



# Amendment of Guidance on Nuisance Permits

by Alfons Emanuel M.



On 2 May 2016, the Indonesian Minister of Internal Affairs issued regulation No. 22 of 2016 (“**Regulation 2016**”) that amends regulation No. 27 of 2009 on Guidance for the Granting of Regional Nuisance Permits (“**Regulation 2009**”). This amendment aims to catch up with varied provisions on the issuance of nuisance permits under local regulations. There are 3 matters amended by Regulation 2016: (i) criteria of nuisance; (ii) exemption for business activities; and (iii) public access to information regarding the stages and timeline for the issuance of nuisance permits.

## Nuisance Criteria

In general, the term “nuisance” is defined as an event(s) or act(s) which is undesirable or may cause harm to health, safety, equanimity and/or the welfare of the public interest. Therefore, any party or entity intending to engage in activity which may cause such nuisance, must first secure permits from their respective local government. Under Regulation 2016, there are two types of nuisance that require such a permit:

1. social nuisance which covers the threat to moral deterioration and/or public order; and
2. economic nuisance, which refers to any threat to productivity of the local business, and/or an economic downturn in the value of goods around the location in question. *\*Previously, the Regulation 2009 also included environmental nuisance, which covered any potential disturbance to environmental resources, e.g., land, groundwater, river, sea and air, as well as disturbances caused by vibration or noise.*

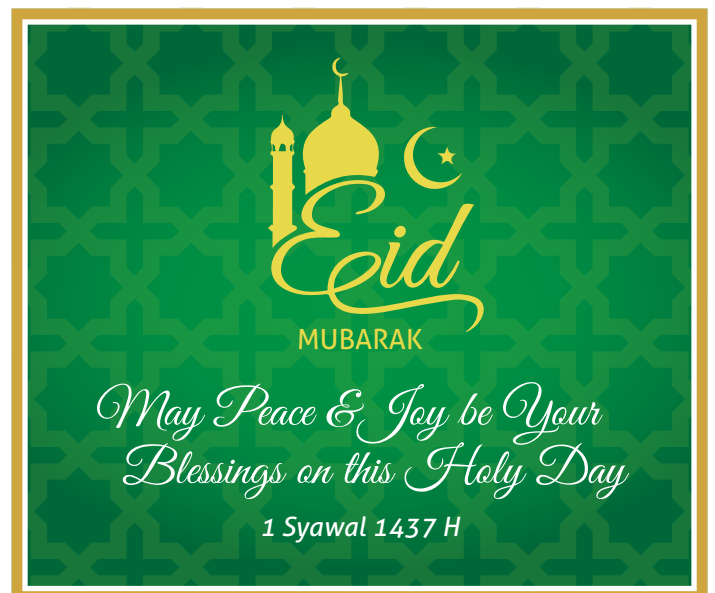
## Exemption from obtaining a Nuisance Permit

Despite the mandatory nature of nuisance permits as explained above, there are exemptions for certain business activities, as follows:

1. business activities located in industrial areas, bonded areas, and special economic zones;
2. business activities which are being managed in a building which has already obtained a nuisance permit;
3. micro-, small-, or medium-scale business conducted in a building or area, the effect of which activity remains within the area in question; or
4. upstream oil and gas business activities. *\*Previously, the Regulation 2009 did not exempt upstream oil and gas business activities from the nuisance permit obligation.*

## Public Access to Information

Under Regulation 2016, public is given access to information regarding the process of obtaining nuisance permits. Such information covers procedures and timelines to secure nuisance permits and business and/or activity plans and their estimated impact on the society. Previously, the information provided also included the environmental impact. However, since Regulation 2016 no longer incorporates environment nuisance within its scope, the reference to environmental impact has also been deleted from this provision as well.



# The Establishment of the Association of Owners and Tenants of Condominium Units

by Febi Jaya Conggih



On 10 May 2016, the Constitutional Court of the Republic of Indonesia (*Mahkamah Konstitusi* or “**MK**”) issued a decree on the request for a review over the provisions of Law No. 20 of 2011 on Condominiums (“**Condominium Law**”) of the Constitution of the Republic of Indonesia Year 1945 (“**UUD 1945**”). MK concluded that the developer must facilitate the establishment of PPPSRS (see below) no later than 1 (one) year since the first delivery of the condominium unit to the owner, even if all the condominium units are not yet sold. This is stated in the Decree No. 21/PPU-XIII/2015.

The claimant requested a review for the clauses related to the establishment of the Association of Owners and Tenants of Condominium Units (*Perhimpunan Pemilik dan Penghuni Satuan Rumah Susun* or “**PPPSRS**”) which are stated in Article 75 paragraph (1), Article 59 paragraph (1) and paragraph (2), as well as its elucidation.

Article 75 paragraph (1) of Condominium Law, which states that “*the developer is obliged to facilitate the establishment of the PPPSRS at the latest before the transition period set forth in Article 59 paragraph (2) expired*”. While Article 59 paragraph (2) of Condominium Law states “*the transition period as stipulated in paragraph (1) is determined not later than 1 (one) year since the first delivery of condominium unit to the owner*.” Pursuant to the elucidation of Article 59 paragraph (2) of Condominium Law, the transition period means a period when condominium units have not been wholly sold.

The role of PPPSRS is very important for the developer because of the benefits obtained by developer in managing the condominium. PPPSRS is responsible for the operation, management, and maintenance of the condominium. It is very important for the developer to intervene in the establishment of PPPSRS because the benefits may be stopped if the PPPSRS is established and all the building management proceeds to PPPSRS.

The above reason is used as an excuse by developers to intervene in PPPSRS establishment, even though it is clear that based on Article 74 paragraph (1) in Condominium Law, the establishment of PPPSRS is an obligation of condominium owners.

In practice, the developer often uses the phrase “to facilitate” not only to provide all facilities and assistance that are necessary for the establishment of PPPSRS, but also to intervene in the management election process of PPPSRS. According to the above provisions, the obligation of the developer to facilitate the establishment of PPPSRS will not end until all condominium units are sold.

MK stated that there is a difference, or conflict, between the content of Article 59 paragraph (2) of Condominium Law and its elucidation in defining the transition period, which can be rationalized by the developer to act as management even though the one-year period has lapsed. Therefore, MK adjudicated that Article 75 paragraph (1) of Condominium Law with regard to the phrase “Article 59 paragraph (2)” violates UUD 1945 and does not have legally binding force as long as it is not construed that “transition period” in elucidation of Article 59 paragraph (1) is not interpreted as 1 (one) year without relating the condition of non-sale over the whole of the condominium units.

In addition, MK also decided that the government should still be responsible for facilitating the establishment of PPPSRS even if the government is not the developer of the commercial condominium. This can be done by the government when it has been proven that the developer has deliberately misrepresented the phrase “to facilitate” in Article 75 paragraph (1) of the the Condominium Law, so that the developer does not facilitate the establishment of PPPSRS.

# Indonesia's New Negative Investment List

by Arien Kartika Sari



The long-awaited new Negative Investment List has finally been issued. Presidential Regulation No. 44 of 2016 regarding the List of Business Fields Closed and Business Fields Conditionally Open for Investment (“**2016 DNI**”) replaces the previous Negative Investment List that had been in effect since 2014.

The ultimate goal of the 2016 DNI is to liberalize some areas of foreign investment in Indonesia, with the aim of increasing Indonesia’s competitiveness in the ASEAN Economic Community, while also providing better protection for strategic economic sectors and small-and-medium-scale enterprises and cooperatives (“**UMKMK**”).

The 2016 DNI classifies Indonesian investment fields into 3 categories:

- a. Closed for investments, specifically business fields which are restricted for all investment activity (either foreign and domestic);
- b. Conditionally open for investments, including:
  - (i) Business fields reserved for UMKMKs, and
  - (ii) Business fields defined by certain requirements, including requirements related to foreign and domestic ownership, ASEAN investments, as well as location and special licensing

- c. Entirely open for investment, which are basically businesses that do not fall into category (a) or (b)

## A. Sectors Closed for Investment

There is no substantial revision to the sectors closed for investment, but 2016 DNI as one new business field that is now closed for both foreign and domestic investment, namely the collection of valuable objects from sunken ships.

## B. Sectors Reserved for UMKMK

The business fields that fall into this category are either reserved for UMKMK or require UMKMK partnership schemes. There is no remarkable change to this category, with a few exceptions:

### 1. Public Works

Only two business fields are reserved for UMKMKs from the public sectors, namely:

- a. construction services which utilize simple technologies, involve low levels of risk, and/or which have a value of up to IDR 50 billion, and
- b. consultation construction services which utilize simple technologies, involve low levels of risk, and/or which have a value of less than IDR 10 billion.

Previously, this restriction encompassed construction services with a value of IDR 1 billion at the most.

### 2. Retail trading

The 2016 DNI now requires online retailers which utilize postal delivery and internet ordering to engage in partnerships with UMKMKs. Previously, this field was open for domestic investment but did not impose any obligation to engage in any partnership schemes with UMKMKs. This business field includes the platform based market place, daily deals, price grabbers and classified advertisements. If the investment value in this business is less than IDR 100 billion, foreign investment is capped at 49%. However, if the investment value is more than IDR 100 billion, then it is 100% open for foreign investment.

### C. Sectors open with conditions for investments

New conditions have been applied to various sectors as detailed below:

#### 1. Energy and Mineral Resources

New sub-businesses that are related to the construction and installation of electrical-power structures were introduced. High or extra-high voltage electrical construction and installation is restricted at maximum 49% foreign investment, while low or medium-voltage electrical construction and installation is reserved for domestic businesses only.

#### 2. Public Works

Foreign investment in construction services which utilize advanced technologies and/or are considered high risk and/or have a value amounting to IDR 50 billion or more, and construction consultation services which utilize advanced technologies and/or are considered high risk and/or have a value amounting to IDR 50 billion or more, are capped at 67% for non-ASEAN countries, or 70% for ASEAN countries.

#### 3. Trade

Under the 2016 DNI, trading has a more relaxed restriction than as previously regulated. Distributors' activities with no affiliation with the production business is now capped at 67% compared to the 33% in previous regulation. While distributors that are affiliated with an affiliated manufacturer are now entirely open to investment. Warehouse businesses are now also capped at 67%. Some businesses, such as cold storage and direct selling through a network developed by a business partner are now entirely open for foreign investment.

#### 4. Tourism and Creative Economy

The 2016 DNI no longer lists film-production services, including production houses, film distribution facilities and recording studios, making this particular field entirely open for investment.

#### 5. Communications and Information Technology

Many investments for businesses in the communication and IT sector have increased from 49% to 67%, namely :

- Operation of content provision telecommunication services (ringtone, premium short message services, etc.)
- Internet service providers
- Information centers (call centers) and other telephone added value services

- Internet interconnection services (network access point) and other multimedia services

#### 6. Finance

Securities companies (*perusahaan penjaminan*), which were previously unlisted, are now restricted to 30% maximum foreign investment. On the other hand, pension funds business is removed from the list, hence this business field is entirely open for investment.

#### 7. Manpower

The business of work training to provide, obtain, enhance and develop work competency, is now open for maximum 67% foreign investment.

#### 8. Health

Some business fields previously restricted are now not listed and thus open for 100% foreign investment, such as industry of pharmaceutical raw materials, consultancy services of business and management and/or hospital management services, rental of medical equipment, and medical check-up clinics/laboratories

# Procedures for the Imposition of Administrative Sanctions on Exporters and Importers

by Athalia Devina



The Minister of Trade has enacted Regulation No. 36/M-DAG/PER/5/2016 concerning Procedures for the Imposition of Administrative Sanctions on Exporters and Importers. This is as mandated in Article 43 (3), 46 (3), and 52 (6) Law No. 7 Year 2014 concerning Trade. Exporters or Importers who violate the provisions of the legislation in relation to export and import will be subjected to administrative sanctions. The imposition of administrative sanctions are based on reports of complaints, results of post-audit, evaluation results, and/or monitoring results. Administrative sanctions will be in the form of written warnings, suspension, freezing or revocation of licenses.. The imposition of administrative sanctions will be implemented gradually and not gradually.

Administrative sanctions that will be imposed gradually are in the form of written warnings, freezing of licenses, and revocation of licenses. This method will be applied if exporters or importers do not carry out the obligation to submit a report concerning export or import activities, whether realized or unrealized, in writing and/or electronically within the prescribed period. If exporters or importers do not fulfil that obligation then they are subject to the first stage of administrative sanctions in the form of a written warning. The imposition of a written warning is at most 2 (two) times. If exporters or importers do not fulfil the obligation after the first stage of administrative sanctions, the freezing of licenses will be applied. Revocation of licenses is the final stage of administrative sanctions. This will be applied if exporters or importers do not carry out this obligation after the second stage of administrative sanctions i imposed.

Administrative sanctions that will not be imposed gradually are in the form of suspension of licenses, freezing of licenses, or revocation of licenses. The imposition of administrative sanctions that will not be imposed gradually are conducted by considering (i) the type of exported or imported goods and/or (ii) violations committed by exporters or importers. Suspension of licenses will be imposed if (i) exporters or importers do not carry out the obligation to submit a report concerning export or import activities whether realized or unrealized, in writing and/or electronically within the prescribed period at most 2 (two) times and/or (ii) exporters or importers are unable to realize the minimum limits of export and import as stipulated in the legislations. Freezing of licenses will be imposed if (i) exporters or importers do not carry out the obligation to submit a report concerning export or import activities whether realized or unrealized, in writing and/or electronically within the prescribed period at most 2 (two) times, (ii) exporters or importers are not responsible for any consequences arising from the exported or imported goods, and/or (iii) there is an allegation of a criminal offense related to the misuse of licenses. Revocation of licenses will be imposed if (i) exporters or importers do not carry out the obligation to submit a report concerning export or import activities whether realized or unrealized, in writing and/or electronically within the prescribed period at most 2 (two) times, (ii) exporters or importers submit data and/or information that is not true as a requirement to get licenses, (iii) exporters or importers modify the information mentioned in licenses, (iv) exporters or importers conduct export or import of goods that is not in accordance with licenses, (v) exporters or importers are not responsible for any consequences arising from the exported or imported goods, and/or (vi) exporters or importers are found guilty by a court decision that has binding legal force for a criminal offense related to the violations of licenses.

Any imposition of administrative sanctions will be submitted to the manager of INATRADE of Ministry of Trade. The manager of INATRADE will block the licenses and publish a public announcement through the portal of INATRADE, which will then be forwarded to the portal of INSW.