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This issue covers the following topics:

Indonesia

DRAFT NEW NEGATIVE LIST: MORE BUSINESSES OPEN FOR FOREIGN INVESTORS

2020 年 11 月に制定された雇用創出に関する法律（通称オムニバス法）による投資法の改正により、外資規制の大幅な緩和が見込まれる中、新たな外資規制の枠組と具体的な規制業種のリストが施行規則の草案として公表された。前触れ通り草案では多くの業種で外資規制が撤廃されており、外国投資家にとっては今後の投資判断に大きな影響があると思われることから、本稿ではかかる規則案の内容について速報する。

Introduction

As a follow up to the amendment of Law No. 25 of 2007 on Investment ("**Investment Law**") under the Omnibus Law, the government recently issued the draft new negative list as the implementing regulation to be applied for foreign investment in Indonesia. Negative list is a list of shareholding requirements and restrictions for all business activities in Indonesia. The latest negative list is regulated under the Presidential Regulation No. 44 of 2016 on List of Business Fields that are Closed to and Business Fields that are Open with Conditions to Investment ("**Negative List**").

One of the most significant amendment of the Investment Law is of Article 12 that sets the basis for the issuance of the Negative List. We set out below the provision of Article 12 before and after the amendment:

Investment Law	Amendment under Omnibus Law
Article 12	Article 12
1. All business sectors are open to investment, except business sectors which are closed or opened with restriction.	1. All business sectors are open to investment, except for business sectors that are declared to be closed to investment or activities that can only be carried out by the central government.
2. The business sectors that are closed for foreign investors are:	2. Business sectors that are closed to investment as referred to in paragraph (1) includes:
a. Weapons, ammunition, explosives, and war equipment; and	a. Cultivation and industry of category I narcotics;
b. Business sectors that are explicitly determined closed by law.	b. All forms of gambling and/or casino activities;

3. The government based on a presidential regulation shall determine the business sectors closed for investment, both foreign and domestic, based on criteria of health, moral, culture, environment, national defense, and security, and other national interest. 4. Qualification and requirements for each of the closed and open business sectors shall be regulated under a Presidential Regulation. 5. The government shall determine the business sectors open with restriction based on national interest, namely the preservation of natural resources, the protection and development of micro, small, medium enterprises, and cooperative enterprises, the supervision of the production and distribution process, the increase of technological capacity, domestic capital participation, and cooperation with institutions appointed by the government.	c. Capture of fish species listed under Appendix I of Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); d. Utilization or taking of corals and utilization or taking of reefs from nature which are used for building materials/lime/calcium, aquarium, and souvenirs, as well as live coral or recent death coral from nature; e. Chemical weapon manufacturing industry; and f. Chemical industry and ozone-depleting substance industry. 3. Further provisions regarding investment requirements as referred to in paragraph (1) and paragraph (2) shall be regulated under a Presidential Regulation.

Seeing the amendment of this Article 12 especially in paragraph (1), the first impression is that the government will open all businesses for foreign investment, except for the closed business as stated in paragraph (2) and activities that can only be conducted by central government. Therefore, the Negative List will be abolished. The government, however, provides further explanation on the definition on "*business sectors that are opened for investment*" in this draft new negative list. We have prepared a brief summary on the content of draft new negative list below.

Definition of "business sectors that are open for investment"

The draft new negative list regulates that business sectors that are open for investment consists of:

a. Priority business fields, which are the business fields that meet certain criteria such as: national strategic programs, capital intensive, labor intensive, using advance technology, pioneer industry, and export orientation. Companies engage in these priority business fields may enjoy certain incentives, including tax incentive;

b. Businesses that are specifically designated for SMEs or must be conducted through a partnership with SMEs;

c. Business fields with certain requirements, such as foreign ownership restriction, specific license requirement, etc.; and

d. Business fields that are not included in (a), (b) and (c) above. These businesses can be carried out by all investors.

Based on the above definition, it appears that the government still envisages foreign ownership restriction for certain line of businesses. However, based on our review of the draft new negative list, most of line of businesses that are restricted for foreign investment under the current Negative List are now fully opened for foreign investment, and only few businesses are still subject to certain foreign ownership limitation. It should be noted that for businesses in financial sector under the supervision of Bank Indonesia and/or Indonesian Financial Service Authority (OJK), such as banks, financing companies, insurance, etc., the draft new negative list stipulates that the foreign ownership restriction will be as set out in the relevant regulations in the financial sector.

Several line of businesses that are proposed to be opened for 100% foreign ownership

Based on the draft new negative list, most businesses that are currently restricted for foreign investment under the Negative List have been removed, which means they are open for 100% foreign ownership. The following are the line of businesses that are very common for investors:

Line of Business	Foreign Ownership Limitation under Current Negative List	Foreign Ownership Limitation under Draft New Negative List
Distributor Business	67% (or 100% if it is affiliated with manufacturing company)	100%
Construction Service	67% (or 70% if the shareholders are from ASEAN countries)	100%
Freight Forwarding	67%	100%
Land Transportation	49%	100%
Retail Business	• Minimarket with the area less than 400 m^2, including convenience store and community store are closed for foreign investor; • Supermarket with the area less than 1,200 m^2 is closed for foreign investor; • Department store with the area between 400 m^2 to 2,000 m^2 is opened for 67% (with the conditions that it is located inside mall and the additional of store based on pay performance).	Minimarket, supermarket, and department store are opened for 100% foreign ownership
Golf Course	67% (or 70% if the shareholders are from ASEAN countries)	100%
Hospital	67% (or 70% if the shareholders are from ASEAN countries)	100%
Healthcare Equipment Distributor	49%	100%

Several line of businesses that are subject to foreign investment restriction

While it is proposed that most businesses will be fully open for foreign investors, the draft new negative list stipulates certain businesses that are still subject to foreign investment restriction, among others (i) sea transportation and ferry service are still limited to 49% foreign ownership, (ii) postal service is limited to 49% foreign ownership, and (iii) broadcasting business is limited to 20% foreign ownership, provided that it must be owned by 100% domestic ownership at the time of establishment.

Our analysis of the restriction on these businesses is because the limitation for foreign ownership has been specifically regulated in the relevant sectoral regulation, for example: the limitation of foreign ownership has been regulated under Law No. 38 of 2009 on Postal Service pursuant to which the Indonesian party shall have majority shares in a foreign direct investment company engaged in postal service, the limitation in sea transportation and ferry service are the mandate of Law No. 17 of 2008 on Shipping to implement the cabotage principle, and the limitation in broadcasting sector is also regulated under Law No. 32 of 2002 on Broadcasting. Based on this limitation, we are of the view that the government wishes to harmonize the negative list and sectoral regulations so that they are not contradicting one another.

In addition to these business, the draft new negative list also stipulates several businesses that are specifically designated for SMEs, most of which are traditional businesses or activities which do not require technology or use intensive labor or capital.

Conclusion

Although the new negative list is still in a draft form, it gives the impression that the government of Indonesia is now trying to open the market to foreign investors by allowing them to have 100% ownership in various businesses and therefore foreign investors will have more options to invest in Indonesia, including in several attractive businesses that are currently restricted for foreign investment, such as: distribution, construction, and retail business. The relaxation is in line with the instruction of President Joko Widodo to attract as many investors as possible to create jobs. Current Covid-19 pandemic has also affected the economic condition of the country, and attracting foreign investors is one of

the solutions to improve the current employment situation.

So far the government has not given a definitive schedule when this draft will be officially enacted, we will keep you updated on this particular matter. Should you have any question with respect to the content of draft new negative list including the foreign ownership restriction for a specific business you wish to carry out, please do not hesitate to contact us.

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Vietnam

LAW ON PUBLIC PRIVATE PARTNERSHIP

ベトナムでは、2020 年 6 月、これまで政令で定められていた官民連携（PPP）に関するルールを見直すと同時に、法律レベルでこれを定める PPP 法が成立し、同法は 2021 年 1 月 1 日に施行された。本稿では、この新しい PPP 法について、実務的にも関心が高いと思われる点を中心にご紹介する。

Introduction

In June 2020, the National Assembly of Vietnam passed a new Law on Investment in Form of Public Private Partnership ("**PPP**"), which took effect from 1 January 2021 except for the ban of the build-transfer ("**BT**") contract being effective from 15 August 2020 ("**PPP Law**"). Prior to the effective dates of the PPP Law, PPP investment was subject to Decree 63/2018 of the Government dated 4 May 2018 ("**Decree 63**").

It has been reported that the Vietnamese Government will soon issue three decrees on implementation of the PPP Law, two of which will regulate the selection of investor and the financial management of a PPP project, while the third one will provide further detailed regulations on other matters (collectively, "**Draft Decrees**").

In this article, we discuss the key points and the major changes of the PPP Law (including the Draft Decrees) in comparison to Decree 63.

Project contracts (without BT contract)

An investor may invest in a PPP project in Vietnam via one of the following seven types of project contract with a competent authority of Vietnam (collectively, "**project contract**"): build-operate- transfer ("**BOT**") contract; build-transfer-operate ("**BTO**") contract; build-own-operate ("**BOO**") contract; operate-manage ("**O&M**") contract; build-transfer-lease ("**BTL**") contract; build-lease- transfer ("**BLT**") contract; or mixed contract (a combination of the contracts mentioned above).

As one of the most noticeable change, the BT contract was crossed out from the permitted forms of PPP investment and those PPP investments under BT contract that have not obtained the IPA (as defined below) were directed to be stopped from 15 August 2020. The BT contract was permitted under previous decrees (including Decree 63) and was a common, preferred form of PPP investment in the country. Under the BT contract form, the investor (through its project company) built an infrastructure project and upon completion of construction, transferred such project to the State. In

return, the State (via its competent authority) transferred certain public asset (e.g. land, headquarter, infrastructure works) to the investor for carrying out other project to generate income. The removal of the BT contract form is consistent with the recent move from the Vietnamese Government to prevent the transfer of public assets to private ownership without auction.

Possible sectors for PPP investment

Under the PPP Law, the permitted sectors of PPP investment have been limited to only the following: (i) transport; (ii) power transmission lines, power plants (except for hydroelectric plants and other cases of State monopoly); (iii) irrigation; clean water supply; water drainage and waste water treatment; waste disposal; (iv) health, education and training; and (v) information technology infrastructure.

Previously, under Decree 63, the Government of Vietnam encouraged PPP investments in a wide range of sectors. In addition, the Prime Minister could approve other sectors that were not listed under Decree 63. This limited scope in the PPP Law reflects the intention of the Vietnamese Government to drive the resources to certain specific sectors which really need the form of PPP.

Minimum investment capital

Unlike Decree 63 which does not specify any minimum amount of investment capital for a PPP project, the PPP Law sets out the minimum amount of investment capital for a PPP project to be VND200 billion (approx. USD8.7 million). For projects in locations with difficult socio-economic conditions or projects in health, education and training sector, this minimum amount may be less but cannot be less than VND100 billion (approx. USD4.35 million). And no minimum amount of investment capital is required for O&M contracts.

The Draft Decrees further contemplate that the minimum amount of investment capital shall be as below:

Sectors	**Total investment capital**
Transport	VND1.5 trillion (approx. USD65.2 million)
Power transmission lines; power plants	VND1.5 trillion (approx. USD65.2 million), except that investment in renewable energy can be VND500 billion (approx. USD21.7 million)
Irrigation; clean water supply; water drainage and waste water treatment; waste disposal	VND200 billion (approx. USD8.7 million)
Health; education and training	VND100 billion (approx. USD4.35 million)
Information technology infrastructure	VND200 billion (approx. USD8.7 million)

Like the permitted sectors, these new requirements reflect the expectation of the Vietnamese Government to attract PPP projects with a fairly great amount of investment capital.

Selection of investor

While Decree 63 simply stipulates that selection of investor must follow the tendering law, the PPP Law provides four methods for selection of investor:

Methods	**Conditions**
(1) open bidding	This method (1) must apply to all cases except for cases that fall into methods (2), (3) or (4) below.
(2) competitive negotiation	When no more than three (3) investors, who satisfy conditions for implementing the PPP project, are invited by the competent authority to participate in the competitive negotiation.
(3) appointment of investor	When there is a need to ensure national defense and security or to select a replacing investor in an urgent manner (when the project contract is terminated ahead of schedule).
(4) selection of investor in special cases	When there appears certain specific characteristics in the PPP project that the application of methods (1), (2) and (3) are not feasible. This method (4) requires the Prime Minister's approval.

In principle, the selection of domestic investors or international investors may be subject to one of these methods. However, the PPP Law emphasizes that the selection of international investors (i.e. comprising domestic investors and foreign investors who participate in the selection process) may not be implemented for projects (i) falling into the sectors that are not open to foreign investment; or (ii) requiring assurance of national defense, security or State secret. This approach appears to be in line with the Law on Investment 2020.

Licensing procedure

Under the PPP Law, the licensing procedure for a PPP project is a complex process, which may be summarized in four key steps as below:

Steps	Contents
1	Competent authority/investor to prepare and submit pre-feasibility study ("**pre-FS**")to a superior authority for an investment policy approval ("**IPA**")
2	Competent authority/investor to prepare and submit feasibility study ("**FS**") for a higher authority for an investment approval ("**IA**")
3	Competent authority to announce the PPP project and select investor (through the prescribed process)
4	Investor to establish a project company and sign a project contract

With respect to steps 1 and 2, either the competent authority or the investor may propose a PPP project and accordingly, prepare the pre-FS and/or the FS. However, the PPP Law indicates that, being a party, who proposes the PPP project and prepares the pre-FS and/or the FS, does not help to ensure that the investor will be selected by the competent authority as the investor of the PPP project. If the PPP project is not approved by the competent authority, the investor will bear all costs and risk. And if the PPP project is approved and the investor is not selected, the successful bidder will reimburse the costs for preparing the pre-FS (if any) and/or the FS to the investor.

The PPP Law and the Draft Decrees fail to specify whether a foreign investor will need to obtain an investment registration certificate.

Investor's capital and State capital

The PPP Law provides that the equity capital of the investor must account for at least 15% of the total investment capital of the PPP project (excluding the portion funded from the State capital).

The State capital may be used for a PPP project for funding (i) construction of works and infrastructures of the PPP project; (ii) land compensation, clearance and resettlement and construction of temporary works; (iii) reduced revenue of the PPP project (as further discussed below); and (iv) preparation and appraisal costs of the pre-FS/FS. As to items (i) and (ii), the PPP Law makes clear that the State capital used for these items cannot account for more than 50% of the total investment capital of the PPP project.

According to Decree 63, the equity capital of the investor is determined on a progressive basis, that is (i) at least 20% of the total investment capital for the portion of up to VND1.5 trillion, and (ii) 15% for the portion exceeding VND1.5 trillion. However, Decree 63 does not specify the cap for participation of the State capital.

Duration of a project contract

Unlike Decree 63 which simply provides that the duration of a project contract will be agreed by the parties, the PPP Law stipulates that duration of a project contract is based on the IA and the investor selection decision, but cannot exceed 50 years (or 70 years in very special cases). The PPP Law also specifies the circumstances that allow adjustment of the duration or trigger termination of the project contract.

The adjustment of the duration may be considered when the construction or operation of the PPP project is delayed or interrupted due to either (i) a fundamental change in circumstances as contemplated (i.e. beyond the control of a party) under the Civil Code or (ii) a decision of the relevant authority (not due to the default of the project company).

The termination before the expiration of a project contract may occur in cases of failure to continue the PPP project due to various causes including (i) a force majeure event; (ii) a decision of the relevant authority for national interests, defense and security, or for protection of state secrets; (iii) insolvency of the project company; (iv) a material breach of the project contract by a party; or (v) a mutual decision of the parties (when a fundamental change in circumstances as contemplated in the Civil Code has incurred). Consequently, the PPP Law also contemplates that if termination is due to the default of the relevant authority, the competent authority may use State capital to acquire the project or compensate the investor. And if the termination is due to the default of the investor, the relevant authority may work with the lenders to select a replacement investor and the replacement investor will acquire interest in the project company from the investor.

Government's incentives

In respect of those important PPP projects which have the IPA of the National Assembly or the Prime Minister, the Government may grant a guarantee undertaking on foreign currency balancing to the project company. Accordingly, in case the market cannot meet its demand of foreign currency, the project company may enjoy the Government's guarantee undertaking for purchasing foreign currency up to 30% of the net VND revenue of the PPP project (after deducting the expenses in VND). This cap of 30% may cause a concern to the foreign lenders.

The PPP Law also introduces a risk allocation scheme for certain PPP projects. Under this scheme, when the actual revenue of the PPP project is 125% higher than the revenue projected in the financial plan ("**projected revenue**"), the project company will be obliged to share with the State 50% of the revenue exceeding 125% of the projected revenue. In the event the actual revenue is less than 75% of the projected revenue, the State will share with the project company 50% of the difference of the amount being 75% of the projected revenue and the actual revenue. To some extent, this scheme is helpful to stabilize the revenue of the PPP project and to reduce risks to the investors and lenders.

Conclusion

The introduction of the PPP Law and its implementing decrees is a major step to complete the legal framework for PPP investment in Vietnam. The transparent regulations will likely be helpful to the investors in preparation and implementation of the PPP project.

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Philippines

BENEFICIAL OWNERSHIP DISCLOSURE AND TRANSPARENCY REQUIREMENTS

フィリピン証券取引委員会は 2020 年 12 月 4 日付で法人の実質的所有者の透明性促進に関するガイドラインの草案を公表した。同趣旨のガイドラインは既にインド、マレーシア、インドネシア等の複数の東南アジアの国でも導入済みであるところ、フィリピンにおいても近日中に正式なガイドラインとして制定されることが見込まれる。本稿では、草案段階の同ガイドラインの概要について紹介する。

On 27 January 2021, the Philippine Securities and Exchange Commission ("**SEC**") issued Memorandum Circular No. 1, series of 2021, or the Guidelines in Preventing the Misuse of Corporations for Illicit Activities Through Measures Designed to Promote Transparency of Beneficial Ownership ("**Transparency Guidelines**"). The Transparency Guidelines seeks to reinforce initiatives already taken by the SEC to assist in the implementation of the Anti-Money Laundering Act (Republic Act No. 9160, as amended) and the Terrorist Financing Prevention and Suppression Act (Republic Act No. 10168).

Prior to the Transparency Guidelines, the SEC had earlier issued Memorandum Circulars No. 16, series of 2018, No. 15, series of 2019 and No. 30, series of 2020 (collectively, the "**Issued Memorandum Circulars**") which prescribed revised General Information Sheet ("**GIS**") forms incorporating an obligatory beneficial ownership disclosure section. GIS are reportorial requirements filed annually by all SEC registered stock and non-stock domestic corporations, and foreign corporations, and are amended in the event of any change of information reflected.

Background on the Issued Memorandum Circulars

The Issued Memorandum Circulars define the term "beneficial owner" to mean any natural person who ultimately owns or controls, or exercises effective control over the reporting corporation. Information on the beneficial ownership to be disclosed in the revised GIS forms of the reporting corporation shall either be:

1) the identity of natural persons who ultimately has controlling interest in the reporting corporation;

   For this purpose, the Issued Memorandum Circulars provide that ultimate controlling interest is exercised when a natural person:

   a) directly or indirectly (e.g., through multiple corporate layering) owns at least 25% of the voting shares or rights in the reporting corporation.

      Where the entity owning at least 25% of the reporting corporation is an estate, trust or partnership, the natural person owning or controlling such shall be disclosed as the beneficial owner, while if another corporation directly or indirectly owns at least 25% of the voting shares or rights of the reporting corporation, the members of the board of directors or trustees or any similar body and/or senior managing official of such corporation may be considered as beneficial owner of the reporting corporation.

   b) has the ability to elect a majority of the board of directors, or any similar body of the reporting corporation

   c) has the ability to exert a dominant influence over the management or policies of the reporting corporation (e.g., majority of the members of the board of directors of reporting corporation are under an obligation (formal or informal), to act in accordance with such person's directions, instructions or wishes in conducting the affairs)

2) the identity of the natural persons (if any) exercising control of the corporation through other means; or

3) the identity of the natural persons composing the board of directors or trustees or any similar body and/or senior managing official of the reporting corporation, in the exceptional circumstance that no natural person can be identified as ultimately owning or controlling the reporting corporation after all other means of identification have been exhausted.

Where the reporting corporation opts for this third manner of disclosure, information disclosed will be subject to the continued verification (e.g. through on-site inspection of corporate records) and strict monitoring of the SEC, since the reporting corporation must be able to show that it has exhausted all other means of identifying the beneficial owner.

Violations of the Issued Memorandum Circulars may result in administrative fines of Php 10,000.00 to Php 200,000.00 imposed on the corporation for its failure to disclose, and Php 5,000.00 to Php 50,000.00 imposed on the responsible officers of the reporting corporation (i.e., the board of directors or senior management, in case of domestic corporations, or the resident agent, country or regional/area head in case of foreign corporations) for failure to exercise due diligence in ensuring compliance with the requirement to disclose beneficial ownership information.

Absence of written procedures and policies for obtaining, updating and disclosing the beneficial ownership information, or the lack of oversight by the board of directors or senior management to ensure compliance with such written policies, will be considered as *prima facie* proof that there was failure to exercise the due diligence required.

Although the disclosed information on the beneficial ownership will not be uploaded to the SEC's publicly accessible electronic database, such information may be made accessible to competent authorities for law enforcement and other lawful purposes.

The Transparency Guidelines

The Transparency Guidelines seek to add to the SEC's existing framework on beneficial ownership disclosure in order to guard against the misuse of corporate vehicles.

Adopting the definition of "beneficial owner" under the Issued Memorandum Circulars, the Transparency Guidelines particularly apply to bearer shares, bearer share warrants, nominee directors/trustees and nominee shareholders, and incorporators/applicants for incorporation, and all corporation falling under the supervision and jurisdiction of the SEC.

Based on the provisions of the Transparency Guidelines, it will have the effect, among others, of:

1) prohibiting the issuance, sale and public offering of bearer shares (i.e., equity securities owned by the person or entity that holds the physical certificate which enables the transfer of ownership of shares of stock by mere delivery of such certificate) and bearer share warrants (i.e., a document certifying that the bearer is entitled to a certain amount of the fully paid shares of stock of a corporation) within the Philippines;

2) requiring that payment of dividends shall be made only to the shareholder of record (i.e., person or entity whose name appears in the records of the corporation as the owner of the shares of stock for which dividends are being paid), except for dividend payments made by publicly listed companies to the depositary or custodian of shares for purposes of trading in the stock exchange;

3) rendering beneficial ownership information as part of the corporate records, which are required to be kept and preserved at the principal office of a corporation and may subject to a shareholder's right of inspection;

4) requiring the additional mandatory disclosure of the nominators/principals/persons on whose behalf a corporation is registered and a director or shareholder acts .

   Such disclosure shall be submitted online in such form and manner as the SEC deems practicable, and will be required to contain personal information on the beneficial owners, nominators / principals, etc.

   All persons who are already nominee directors or shareholders of existing corporations are required to submit the said disclosure to the SEC within 30 days from the effectivity of the Transparency Guidelines, while those who will become nominee shareholders or directors after the Transparency Guidelines becomes effective shall submit the same within 30 days from the time they assumed such role.

Violations of the Transparency Guidelines, including making untrue statements of material fact or refusal to permit lawful examination by the SEC, will be subject to steeper administrative sanctions as compared to those imposable for violations of the Issued Memorandum Circulars. Depending on the extent, nature, frequency and seriousness of the violation, the SEC may impose either (a) administrative fines ranging from Php 5,000.00 to Php 2 million, plus not more

than Php 1,000.00 for each day of continuing violation but in no case exceeding Php 2 million, (b) suspension or revocation of the certificate of incorporation, and such other penalties, without prejudice to the filing of criminal charges against persons responsible for the violation.

Conclusion

In requiring stricter beneficial ownership disclosures on private domestic and foreign corporations doing business in the Philippines, the SEC has increased its efforts to promote a culture of transparency, and carry out best practices in combating money laundering and terrorist financing activities. Board of directors and senior management of corporations should take note of the latest beneficial ownership disclosure and transparency requirements, so that they can fulfill their duties to exercise due diligence in ensuring that the corporations they are responsible for, are able to comply.

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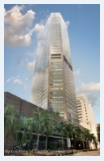

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