

SUMMARY

- **Introduction:** DS Avocats in Indonesia1
- **Announcement of the 10th Economic Deregulation Package:** towards a liberalization of foreign shareholding in Indonesian Companies.....2
- **Infrastructures & Energy:** Acceleration of National Strategic Projects.....4
- **Regulatory Framework on Public Railways procurement:** a methodology to business in Indonesia.....6

INTRODUCTION : DS Avocats in Indonesia

DS has been working for years in Indonesia from its Singapore office.

Considering the Indonesian growth and reforms perspectives DS decided to go further and to start an effective presence in the country in compliance with the Indonesian regulatory framework.

DS has indeed entered into a cooperation agreement with the local law firm WIBOWO HADIWIJAYA & Co. (WH & Co) where to it seconded one of its French associates, Lucas MASCARADE.

Founded in 2006 WH & Co is a fast growing law firm specially formed to accompany foreign enterprises in the legal environment of foreign direct investments.

Lucas MASCARADE joined the firm after two first experiences in the region, for Business France in Singapore and a German law firm in Kuala Lumpur.

DS Indonesian presence is enjoying the full support of the other DS Asian offices, especially the Singapore one, and the Chinese and Vietnamese ones.

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ANNOUNCEMENT OF THE 10TH ECONOMIC DEREGULATION PACKAGE: towards a liberalization of foreign shareholding in Indonesian Companies

10th Economic Deregulation Package & Presidential Regulation No.39/2014 (Negative Investment List)

The announcement of the *10th Economic Deregulation Package* highlights the Indonesian Government's policy actions pertaining to the reform of its Economy by both stimulating its domestic market and attracting foreign investors.

On 11th February 2016, the Coordinating Minister for Economic Affairs, Darmin Nasution, has set out the Government policies to achieve some of the following objectives:

- To secure domestic and foreign investors legal right;
- To facilitate international trade with Indonesia;
- To launch new tax incentives for the private sector;
- To simplify business regulations;
- To secure the development of SMEs.

Among these measures, the reform contemplates to amend the *Presidential Regulation No.39/ 2014* known as *Negative Investment List* (« NIL 2014 »). This Regulation defines restriction on foreign direct investments by limiting foreign shareholding in various business sectors.

As an example, the draft regulation will allow a 67% foreign shareholding in Indonesian Companies engaged in Distribution sector against 33% under the current NIL 2014. Hence, foreign companies involved in this field might intend to acquire a controlling majority in their venture in Indonesia, or at the stage of incorporation to enter the Indonesian market.

Hence, the Indonesian Government aims to reduce or remove barriers to foreign shareholding entries for more than 20 business sectors, as resumed in tables below:

Business sectors previously closed to foreign investment and about to be liberalized

| Business sectors | Maximal amount of allowed foreign shareholding | |
|--|--|-----------|
| | NIL 2014 | Draft NIL |
| Online marketplace & e-commerce (for marketplace with a valuation of an amount superior of IDR 100 billion (approx. USD 10 million)) | 0% | 100% |
| Film industry and distribution | 0% | 100% |
| Healthcare support services | 0% | 67% |
| Passenger land transport | 0% | 49% |
| High voltage electricity utilization installation | 0% | 49% |

Business sectors previously limited to foreign shareholding and about to be liberalized

| Business sectors | Maximal amount of allowed foreign shareholding | |
|---|--|-----------|
| | NIL 2014 | Draft NIL |
| Cold storage | 33% | 100% |
| Crumb rubber industry | 49% | 100% |
| Sport centers | 49% | 100% |
| Film processing laboratories | 49% | 100% |
| Bar, restaurant, art, entertainment and recreational services | 51% | 100% |
| Raw materials for pharmaceutical industry | 85% | 100% |
| Telecommunication Testing Agency | 95% | 100% |
| Toll road operators | 95% | 100% |
| Non -hazardous waste management | 95% | 100% |

Business sectors previously limited and about to be liberalized more open to foreign shareholding

| Business sectors | Maximal amount of allowed foreign shareholding | |
|---|--|-----------|
| | NIL 2014 | Draft NIL |
| Distribution and warehousing | 33% | 67% |
| Labor training | 49% | 67% |
| Travel Agency | 49% | 67% |
| Golf course | 49% | 67% |
| Aviation support services | 51% | 67% |
| Meeting, incentive, conference and exhibition | 51% | 67% |
| Telecommunication services | 55% | 67% |
| Construction consultancy (for projects with a value of an amount superior of IDR 10 billion (approx. USD 1 million) | 55% | 67% |

It has to be noted that this draft NIL announced by the Indonesian Government is still under discussion and is expected to be passed in June 2016. Therefore, the above may be subject to further substantial amendments.

DS ASEAN in cooperation with Wibowo Hadiwijaya & Co. will monitor closely the evolution of such regulation.

Presidential Regulation No. 3 of 2016 regarding the Acceleration of National Strategic Projects & Presidential Regulation No. 4 of 2016 on Acceleration of Power Infrastructure Development

Both enacted January 8th and 12th 2016, Presidential Regulation No. 3 of 2016 (« PR 3/2016 ») and Presidential Regulation No. 4 of 2016 (“PR 4/ 2016”) concern the Acceleration of National Strategic Projects and the development of the Indonesian’s Power Infrastructure to 35 additional GW.

Promised by President Widodo during its campaign, the Indonesian Government launch, with these two regulations, its major development project to strengthened its infrastructure capacity, the growth of public resources and the development of its Power efficiency.

Objectives of PR 3/2016 are to ease and accelerate the application process of licenses and administrative authorizations as well as strengthening operators’ rights while participating to the 225 new infrastructures projects located throughout Indonesia, listed in PR 3/ 2016’s Annex.

The new legal framework applicable to these projects will have effects on both public and private sector. Indeed, central and local governments, their subsidiaries and private sector companies will be able to tender to these projects according to a facilitated process. The following activity sectors are concerned:

- Waste water management projects;
- Flood prevention projects;
- Drinking water supply system;
- Revitalization and developments of airports, ports, toll and non-toll road and railway;
- Cross-border postal facilities;
- Dams construction;
- IT, Broadband and scientific projects;
- Prioritized Industrial Area / Special Economic Zones;
- One million houses development;
- Tourism Smelter facilities;
- Tourism;
- Agriculture and maritime facilities;
- Energy infrastructures;
- Renewable Energy and Energy from waste projects.

The development of the Indonesian Power capacity to an additional 35 GW is a pillar of this development plan. PR 4/ 2016 draws a new regulatory framework for energy projects developed by the National Company of Energy, Perusahaan Listrik Negara (« PLN ») and projects where PLN will involve private energy producers.

An accelerated and dedicated process for licenses and authorizations

PR 3/ 2016 creates a one-stop shop governmental body to manage the delivery of licenses and authorizations required to participate to the NSP. This one-stop shop will be managed under the supervisory of the Indonesian Investment Coordinating Board (“BKPM”) and will be present at every level of governmental authorities: at the central level in the Jakarta office of BKPM, in every province and regencies. Concerned licenses and authorizations are:

- Principle licenses authorizing an investor to conduct an activity;
- Location permits;
- Environmental licenses;
- Borrow-to-use permits for forest area;
- Building construction permits;
- Fiscal and non-fiscal facilities.

Under the ambit of PR 3/ 2016, a delegation of authority is performed from the representative of central and local governments to the BKPM. This delegation is justified to limit the number of administrative procedures. In order to gain efficiency, BKPM also commit to deliver these licenses and authorizations in fixed and shorter terms¹.

The same process will apply to energy projects under the ambit of PR 4/ 2016.

Direct procurement from Government

PR 3/2016 determines modalities of direct procurement from Central and local government to NSP. As an example, the regulation grants the possibility of direct procurement for advisory services within an amount of approx. 38.000,00 USD rendered for a NSP.

Financial guarantees from Central Government

Central Government may grant financial guarantees to the public and private entities willing to finance NSPs. The applicable legal framework of such guarantees will be determined in an upcoming regulation from the Ministry of Finance.

Under the ambit of PR 4/ 2016, further dedicated financial guarantees are available for projects listed under the PLN's Long Term Electricity Generation Plan.

Supporting renewable energy production

The Indonesian Government has set the objective to reach an energy production from renewable energy of an amount of 25% in 2025. PR 4/ 2016 grants tax facilities as well as dedicated subsidiaries related to projects involved in this field.

In addition, in order to facilitate the management of the renewable energy production with PLN, a dedicated body will be created.

DS ASEAN in cooperation with Wibowo Hadiwijaya & Co. will monitor closely the application of these regulatory measures. Please feel free to contact us in order to obtain the list of the 225 projects launched by the Indonesian Government and to seek our advice concerning these matters.

¹ e.g. authorizations from BKPM should be delivered within 5 days upon submission of the complete application. However, are not included in this time-frame the environmental licenses (60 days), borrow-to-use permits (30 days) and tax facilities (30 days) and other time-frames prescribed by Law

Regulatory Framework On Public Railways Business In Indonesia

1. ***Law of the Republic of Indonesia Number 23 of 2007 regarding Railways (“Law 23/2007”);***
2. ***Governmental Regulation of the Republic of Indonesia Number 56 of 2009 regarding the Implementations of Railways (“GR 56/2009”);***
3. ***Presidential Regulation of the Republic of Indonesia Number 38 of 2015 regarding the Cooperation of the Government and Business Entity in the Procurement of Infrastructure (“PR 38/2015”);***
4. ***Regulation of the Head of Government’s Goods/Services Procurement Policy Institution Number 19 of 2015 regarding Guidelines of the Implementation of the Procurement of Business Entity for the Cooperation of the Government and Business Entity in the Procurement of Infrastructure (“Institution Reg. 19/2015”);***
5. ***Regulation of the Minister of Transportation of the Republic of Indonesia Number 15 of 2016 regarding Concession and Other Cooperation Form between the Government and Business Entity in the Public Railways Sector (“Minister Reg. 16/2016”).***

I. **Introduction**

The Indonesian constitution described that any sectors that have a fundamental impact to public’s interest shall be managed and controlled by the Government, including the railways business. The Law Number 13 of 1992 regarding Railways was issued to uphold such principle, whereby it is regulated that the railways shall be controlled by the State, and its management shall be delegated by a Governmental management body established for such matter: PT. Kereta Api Indonesia (Persero), a state-owned company, had been established and granted the monopoly rights to conduct the public railway business.

However, due to the development of Indonesian’s population and the trend to liberate the railways business, such monopoly rights are no longer available. To enhance the transportation infrastructure development especially in railways sector, Law 23/2007 has been issued to open the opportunities for the private sector, including foreign investors to participate in railways business, with the purpose of accelerating the growth and met the public needs of an available and dependable public railways. By the issuance of Law 23/2007, the Law Number 13 of 1992 regarding Railways has been revoked.

Recently, Wibowo Hadiwijaya & Co (“**WH & Co**”) has assisted a consortium of state-owned companies (“**Client**”) on compiling the regulatory codification and preparing the regulatory framework related to for the participation to the procurement of a specific public railways project. This article highlights the good practice and our methodology for the Client’s participation in public railways sector bidding, on the regulatory basis.

The participation of the private sectors in railways business shall be conducted by the cooperation with the Government, which is known as the Cooperation between the Government and Business Entity concept (Kerjasama Pemerintah dan Badan Usaha – “**KPBU**”). KPBU concept, especially concerning the cooperation in infrastructure procurements, has been renewed and updated with a couple of regulations, which the latest has been updated with PR 38/2015 and specifically for public railways business, with Minister Reg. 15/2016.

It has to be noted that the methodology herein, only concern the management² of the infrastructure and facilities³ of Public Railway projects⁴.

The management of the railways could be conducted by a business entity in the form of state-owned companies, local state-owned companies or Indonesian legal entities specifically formed with the purpose to conduct railways business established under and in accordance with Indonesian laws, including companies with foreign ownership.

² i.e. which includes the procurement, operation and maintenance of the vehicles which will be used as transportation mode, such as locomotives, carts, carriages, and specific apparatus for maintenance

³ i.e. which includes construction, operation and the maintenance of the line of the railways, railway stations, and railways supporting facilities

⁴ i.e. including the management of the railway services used to serve the transportation need of people and/or goods

II. The Management of the Infrastructure and Facilities of the Public Railways Business

The management of the infrastructure shall be conducted by the business entity in cooperation with the relevant Governmental body, such as the Minister of Transportation, the Governor or the Regent/ Mayor, according to their respective authorities.

The management of facilities shall be conducted by the business entity with the party who conduct the management of infrastructure (either the Governmental body or another business entity).

The stages to start the management of infrastructure and facilities of public railways business are as follows:

2.1 The Determination of the Trace Mapping

The business entity shall ensure that the Governmental body has already determined the trace mapping for the proposed railways' line that will be cooperated, before they enter into any concession/cooperation agreement. Such trace mapping shall be adopted by decree issued by the relevant Governmental body⁵ and will be used as the basis for the construction, management and operation of the location of the prospected infrastructure.

2.2 The Appointment of Business Entity

The procurement of the business entity for the KPBU concept shall be conducted in accordance with the provisions of Institution Reg. 19/2015. In general, the procurement of business entity for KPBU could be conducted via bidding or direct appointment, depending on the type and the nature of the project.

2.3 The Concession/Cooperation Agreement

The Governmental body and the business entity shall enter into the agreement regarding the management of public railways infrastructure and facilities, which shall include among others the scope of management, the parties' rights and obligations, management period, etc.

2.4 The Application of Licenses

The basic licenses required to start the management of infrastructure and facilities of public railways business shall be the following:

- 2.4.1 The Management of Infrastructure of Public Railways Business License;
- 2.4.2 The Management of Infrastructure of Public Railways Construction License;
- 2.4.3 The Management of Infrastructure of Public Railways Operation License;
- 2.4.4 The Management of Facilities of Public Railways Business License;
- 2.4.5 The Management of Facilities of Public Railways Operation License.

Each of which shall be applied to the relevant Governmental body as regulated in the Law 23/2007 and GR 56/2009, as also supported with the application of any related licenses such as building permit, location permit, etc.

2.5 The Operation

The operation of the management of infrastructure and facilities of public railways business could be started by the business entity once the business entity has obtained the Management of Infrastructure of Public Railways Operation License and the Management of Facilities of Public Railways Operation License. Whereas to obtain such licenses, the business entity shall prior conduct all of the required steps needed to be completed as based on Law 23/2007 and PP 56/2009.

III. Highlighted Issues Related to the Establishment of Public Railways Business

⁵ based on the national landscaping plan, regional landscaping plan and the national railways master plan

3.1 Government's Contribution

The business entity shall ensure the feasibility and the possibility of the implementation of the Government body's contribution in the concession/cooperation agreement as based on the laws and regulations regarding KPBU.

3.2 Land Procurement

The procurement of plot of lands needed for the management of infrastructure of the public railways business shall be included in the category of the procurement of lands for public interest⁶. The funding of such procurement shall also be obtained from the State's budget, local government's budget and or funding provided by a business entity which then shall be included in the calculation of investment returns.

With the services provided by WH & Co the Client will be able to protect its interest, render any actions necessary, and establish the proper steps to be taken for the establishment and operation of railways project. WH & Co is also ready to further assist and accompany the Client on the bidding process and negotiation process for the implementation of KPBU with the Government body.

WH & Co have the expertise not only on the public railways business, but infrastructure projects in general and has assisted a large variety of clients from state-owned companies to foreign investment companies participating in general infrastructure projects such as toll road development, gas production facility development, housing development, and others.

⁶ such land procurement shall be conducted by the Government, as based on Law number 2 of 2012 regarding the Procurement of Land for the Development of Public Interest