International
Comparative
Legal Guides

Foreign Direct Investment Regimes 2021

A practical cross-border insight into FDI screening regimes

Second Edition

Featuring contributions from:

Advokatfirmaet Thommessen AS
ABNR Counsellors at Law
Anderson, Mōri & Tomotsune
Baker Botts L.L.P.
Barun Law LLC
BEITEN BURKHARDT
Boga & Associates
Gowling WLG
Hassan Radhi & Associates
Houthoff
Ipek | Akbal Schwimann
Iwata Godo
Lehman, Lee & Xu
Morais Leitão, Galvão Teles, Soares da Silva & Associados
Niederer Kraft Frey Ltd
PRA Law Offices
Schoenherr
Schoenherr-Hetényi Attorneys-at-Law
Stikeman Elliott LLP
Wiggin and Dana LLP
Wolf Theiss
Wolf Theiss Rechtsanwälte GmbH & Co KG

ICLG.com

Expert Chapters

Q&A Chapters

Indonesia


Elsie F. Hakim


Giffy Pardede


Monic Nisa Devina

ABNR Counsellors at Law

1 Foreign Investment Policy

1.1 What is the national policy with regard to the review of foreign investments (including transactions) on national security and public order grounds?

Broadly, there is no specific national policy for the review of foreign investment (including transactions) on national security and public order grounds. However, the Government has discretion to reject any foreign investment application in fields that are restricted or closed to investment (domestic or foreign), including narcotics or gambling, or on national security and public order grounds.

Foreign investment in Indonesia is generally governed by the Investment Law and its ancillary regulations. The Investment Law requires the Government to stipulate the fields of activity open to foreign investment, and to set the priority and any special conditions placed on such investments. It also permits the Government to determine that certain areas are closed to further investment.

The Investment Law also stipulates that industries relating to national defence are completely closed to foreign investment and, as noted above, that certain sectors deemed important to the state and affect the livelihood of the population cannot be undertaken by foreign investors alone (i.e., without local participation): harbors; production/transmission/distribution of electricity; telecommunications; shipping; aviation; drinking water supply; public railways; atomic reactors; and the mass media.

Based on these provisions, the Government has issued, from time to time, lists on investment that are closed or conditionally open to foreign investment ("**Negative List**").

The Negative List distinguishes business fields that are:

a. closed to foreign investment, including gambling, government-run museums, manufacturing of alcoholic beverages, air navigation services;
b. conditionally open to (foreign) investment, i.e., requiring a partnership with micro, small, or medium enterprises, or cooperatives, and reserved for micro, small, or medium enterprises (not open to foreign investment), including radio and television broadcasters, commercial plantations, travel agents, etc.; and
c. conditionally open to (foreign) investment and subject to certain requirements, i.e., a limitation on foreign ownership, certain locations, special licensing, domestic capital of 100%, and/or limitation on capital ownership within the framework of ASEAN cooperation, including trading/distribution, construction, transportation services, etc.

1.2 Are there any particular strategic considerations that apply during foreign investment reviews?

No, as pointed out in question 1.1, in essence, Indonesia does not have particular strategic considerations that apply during review of foreign investment. In general, to the extent that the foreign investor fulfils the requirements under the applicable laws and regulations (including the foreign ownership percentage as set out in the Negative List), it is permitted to establish and operate a business in Indonesia. However, certain sectors, e.g., banking, oil and gas and mining, are subject to separate regulatory regimes and a specific review mechanism is in place, including that foreign investors must secure approval from the authorised Government authorities.

1.3 Are there any current proposals to change the foreign investment review policy or the current laws?

Recently, the Government submitted the much-anticipated Bill on Job Creation (the "Omnibus Law") to the National Legislature (DPR) in early 2020. The intention of the Omnibus Law is to improve the ease of doing business in Indonesia. If passed, it will amend a total of 79 existing statutes, which, taken together, cover virtually all major economic sectors and aspects of economic activity, as well as many important facets of the country's governmental, regulatory and planning systems. The economic sectors affected include manufacturing, agriculture, banking, fisheries, construction, broadcasting, mining, oil and gas, forestry, aviation, tourism, higher education, healthcare, telecommunications, power, etc. Enactment of the Omnibus Law, however, will require involvement of lawmakers and will take some time amid the COVID-19 pandemic.

2 Law and Scope of Application

2.1 What laws apply to the control of foreign investments (including transactions) on grounds of national security and public order? Are there any notable developments in the last year?

Please refer to our response to question 1.1 (*above*).

2.2 What kinds of foreign investments, foreign investors and transactions are caught? Is the acquisition of minority interests caught?

In respect of foreign investment and a foreign investor, the Investment Law defines "Foreign Investment" as an activity by a foreign investor to invest in business in Indonesia, whether wholly using foreign capital or by establishing a joint venture with a domestic investor. "Foreign Investor" is defined as a foreign citizen, a foreign business entity, or a foreign government engaged in investment in Indonesia. Further, "Foreign Capital" is defined as capital owned by a foreign state, national, business entity, legal entity or an Indonesian legal entity, in which the capital is owned partly or wholly by a foreign party. In conclusion, any participation of foreign capital in an Indonesian company (either with minority or majority interest) will be deemed foreign investment.

2.3 What are the sectors and activities that are particularly under scrutiny? Are there any sector-specific review mechanisms in place?

Please refer to our response to question 1.2 (*above*).

2.4 How are terms such as 'foreign investor' and 'foreign investment' specifically addressed in the law?

Please refer to our response to question 2.2 (*above*).

2.5 Are there specific rules for certain foreign investors such as state-owned enterprises (SOEs)?

No specific rules apply to foreign investors such as state-owned enterprises ("**SOEs**"), which are treated the same as any other foreign investment.

2.6 Is there a local nexus requirement for an acquisition or investment to fall under the scope of the national security review? If so, what is the nature of such requirement (existence of subsidiaries, assets, etc.)?

No, please refer to our response to question 1.1 (*above*). Acquisition or investment requirements will be subject to the applicable laws and regulations.

2.7 In cases where local presence is required to trigger the review, are indirect acquisitions of local subsidiaries and/or other assets also caught?

The review of local presence for the acquisition of local subsidiaries or other assets will trigger the Indonesian Competition Law ("**ICL**"). The ICL and its implementing legislation prohibits businesses from carrying out a merger, consolidation or acquisition that may result in monopolistic practices or unfair business competition, and obliges a business engaged in a merger, consolidation or acquisition to notify the transaction to the Indonesian Competition Commission (*Komisi Pengawas Persaingan Usaha* or "**KPPU**") within 30 business days of the closing of the transaction.

The criteria on which to determine whether a transaction should be notified to the KPPU is to apply four conditions (on a cumulative basis):

(i) Change of control:
A change of control can be the result of a transfer of shares or voting rights above 50% OR actual control (ability to influence or direct the company's policy and/or management).

(ii) Assets/sales thresholds:
The following thresholds apply:
(1) if the combined value of assets of the business entity resulting from the merger, consolidation and acquisition exceeds IDR 2.5 trillion (approx. USD 178 million, USD 1 = IDR 14,000) (in the banking sector, the threshold is IDR 20 trillion, approx. USD 1.42 billion) worldwide; or
(2) if the combined value of sales of the business entity resulting from the merger, consolidation and acquisition exceeds IDR 5 trillion (approx. USD 357 million) within Indonesian territory.

(iii) The transaction has a direct impact on the Indonesian market.

(iv) It is carried out between non-affiliated companies:
If the transaction is conducted between affiliates, the transaction is exempted (regardless of whether all variables are met). A company is an affiliate of another if (a) it either directly or indirectly controls or is controlled by that company, (b) it and the other company, directly or indirectly, are controlled by the same parent company, or (c) there is a relationship as a "main principal shareholder" (*pemegang saham utama*).
If the proposed transaction meets **all** of the above conditions, it will trigger mandatory notification under the Indonesian competition regulations for the acquirer of shares to notify the KPPU. Failure to comply with the mandatory notification requirement will render an undertaking liable to an administrative fine in the amount of IDR 1 billion (USD 71,428) per day of non-performance, up to IDR 25 billion (USD 1,785,714).

3 Jurisdiction and Procedure

3.1 What conditions must be met for the law to apply? Are there any monetary thresholds?

The Investment Law is applicable to all foreign investment in Indonesia regardless of the amount of investment. Further, the Investment Law and its implementing regulations require that foreign investment in Indonesia must fulfil a minimum investment of more than IDR 10 billion (excluding land and buildings). Certain sectors may impose a higher investment value such as freight forwarding services that require a minimum USD 4 million investment.

If the investment is made by acquiring an existing company in Indonesia, it will be subject to merger control requirements. Details of the KPPU notification threshold are shown in the response to question 2.7.

3.2 Is the filing voluntary or mandatory? Are there any filing fees?

Filing is mandatory. Except for the capital market sector, no fees are imposed for filing. Filing fees in the capital market sector depend on the type of transaction. For instance, a fee of IDR 25 million will be imposed for acquiring a listed company.

3.3 In the case of transactions, who is responsible for obtaining the necessary approval?

In general, there is no specific approval for foreign investment. The local company needs to ensure that foreign ownership in the company complies with the requirements of the Negative List. However, for certain sectors, such as mining, banking and financial institutions, the new controlling shareholder must also obtain prior approval from the relevant authority to act as a controlling shareholder of the local company.

3.4 Can foreign investors engage in advance consultations with the authorities and ask for formal or informal guidance on the application of the approval procedure?

Yes, that is possible. For such consultation, the foreign investor will need to submit a letter of request to the relevant authorities; the timing of the meeting will be subject to the availability of the relevant authorities.

3.5 What type of information do investors have to provide as part of their filing?

As mentioned in our response to question 3.3 above, in general, there is no specific approval for foreign investment for certain lines of business and thus no requirement to file documents with the Investment Coordination Body (*Badan Koordinasi Penanaman Modal*, "**BKPM**"), a ministry-level government entity. However, certain information on the investors will need to be submitted to the Ministry of Law and Human Rights to record their share ownership in the company. For such recordation, investors will need to submit their corporate documents such as articles of association and documents evidencing the latest composition of the board. For other specific sectors, such as banking, in addition to corporate documents, investors are also required to submit a financial statement, and various letters of commitment to state their support for the banking industry in Indonesia.

3.6 Are there sanctions for not filing (fines, criminal liability, unwinding of the transaction, etc.) and what is the current practice of the authorities?

Please see our response to question 3.5 above. For specific sectors such as mining, banking and financial institutions, the transaction cannot be concluded without documents proving that the investor has secured the approval to act as controlling shareholder from the relevant authorities.

3.7 What is the timeframe of review in order to obtain approval? Are there any provisions expediting the clearance?

Please see our response to question 3.5 above. For specific sectors such as mining, banking and financial institutions, the process may take three to four months once submission of the application is complete.

3.8 Does the review need to be obtained prior to or after closing? In the former case, does the review have a suspensory effect on the closing of the transaction? Are there any penalties if the parties implement the transaction before approval is obtained?

For specific sectors such as mining, banking and financial institutions, review and approval need to be obtained prior to closing and it will have a suspensory effect on the closing of the transaction. As explained in our response to question 3.6 above, the transaction cannot be concluded without approval.

3.9 Can third parties be involved in the review process? If so, what are the requirements, and do they have any particular rights during the procedure?

The process must be handled by the authorities, with no involvement from third parties. Nevertheless, the authorities will always have discretion to seek an opinion, comments or recommendations from third parties, such as an industry association, in reviewing the application. However, they do not have an automatic right to be heard in the review and approval process.

3.10 What publicity is given to the process and the final decision and how is commercial information, including business secrets, protected from disclosure?

For specific sectors such as mining, banking and financial institutions, the final decision will be notified only to the relevant parties and not be made available to the public.

3.11 Are there any other administrative approvals required (cross-sector or sector-specific) for foreign investments?

Please see our response to question 3.5 above.

4 Substantive Assessment

4.1 Which authorities are responsible for conducting the review?

In general, the review authorities fall into three categories: (i) those that oversee foreign direct investment-related review (as well as implementation or realisation of the foreign direct investment); (ii) those that review the operational and commercial activities; and (iii) those that review both foreign direct investment and operational and commercial activity of a certain line of business. These will vary in accordance with the particular line of business.

The supervisory authority for businesses involved in foreign direct investment is BKPM.

For those businesses subject to BKPM supervision, operational and commercial activity will be reviewed by the line ministry or government institution concerned. For example, energy and mining is supervised by the Ministry of Energy and Mineral Resources ("**MEMR**"), while for industry and manufacturing it is the Ministry of Industry.

However, certain lines of businesses are subject to review by one agency, for example, banking and non-banking, which

fall under the supervision of the Financial Services Authority (*Otoritas Jasa Keungan*) while upstream oil and gas fall under the Special Task Force for Upstream Oil and Gas (*Satuan Kerja Khusus Minyak dan Gas Hulu*).

4.2 What is the applicable test and who bears the burden of proof?

Each government authority would in general require submission of periodical reports containing substantive supporting documents or evidence that would substantiate the compliance of each investor in their line of businesses.

4.3 What are the main evaluation criteria and are there any guidelines available?

The review of foreign direct investment checks with regard to whether the business is aligned with the general restrictions or requirements imposed on foreign direct investment as well as mandatory capital requirements.

The review of operational and commercial activities checks compliance with regard to specific or technical requirements applicable to each line of business.

4.4 In their assessment, do the authorities also take into account activities of foreign (non-local) subsidiaries in their jurisdiction?

No, activities of foreign (non-local) subsidiaries are not relevant.

4.5 How much discretion and what powers do the authorities have to approve or reject transactions on national security and public order grounds?

The government has full discretion to reject investments closed to foreign direct investment, e.g., the firearms, gambling, and narcotics industries.

For certain industries, typically, the authority's consent will also be required where there is a change in control. In some industries, the authority has the power to reject based on arguments of national security or interest. For example, in the mining industry, the MEMR may refuse to approve should the investment exceed the permissible foreign investment threshold.

4.6 Can a decision be challenged or appealed, including by third parties? Is the relevant procedure administrative or judicial in character?

A decision to reject an investment proposal is not subject to challenge.

A decision to reject an application for the consent of the authority, for example, in the context of an acquisition of a certain company, is subject to an appeal with the State Administrative Court (*Pengadilan Tata Usaha Negara*).

4.7 Is it possible to address the authorities' objections to a transaction by providing remedies, such as undertaking or other arrangements?

The regulation is silent on this matter.

4.8 Are there any other relevant considerations? What is the recent enforcement practice of the authorities and have there been any significant cases? Are there any notable trends emerging in the enforcement of the FDI screening regime?

The most recent enforcement practice by the authorities relates to the revocation of the so-called principle investment licence of companies by the BKPM. The revocation was carried out due to lack of reporting made by the company in relation to the required investment activity report or locally known as *laporan kegiatan penanaman modal*. These are in majority dormant companies.

The last known "high profile" enforcement case occurred in 2008, where the BKPM raised an investigation with regards to Qatar Telecom (Qtel) investment in PT Indosat Tbk., a publicly-listed telecommunication company, of which there was a question of whether the "portfolio" investment made by Qtel by indirectly acquiring shares in the telecom company had circumvented Indonesia's Negative List.

In Qtel's case, BKPM had decided to apply the foreign ownership restriction under the Negative List. However, until now, there are still no formal written rules and regulations in place that would adopt this approach and specifically in relation to supervising foreign direct investment in Indonesian publicly-listed companies. In the absence of any existing mandatory rule, we believe that it would be extremely difficult for the financial services authority or BKPM in practice to control the transfer of shares of all public listed companies in the Indonesian stock exchange, in order to police and uphold the maximum foreign shareholding rules under the Negative List.

There are no recent enforcement practice or significant cases. The notable trend, publicised in the media at the end of 2019 and early 2020, is towards more "opening up" of foreign direct investment by removing many restrictions or requirements, through promulgation of the Omnibus Law, which is intended to promote foreign direct investment in Indonesia.

However, this would require the enactment of a high-level law (in the legal hierarchy, this is just below the Constitution) which necessitates the involvement of lawmakers and would therefore take time, especially under the COVID-19 emergency regime.

Elsie F. Hakim joined ABNR as an associate in 2007 and was made partner on 1 January 2018. At ABNR, Elsie focuses her practice on banking, fintech, corporate & FDI, and financial restructuring. She has also participated in various other transactions involving diverse practice areas, such as offshore IPOs, asset securitisations, BASEL compliance reviews, and equity investments.
Elsie is listed as a "Next Generation Partner" for banking & finance by *The Legal 500 Asia Pacific*, making her one of only three Indonesian lawyers so ranked for this practice area, and is recognised as a "Notable Practitioner" for fintech by *Chambers FinTech Guide*, one of only seven Indonesian lawyers recommended by the guide.

ABNR Counsellors at Law
Graha CIMB Niaga, 24th Floor
Jl. Jend. Sudirman Kav. 58
Jakarta 12190
Indonesia

Tel: +62 21 250 5125/5136
Email: ehakim@abnrlaw.com
URL: www.abnrlaw.com

Giffy Pardede is a key member of the firm's project finance, mergers and acquisitions (M&A), foreign direct investment (FDI) and real estate practices, advising clients across a wide range of industries and economic sectors, including oil & gas/natural resources, financial services and fintech, manufacturing, consumer goods, pharmaceuticals & healthcare, power & renewables, automotive, plantations & agriculture, and tourism & hospitality.
Giffy is a regular contributor of articles on topical legal issues for various publications, and is a frequent speaker at workshops and seminars. He was recently named "Indonesian Young Lawyer of the Year" at the 2019 *Asian Legal Business* (ALB) Indonesia Law Awards, and is recognised by *IFLR1000* as a "Notable Practitioner" for Banking and Corporate and M&A. He is also recommended for Real Estate by *The Legal 500 Asia Pacific*.

ABNR Counsellors at Law
Graha CIMB Niaga, 24th Floor
Jl. Jend. Sudirman Kav. 58
Jakarta 12190
Indonesia

Tel: +62 21 250 5125 (Ext. 346)
Email: gpardede@abnrlaw.com
URL: www.abnrlaw.com

Monic Nisa Devina has been with ABNR since 2005 and was made partner on 1 January 2019. She specialises in banking & finance, mergers & acquisitions (M&A) and foreign direct investment (FDI). She advises on a number of banking and financial institutions M&A processes and recently advised on a banking merger and acquisition to form PT Bank Shinhan Indonesia and PT Bank IBK Indonesia in Indonesia. She was also a member of the ABNR team that assisted Uber with the Indonesian aspects of the merger of their Southeast Asia operations with those of Singapore-based ride hailing company Grab Inc., the largest deal ever of its kind in the region. In other sectors, she advises across the entire spectrum of foreign investment law in Indonesia.

ABNR Counsellors at Law
Graha CIMB Niaga, 24th Floor
Jl. Jend. Sudirman Kav. 58
Jakarta 12190
Indonesia

Tel: +62 21 250 5125/5136
Email: mdevina@abnrlaw.com
URL: www.abnrlaw.com

ICLG.com

Other titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Finance & Leasing
Aviation Law
Business Crime
Cartels & Leniency
Class & Group Actions
Competition Litigation
Construction & Engineering Law
Consumer Protection
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Tax
Cybersecurity
Data Protection
Derivatives
Designs
Digital Business
Digital Health
Drug & Medical Device Litigation
Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Environmental, Social & Governance Law
Family Law
Fintech
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law
Oil & Gas Regulation
Outsourcing
Patents
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Renewable Energy
Restructuring & Insolvency
Sanctions
Securitisation
Shipping Law
Telecoms, Media & Internet
Trade Marks
Vertical Agreements and Dominant Firms

@ICLG_GLG

The International Comparative Legal Guides are published by:

global legal group