



July 12, 2023

**BSA Comments on Ministry of Finance Regulation  
No. 190/PMK.04/2022**

**Respectfully to: Pak Suahasil Nazara, Vice-Minister of Finance**

On behalf of BSA | The Software Alliance (**BSA**),<sup>1</sup> we send you our sincere regards. BSA is the leading advocate for the global software industry before governments and in the international marketplace. BSA members are at the forefront of data-driven innovation that is fueling global economic growth, including cutting-edge advancements in artificial intelligence (**AI**), machine learning, cloud-based analytics, and the Internet of Things. We thank you for past discussions on the Ministry of Finance (**MOF**) Regulation No. 190/PMK.04/2022 (**PMK 190**) at the Financial Services and Information Technology Mission organized by the American Chamber of Commerce in Jakarta on March 14, 2023.

BSA is a strong supporter of Indonesia's efforts to advance its digital transformation goals, including those identified in Indonesia's 2022 G20 Host Year. As such, we are concerned that advancing PMK 190 will frustrate and undermine these goals, including Indonesia's goals to: (1) "achiev[e] the true potentials from the rapid digitalization of the global economy"; (2) leverage digitalization to achieve a "stronger, inclusive and collaborative" global economic order; (3) "accelerat[e the integration] of MSMEs into the digital ecosystem, digital entrepreneurship, and revitaliz[e] the role of women in the workplace by increasing digital capabilities."

Unfortunately, the unilateral self-imposition of customs filing requirements and/or duties on Indonesia's own access to knowledge, digital tools, and software will harm no country more than Indonesia. Cross-border access to knowledge, digital tools, and enterprise software (including industrial software, design software, accounting software, productivity software, etc.) are needed for Indonesian students to learn, Indonesian innovators to innovate, and Indonesian enterprises to compete in a globally interconnected world.

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<sup>1</sup> BSA's members include: Adobe, Alteryx, Altium, Amazon Web Services, Atlassian, Autodesk, Bentley Systems, Box, Cisco, Cloudflare, CNC/Mastercam, Dassault, Databricks, DocuSign, Dropbox, Graphisoft, IBM, Informatica, Juniper Networks, Kyndryl, MathWorks, Microsoft, Nikon, Okta, Oracle, Prokon, PTC, Rockwell, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

By raising the costs (whether directly or indirectly) for its own citizens, students, innovators, and enterprises to access the same 21<sup>st</sup> Century tools than others readily have, Indonesia threatens to undermine its own goals relating to “the digital ecosystem, digital entrepreneurship, and... [digital inclusion] by increasing digital capabilities.” Indeed, given the power of digital tools and software to advance economic development and environmental priorities,<sup>2</sup> PMK 190 could also have the unintended effect of undermining Indonesia’s own efforts to work towards the UN’s 2030 Sustainable Development Goals. In short, PMK 190 will impede Indonesia’s own access to knowledge, digital tools, and software, thus threatening Indonesia’s own populations with significant long-term costs and disadvantages. We urge you to reconsider this course of action.

## **PMK 190 Will Harm Indonesian Enterprises**

PMK 190 imposes customs obligations on the import of intangible goods, requiring importing companies to make a customs declaration and pay the customs tariff which is currently set at zero percent. Imposing these new documentation and duty requirements on electronic transmissions will significantly increase the administrative and compliance burdens to businesses and end-consumers.

PMK 190 is targeted at enterprise software (also referred to as business-to-business or B2B software). However, enterprise software plays a critical role in enabling the operations of other companies. It helps organizations of all sizes and across all industries to operate more safely and efficiently, enhance product and service development, and increase opportunities to innovate and grow.

To compete in today’s global economy, local industries need cross-border access to best-in-class digital tools. When local industries are faced with higher costs of accessing valuable information or digital tools from abroad, they suffer competitive harms, as they bear expenses and disadvantages that their foreign competitors do not. Furthermore, as data-related restrictions (such as customs duties on electronic transmissions) impose an unnecessary burden on industries operating in the countries that impose those restrictions, such restrictions also undermine those countries’ attractiveness as a destination for investment, and research and development.

Access to digital tools and software is essential to the interests of millions of Indonesian workers and their employers. We urge you to reconsider PMK 190, given its effect of impeding access for these workers and enterprises to the tools that they need.

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<sup>2</sup> See e.g., Global Data Alliance, Cross-Border Data Transfers & Economic Development (2022), at: <https://globaldataalliance.org/wp-content/uploads/2021/07/05062021econdevelopments1.pdf>; Global Data Alliance, Cross-Border Data Transfers & Environmental Sustainability (2023), at: <https://globaldataalliance.org/wp-content/uploads/2023/04/04192023gdacbdtsustainability.pdf>

## **PMK 190 Will Undermine Indonesia’s Broader Goals Relating to the Digital Ecosystem, Digital Entrepreneurship, and Digital Inclusion**

Digital tools and software support a wide range of organizations, including SMEs and large companies; local and central governments; hospitals, schools and universities; and non-profits. By targeting enterprise software,<sup>3</sup> PMK 190 imposes additional costs on the entire spectrum of organizations, from the private sector, public sector and non-profit sector; and from the start-ups and MSMEs to large multinational organizations.

First, PMK 190 will place unnecessary burdens on Indonesia’s ecosystem for software and technology start-ups, and its ability to attract investment and to compete with peer nations. Indonesia risks hobbling its local software enterprises and making itself less attractive (in both absolute and relative terms) to foreign investment in software development and other emerging technologies. While one of Indonesia’s policy objectives may be to protect the local software industry,<sup>4</sup> PMK 190 is likely to do more harm than good – even in this single sector.

Second, PMK 190 may have knock-on effects that include dampening innovation for startups and hampering SME efforts across the economy. PMK 190 imposes unnecessary costs on all sectors and organizations that rely on imported software for their business operations. Dynamic effects also extend beyond enterprises to local educational, health, and research organizations – and to students, patients, and other constituents – due to reduced access to critical knowledge, digital tools, and software.

## **PMK 190 Will Isolate Indonesia from Global Knowledge Exchange and Cross-Border Digital Ecosystems**

Indonesia should be wary of arguments that it will benefit by restricting its own access to knowledge, information, and digital tools from abroad, such as by imposing customs requirements under measures like PMK 190. Studies from UNCTAD, UNESCAP, the Asian Development Bank, the OECD, and other organizations underscore the importance of ensuring open and continued cross-border access to knowledge, information, and digital tools. A broad body of research by international organizations indicates that: (1) cross-border access to information and digital tools is critical to achieving developmental objectives; and (2) harms to local populations from restrictions (such as customs duties imposed on knowledge and information) could be severe and long-lasting – unnecessarily exacerbating the “digital divide.”

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<sup>3</sup> Tariff lines that fall under enterprise software include HS Codes 9901.10.00 (Operating system software), 9901.20.00 (Application software), 9901.40.00 (Supporting or driver data, including design for machinery system), and 9901.90.00 (Other software and digital product). See Figure 1 of Indonesia’s Communication to the WTO General Council: [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=290374&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=290374&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True)

<sup>4</sup> See Section 2.3 of Indonesia’s Communication to the WTO General Council.

## Customs Declarations Remains a Burden, Even if the Tariff is Set at Zero Percent

While the tariff is currently set at zero percent, the customs declaration remains an administrative burden. Moreover, the lack of written clarification on the entities that are required to make the declaration as well as the types of intangible goods affected results in confusion for buyers of software from outside Indonesia.

If the MOF intends to rely on the customs declaration for information to assess digital risks such as tax avoidance, intellectual property rights infringement or transnational crime,<sup>5</sup> these may be better addressed by existing measures, such as declarations on value-added tax (VAT). Further, the collection of relevant statistics can similarly be achieved through declarations on VAT.<sup>6</sup>

Additionally, we urge the MOF to be very cautious regarding plans to impose customs duties in the future. Supposed customs revenue gains from imposing customs duties are illusory. One economic report examined the potential gross domestic product (GDP) impacts of such duties across selected markets. That report concluded that GDP losses would dwarf the value of customs duties collected by 160 times for Indonesia, 49 times for India, and over 25 times for South Africa, when the risk of retaliatory or corresponding duties imposed by other countries is taken into account.<sup>7</sup>

## PMK 190 Creates International Trade Legal Compliance Concerns

At a time of ongoing WTO digital trade negotiations and uncertainty in the global trading system, we urge Indonesia not to create unnecessary legal exposure for itself by imposing customs duties or other requirements on electronic transmissions. PMK 190 and Regulation No.17/PMK.010/2018 (**Regulation 17**) raise several legal concerns.

First, customs requirements and duties are authorized only on goods subject to the General Agreement on Trade in Goods – not on services covered by the General Agreement on Trade in Services (**GATS**). Many of the digital tools and software that Indonesia has itemized in Regulation 17 and PMK 190 qualify as services in WTO GATS Schedules, including accounting software services, cybersecurity software, and various other enterprise software services.

Second, imposing customs requirements and duties on imported digital services or foreign enterprises - while exempting domestic digital services or domestic enterprises – raises questions regarding consistency with GATT and GATS national treatment obligations.

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<sup>5</sup> See Section 2.3.5 of Indonesia's Communication to the WTO General Council.

<sup>6</sup> See Section 2.3.1 of Indonesia's Communication to the WTO General Council.

<sup>7</sup> See e.g., Andrea Andrenelli and Javier Lopez Gonzalez, "Electronic Transmissions and International Trade – Shedding New Light on the Moratorium Debate," OECD (November 2019); Hosuk-Lee Makiyama and Badri Narayanan, "The Economic Losses from Ending the WTO Moratorium on Electronic Transmissions," European Centre for International Political Economy (August 2019).

Third, the nature of electronic transmissions, which often consist of data packets transiting multiple servers in multiple jurisdictions, makes country of origin determinations difficult – if not impossible. It is unclear how Indonesia would ensure proper and valid customs origin determinations that are consistent with international legal practice.

Fourth, PMK 190 and Regulation 17 raise questions under the WTO Agreement on Customs Valuation. Among other things, it is unclear whether Indonesia's proposed rules would seek to assess value on the basis of the medium on which content is contained, such as an optical media disk. The value of the "transmissions" themselves (which would represent the corresponding medium to an optical media disk) would appear to be zero or extremely negligible. PMK and Regulation 17 do not indicate, however, that Indonesia will follow this accepted international customs valuation practice.

Finally, beyond the legal determinations of customs origin and customs valuation, Indonesia would also need to demonstrate that PMK 190 and Regulation 17 meet international legal requirements in other areas as well: (1) classification under the Harmonized Schedule, (2) procedures regarding suspension of release and formal release, (3) procedures regarding articles "in transit" vs. being entered "for consumption," (4) procedures relating to the re-exportation of software and duty drawback, and so forth. As you know, WTO member compliance with these various procedural and substantive customs law requirements has been heavily litigated in prior WTO cases.

PMK 190 raises many international legal compliance questions that have not yet been resolved.

### **Recommendations regarding PMK 190**

BSA's recommends that Indonesia refrain from imposing customs requirements on intangibles pending a more thorough study of the potential impacts on Indonesian businesses and their competitiveness. Raising costs for Indonesian enterprises to access enterprise software and other digital tools will only serve as a tax on Indonesian businesses across all sectors of the economy – immediately putting them at an economic and technology disadvantage vis-à-vis their international competitors based in China, Malaysia, Thailand, and the Philippines.

BSA also urges Indonesia to refrain from launching this costly new regime to the extent that it has not already assessed the costs and benefits of imposing customs duties on knowledge, digital tools, and software. When Indonesia first announced its new tariff lines covering software and digital tools in 2018, several BSA members began exploring how to limit their service/product offerings in Indonesia as a means of avoiding the customs duties. If this happens, Indonesian businesses will face a double shock. Not only will access to enabling software solutions become more costly and difficult, but also many producers may not serve Indonesia at all, thus directly undermining the President's innovation goals.

## Conclusion

BSA appreciates the opportunity to provide our comments and recommendations on PMK 190. We would like to thank the Ministry of Finance for considering our comments and hope that the MOF will positively implement our recommendations. We urge the MOF to continue to engage in dialogue with the private sector and all relevant stakeholders to achieve common goals for developing a vibrant and competitive digital economy.

Please do not hesitate to contact the undersigned at [waisanw@bsa.org](mailto:waisanw@bsa.org) if you have any questions or comments regarding our suggestions.

Yours faithfully,

*Wong Wai San*

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