TaxFlash

2014 Negative List of Investment: What's New?

The President of the Republic of Indonesia issued a new Negative List of Investment (NLI) on 23 April 2014, under Presidential Regulation No. 39/2014, to replace the previous NLI issued in 2010. This NLI is effective starting 24 April 2014 without any transition period.

Under this long awaited new NLI, the government provides more flexibility on foreign ownership limitation in certain businesses whilst restricting it in others. Two appendices in this NLI stipulate the businesses which are closed for investment and the businesses which are open for investment with certain requirements, such as maximum foreign ownership, specific licenses or particular investment locations.

We highlight below some of the important changes in the regulation.

Businesses given relaxation

Infrastructure

Some infrastructure businesses offer a higher foreign ownership level, including:

- Power plants with more than 10 megawatt capacity operated under a Public Private Partnership (PPP or *Kerjasama Pemerintah Swasta/KPS*) scheme, which can now be fully owned by foreign investors during the concession period, compared to a maximum of 95% under the previous NLI; and
- Port business including docks, buildings, terminals and/or container ships operated under PPP scheme, in which during the concession period foreign investors can hold up to 95% ownership of PPP, compared to 49% if it is operated not under a PPP scheme.

We believe that this is consistent with the aim of the government to develop infrastructure as one of the important factors to maintain economic growth, and at the same time attract more investment in these capital intensive businesses.

Pharmaceutical

As well as infrastructure businesses, the pharmaceutical industry is also now allowed maximum 85% foreign ownership compared to 75% under the previous NLI.

Advertising

Consistent with ASEAN economic agreements, the government has also opened advertising businesses for maximum 51% ownership by foreign investors from ASEAN countries, compared to only 49% in the past. The government, however, still keeps advertising business closed to foreign investors other than those from ASEAN countries.

Businesses subject to stricter rules

Oil and gas

Oil and gas drilling services is another industry which has been further restricted by the government. Onshore oil and gas drilling services are now closed to foreign investment and offshore oil and gas drilling services are open for maximum 75% investment compared to 95%, which applied to both these services under the previous NLI.

Distribution

Some businesses have become more restricted. One of the most significant changes is to distribution businesses, which are now only allowed maximum 33% foreign ownership compared to 100% in the past. This could be an effort by the government to create a barrier for foreign companies/investors to establish and control their distribution business in Indonesia. But since the NLI does not seems to restrict import trading business, this could mean that foreign investor need to consider other distribution models to sell their products to the Indonesian market; for example, by setting up an import trading business in Indonesia with 100% foreign ownership and partnering with an existing distributor to sell products to the market.

E-commerce

E-commerce is now closed to foreign ownership. Previously, the foreign ownership rule for this industry is not clear. The closing of this industry for foreign ownership is probably to reserve the retail industry for domestic investor, except for large retailer, i.e. supermarket, malls, hypermarket.

Others

Businesses not listed in the NLI

Unlike the previous NLI, this new NLI provides a specific provision which stipulates that a business not listed in the appendices is open to investment without any requirements. This provision can be interpreted as meaning that there is no foreign ownership limitation in that business i.e. 100% foreign ownership is allowed. This provision certainly provides a strong clarification, but as the NLI is quite new we still need to observe whether in practice this will be the case or whether unwritten policies or interpretations would still be considered to limit foreign ownership in that business.

Although quite comprehensive, the NLI does not cover all business activities. Under the previous NLI there was an interpretation that if a business is not listed in the NLI, theoretically it should be open to 100% foreign ownership. However, in practice, it was not always the case, since unwritten policies or interpretation from relevant government agencies might apply and might also limit foreign ownership. This has created uncertainty, so that whenever foreign investors wanted to engage in a business not included in the NLI, they need to firstly consult with the authorities to ensure that there are no unwritten policies which may limit foreign ownership.

Grandfathering clause

This new NLI also includes a grandfathering clause which stipulates that it does not apply to any existing investment unless this new NLI provides greater benefit for the investor e.g. allowing a higher foreign ownership compared to the previous NLI. Therefore, any existing investment can still maintain the existing foreign ownership regardless of the fact that the business is now more restricted for foreign investment.

Exception clause

In the case there is a need for capital increase for business expansion and the local shareholders cannot inject more capital, the local shareholder may be diluted and foreign ownership can exceed the maximum foreign ownership requirement in the NLI. Within two years, the company must again comply with the NLI and the foreign shareholders must sell the excessive shares either (1) through Indonesian capital market or (2) to private local investors; or (3) the shares must be re-purchased by the company.

In addition, the NLI does not apply to indirect/portfolio investments through capital market.

Business combination

In a merger, maximum foreign shareholding follows the existing foreign ownership of the surviving company. In a consolidation, maximum foreign ownership in the new NLI applies. This factor should be considered when planning a business combination structure.

For more information and further discussion of this new NLI and how it will affect your existing and potential investment, please contact your usual PwC consultants.

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