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The Indonesian Constitutional Court Ruling on the Omnibus Law: Unconstitutional with Conditions?

Brief Overview

On the 25th of November 2021, under its final and binding ruling No. 91/PUU-XVIII/2020 (“**Ruling**”), the Indonesian Constitutional Court (*Mahkamah Konstitusi* - “**Court**”) ruled on an application for a judicial review of Law No. 11 of 2020 on Job Creation (commonly known as the “**Omnibus Law**”) – a law which (i) changed 78 Indonesian laws; and (ii) has been implemented by 51 implementing regulations across different sectors in hopes of boosting investment and making doing business in Indonesia easier.

In the Ruling, the Court concluded that the formation of the Omnibus Law is **procedurally flawed** (*cacat formil*) and ruled, among other things:

- *To declare the formation of Law No. 11 of 2020 on Job Creation (State Gazette of the Republic of Indonesia of 2020 No. 245, Supplement to the State Gazette of the Republic of Indonesia No. 6573) to be in conflict with the Constitution of the Republic of Indonesia of 1945 and **conditionally will have no legally binding force as long as it is not interpreted as “not revised within two (2) years of this ruling being pronounced”**;*
- *To declare Law No. 11 of 2020 on Job Creation (State Gazette of the Republic of Indonesia of 2020 No. 245, Supplement to the State Gazette of the Republic of Indonesia No. 6573) **still in effect** until the revision of its formation within the grace period provided in this ruling;*

- To order the legislators to make revisions within two (2) years of this ruling being pronounced and if within the grace period no revisions are made, Law No. 11 of 2020 on Job Creation (State Gazette of the Republic of Indonesia of 2020 No. 245, Supplement to the State Gazette of the Republic of Indonesia No. 6573) will **become permanently unconstitutional**;
- To declare that if within the two (2) year grace period the legislators cannot complete the revision of Law No. 11 of 2020 on Job Creation (State Gazette of the Republic of Indonesia of 2020 No. 245, Supplement to the State Gazette of the Republic of Indonesia No. 6573), **the laws or articles or content of laws that have been revoked or amended** by Law No. 11 of 2020 on Job Creation (State Gazette of the Republic of Indonesia of 2020 No. 245, Supplement to the State Gazette of the Republic of Indonesia No. 6573) will be declared to be **re-enacted**;
- To declare the suspension of all actions/policies that are strategic in nature and have a far-reaching impact, including a **prohibition against issuing new implementing regulations** related to Law No. 11 of 2020 on Job Creation (State Gazette of the Republic of Indonesia of 2020 No. 245, Supplement to the State Gazette of the Republic of Indonesia No. 6573).

”

The Court found that the formation in the Omnibus Law does not comply with the Constitution and Law No. 12 of 2011 on the Formation of Laws and Regulations as lastly amended by Law No. 15 of 2019 on the same subject (“**Law No. 12/2011**”) resulting in a procedural flaw. As the Court considers Law No.12/2011 a delegation of the Constitution, examining the Omnibus Law in relation to Law No. 12/2011 is still within the framework of a judicial review applied for to the Court.

To determine the procedural flaw, the key problems considered by the Court in its Ruling include, among others:

- (i) the uncertainty of whether the Omnibus Law is new, amending or revoking legislation under Law No. 12/2011;
- (ii) the significant changes to the substance of the Omnibus Law after the joint approval of the House of Representatives (*Dewan Perwakilan Rakyat*) and the President; and
- (iii) the lack of the maximum possible and meaningful public participation in the formation of the Omnibus Law.

MOVING FORWARD – POSSIBLE IMPLICATIONS

Despite the exposure and many concerns about this new Ruling, for now, and at least until 25th of November 2023, the Omnibus Law, together with all its already issued implementing regulations, remains in effect, valid and legally binding.

However, one major impact of the Ruling is the suspension of the further issuance of implementing regulations of or relating to the Omnibus Law, presumably, until the necessary revisions have been made. This vacuum of implementing regulations may cause uncertainty and confusion in the implementation and practical application of the Omnibus Law, which consequently may affect future investments in Indonesia. For example, the risk-based licensing system introduced by the Omnibus Law may return to the previous licensing regime if the Omnibus Law is eventually declared 'permanently unconstitutional'. What will happen to the licenses or approvals obtained under the Omnibus Law has not yet been determined, although their being declared invalid is unlikely. However, adjustments to these licenses or approvals may be required. Nevertheless, it is still a risk that investors and potential local business entrepreneurs need to consider.

The government and the House of Representatives have stated in the news that they respect the Ruling and will adjust the Omnibus Law accordingly, but have not made any definite promise as to when and to what extent the revisions of the Omnibus Law will be made as the Ruling does not specify what revisions of the Omnibus Law must be included.

We will continue to observe and follow up on the implementation of the Ruling by the government and legislature and at the practical level ie, in the Online Single Submission System, the Ministries and decisions of the Indonesian courts on disputes or matters related to the Omnibus Law, including on industrial relations disputes.



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