, liquid petroleum gas, composed natural gas, or liquid natural gas; (ii) a temporary business licence for petroleum processing with a well capacity above 20,000 barrels per day, petroleum processing, processed product processing; or (iii) a temporary business licence for general trading of petroleum, fuel or processed products.

During the 2015 regime, use of the three-hour process was extremely rare and we expect this will continue.

**Update and trends**

BKPM has indicated that the 2016 DNI is under review.

BKPM monitors three-hour applications more closely than regular applications. Representatives of the founding shareholders may need to make a presentation to BKPM and must be physically present at BKPM's office when the BKPM approval is issued and the articles of association are signed. The three-hour investor will generally want to delay the process to ensure, for example, that its articles of association are not in a standard form but are tailored for its investment.

The current fast-track option is only available for companies requiring a PPM or any investment made for the infrastructure business in the field of energy and mineral resources. We are not aware of any examples of how the three-hour business licensing process is implemented in practice since BKPM Regulation 13/2017 is still new.

**12 Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?**

To form a new PMA company, there is no way to avoid a step-by-step compliance with BKPM and the MOLHR requirements.

To acquire a PT and convert it to a PMA company, which is necessary because of the proposed foreign shareholding, it is also necessary to follow the same procedures under the Capital Investment Law. The foreign shareholder's ownership of a PMA company will not be recognised by the GOI unless BKPM approves the acquisition and the shareholding is recognised by the MOLHR.

**13 Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?**

Relevant laws and regulations do not specifically address the issue of consultation. However, BKPM and other relevant government authorities in practice welcome all investors to request guidance through direct consultation. Any guidance provided is informal and cannot be regarded as an approval to implement any specific action. BKPM's guidance may be provided at a meeting with BKPM if it deems necessary.

**14 When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?**

As mentioned above, investors may engage legal advisers or business consultants to assist them in applying for BKPM approval. Engaging other parties such as government relations, public affairs or lobbying specialists may also be done to assist the investors in ensuring compliance and discussion with government authorities. Unless the proposed investment has special characteristics, such public relations support of the type indicated above is not needed.

There are no informal procedures that can be carried out to facilitate or expedite clearance. Again, foreign investors should conduct preliminary consultation with BKPM to obtain informal guidance on the proposed investment.

**15 What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to review?**

This question is not relevant to any investment to be approved by BKPM, unless the investors have misled the BKPM in some substantive way. Once the required BKPM approvals have been granted, it would be extremely rare for BKPM to revisit the process or the grant of an approval. That said, if the conditions specified in the PPM have not been met, BKPM can decline to issue the IU. For example, if the investors fail to make the minimum investment required in the PPM, the IU will not be granted. Under the new regime, in most cases the IU will be issued directly.

As noted above, the KPPU can challenge an investment on anti-competitive grounds after an acquisition or merger transaction has closed. Among the sanctions it may impose is the unwinding of the transaction.

**Substantive assessment**

**16 What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?**

There are two distinct aspects to this question: first, what are the general requirements for BKPM approval of a foreign investment and second, what are the tests for KPPU clearance of a merger or acquisition?

With regard to BKPM's requirements, BKPM has the sole authority to approve or reject any investment application made by investor. BKPM will consider the following before issuing its approval:

- (i) the proposed line of business and whether it is open 100 per cent for foreign investment, open with conditions or whether foreign investment is simply prohibited based on the 2016 DNI: If the line of business is open with conditions, then BKPM will further check whether the PMA company complies with the following requirements:
  - the requirement to establish a direct or indirect partnership with micro, small and medium-sized enterprises and/or cooperatives; or others;
  - limitation of foreign capital ownership;
  - required locations;
  - special licensing by a technical department; or
  - special foreign shareholding treatment if the investor comes from one of the ASEAN countries;
- (ii) the form of legal entity of the proposed investment: As regulated under the Capital Investment Law, foreign investment must be implemented through a PT. A PT must have at least two shareholders. The foreign investor must either find another foreign investor shareholder or a local shareholder. Foreign capital investment is regarded as a large-scale business. This will affect to the amount of total investment and capitalisation needed as explained in point (iii);
- (iii) the required amount of foreign investment: A PMA company must have a total investment of more than 10 billion rupiah. This investment amount excludes land and buildings. Some businesses are required to have a minimum of 100 billion rupiah to be entitled to 100 per cent foreign ownership. E-commerce marketplace companies are an example. BKPM Regulation 13/2017 allows a PMA company to be initially formed with a minimum of 2.5 billion rupiah of issued and paid-up capital. This applies only to companies that must obtain a PPM, and the capital must be increased to more than 10 billion rupiah to obtain the IU. BKPM requires a PMA company that must obtain an IU to have more than 10 billion rupiah in net assets, or net annual revenues greater than 50 billion rupiah. For a new PMA company its net assets include its capital. Accordingly, if all of its equity must be fully paid, so the 10 billion rupiah requirement can be satisfied. A new PMA company is obviously unable to realise annual revenues of 50 billion rupiah prior to obtaining its IU, since, theoretically at least, it is not engaged in business during the PPM stage. In any case, for those companies that obtain an IU directly, all of the 10 billion rupiah must be issued and fully paid on formation;
- (iv) debt equity ratio: The BKPM has a long-standing unwritten policy that limits a PMA company to a 3:1 debt to equity ratio. Exceptions are permitted for highly capital intensive investments such as mining and infrastructure. BKPM Regulation 13/2017 adds a specific provision requiring a 4:1 debt to equity ratio for a PMA company running a business in property construction and management;
- (v) the minimum shares held by each shareholder: each shareholder must own at least that number of shares that will equal 10 million rupiah at a minimum per shareholder; and
- (vii) other requirements; the identity of the individual or legal entity investor, the need for a recommendation or operational licence from a technical minister and the business prospects of the applicant's investment plan. BKPM may request documentation to ensure that the business is actually being operated.

**17 To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?**

We do not believe there are any circumstances where such consultation or cooperation is required, except perhaps in cases where an export credit agency of a foreign government is a shareholder of a PMA company. However, in such cases the export credit agency is treated like any other foreign investor.

**18 What other parties may become involved in the review process? What rights and standing do complainants have?**

It is not possible for competitors or customers to officially involve themselves in the review process. However, other government ministries may be involved in the review process, if a technical licence is required or if BKPM needs technical expertise in the evaluation of the application. For example, a PMA company that has been appointed as a sole agent of a foreign-owned manufacturer must provide evidence to the Ministry of Industry that it is the authorised agent permitted to use the foreign manufacturer's trademark.

**19 What powers do the authorities have to prohibit or otherwise interfere with a transaction?**

BKPM has the full power and authority to approve or prohibit formation of a PMA company application.

For an acquisition, merger or consolidation, the MOLHR must approve any changes in the articles of association of the companies engaged in such transactions. However, we would not categorise such authority as the power to prohibit or intervene. As noted previously, if such a transaction results in anticompetitive effects, the KPPU can prohibit such a transaction.

**20 Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings?**

The BKPM regulations do not provide for such a practice. However, if BKPM does not approve an investment application, the applicant will be given an objection letter mentioning the reasons. The applicant is allowed to submit a new application after complying with BKPM's objections. In practice, disapproval of an application can be avoided as BKPM will comment on applications prior to its final decision. Once an application is submitted, BKPM will typically revert back to the investors to give comments if a revision to the application and supporting documents is needed or additional documents are required to satisfy BKPM's comments. This process will be carried out through the BKPM online system.

The establishment of a PT and certain transactions are also subject to MOLHR's review before the MOLHR issues its approval or acknowledgement. This process will also be administered by the MOLHR online system.

**21 Can a negative decision be challenged?**

No. Negative decisions cannot be challenged. However, as mentioned above, the applicant is allowed to reapply for an approval.

**22 What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?**

Chairman of BKPM Regulation No. 4 of 2014 regarding Electronic System of Information and Investment Licensing Services (BKPM Regulation 4/2014) provides that when BKPM receives confidential information regarding investors and PMA companies, BKPM is obligated to protect the confidentiality of such information. BKPM maintains its own Data and Information Processing Centre to process capital investment information, data management, reporting and display of capital investment information in order to ensure that the data remains confidential.

BKPM Regulation 4/2014 does not specify what procedures apply if there is a data breach.

**Recent cases****23 Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.**

Information pertinent to the licensing or non-licensing of foreign direct investment is not publicly available in public and constitutes confidential information of the PMA company. Information about a company can be obtained if such company is a public company. The following examples are given on no-names basis for confidentiality purposes and to indicate how the foregoing laws and policies were applied in Indonesia.

**Temporary IU from BKPM**

Prior to the issuance of BKPM Regulation 13/2017, the 2015 regime did not provide for the issuance of a temporary IU for a business that had not fulfilled the total investment requirement. However, this practice was permitted by BKPM as a policy matter. The company in question was a PMA company running a business in management consulting services. The company obtained an investment approval (the previous name of the PPM) before 2015, at which time, the capitalisation requirement was less than now required. In 2016, the investment approval of the company had expired and the company was required to obtain the IU from BKPM. To obtain the IU, the BKPM required the company to increase its capitalisation to comply with the new requirement. However, the company could not satisfy the new requirement and BKPM then issued a 'temporary' IU to the PMA company with an expiry date. Although the IU is normally valid as long as a company operates, BKPM gave a period of a year for the PMA company to increase its issued and paid-up capital to meet the 10 billion rupiah requirement. When the company was still not able to fulfil that requirement, BKPM allowed the PMA company to extend the temporary IU as long as it could present evidence that it had made 'progress' in its



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business. The PMA company then conducted a capital increase of less than 10 billion rupiah after receiving verbal assurance that this would suffice. However, the application for extension of the temporary IU was rejected by BKPM because it was submitted after the temporary IU had expired. This action is in accordance with the provisions on temporary IUs now regulated under BKPM Regulation 13/2017.

#### **Rejection of licences/application and meeting with BKPM**

In a second example, investors proposed an investment to BKPM in what it thought was the oil and gas supporting services sector. After an exchange of correspondence and comment, BKPM rejected the application because the proposed business activities of the proposed PMA company were not in accordance with what BKPM believed was the correct KBLI number.

As mentioned above, if an investment application is rejected by BKPM, BKPM will issue a statement letter of objection with the reasons for the objection. While BKPM may also request certain companies to appear before the BKPM as discussed above, this was not one of those companies. Nonetheless, BKPM invited the investors to a meeting to discuss the investor's view regarding the correct KBLI number. BKPM accepted the investor's view of the correct KBLI number and granted the IU on the condition that the company obtain an Oil and Gas Sector Registration Letter from the Directorate General of Oil and Gas, a requirement for oil and gas service companies.

This example illustrates that BKPM has discretion and flexibility to make decisions beyond the scope of its regulatory authority. Investors should take the initiative to actively participate in the application process to obtain clearance from BKPM.

## *Getting the Deal Through*

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Anti-Money Laundering  
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Banking Regulation  
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Cloud Computing  
Commercial Contracts  
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Complex Commercial Litigation  
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Real Estate M&A  
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Restructuring & Insolvency  
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