

POLICY BRIEF (APRIL 2021)

RISK-BASED BUSINESS LICENSING: A CLOSER LOOK INTO THE NEW LICENSING SYSTEM

1. Background

The Enactment of Law No. 11 of 2020 on Job Creation (“**Job Creation Act**”) introduces several major changes to Indonesian law, especially to statutes and regulations pertaining to business, land, general government administration, and employment. Amongst the changes imposed by the Job Creation Act is the introduction of a new permits and licensing system in Indonesia—a key aspect in business and a detrimental factor in the Ease of Doing Business Index. Articles 8 to 15 of the Job Creation Act and its corresponding implementing legislation, Government Regulation No. 5 of 2021 on Risk-Based Business Licensing (“**GR 5/2021**”) stipulate that all business licenses will be issued under a risk-based approach.

Utilized in varying degrees in other jurisdictions such as the state of New South Wales, Australia and California, in the United States, the risk-based approach is an entirely new beast in business licensing in Indonesia. Accordingly, this policy brief will discuss the conceptual basis of risk-based licensing, what risk factors are involved in deciding risk levels for business activities, and how risk-based licensing is implemented according to existing laws. The overall purpose of this brief is to provide a clear and concise guide for business actors and legal professionals in regards to the new Risk-Based Business Licensing system.

Summary of Key Issues

No.	Issues	Regulations	Notes
1.	GENERAL–Risk-Based Licensing (<i>Job Creation Act, GR No. 5/2021</i>)	Reforms Indonesian licensing systems with a commitment-based system pursuant to GR No. 24/2018. Under GR No. 5/2021, business licenses are qualified into four categories: <ul style="list-style-type: none"> - Low risk (NIB required) - Low-medium risk (NIB + standards commitment); - Medium-High (NIB + standards certificate); - High (NIB + additional license). 	Risk-based licensing is applied throughout for all business-related licenses and applicable to each KBLI.
2.	GENERAL – Online Single Submission	OSS is a single-entry point for all business licenses, and applies	With GR No. 5/2021 revoking GR No.

	<i>(Job Creation Act, GR No. 5/2021)</i>	the risk-based licensing approach.	24/2018, OSS is now in the midst of a systemic change. This might entail uncertainties in the near future.
3.	GENERAL –Expansion of Discretionary Powers for Government Officials <i>(GR No. 5/2021)</i>	Government officials have wider discretionary powers to interpret and implement regulations regarding business licenses in the event regulations are unclear (Art. 561 GR No. 5/2021).	No implementation of this as of yet.
4.	ENVIRONMENT– Replacement of Environmental Permits (Izin Lingkungan) with Environmental Approvals <i>(Job Creation Act, Law No. 32/2009 as amended by the Job Creation Act., GR No. 22/2021)</i>	Environmental Approvals is a government decision/permit given to business actors that require environmental protection measures and commitments for their business activities.	Under current regulations, business actors no longer need to obtain Environmental Permits, and it is only mandatory to acquire a <i>Surat Keputusan Kelayakan Lingkungan Hidup</i> .
5.	SPATIAL PLANNING – Confirmation for Use of Space (Konfirmasi Kesesuaian Pemanfaatan Ruang) <i>(Job Creation Act, Law No. 26/2007 as amended by the Job Creation Act, GR No. 21/2021)</i>	Replacing the location permit (<i>izin lokasi</i>), Confirmations are given to business actors by regional authorities, who are looking to perform certain activities within an area having a detailed spatial plan (RDTR).	Attainable through OSS.
6.	SPATIAL PLANNING – Approvals for Use of Space (Persetujuan Kesesuaian Pemanfaatan Ruang) <i>(Job Creation Act, Law No. 26/2007 as amended by the Job Creation Act, GR No. 21/2021)</i>	Similar to number 5, Approvals are required for certain activities within areas not having a detailed spatial plan (RDTR), and is given by the central government based on a regional spatial plan (RTRW).	Attainable through OSS.
7.	BUILDINGS– Replacement of Building Construction Permit (IMB) with Building Approvals (PBG)	Orang yang ingin membangun gedung perlu memiliki PSB.	Attainable through OSS.

<p>(UU Cipta Kerja, UU No. 28/2002 tentang Bangunan Gedung sebagaimana diubah UU Cipta Kerja, GR No. 16/2021)</p>	<p>Permohonan PSB dilakukan via OSS.</p>	
---	--	--

2. Conceptual Framework

Risk-based licensing is built around the analysis of risk factors pertaining to a certain activity and how the government should approach administering licenses, authorizations, and/or permits to business actors looking to perform said activities. Fundamentally, risk-based licensing is the categorization of factual activities into predetermined risk levels of a certain activity.

As an example, nickel mining would generally involve more substantial risks towards the environment, the health of the local population, and land and/or sea traffic, say, in comparison to the establishment and operation of a department store. Under a risk-based licensing approach, the government would approach the two activities differently, especially in regards to business licensing requirements and operational inspection. Under said approach, the government would have more stringent and strict requirements for mining operations due to the risk factors involved, while opening a department store would not be as difficult.

3. Risk Factors as a Detrimental Factor for Licensing Requirements (Dasar Penentuan Tingkat Risiko or “Risk Factors”)

Article 6 of the Job Creation Act, and Articles 8 and 9 of GR No. 5/2021 recognizes a number of risk factors involved with business activities, as follows:

- Health and safety risks;
- Environmental risks;
- Use and management of natural resources;
- Nature of business activity;
- Criterion for business activity;
- Location of business activity;
- Potential for the exhaustion of resources;
- Volatility risks;

Based on those factors above, a business activity is further analysed on the likelihood of the aforementioned risks to ever happen, into the following categories:

- Extremely unlikely to happen;
- Unlikely to happen;
- Likely to happen;
- Very likely to happen.

Pursuant to the analysis of the likelihood of risk-inducing events to happen, a business activity is further grouped into the following risk predicates:

- Low-risk activity;
- Medium-low risk activity;
- Medium-high risk activity;
- High-risk activity.

A business activity's risk level decides the amount and/or difficulty of requirements a business actor has to fulfil before being allowed to perform said business activity, as discussed in Section 5 below. The Indonesian government prior to the enactment of GR No. 5/2021 had decided the risk levels of all business having an Indonesia Standard Industrial Classification Code (KBLI Code). Such categorizations may be found in detail under Annex I of GR No. 5/2021.

4. Business ID as the entry-point document for Business Licenses

Under the risk-based licensing regime, the Business Identification Number (*Nomor Induk Berusaha – NIB*) ("**Business ID**") exists as one of the most important documents a business should possess. The Business ID is an identification document issued by the Online Single Submission system and exists as a prerequisite for businesses to apply for and fulfil other business licenses, permits, and/or authorizations. The Business ID applies as a Proof of Registration (TDP), Import ID, and Customs ID (Art(s). 8 to 10 of the Job Creation Act, Art. 1(12) of GR No. 5/2021). Under the risk-based system, the Business ID acts as the most basic business license, as seen in Section 1.3. below.

The Business ID exists as long as the business actor continues to perform business activities, though may be revoked if the actor is found to have performed activities outside of those permitted within the ID, violated statues and regulations, liquidation, and/or be revoked by a binding court decision. A business actor may also on their own accord request that their Business ID be revoked (Art. 212 GR No. 5/2021).

5. Risk Levels and Its Implications to Business Licensing

Whereas the Job Creation Act categorizes risk levels for business activities in general, GR No. 5/2021 provides a detailed explanation for business activity risk levels in Indonesia. Business activities are grouped under the Indonesian Standard Industrial Classification (KBLI), where each activity is given a 5-digit code. GR No. 5/2021 explicitly determines the risk-level, and therefore further licensing requirements, of each KBLI activity.¹

5.1. Low-Risk Business Activities

¹ KBLI Codes are regulated via the Director of the Central Statistics Bureau Regulation No. 19 of 2017, further amended by the Director of the Central Statistics Bureau No. 2 of 2020. The latter has not been applied by the OSS.

For business actors looking to perform a low-risk business activity, the only necessary authorization required to register for a business license exists in the form of the Business ID (Art. 8 of the Job Creation Act, Art. 12 GR No. 5/2021). For example, the KBLI Code 47191 for department store activities is stated as a 'low-risk' activity, thus the sole requirement for a business to apply for a Trade License (*Surat Izin usaha Perdagangan*) is the Business ID, in addition to filling OSS forms related to business/project data (Annex I.7.A.95 of GR No. 5/2021).

5.2. Medium-Low Risk Business Activities

Business actors looking to perform a medium-low risk business activity, must complete the following (Art. 9(2) and (4) of the Job Creation Act, Art. 13 GR No. 5/2021):

- Business ID;
- Standard certificate stating that the business actor will be in compliance of industrial standards throughout the operation of the business.

For example, a business actor is looking to do fishing at sea as a business (KBLI Code 03111– finned seafish fishing), an activity that is decided as medium-low risk under GR No. 5/2021. In order for his business activity to be legal, then said business actor must send an application to the Ministry of Maritime and Fishing Affairs (via OSS) for a sea fishing license, with their Business ID and a ministry-provided standards commitment certificate as part of the application (Annex I.1.A.2. GR No. 5/2021).

5.3. Medium-High Risk Business Activities

For those looking to pursue business in activities categorized as 'medium-high risk', they must fulfil the following documentary requirements (Art. 9(3) of the Job Creation Act, Art. 14 GR No. 5/2021):

- Business ID; and
- A standard certificate stating that said business actor has already fulfilled applicable standards for goods and services.

A good example for a medium-high risk activity is a business actor looking to establish and operate a four-wheel automotive industrial activity (KBLI Code 29101). To produce four-wheel automotives, said business actor must receive a Industrial Business License (*Izin Usaha Industri*) from the Ministry of Industry via OSS/SIINAS. Accordingly, the business actor in question must have a Business ID as well as an Indonesian National Standard (*Standar Nasional Indonesia–SNI*) accreditation as well as the consent of the Industrial Estate owners on the products produced (Annex I.6.A.370 of GR No. 5/2021).

Specifically for industrial activities, industrial companies must also fulfil environmental requirements in the form of a Detailed Environmental Management and Protection Plan (*RKL-RPL Rinci*), drafted based on the environmental documents of the Industrial Estate where said factories will be built upon (Art. 11 (3) GR No. 22/2021, Art. 4(1) Minister of Industry Regulation No. 1/2020).

5.4. High-Risk Business Activities

Business actors looking to pursue high-risk business activities must acquire a Business ID, a permit, and in some cases, a standards certificate (Art. 9(3) and (5) of the Job Creation Act, Art. 15 GR No. 5/2021). Although the definition of 'permit' within this context seems vague, it may be clarified with the following example.

Industrial Estate business activities (KBLI Code 68130) have a high risk level under GR No. 5/2021 (Annex I.6.A.463 GR No. 5/2021), where the required permit is an Industrial Estate Business License (*Izin Usaha Kawasan Industri*). However, Industrial Estate Business Licenses in itself require several more preceding permits/licenses/authorization (Art. 10 Minister of Industry Regulation No. 45/2019):

- Environmental Approval (*Persetujuan Lingkungan*) in the form of a Environmental Qualification Decision (*Keputusan Kelayakan Lingkungan Hidup*);
- Confirmation/Approval on Use of (*Konfirmasi/Persetujuan Kesesuaian Kegiatan Ruang*), which are in turn made based on existing detailed city/regional plans and/or detailed regency area plans (RDTR/RTRW); and
- A 'positive' result from field inspection verification as inspected by Ministry of Industry officials, including the fulfilment of Industrial Estate Standards (*Standar Kawasan Industri*), basic infrastructure, and possession of land, among others.

6. Conclusions

Based on the foregoing, we may conclude that although ideally the risk-based licensing system is in many ways a *very good idea*, it is too early to conclude anything in its effectiveness, efficiency, and equity to not only business actors, but also those affected by medium-high to high risk business activities. Regardless, the simplification of requirements and a general catalog of assessments modelled on the risk-based approach, as found under the Annexes of GR No. 5/2021, provides business actors and legal professionals easy access to regulatory risk-levels and requirements for specific business activities.

Moreover, with the entire risk-based licensing system being implemented entirely through electronic means (OSS, SIINAS, etc.), assuming all goes well, the new system would be a luxury previously unattainable for small and large businesses alike. However, as stated earlier in this section, it is much too early to say how the OSS and other electronic permit systems will deal with the major changes brought by the Job Creation Act and its implementing regulations. The OSS has until latest June 2021 to implement said changes

NOVIRIANTI & PARTNERS

(Art(s). 565-566 GR No. 5/2021). Accordingly, with implementing regulations for GR No. 5/2021 still pending in draft, we will never know the full extent and clear-cut technical risks of the new risk-based licensing system until said regulations are put in force.

Author

Rizky Bayuputra, S.H.
Rifqi Mufid Riansyah, S.H.
Abiyyu Ihsan Samudro