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Briefing note

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Indonesia's New Negative List: A noticeable step forward

Following a press release in February 2016 on the Government's proposal to amend the negative investment list as part of President Jokowi's Economic Stimulus Package, on 18 May 2016, the Government issued the highly anticipated Presidential Regulation No. 44 of 2016 containing the new negative investment list (the 2016 Negative List). The 2016 Negative List revokes and replaces the Negative List issued in 2014 and is effective from 18 May 2016.

The issuance of the 2016 Negative List is hoped to boost foreign direct investment (FDI) into Indonesia, which has recently declined, and to make Indonesia more competitive within the ASEAN Economic Community and the global investment community. The 2016 Negative List now also provides for higher foreign shareholding thresholds for FDI made by ASEAN investors.

Highlights

While the 2016 Negative List is a noticeable step forward from the 2014 Negative List, there are still some sectors that do not fully benefit from the amendments. Some industry sectors have been opened up by allowing a much larger percentage of FDI, while a number of industry sectors have either been affected in a limited manner, or not at all.

The industry sectors with the most noticeable relaxation of the FDI rules include:

- cold storage (previously 33%, now 100%);
- warehouse (previously 33%, now 67% open);
- toll roads investment (previously 95%, now 100% open);
- certain healthcare support services (previously closed, now 67% open);
- department stores with a retail space between 400-2,000sqm (previously closed, now 67% open);
- crumb rubber (previously closed, now 100% open, albeit with conditions); and
- certain film businesses (previously closed, now 100% open).

An example of the industry sector with a disappointing modification to the anticipated relaxation to the FDI rules is the telecommunications network sector integrated with telecommunications services, in respect of which the foreign shareholding threshold was increased by only 2% (from 65% to 67%).

The 2016 Negative List also introduces new lines of business that were previously included as part of more general lines of business. For example, medical devices distribution was previously included as part of the general "distributorship" line of business with a maximum shareholding threshold of 33%. While the 2016 Negative List has increased the FDI threshold for a general distributorship from 33% to 67%, it has also introduced a new category for medical device distributorship with an ultimate lower shareholding threshold of 49%. While it is an improvement from the previous position, the new threshold is lower than what had been anticipated by the business community.

Another example of a newly regulated sector is geothermal power plants with capacity of ≤ 10 MW. Previously it was included as part of the general power plant line of business where it was closed to FDI for the capacity of <1 MW and limited to 49% for the capacity of between 1 to 10 MW. Under the 2016 Negative List, a new category of geothermal power plants with capacity of ≤ 10 MW has been introduced with a higher foreign shareholding threshold of 67%.

There also remain other industry sectors, such as operators and providers of telecommunication towers and alcohol industry, which remain closed to FDI.

For more details on the key changes introduced by the 2016 Negative List, please refer to the Annexure.

What is the Negative List?

In line with Indonesia's Investment Law (Law No. 25 of 2007), the Government periodically issues a regulation (which contains the Negative List), which specifies the business sectors that are:

- completely closed to FDI;
- partially open to FDI; and
- open to FDI but subject to certain conditions, e.g. requirements to secure additional ministerial approvals, partnerships with small and medium enterprises or specific regional location.

Generally, if a business sector is not on the Negative List, then it will be considered to be open to 100% FDI.

What are the exceptions to the Negative List?

Indirect or portfolio investments

The 2016 Negative List provides that if the investment is carried out through an indirect investment or portfolio investment, (ie the transactions are carried out through the Indonesian Stock Exchange), the line of business is deemed to be open to 100% FDI (save for the lines of business that are 100% closed in the 2016 Negative List) .

Investment in Special Economic Zones

Provided that the line of business is not reserved for micro/medium size enterprise, if the investment is located in Special Economic Zones then it would be possible to have 100% foreign ownership.

Special Economic Zones mean certain areas within Indonesia granted with special economic function and facilities as determined by the Government of Indonesia. Further details on which areas have been determined as Special Economic Zones can be found here.

Grandfathering

The 2016 Negative List also contains a grandfathering provision whereby existing foreign investors in sectors that are affected by the new provisions are permitted to retain the previously approved investment even though the shareholding exceeds the foreign investment threshold or is prohibited under the 2016 Negative List.

Conclusion

The amendments to the FDI rules contained in the 2016 Negative List clearly show the Government of Indonesia's intention to attract a greater FDI. The 2016 Negative List has opened up a number of the business sectors to a greater degree of FDI, which has been highly anticipated and will be a very welcome move amongst potential investors into the country. However, it is also clear that the Government has pulled back on the liberalisation of certain sectors, which has come as a disappointment to some of the industry sectors anticipating a greater relaxation of the FDI rules.

While the 2016 Negative List constitutes a noticeable step forward, this is just one of many that the Government of Indonesia will need to take to attract a real or significant investment which in turn will help to boost the Indonesian economy.

Annexure

Summary of Key Changes in the 2016 Negative List

New industry sectors opened to 100% foreign ownership

Industry sectors that are now open to 100% FDI include:

Line of Business	2014 Negative List	2016 Negative List
Film industry, which includes film distribution, film shooting, film editing, film subtitling, film making, movie show	Closed to FDI	Open to 100% FDI
Tourism which includes restaurants, cafes, recreation, arts and entertainment and sports facilities (excluding billiards, bowling and golf)	Limited to FDI ranging from 49 – 51%	Open to 100% FDI (while billiards, bowling and golf are limited to 67% FDI)
Film processing laboratories	Limited to 49% FDI	Open to 100% FDI
Toll roads	Limited to 95% FDI	Open to 100% FDI
Telecommunications equipment testing	Limited to 49% FDI	Open to 100% FDI
Processing and disposal of non-hazardous waste	Limited to 95% FDI	Open to 100% FDI
Cane sugar industry (white sugar, refined sugar and raw sugar)	Limited to 95% FDI	Open to 100% FDI, but subject to certain technical conditions
Pharmaceutical raw material industry	Limited to 85% FDI	Open to 100% FDI
Crumb rubber industry	Closed to FDI	Open to 100% FDI but subject to certain technical conditions
Cold storage	Limited to 33% FDI	Open to 100% FDI

Increased permitted foreign shareholding

The 2016 Negative List increased the maximum foreign shareholdings in various industry sectors. These include:

Line of Business	2014 Negative List	2016 Negative List
Distribution that is not affiliated with production	Limited to 33% FDI	Limitation increased to 67% FDI
Warehouse	Limited to 33% FDI	Limitation increased to 67% FDI
Telecommunications network integrated with telecommunications services	Limited to 65% FDI	Limitation increased to 67% FDI
Service activities related to airports, freight forwarding services, air freight forwarding services, airline general sales agents (GSA)	Limited to 49% FDI	Limitation increased to 67% FDI
Air transport support services (computer reservation system, passenger and cargo ground handling, and aircraft leasing)	Limited to 49% FDI	Limitation increased to 67% FDI
Loading and unloading of goods (maritime cargo handling services)	Limited to 49% FDI	Limitation increased to 67% FDI (70% for ASEAN countries)
Distribution that is not affiliated with production	Limited to 33% FDI	Limitation increased to 67% FDI
Warehouse	Limited to 33% FDI	Limitation increased to 67% FDI
Telecommunications network integrated with telecommunications services	Limited to 65% FDI	Limitation increased to 67% FDI
Service activities related to airports, freight forwarding services, air freight forwarding services, airline general sales agents (GSA)	Limited to 49% FDI	Limitation increased to 67% FDI

Previously closed sectors that are now open with specific foreign ownership thresholds

There are also some industry sectors previously closed to FDI that are now open but subject to certain foreign ownership limitations. These include:

Line of Business	2014 Negative List	2016 Negative List
Healthcare support services i.e. pest control, ambulance services	Closed to FDI	Open up to 67% FDI
Department stores with retail space of between 400 - 2,000m^2	Closed to FDI	Open up to 67% FDI

Sectors that were not specifically regulated

The 2016 Negative List also introduces specific lines of business which were not previously regulated or included in the broader business description in the 2014 Negative List. These include:

Line of Business	2014 Negative List	2016 Negative List
Medical device distribution	Included as part of the general distribution which was limited to 33% FDI	Specifically regulated with a lower foreign shareholding threshold of 49%
Geothermal power plant ≤ 10 MW	Included as part of general power plants ie closed to foreign investment for <1 MW power plant and limited to 49% for 1 – 10 MW power plant	Specifically regulated with a higher foreign shareholding threshold of 67%
Health equipment industry	Not regulated	Specified into various categories, with a maximum of 33% FDI for Class A and open for 100% FDI for other classes
Trade transaction provider through electronic system (market place, daily deals, price grabber) with investment value of less than IDR100billion	Not regulated	Limited to 49% FDI

Sectors that apply specifically for ASEAN countries

- Survey services/public opinion polling and market research with a maximum 70% FDI

Sectors with no change

Sectors that are not impacted by the 2016 Negative List include, amongst others:

- Telecommunication towers (whether as provider or operator) is still closed for FDI
- Alcohol industry continues to be closed to FDI
- Port industry is still restricted to 49% FDI
- Plantation with an area of more than 25ha continues to be a maximum of 95% FDI

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