

New Job Creation Law Finally Passed

9 October 2020



Introduction

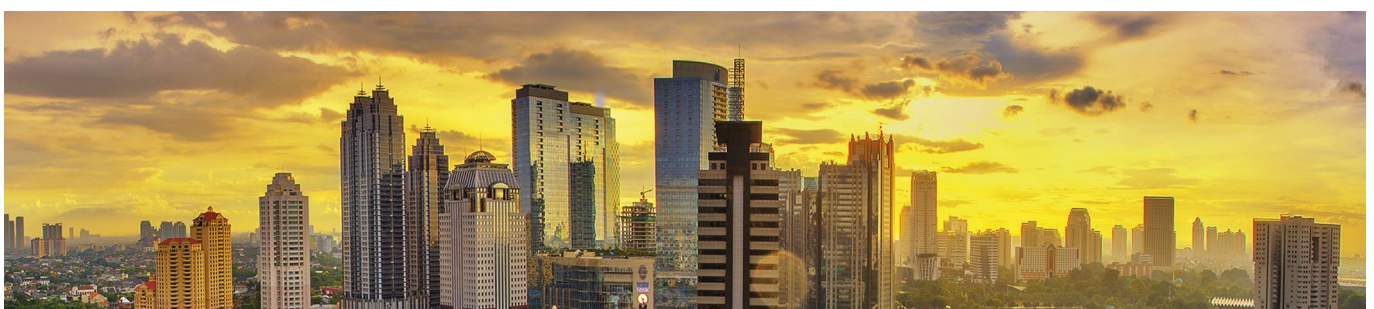
On 5 October 2020, the Indonesian Parliament passed¹ the long awaited Omnibus Law on Job Creation (“**Job Creation Law**”) designed to promote investment and economic growth. This omnibus law contains the most significant legislative reforms to the Indonesian investment framework in recent years, in particular aimed at significantly easing investment and licensing restrictions. It also introduces some controversial amendments to Indonesia’s antiquated manpower laws in order that Indonesia can better compete with other countries in the region to attract labour-intensive foreign investment.



How this affects you

This new Job Creation Law will impact on all investors – foreign and domestic – to some degree. As the centre piece of President Joko Widodo’s proposed legislative reforms during his second term, it foreshadows some of the most sweeping reforms to the Indonesian investment landscape in recent years, particularly with respect to foreign investment policies, business licensing and manpower laws.

However, as with all Indonesian legislative reforms, the extent of the impact will only be known once the requisite implementing regulations are issued. These are understood to be in an advanced state of development and it is expected that the finalisation and issuance of these implementing regulations will be a key focus of the Government for the balance of this year. We have highlighted below certain key changes signalled by Government officials in recent weeks that are expected to be introduced through these implementing regulations.



¹ To be officially enacted, the Job Creation Law must first be signed by the President and promulgated. This publication is prepared based on the latest publicly available version of the Draft Job Creation Law ratified by the Indonesian Parliament.



Outline of Key Provisions

General overview

As an omnibus law, this Job Creation Law is an umbrella law that seeks to amend, supplement and/or revoke a number of existing laws in the pursuit of the law's overarching objective - the promotion of investment and the creation of jobs through economic growth. The Job Creation Law amends or revokes some existing laws for this purpose.

In this publication, we have outlined the key general reforms introduced through the Job Creation Law, being:

- > new regulatory framework on investment;
- > simplification and centralisation of business licensing;
- > manpower law reforms; and
- > land-related reforms.

In subsequent publications, we will focus on specific and sectoral reforms introduced through this 900+ page Job Creation Law.

The Job Creation Law requires that the necessary implementing regulations (along with amendments to implementing regulations of those laws amended by the Job Creation Law) must be issued within three months as of the enactment date of the Job Creation Law. However, during the Government's recent press conference on the Job Creation Law on 7 October 2020, the Government committed to issue the 35 government regulations and five presidential regulations to implement the Job Creation Law within one month.

New regulatory framework on investment

The Job Creation Law foreshadows a significant change in the foreign investment framework in Indonesia, however the full impact of this new framework will depend on the issuance of a new presidential regulation (the “**Positive List**”) to replace the current foreign ownership limitations contained in Presidential Regulation No. 44 of 2016 (the “**Current Negative List**”).

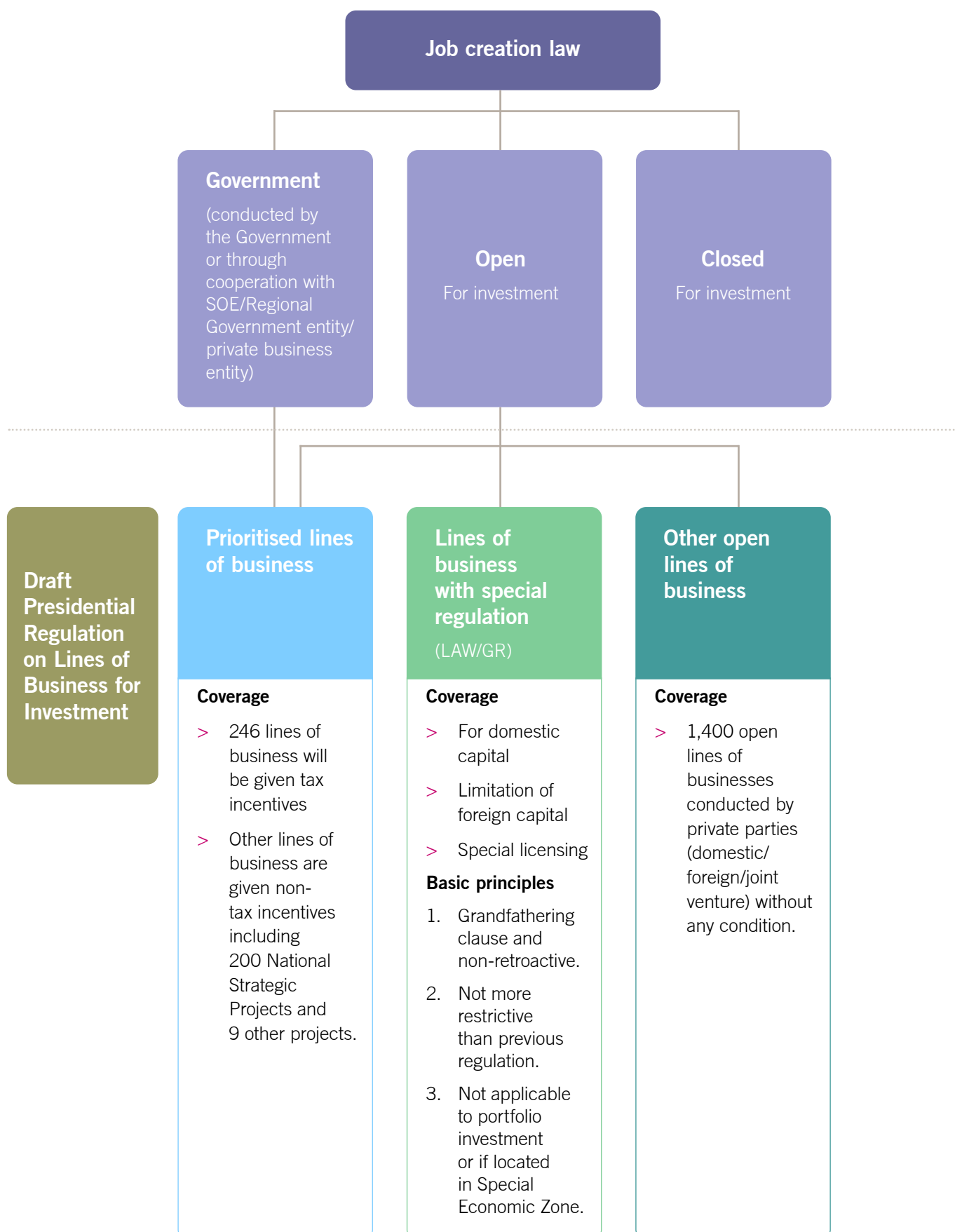
The new investment framework established through the Job Creation Law contemplates:

- > In general, there will be six business sectors which will be fully restricted for either foreign or domestic investment, being narcotics cultivation and industry, fishing of prohibited species, coral extraction, gambling and casino business in all forms, chemical weapons and manufacturing of industrial chemical or materials hazardous to the ozone layer.
- > Other business sectors will be categorised as ‘open’ for investment and set out in the Positive List. There will be three classifications for these ‘open’ businesses, being:
 - > prioritised business sectors – these businesses will be entitled to tax and non-tax incentives;
 - > conditionally open business sectors – these will include: (a) businesses reserved for domestic investment; (b) business conditionally open for foreign investment; and (c) business with special licensing; and
 - > unconditionally open business sectors, being those unconditionally and fully open for both foreign and domestic investment.



This new framework is further illustrated in the diagram below which was released by the Government during a recent socialisation of the new Indonesian business classifications (“KBLI”).

Investment priority list



These classifications generally follow similar classifications as the Current Negative List where there remains the concept of ‘conditionally open’ and ‘unconditionally open’ lines of business. However, the new framework established by the Job Creation Law, and the introduction of a concept of a Positive List, appears intended to emphasise the significant opening up of business lines for foreign investment anticipated under the Job Creation Law. During a recent socialisation of the new KBLI, Government officials have indicated that there will be more than 1,400 business sectors that the Government will open up for foreign investment through the new Positive List. However, to date, there are limited details of the lines of business expected to be opened up to foreign investment; this detail will be set out in the Positive List once released.



Simplification and centralisation of business licensing

In order to enhance the ease of doing business, the Job Creation Law adopts a risk-based business licensing methodology which categorises business licensing based on the risk factors associated to the relevant business activities. The assessment of the business risks considers the aspects of health, security and safety, environment, utilisation of resources and volatility risks, by calculating the type, criteria, location and the limited resource availability of the relevant business activities. Based on the assessed risk level, the Job Creation Law sets out the type of licence required for the business activity, with the lowest risk activities simply requiring a business registration number, the medium risk activities also requiring standard certification compliance and only the high risk activities requiring a business licence. In all cases, the registrations, certification compliance and licences would be issued or regulated by the Central Government. This new licensing framework can be illustrated as follows:

Risk Level	Licence Required
Low	Business Registration Number (<i>Nomor Induk Berusaha</i> “ NIB ”)
Medium Low	> NIB > Standard certification statement
Medium High	> NIB > Standard certification fulfilment
High	> NIB > Licence (issued by the Central Government) > Standard certification (if required)





Manpower law reforms

The most controversial aspect of the Job Creation Law is the reforms to Indonesia's manpower laws, which have long been seen as antiquated and overly employee friendly relative to Indonesia's peers in the region. These changes have resulted in mass demonstrations since the passing of the Job Creation Law and bring with them a significant prospect of Constitutional Court challenge.

We have summarised the key changes below.

Expatriate

The Job Creation Law suggests that the employment of an expatriate would only be based on an expatriate utilisation plan (*Rencana Penggunaan Tenaga Kerja Asing*, “**RPTKA**”) approved by the Ministry of Manpower. Previously, in addition to RPTKA, the employer must also obtain a permit to employ the expatriate. The Job Creation Law also provides that RPTKA is not required for an expatriate who is, among others: a director or a commissioner of a company who is also its shareholder; a diplomat or consular official of an embassy; employed in a start-up; on a business visit; or undertaking research for a certain period of time.

Similar to the Manpower Law, an expatriate may be employed in Indonesia only in certain positions and for a definite term, which are to be further regulated in a government regulation.

Fixed-term employment contract

The Manpower Law limited the term of a fixed-term employment contract (known as *Perjanjian Kerja Waktu Tertentu*, “**PKWT**”) to two years plus a one-year extension, and permitting a renewal of up to two years only after a break. The Job Creation Law now removes the express limit on the term for a PKWT. As a result, a PKWT now simply needs only to provide for the specific time period of the contract (without being limited by the previously prescribed specific limits), or be expressed as “until the completion of the specified work”.

While the quantitative time limit has been deleted, it remains the case that a PKWT is intended for certain types of work or jobs that are intended to be completed within a certain time period. Due regard will still need to be given to the qualitative measures that have been retained, including that the contracted work should be such that it would not take inordinately long. Further provisions on PKWT will be regulated in a government regulation.

Another significant change introduced under the Job Creation Law is that now the employer must pay a compensation sum to the fixed-term employee at the end of the term of the PKWT (and not only where the PKWT is terminated early). The Job Creation Law does not specify the amount of such compensation sum, and instead stipulates that further provisions on such compensation to be paid to the fixed-term contract employees will be regulated in a government regulation.

Outsourcing

The Omnibus Law gives more flexibility for a company to outsource some of its work to a third party given that it removes the previous criteria for work that is permitted to be outsourced. Under the Manpower Law, a company was only allowed to outsource its non-core activities.

However, in affording this greater flexibility, the Job Creation Law retains the greater protection for outsourced employees under manpower outsourcing as previously regulated under Ministry of Manpower regulations on outsourcing. The Job Creation Law obliges the work contract between the outsourcing company and the outsourced employee to be drawn up in a written agreement. Further, the employee's protection, wage, employment term and employment dispute mechanism must be at least in line with those prescribed under the laws and regulations, and these are the responsibility of the outsourcing company. If the outsourced employee is employed for a definite period, the relevant contract must include a requirement to also assign the employee's protection if there is a change in the employing outsourcing company. Lastly, the outsourcing company must be a licensed legal entity.

Working hours

The Job Creation Law prescribes similar working hours as provided under the Manpower Law, namely:

- > seven hours/day and 40 hours/week for six working days in a week; or
- > eight hours/day and 40 hours/week for five working days in a week.

However, the Job Creation Law increases the maximum hours for overtime to four hours/day and 18 hours/week – previously the maximum overtime permitted under the Manpower Law was three hours/day and 14 hours/week. The employer must pay the overtime to the employee. The maximum working hours requirement is not applicable to certain sectors, which will be further regulated under a government regulation.

Minimum wage

Under the Job Creation Law, the Governor must stipulate a provincial minimum wage and may stipulate a city/regency minimum wage (which must be higher than the provincial minimum wage). Further requirements on the minimum wage will be stipulated under a government regulation.

The Job Creation Law removes the provision under the Manpower Law that the employer may defer the minimum wage payment, but it also removes the requirement that the employer may be fined for delaying payment of wages to its employee(s).

Micro and small-scale businesses are excluded from the obligation to apply the minimum wage. The wage for micro and small-scale businesses shall be agreed between the employer and the employee and will be further regulated in a government regulation.

The employer must pay the wages based on the agreement with its employee, provided that the wage must not be lower than the regulatory minimum wage, or the agreement will be considered null and void.

Leave

The Job Creation Law no longer recognises long leave entitlement for employees who have been working for six years consecutively as currently provided in the Manpower Law. The Job Creation Law classifies this as an optional right based on the employer's discretion.

Termination and grounds of termination

Similar to the Manpower Law, the Job Creation Law requires agreement of the employee to terminate their employment relationship. Failing agreement, the parties must go through mediation and if the mediation process fails, then the termination must be referred to the industrial relations court.

However, unlike the Manpower Law, the Job Creation Law does not expressly require the employer to take every effort to avoid termination, including to first discuss the termination with the labour union or the employee. Under the Job Creation Law, the employer is still generally required to avoid any termination, but if the termination is inevitable, the employer should simply notify the reason for the termination to the labour union or the employee. Thereafter, the termination procedures mentioned above shall apply.

During the dispute, the employer will remain obliged to fulfil its obligations towards the employee, including to pay employee's wages.

The Job Creation Law provides more extensive grounds of termination, among others:

- > Merger (*penggabungan*), acquisition (*pengambilalihan*), consolidation (*peleburan*) or separation (*pemisahan*) – the Job Creation Law does not include “change of status” of the company as a ground of termination. It now uses the term “acquisition” rather than “change of ownership”, although it has always been understood that only a change of ownership resulting in a direct change of control (i.e. an acquisition) should trigger severance under the Manpower Law.
- Another significant change under the Job Creation Law is that it removes the employee's right to terminate its employment relationship with the employer in the event of merger, acquisition, consolidation or separation.
- > Efficiency – this is a very significant change, as it introduces the possibility for an employer to make employees redundant for efficiency reasons. This was not available under the Manpower Law; a limitation that has historically been viewed as one of the most significant shortcomings of the Manpower Law.
- > Cessation of business of the employer due to losses – this right was available in the Manpower Law, although the Job Creation Law removes the requirement that the financial loss must have been incurred for two consecutive years.
- > Cessation of business of the employer due to force majeure.
- > If the company is under a suspension of debt payment obligation (*Penundaan Kewajiban Pembayaran Utang*, “PKPU”).
- > If the employee violates the employment contract, the company regulation or the collective labour agreement applicable to them – the Job Creation Law removes the requirement for the employer to first issue three warning letters to the employee.

The employment contract, company regulation and collective labour agreement may provide for additional termination grounds in addition to the grounds provided under the Job Creation Law.

Severance payment

Under the Job Creation Law, termination of an employee by the employer will give rise to an employee's right to claim termination benefits consisting of severance pay and/or service pay and compensation.

As a general proposition, the Job Creation Law prescribes the basic framework and formula for the calculation of severance pay, service pay and compensation, which is based on the employee's monthly salary and years of service. Unlike the Manpower Law, the Job Creation Law no longer distinguishes between the calculation of the termination package based on the various termination grounds – under the Manpower Law, some termination grounds triggered two times (2x) the applicable severance component of the termination package. This distinction is no longer expressly recognised under the Job Creation Law, although it is possible that this distinction could be reintroduced in the government regulation in elaborating on the calculation of termination benefits for different termination grounds. This upcoming government regulation is expected to set out more details on the various termination grounds which are subject to severance payment and the calculation of the applicable termination package.

Further, unlike the Manpower Law, the compensation for housing and medical expenses (set at 15% of the combined severance and service components) is no longer included as part of the compensation formula under the Job Creation Law.

The most fundamental and highly criticised provision of the Job Creation Law is that the severance pay and service pay calculation now serves as the “maximum” termination package instead of the “minimum” termination package as previously provided under the Manpower Law. In practice, an employee is unlikely to readily accept less than the maximum, however it is not clear how this requirement would be treated by the industrial relations court if the employer would like to insist on paying less than the maximum and take the matter to court.

Unemployment benefits

The Job Creation Law introduces new (premiums based) unemployment benefits through the new social security programme in addition to health, work accident, old age, pension and death benefits.





Land related matters

Spatial planning

The Job Creation Law imposes an obligation on the Regional Government to issue a Detailed Spatial Planning (*Rencana Detail Tata Ruang*, “**RDTR**”). The Central Government will integrate such RDTR on the business licensing electronic system. To apply for a business licence, the applicant will need to submit an application for the conformity of the spatial planning with its business activity through the business licensing electronic system by providing the coordinates of the location.

Land bank

The Central Government will establish the land bank body to manage the land for: (i) public interest; (ii) social interest; (iii) national development; (iv) equal distribution of economy; (v) land consolidation; and (vi) land reform. The land managed by the land bank body is under an overarching land title known as the Right to Manage (*Hak Pengelolaan*, “**HPL**”) form of land title, and the land bank body will then coordinate and approve the grant of other land titles² to, or the use of the land under land utilisation agreements by, investors and other parties for the purposes set out above.

Granting of rights for the space above and below ground surface

The Job Creation Law introduces the concept that land or space above or below the surface can be utilised. Separate land titles to such space can be granted to a party that is different from the holder of the land title over the surface land. The boundary will be based on the land building coefficient, floor building coefficient, spatial planning and depth utilisation boundary. This will be further governed by a government regulation.

Revocation of land rights

Any land rights, licence or concession upon land plots which are not utilised within two years from the date that it is granted will be revoked. There is no further explanation on what indicator will be used to justify the utilisation of the land. The provision on this revocation of land right will be further regulated in a government regulation.



² Right to Cultivate (*Hak Guna Usaha*, “**HGU**”), Right to Build (*Hak Guna Bangunan*, “**HGB**”) and/or Right to Use (*Hak Pakai*)

Key contacts

For further information, please contact:



David Holme

Senior Foreign Legal Advisor, Jakarta
Tel: +62 21 2995 1509
david.holme@linklaters.com



Karen Phang

Senior Foreign Legal Advisor, Jakarta
Tel: +62 21 2995 1539
karen.phang@linklaters.com



Adrian Pranata

Partner, Jakarta
Tel: +62 21 2995 1524
adrian.pranata@linklaters.com



Alan Frederik

Partner, Jakarta
Tel: +62 21 2995 1574
alan.frederik@linklaters.com



Yolanda Hutapea

Partner, Jakarta
Tel: +62 21 2995 1596
yolanda.hutapea@linklaters.com



Arie Priadhi

Managing PSL, Jakarta
Tel: +62 21 2995 1551
arie.priadhi@linklaters.com



Abu Dhabi | Amsterdam | Antwerp | Bangkok | Beijing | Berlin | Brisbane* | Brussels | Cape Town*** | Dubai | Düsseldorf
Frankfurt | Hamburg | Hanoi* | Ho Chi Minh City* | Hong Kong SAR | Jakarta** | Jeddah^Δ | Johannesburg*** | Lisbon | London
Luxembourg | Madrid | Melbourne* | Milan | Moscow | Munich | New York | Paris | Perth* | Port Moresby* | Riyadh^Δ | Rome
São Paulo | Seoul | Shanghai^{ΔΔ} | Singapore | Stockholm | Sydney* | Tokyo | Warsaw | Washington, D.C.

* Office of integrated alliance partner Allens

** Office of formally associated firm Widyawan & Partners

*** Office of collaborative alliance partner Webber Wentzel

^Δ Office of Zamakhchary & Co. Linklaters in agreement with Zamakhchary & Co.

^{ΔΔ} Linklaters Shanghai and Linklaters Zhao Sheng (joint operation office with Zhao Sheng Law Firm)

linklaters.com
widyawanpartners.com



Linklaters LLP is a limited liability partnership registered in England and Wales with registered number OC326345. It is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of the LLP or an employee or consultant of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP and of the non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ, England or on www.linklaters.com and such persons are either solicitors, registered foreign lawyers or European lawyers. Please refer to www.linklaters.com/regulation for important information on our regulatory position. LIN.LAT.2206.20.