

# Foreign Investment Review 2020

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# Foreign Investment Review 2020

**Contributing editor**

**Oliver Borgers**  
McCarthy Tétrault LLP

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Lexology Getting The Deal Through is delighted to publish the ninth edition of Foreign Investment Review, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology 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 Lexology 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 Armenia, Cambodia, Laos, Mexico, Myanmar, New Zealand, Thailand and Vietnam.

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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.

Lexology 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.



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# Indonesia

Darrell R Johnson and Greita Anggraeni

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## LAW AND POLICY

### Policies and practices

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

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

There are 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 and medium-scale businesses and cooperatives.

The GOI exercises control over foreign investment through an array of methods. Such control is mainly exercised under the supervision of the Capital Investment Coordinating Board (BKPM). The registration and application for business licensing for foreign direct investment must now be submitted through a new system introduced in mid-2018 – the online single submission (OSS) system operated by the OSS Institution. The OSS system was established by Government Regulation No. 24 of 2018 (GR24/2018). GR 24/2018 provides that the OSS Institution is a non-ministerial institution that implements government affairs in the sector of capital investment coordination. At present, the OSS Institution is under the auspices of the BKPM.

Most foreign investment licensing is now conducted through the OSS. However, based on article 4(2) of BKPM Regulation 6/2018 (as defined in question 2), there are some business sectors and activities the licensing of which is still administered by the BKPM. These are as follows:

Business sector	Licensing/capital investment facilities
Electricity	<ul style="list-style-type: none"> <li>Geothermal business licence; and</li> <li>appointment of geothermal initial survey (feasibility study) and exploration.</li> </ul>
Downstream oil and gas	<ul style="list-style-type: none"> <li>Utilisation of oil and gas data licence;</li> <li>survey licence;</li> <li>oil and gas storage business licence;</li> <li>oil and gas processing business licence;</li> <li>oil and gas transportation business licence;</li> <li>oil and gas general trade business licence; and</li> <li>foreign representative office licence in oil and gas sub-sector.</li> </ul>

Business sector	Licensing/capital investment facilities
Minerals and coal	<ul style="list-style-type: none"> <li>Exploration mining business licence;</li> <li>termination of mining business licence due to restoration;</li> <li>mining production operation business licence, specifically for transportation and sales, and its extension;</li> <li>mining production operation business licence and its extension;</li> <li>mining production operation business licence, specifically for processing and/or refining, and its extension;</li> <li>temporary licence to carry out transportation and sales;</li> <li>mining production operation business licence for sales; and</li> <li>mining services business licence and its extension.</li> </ul>
Import and tax facilities	<ul style="list-style-type: none"> <li>Granting of import facilities for machinery, capital goods and materials for investment in the industrial sector and industries that provide services;</li> <li>granting of import facilities for machinery and capital goods for the electricity sector;</li> <li>granting of import facilities for machinery and capital goods for work contract and work agreement for coal mining concession;</li> <li>proposal for a tax holiday; and</li> <li>proposal for corporate income tax facilities for investment in certain lines of business or certain areas (tax allowance).</li> </ul>
Foreign investment	<ul style="list-style-type: none"> <li>Licence to open a representative office of a foreign company (KPPA permit);</li> <li>licence to open a branch office for companies that had their business licence issued by the central one-stop-service unit of BKPM in electricity, downstream oil and gas, and minerals and coal sectors;</li> <li>limited stay visa recommendations for shareholders;</li> <li>recommendation to change a visit permit to a limited stay permit; and</li> <li>recommendation to change a limited stay permit to a permanent stay permit.</li> </ul>

An exemption also applies for financial services (banks, insurance companies, securities companies and the like), the foreign investment supervision of which is under the Financial Services Authority (OJK), and oil companies, the supervision of which is under the Special Task Force for Upstream Oil and Gas Business Activities and the Ministry of Energy and Mineral Resources. 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 for 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.

Currently, the registration and licensing of foreign investment is centralised and integrated through the OSS system. Upon registration, the system will automatically refer to the General Law Online Administration (AHU), a public service platform that records all notarial deeds containing the information on the establishment of companies and any related changes.

Additionally, there are various other ways the OSS and other government authorities regulate foreign investments. These vary from laws and regulations to unwritten policies. Foreign investors need to be aware that these regulations and policies may be imposed by the OSS system and other governmental authorities regulating businesses in Indonesia.

Regarding foreign currency controls, 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. BI Regulation No. 18/19/PBI/2016 stipulates that Indonesian commercial banks are restricted from carrying out overseas transfers of rupiah, which must first be converted into a 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 Activities of Banks and Customers regulates foreign exchange flows. If the amount transferred overseas exceeds BI's thresholds, supporting documents must be provided by the customer as the basis for the transaction. The transfer of foreign currencies from Indonesia of (i) more than 10 billion rupiah 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 this amount requires the sender to provide the bank with supporting documents for the basis of the 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 the 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.

**Main laws**

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

These are:

- Law No. 25 of 2007 regarding Investment (the 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 regarding Merger or Consolidation and Share Acquisition of a 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);
- Government Regulation No. 24 of 2018 regarding Online Integrated Business Licensing Services (GR 24/2018);
- Chairman of BKPM Regulation No. 6 of 2018 regarding Guidelines and Procedures for Capital Investment Licensing and Facilities, as amended by BKPM Regulation No. 5 of 2019 (BKPM Regulation 6/2018); and
- Chairman of BKPM Regulation 7 of 2018 regarding Guidelines and Procedures for Controlling Capital Investment Implementation (BKPM Regulation 7/2018).

BKPM Regulation 6/2018 and BKPM Regulation 7/2018 were promulgated and consequently came into effect on 20 July 2018. They repealed the following regulations:

- 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 Controlling Capital Investment Implementation (BKPM Regulation 14/2017).

In brief, the Capital Investment Law and the Company Law both govern the 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.

**Scope of application**

**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.

Pursuant to GR 24/2018, foreign companies and individuals who wish to make a direct foreign investment in Indonesia must first obtain a Business Identification Number (NIB). With regard to the business licensing process, following the issuance of a NIB, a company is required to obtain a business licence (IU), and in some cases also a commercial licence (IKO), depending on the line of business. The attachment to GR 24/2018 specifies whether a business requires both the IU and IKO or an IU only. The IU and IKO are issued immediately upon registration. The IU and IKO can be valid immediately, or valid subject to the fulfilment of post-licensing commitments applicable to certain lines of business. The current OSS system allows investors to immediately learn whether such post-issuance commitments apply to the IU and IKO for their respective lines of business. Once the suitable KBLI number is inputted in the column, the list of necessary permits to be obtained is displayed. The respective IU or IKO will remain ineffective until the investors fulfil the commitments. If the investors fail to fulfil the commitments within the required timeline, the respective ineffective IU or IKO

will subsequently be annulled. BKPM Regulation 6/2018 also notes that upon the issuance of the licence by the OSS system, the BKPM will monitor and control the fulfilment of commitments.

The attachment to GR 24/2018 specifies the type of licences required prior to its promulgation that have now been replaced or amended by the current IU and IKO under the OSS system. The OSS system does not revoke companies' existing business licences. However, if a business entity was granted a business licence prior to the enactment of GR 24/2018 and requires a new business licence to accommodate its business development, the application must be made through the OSS system. Therefore, the company must register and submit its business information to the OSS to obtain a NIB even though the existing licences are still valid.

All foreign capital investment in Indonesia must be implemented through an Indonesian limited liability company (PT). A PT with a foreign investor is often referred to as a PMA company. The term PMA is a reference to the PT's licence permitting it to have a foreign shareholder.

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 the OSS 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 may also be 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 6/2018 provides that the procedures to obtain the necessary licences from the BKPM to engage in business are still under the BKPM's auspices. It sets out the provisions on the investment value and the minimum capital required for PMA companies. BKPM Regulation 7/2018 requires PMA companies to conduct periodic reporting in connection with their capital investment activities. Such reporting must be conducted quarterly.

## Definitions

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

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

Article 1(6) of the 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 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.

Under a long-standing BKPM policy that has not been changed under the OSS system, a PMA company is itself treated as a foreign investor if it invests in any subsidiary, and that such subsidiary and any other subsidiaries are also be treated as foreign investors. This rule has a direct bearing on the capitalisation of each company.

## Special rules for SOEs and SWFs

### 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.

## Relevant authorities

### 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 a PMA company. The MOLHR must approve a merger, consolidation or demerger of Indonesian companies, an acquisition of one company by another through a share issuance, or a transfer of shares that results in a change of control. In other cases, the MOLHR must be notified of any acquisition or transfer that causes a change to the PMA company's articles of association (except for certain major corporate changes that require MOLHR approval, such as a change of the company's name, domicile, business line and increases of authorised capital).

Prior to the adoption of the OSS system, the BKPM's approval was required if a PMA company changed its shareholders, wished to sell or acquire shares in another Indonesian company, wished to expand its operations beyond a fixed percentage or wanted to add a new business line to that previously approved. At present, such corporate acts do not need to be first approved by the OSS Institution, but they still need to be approved by or notified to the MOLHR. Any changes received by the MOLHR's AHU system for such corporate acts shall be automatically updated in the relevant company's OSS account because the OSS system has been integrated with the MOLHR's AHU filing. Therefore, companies are required to ensure that (i) once their corporate action is completed, such information has been updated in their OSS account; and (ii) the data provided on the new notarial deed indicating the change is correctly input.

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. The 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 of the surviving company or the acquiring company exceeds a certain amount. 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 asset value as stated in the financial statement exceeds 2.5 trillion rupiah or 20 trillion rupiah for banks; or
- if the combined local turnover 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 consolidation, 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 by, either directly or indirectly, the business entity resulting from the merger or consolidation, or the acquiring business entity and the acquired business entity.

In the 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 at least 50 per cent of the voting shares; 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, mergers and acquisitions of banks, whether wholly or partly foreign-owned, are subject to the approval of the OJK.

## National interest

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

Both the OSS Institution and the BKPM, in accordance with their respective authority, have full discretion to approve or reject transactions that they conclude are not in accordance with the Indonesian capital investment regime, but the BKPM and the OSS Institution cannot refuse approval if the proposed investment complies with Indonesian laws and regulations.

## PROCEDURE

### Jurisdictional thresholds

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

The Investment Law does not contain any threshold requirements that would trigger a review or application of a transaction. If the investment involves a foreign shareholder, it is subject to BKPM and OSS review under the laws and regulations referenced in question 2 and applicable policies. Under the Company Law, an acquisition by means of 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 a 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.

## National interest clearance

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

There is no special requirement or procedure to obtain national interest clearance of a transaction. If an investment is permitted by the DNI and satisfies the foreign investment capitalisation requirement, the transaction need only be completed, which the MOLHR must either approve or acknowledge after receiving notice of the transaction. This will be followed by the MOLHR's online system automatic update to the OSS system. This means that business entities in Indonesia are required to be registered with the OSS system to have any changes of their business entity's data automatically included within the OSS system. In the case where the OSS account is created upon the completion of a transaction, the OSS system will already record the data of the business entity based on the data recorded in the MOLHR's online system.

Even though the OSS system does not refer to the BKPM regulations on the amount of capital investment, the OSS Institution announced on its website and OSS officials recently confirmed that the paid-up capital of a PMA company must be least 2.5 billion rupiah upon commencement of its investment. This is a change to the previous BKPM policy of 10 billion rupiah in paid-up capital. However, the total investment required remains the same (ie, more than 10 billion rupiah, 7.5 billion rupiah of which may consist of loan capital).

As an example, new investors must arrange for their limited liability company to be established prior to registering with the OSS system. This requires that they execute the deed of establishment for the limited liability company, for which MOLHR approval is required, and pay in their issued and paid-up capital. Once the company is established, it must create an account in the OSS system through the OSS website ([www.oss.go.id](http://www.oss.go.id)) to obtain its NIB. This is required for all companies. Then, if the company is subject to article 4(2) of BKPM Regulation 6/2018, it must obtain a specific licence from the BKPM through its online system (ie, the National Single Window for Investment (NSWI)) (<https://nswi.bkpm.go.id/>).

The data required for registration in the OSS system are, inter alia:

- name and identity number (ID card or passport) of the company's representative;
- residential address;
- business field, identified by a five-digit KBLI code.
- location of the capital investment;
- amount of planned capital investment;
- plan for the use of workers;
- business or activity contact number, or both;
- any request for fiscal, customs facilities and/or other facilities; and
- the tax identification registration number (NPWP) of an individual business executive. If a business actor that wishes to register a company with the OSS system has not yet obtained an NPWP, the integrated systems of the OSS and the Directorate General of Taxation will process the issuance of the NPWP.

Along with the NPWP, business actors can also obtain the registration documents for the Employment Social Security (BPJS) and the Health BPJS certificate of membership, the approval letter for the foreign employee utilisation plan, and fiscal incentives.

The OSS system implements business licensing, which includes the activities of the registration and issuance of permits, information on the compliance with permits, (ie, post-audit requirements), the provision of information on the obligation to pay certain fees to the relevant technical ministries, and the facilitation and supervision of licensing administration.

The attachment of GR 24/2018 lists the type of licences relevant to the above-mentioned sectors. Certain businesses are sufficiently

licensed if they have acquired an IU but others may be required to obtain both an IU and an IKO. For example, based on the attachment of GR 24/2018, a web portal business is required to obtain an IU and an IKO, whereas business management consulting needs only an IU.

Through the OSS system, every business entity must acquire a NIB upon registration. A NIB serves as a certificate of company registration (TDP) and an importer identification number (API), and allows customs access for the business entity. A NIB is a mandatory requirement for a business entity to obtain a business licence.

Once the NIB has been obtained, a PMA company may directly proceed to obtain the IU. The OSS system will ask whether the PMA company's business requires any construction of facilities. If the answer is yes, the OSS system will inform the PMA company that its IU will be issued immediately but that it must fulfil certain commitments, specifically to obtain a location permit, a water location permit, an environmental permit (Environmental Impact Analysis/Amdal or Environmental Management Effort and Environmental Monitoring Effort (UKL-UPL)), and a Building Construction Permit (IMB) upon the issuance of the IU. This commitment requirement does not apply to PMA companies that do not need to construct a facility to operate their business. For example, a PMA company that engages in management business consulting is not required to make a commitment because it can rent office space to operate its business.

Commitments imposed must be completed by one or more deadlines, which are determined by the type of the commitment. This is further explained in the response to question 11. Article 40 of GR 24/2018 provides that the OSS Institution may revoke the IU if the commitments imposed on the holder of an IU or an IKO are not fulfilled. Although an IU or an IKO can be obtained by a PMA company by completing the information required by the OSS system, the IU and IKO are not valid until the post-issuance requirements, if any, are fulfilled. Once the post-licensing commitments have been fulfilled and any relevant licensing fees (in the form of non-tax revenues) have been paid, the evidence of such fulfilment must be submitted to the OSS system, and the OSS system will then automatically be updated to indicate that the IU is effective. Some technical ministries also have online licensing systems that have been linked to the OSS system, and once the relevant ministry issues the permit or approval which serves as a post-licensing commitment, the ministry's online licensing system will notify the OSS system that the commitment has been fulfilled.

An IU without a commitment requirement will be issued with a statement that it is already effective.

An IKO can also be issued the same day as the issuance of the IU, but may not be necessarily effective. The relevant ministry must determine and confirm whether the commitment has been completed. The BKPM and the relevant technical ministry will supervise and review the completion of the commitment for an IKO. Once the required commitment has been fulfilled and non-tax state revenues have been paid, the IKO issued by the OSS system will be valid.

Business entities need to determine what licences are required to be obtained by checking the attachment to GR 24/2018. However, in practice, the relevant ministries may not yet understand the procedure. For example, web portal companies are subject to the jurisdiction of the Ministry of Communication and Informatics (MOCI). Pursuant to GR 24/2018, internet companies must obtain both an IU and an IKO. The OSS system will issue the IU and IKO for web portal companies. However, when it comes to the requirement to register with the MOCI, the MOCI only requests at this time the NIB and IU of the web portal companies.

Although most PMA companies must comply with the mandatory requirement to file and obtain a NIB through the OSS system, the BKPM continues to supervise the licensing process of those business entities that are subject to the BKPM's jurisdiction. In such cases, the

licence application must be conducted online through the NSWI with the prerequisites listed in article 8 of BKPM Reg 6/2018, after the company obtains the NIB through the OSS system. In the event that the application cannot be submitted online, the application can be submitted offline at the BKPM's Central PTSP using the format set out in the attachment of BKPM Regulation No. 6/2018.

The licensing procedure of the OSS and the BKPM may be carried out by the prospective investors themselves or their representatives, such as legal advisers or business consultants through a power of attorney (POA). The form of the POA is provided in the attachment to BKPM Regulation No. 6/2018 and must be submitted online along with other supporting documents. The OSS Institution does not provide any specific format for its POA.

Owing to the promulgation of GR 24/2018, the licences set out in the attachment of GR 24/2018 are no longer issued by the BKPM. However, if a company already obtained an IU, a licence of principle or an investment registration number from the BKPM during the BKPM regime, such documents continue to be valid and the reference numbers of such documents can be used to register with the OSS system.

## Securing approval

### 10 | Which party 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, is 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.

## Review process

### 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?

In the OSS system, if the foreign investment complies with the 2016 DNI and the corporate information is input correctly, then the company shall automatically be granted a NIB, IU and IKO on the same day, the validity of which is contingent upon the completion of any required post-licensing commitments. The OSS system is implemented with an expectation that all business entities will conduct their own self-assessment and comply with all post-compliance requirements. The fulfilment of commitments for an IU shall not exceed the period set by GR 24/2018 and the guidelines available in the OSS system. For instance, the company is required to file an application for a location permit within a period not exceeding 10 days of the issuance of a location permit. The processing time until the location permit is effective is stipulated in GR 24/2018. If such a timeline is not followed by the PMA company, the OSS Institution is entitled to revoke its IU. In the matter of an IKO, in practice, the timeline depends on which licence or approval is required by the commitments and whether there are other additional supporting documents required by the technical ministries or any comments thereon. Upon the fulfilment of commitments, the system will display the status of the licence, changing it from a pending status to completed.

The OSS Institution may revoke the issued IU if the PMA company does not fulfil the commitment for an IU or an IKO.

The BKPM will issue licences not later than three working days after the application and supporting documents are regarded as complete by the BKPM.

The MOLHR normally issues its approval for the establishment of a limited liability company within one week.

### Determining factors

Previously, to start a transaction, prior approval from the BKPM was required. Now, the only approval needed is the final approval from the MOLHR. With the launch of the OSS system, business entities are expected to maintain and update their online accounts. The OSS system is integrated with the MOLHR system in order to synchronise all business entities' data. However, back-and-forth correspondence with the OSS Institution or the BKPM regarding how to use the OSS system, what types of licences are required and additional supporting documents that must be filed by the foreign investor is still needed. The OSS system is being operated at present under a trial-and-error process. It is not unusual for the OSS Institution to publish an announcement regarding modifications to the system's interface. This will delay the licensing process as all the OSS stakeholders are not yet familiar with the OSS system.

Despite the present difficulties in using the OSS system, the OSS system is intended to accelerate the business licensing process once it is fully established. For particular licences for which applications are submitted to and issued by the BKPM, the BKPM has also reduced its unwritten policies that were often cumbersome for investors. It is important to comply with all requirements at the outset to minimise the review and approval time. Foreign investors are well advised to carry out an independent consultation with the OSS, the BKPM, and the technical ministries before and during submitting their application to learn whether there are any specific requirements for the proposed investment.

### Fast-track options

Since 2015, PMA companies that fulfil certain criteria are able to receive a priority business licensing treatment from the BKPM. BKPM Regulation No. 6/2018 continues this approach with different options. 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.

The above criteria are exempt for:

- certain industries, areas or locations granted domestic free trade facilities based on inland free trade arrangements;
- certain industries that are part of a production supply chain, provided that such business actors convey a statement letter or memorandum of understanding as a supplier of a company using the product manufactured by the business actor;
- companies participating in the tax amnesty programme, provided that such company conveys a copy of the tax amnesty statement letter from the Minister of Finance or any official appointed by the Minister of Finance; and
- infrastructure or national strategic projects stipulated under laws and regulations.

BKPM Regulation 6/2018 provides detailed information on the provisions and procedures of priority services in relation to infrastructure investment in the energy and mineral resources sectors. There are specific forms attached to BKPM Regulation 6/2018 that must be submitted by companies within these sectors. Priority services may be granted by the BKPM pertaining to temporary business licences with commitments. The temporary licences that may be given are as follows:

- temporary business licences for the storage of oil, oil fuel, liquid petroleum gas, composed natural gas or liquid natural gas;
- temporary business licences for oil processing with a refinery capacity of above 20,000 barrels of oil per day, gas processing or processed product processing; and
- temporary business licences for general commerce of oil, oil fuel and processed products.

To enjoy such priority services, the company's executive must physically convey the application to the BKPM. The Ministry of Energy and Mineral Resources (MEMR) should also issue a regulation regarding the fulfilment of commitments for the priority services. To date, the MEMR has not issued this regulation.

### Clearance penalties

- 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, the step-by-step procedure required by the MOLHR must be completed, as must the mandatory registration required by the OSS system.

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 procedures under the Capital Investment Law and the Company Law. The foreign shareholder's ownership of a PMA company will not be recognised by the GOI unless the MOLHR approves the acquisition.

If a company or its investors fail to obtain MOLHR approval or acknowledgement of a transaction, the transaction will not be recognised by the MOLHR.

### Involvement of authorities

- 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, the OSS Institution, 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 request. The BKPM's guidance may be provided at a meeting with the BKPM if it deems it necessary.

### Facilitating clearance

- 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?**

Investors may engage legal advisers or business consultants to assist them in registering their investments and applying for licences with the OSS Institution or BKPM approval. Engaging other parties such as government relations, public affairs or lobbying specialists may also be done to assist investors in ensuring compliance and discussion with government authorities. Unless the proposed investment has special characteristics, such public relations support is unnecessary.

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

### Post-closing powers

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

Under the OSS system, post-audit requirements may be imposed for new investments. They are not required for established companies

whose actions result in changes to the company's data that is recorded with the MOLHR. For example, an established company that increases its capital investment or changes the composition of its shareholders or its management structure will not be subject to post-compliance requirements. A new company making a new investment may be subject to such requirements, even though it is directly issued an IU and IKO after making its application. It is possible that once a company completes its post-compliance conditions, its IU and IKO may be revoked if the OSS Institution assigned to monitor investment activity determines that the conditions have in fact not been satisfied.

If a licensed company enters into a transaction that affects the information it has provided the OSS system, or makes a change to its corporate documents that will have such a result, it must obtain MOLHR approval or an acknowledgement from the MOLHR if only notice is required to be given to the MOLHR. Then the MOLHR shall update any changes to the company's information to the OSS and the company will have its OSS account updated with such information. GR 24/2018 also requires a PMA company to check its OSS account to verify whether or not recent information has been updated by the OSS. If changes have not been updated, the PMA company must submit a letter through its notary that the company's information should be updated by the OSS and the MOLHR.

It is unclear how this process would be implemented for companies licensed by the BKPM.

Once the required MOLHR approval has been granted, it would be extremely rare for the MOLHR, the OSS or the BKPM to revisit the process, including the grant of an approval, unless the investors have misled them. That said, if the conditions specified in the DNI or other prevailing laws and regulations have not been met, or if investors do not keep their corporate information current and the authorities become aware of this, the MOLHR can decline to issue its approval or acknowledgement to a future request. If erroneous information has been included in the OSS or BKPM systems, the OSS Institution and BKPM may question the company. For example, if the investors fail to make the minimum investment required in the DNI, the investors will not be granted access to sign up for their company's OSS account and the NIB and IU or the IKO will not be granted.

The KPPU can challenge an investment on anti-competitive grounds after an acquisition or merger transaction has closed and it can require the unwinding of the transaction, among other sanctions.

## SUBSTANTIVE ASSESSMENT

### Substantive test

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: first, what are the general requirements for foreign investment that is subject to OSS or BKPM review; and second, what are the tests for KPPU clearance of a merger or acquisition?

Regarding foreign investment requirements, previously the BKPM was the sole authority to approve or reject any investment application made by an investor. Today, the BKPM and the OSS Institution share authority. The OSS Institution is responsible for all business entry requirements and the BKPM has the authority to monitor the licences issued by the OSS Institution that are related to foreign investment as well as the licences it issued before the OSS was adopted. Investors are also required to conduct a self-assessment of their investment in Indonesia. The OSS Institution and BKPM will consider the following before issuing their approval:

1 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, the relevant investors need to assess whether their PMA company complies with the following requirements:

- the requirement to establish a direct or indirect partnership with micro, small and medium-sized enterprises or cooperatives; or others;
- limitation of foreign capital ownership;
- required locations;
- special licensing requirements of a technical department; or
- special foreign shareholding treatment if the investors come from one of the ASEAN countries.

If the investors do not comply with the foregoing requirements, the OSS system will directly reject the NIB application. The BKPM will reject any application if the foreign ownership restriction is not satisfied.

- 2 The form of legal entity of the proposed investment: As regulated under the 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, depending on whether the PT can be wholly foreign-owned or not, based on the DNI. Foreign capital investment is regarded as a large-scale business. This will affect the amount of total investment and capitalisation needed as explained in (3).
- 3 The required amount of foreign investment: A PMA company must have a total investment of more than 10 billion rupiah. This can now consist of 2.5 billion rupiah equity and 7.5 billion rupiah in loan capital. This represents a fundamental shift from the BKPM's policy of 10 billion rupiah on net assets, which for a new company means issued capital. The OSS Institution made this change through its announcement and the BKPM through BKPM Reg 6/2018. These amounts exclude the investment made in 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.
- 4 The debt-equity ratio: the BKPM has a long-standing unwritten policy that limits a PMA company to a 3:1 debt to equity ratio. This ratio is assumed to be retained by the OSS Institution but this has not been confirmed. Exceptions are permitted for highly capital-intensive investments such as mining and infrastructure.
- 5 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.
- 6 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.

### Consulting other countries

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

There are no 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 in the same way as any other foreign investor.

### Other relevant parties

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 to determine the necessary documents required and for the relevant licence or permit to be issued by a technical ministry. For example, when fulfilling the OSS commitments, 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.

### Prohibition and objections to transaction

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

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. If such a transaction results in anti-competitive effects, the KPPU can prohibit such a transaction.

### Mitigating arrangements

20 | Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

OSS and BKPM regulations do not provide such a procedure. As long as an application has the required information, the NIB and business licence will be issued. The OSS Institution would revoke any licence it issues if commitments required are not fulfilled by a certain deadline. In the case of the BKPM licensing process, if the 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 the BKPM's objections. In practice, disapproval of an application can be avoided as the BKPM will comment on applications prior to its final decision. Once an application is submitted, the 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 BKPM online system is still available for the licensing of business sectors that are subject to article 4(2) of BKPM Regulation 6/2018.

The establishment of a PT and transactions resulting in a change of the PT's data are also subject to MOLHR's review before the MOLHR issues its approval or acknowledgement. The issuance of MOLHR approval or acknowledgement will also be administered through the MOLHR online system.

### Challenge and appeal

21 | Can a negative decision be challenged or appealed?

No. Negative decisions cannot be challenged or appealed. However, the applicant is allowed to reapply for an approval.

### Confidential information

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

GR 24/2018 does not specify any mechanism to protect confidential information.

Chairman of BKPM Regulation No. 4 of 2014 regarding Electronic System of Information and Investment Licensing Services (BKPM Regulation 4/2014) provides that when the BKPM receives confidential information regarding investors and PMA companies, the BKPM is obligated to protect that confidentiality. The BKPM maintains its own Data and Information Processing Centre to process capital investment information, data management, reporting and display of capital investment information to ensure that the data remains confidential. It is unclear whether this requirement also applies to the OSS Institution.

Neither BKPM Regulation No. 4/2014 nor GR 24/2018 specify what procedures apply if there is a data breach.

## RECENT CASES

### Relevant recent case law

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 and constitutes confidential information of the PMA company. Information about a company can be obtained if the company is a public company.

The OSS system is new and there are no judicial cases that have involved it.

What differentiates the OSS regime from the previous BKPM regime is that all licences are issued immediately upon application as long as all information is submitted. Previously, the BKPM had to review and approve every investment before a business licence could be approved and further licences were required after the BKPM had issued a business licence. A key objective of the OSS system is to minimise the number of licences to be obtained and the OSS system achieves this objective. Investors are only required to complete the application and any post-application commitments. The OSS system accelerates the business licensing process for investors and the commencement of their businesses. However, although an IU or IKO is issued immediately upon the filing of an application with the relevant data, if the licence is issued with post-issuance requirements, the investors are required to complete those requirements by the deadlines imposed before the licence is effective. Until the licence becomes effective, the PT formed by the investors cannot legally engage in business. The PT can engage in activities that are preliminary to engaging in business, such as entering into a lease of office space. However, in some cases, the PT will need a valid IU to address such preliminary activities. For example, if the PT needs to acquire land and build a manufacturing facility, it will need a valid IU to purchase the land and to obtain a building permit.

Recently, an issue arose related to the acceptance of the OSS system by certain technical ministries. Since many licences are effectively replaced by business licences issued under GR No. 24/2018, some technical ministries have indicated they will issue new regulations themselves that will require technical licences that will be issued directly by the relevant ministry. The OSS Institution has responded to this issue by stating that the integration of many government institutions is still ongoing and has emphasised that any licence issued by OSS is valid. Presumably, this means the OSS licences are valid whether or not the PT obtains a technical licence.

Another example involves web portal companies. Based on GR 24/2018, web portal companies are subject to the requirement to obtain both an IU and an IKO. However, the MOCI has indicated that web portal companies need only obtain a NIB and an IU. MOCI officials have verbally confirmed that an IKO is not needed. We expect that over time many of these contradictions will be resolved as coordination between the OSS Institution and the technical ministries improves.

### Rejection of licences applications and meeting with BKPM

The following is an example of the licensing process under the jurisdiction of the BKPM during the previous regime. We believe the BKPM would apply the same treatment under the new regime. Investors proposed an investment to the BKPM in what it thought was the oil and gas supporting services sector. However, after an exchange of correspondence and comment, the BKPM rejected the application because the proposed business activities of the proposed PMA company were not in accordance with what the BKPM believed was the correct KBLI number.

If an investment application is rejected by the BKPM, the BKPM will issue a letter giving its reasons for the rejection. The BKPM invited the investors to a meeting to discuss the investors' views regarding the correct KBLI number. The BKPM accepted the investors' argument 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 all oil and gas service companies.

This example illustrates the BKPM's discretion and flexibility to make decisions. Investors should take the initiative to actively participate in the application process to obtain clearances from the BKPM.

As for the OSS Institution, to date, we are not aware of any meetings set with the OSS Institution, other than routine consultations regarding the technicalities of the OSS system.

## UPDATE AND TRENDS

### Key developments of the past year

24 | Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

As an effort to improve Indonesia's ease of doing business ranking, the Indonesian President has ordered the BKPM to handle all forms of licensing previously handled by technical ministries and has targeted the revocation of 40 ministerial regulations that are seen could inhibit investments. The Indonesian government has reported that a presidential instruction will be issued that will serve as the legal basis for the BKPM to assume the authority over the issuance of such licences. The primary reason that underlies this proposed breakthrough is the fact that the OSS system has not been effective enough to simplify the investment licensing process. While the OSS system allows investors to obtain an initial business licence very quickly and commence business, investors are nevertheless often still required to obtain additional licences, permits or approvals from technical ministries, other governmental institutions or regional governments, which creates uncertainty and a disincentive for the full implementation of investments.

To implement the above, the government contemplates major revisions to those regulations that allow or require the issuance of licences by technical ministries or other governmental institutions. It appears that these revisions will be addressed by using the omnibus law that is now being prepared by the government. Further, significant improvements to the OSS system are expected to allow the centralisation of authority for the issuance of licences by the BKPM.



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With respect to anticompetition, the KPPU recently issued KPPU Regulation No. 3 of 2019 regarding Assessment of Merger or Consolidation of Business Entities, or Acquisition of Shares which May Result in Monopolistic Practices and/or Unfair Competition (KPPU Regulation 3/2019). This regulation entirely replaces the previous guideline. There are two key changes that may impact both foreign and domestic investment transactions:

- KPPU Regulation 3/2019 provides for mandatory reporting for certain asset acquisitions. Asset acquisitions were not regulated under the previous KPPU guideline and hence were not subject to mandatory reporting. Under KPPU Regulation 3/2019, however, all transfers of assets that (i) result in the change of control and/or authority over the asset; and/or (ii) increase the possible control over a certain market by the acquiring entity, are subject to mandatory reporting to the KPPU. Based on a recent consultation with the KPPU, the KPPU currently does not impose a clear monetary threshold, which allows the provision to apply to every kind of transfer of assets, regardless of value. The KPPU will likely issue further guidelines outlining clearer standards for the transfer of assets.
- KPPU Regulation 3/2019 broadens the scope of 'assets' used as the threshold of mandatory reporting (see question 6). Previously, the threshold referred to the combined local asset value, while now the threshold is the combined asset value as stated in a financial statement, which may include assets outside Indonesia that would lower the threshold for mandatory reporting if global assets are taken into account in calculating a future threshold of asset value.

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