

NEWSLETTER

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AMENDMENT OF THE MINING LAW: TYING UP LOOSE ENDS

After around 11 years from its enactment, Law No. 4 of 2009 on Mineral and Coal Mining (Mining Law) is now undergoing its first transformation as the House of Representatives has passed the bill on the amendment of the Mining Law on 12 May 2020

Background

The finalized draft of Law on the amendment of the Mining Law (Bill) was publicly released on 11 May 2020 and was then approved by the House of Representative (*Dewan Perwakilan Rakyat* or DPR) on the next day, 12 May 2020. The Minister of Energy and Mineral Resources (MEMR) introduces this Bill as an attempt to stimulate the mining industry and provide a legal certainty for the business actors in the industry. This writing is intended to share our view and analysis on the changes in the Bill that we believe are material.

**As per the issuance of this article, the Bill has not yet been publicly announced in the State Gazette.*

Main Changes

Centralization of Authority – The Opposite Direction from the Mining Law



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The changes under the Bill, particularly on the distribution of authority has shown that the anticipated new law is going to move to a completely different direction than what the Mining Law had envisaged. Initially, the Mining Law distributed the authority on the control and supervision of mining sector in Indonesia proportionately to the Central Government (**Government**) and Provincial Government and Regency Government (**Local Government**) based on their relevant jurisdiction. For example, the authority to issue mining licenses (IUPs) and to carry out mining business administration and supervision process.

During the implementation of the Mining Law, there were some issues that were faced by mining business owners and investors, one of them was mining area overlapping issue. Generally, this was caused by the decentralization as each of the Government, Provincial Government and Regency Government can issue IUPs and coordination was quite lacking at that time.

In 2014, the Government enacted Law No. 23 of 2014 regarding Regional Government (**Regional Government Law**) in which the Regency Government's authority to determine mining area (*Wilayah Usaha Pertambangan* or **WUP**) and issue mining license (*Izin Usaha Pertambangan* or **IUP**) were revoked. This has cut down some of the root cause of the mining area overlapping issue that were quite often met back then. As a follow up of the Regional Government Law, the Government required the Regency Governments to hand over all mining licenses document and information that were in their possession or under their authority to the Provincial Government.

Similar with what happened in 2014, the Bill is going to revoke all authority on the control and supervision of mining sector that were left for the Provincial Government, and grant all authority on the control and supervision of mining sector in Indonesia to the Government. This includes, among others the authority to issue Business Licensing or *Perizinan Berusaha* (as further elaborated below), approve the transfer of IUP or Special Mining License (*Izin Usaha Pertambangan Khusus* or **IUPK**) and approve the transfer of shares in the IUP or IUPK holders. The Bill will also give the Government the right to delegate the authority in

issuing Business Licensing to the Provincial Government if it deems necessary. As such, involvement by the Provincial Government in this regard will not happen if the Government does not desire it. Having said that, the Bill still left role to be held by the Provincial Government, which is to determine the Mining Area (*Wilayah Pertambangan* or **WP**), to be further declared by the Central Government.

The Bill provides a 6 months transitional period for the Provincial Governments to continue carrying out their authorities under the Mining Law, however with the limitation that the Provincial Government and the Minister may not issue a new IUP during this period. This transitional period may be shorter if within the 6 months period the Government has managed to issue the implementing regulations of the new law. In this connection, the Governors are required to hand over the licenses that were issued by them under the framework of the Mining Law to the Minister to be renewed within 2 years after the Bill is enacted.

New Licensing Regime and Resolution for License Dualism Issue

Based on the Bill, in order to carry out Mining Business, business actors are now required to obtain a set of licenses that is defined as **Business Licensing** (*Perizinan Berusaha*). Business Licensing consists Identification Business Number (*Nomor Induk Berusaha* or **NIB**), standard certification (*sertifikasi standar*), and/or Licenses.

The Licenses under the Bill are further broken down into:

- (a) IUP;
- (b) IUPK;
- (c) Special Mining Business License for the Continuance of Contract Operation (*IUPK sebagai Kelanjutan Operasi Kontrak/Perjanjian* or **Operation Continuance IUPK**) – will be further elaborated below;
- (d) Community Mining License (*Izin Pertambangan Rakyat* or **IPR**);

- (e) Rock Mining License (*Surat Izin Penambangan Batuan* or **SIPB**) – a new license for rock mining;
- (f) Assignment License (*Izin Penugasan*) – a license for exploitation of radioactive minerals in accordance with the laws and regulations in the nuclear sector;
- (g) Transportation and Sales Permit (*Izin Pengangkutan dan Penjualan*) – given to companies to buy, transport, and sell mineral or coal mining commodities.
- (h) Mining Service Business License (*Izin Usaha Jasa Pertambangan* or **IUJP**); and
- (i) Mining Business License for Sales (*Izin Usaha Pertambangan untuk Penjualan* or **IUP Penjualan**) – given to non-mining business entity which is going to sell excavated mining commodities, which will only be given for one transaction.

Some of the licenses are newly introduced, such as Operation Continuance IUPK, SIPB and Assignment License (will be further regulated in laws and regulations for nuclear sector). The remaining licenses, namely IUP, IUPK, IPR, IUP-OP for transportation and sales (now, *Izin Pengangkutan dan Penjualan*), IUP-OP for sales, and IUJP are licenses that were already introduced since the enactment of the Mining Law.

There are a couple of missing licenses from the original licenses under the Mining Law that are not included in the Bill, i.e. temporary license for transportation and sales given to the Exploration IUP to sell the commodities found during the exploration stage, and the IUP-OP for Processing and Refining. Under the Bill, a non-integrated processing and refining business, and its licensing process are no longer under the scope of the Mining Law and should refer to the laws and regulations on manufacturing sector. With this amendment, the dualism of license issue that was caused by the introduction of IUP-OP for Processing and Refining (*IUP-OP Pengolahan Pemurnian*) under the Mining Law can now be resolved.

Previously, there was a confusion on whether a non-integrated processing and refining business must have an IUP-OP for Processing and Refining or a Manufacturing Business License (*Izin Usaha Industri - IUI*) or both to carry out its business. One of the most conservative view was to have both, as the prevailing regulations from the mining sector and manufacturing sector respectively required the business actors to have IUP-OP for Processing and Refining and IUI. Now, it is clear that a new business actor that intends to carry out a non-integrated processing and refining business must obtain the relevant license under the framework of laws and regulations on manufacturing sector. Existing IUP-OP for Processing and Refining will be adjusted to become a manufacturing business license as regulated under the framework of laws and regulations on manufacturing sector within one year after the enactment of the Bill.

Existing IUP, IUPK, IPR, IUP-OP for transportation and sales, IUP-OP for sales, and IUJP, will remain valid, however those will need to be adjusted to become Business Licensing, as explained above, within 2 years after the enactment of the Bill.

Conversion of KK and PKP2B to become Operation Continuance IUPK (IUPK sebagai Kelanjutan Operasi Kontrak/Perjanjian)

This is one of the most anticipated matter for the Contract of Work (KK) holders, Coal Contract of Work (PKP2B) holders and the Government as several efforts to address this matter have been made in the form of amendments of Government Regulation No.23 of 2010 (GR 23/2010) on the Implementation of Mineral and Coal Mining Activities in which KK or PKP2B can be converted into an Operation Production IUPK. Those efforts did not quite work as the Mining Law at that time has set a limitation on what an Operation Production IUPK can have as its terms, e.g the maximum area that an Operation Production IUPK can have was 25,000 Ha for metal mineral and 15,000 Ha for coal.

Most of the provisions regarding KK and PKP2B conversion that have been regulated under GR 23/2010 and MEMR Regulation No. 7 of 2020

on Procedures of Area, Licensing, and Reporting on Mineral and Coal Mining Business Activities (MEMR Reg 7/2020) have now been incorporated into the Bill. The most important provisions are the introduction of the Operation Continuance IUPK which is defined as a business permit that is granted as an extension after the completion of a KK or PKP2B, and that there is no specific limit for the maximum area of an Operation Continuance IUPK. Legally, this has provided sufficient framework to implement the previous efforts made by the relevant stakeholders.

Based on the Bill, KK and PKP2B are guaranteed to get the extension to become Operation Continuance IUPK with following terms and conditions:

- (a) KK or PKP2B that has not been extended, are guaranteed to obtain two-times extension in the form of Operation Continuance IUPK (conversion), for up to 10 years period each, after such KK or PKP2B has expired; and
- (b) KK or PKP2B that has been extended once, are guaranteed to obtain a one-time extension guarantee in the form of Operation Continuance IUPK (conversion), for up to 10 years period, after the first extension of such KK or PKP2B has expired.

Both conditions above have to take into account the state revenue increase effort in the form of redetermination of tax and non-tax state revenue.

The area granted for the Operation Continuance IUPK will be based on the approved contract area development plan or an agreement that has been approved by the MEMR. Such area will also be considered as WIUPK for operation production. Furthermore, KK and PKP2B holders can apply for an additional area outside of its contract area to the MEMR to support its activities.

In order to obtain an Operation Continuance IUPK, a KK or PKP2B holder must submit its conversion application at the soonest within 5 years and at the latest by a year prior to the expiration of its KK or PKP2B. MEMR can reject the application if, based on the MEMR's evaluation, the KK or PKP2B holder does not show a good performance.

Lifting the Ban on IUP/IUPK Transfer

The Bill has lifted the ban on IUP or IUPK transfer that was initially envisaged in the Mining Law. Transfer of IUP or IUPK can be done, provided that approval from the MEMR has been obtained. The minimum requirements to obtain such approval are:

- (i) The IUP or IUPK holders must have completed their exploration activities that can be evidenced by the availability of resources and reserves data; and
- (ii) The IUP or IUPK holders must fulfill the administrative, technical, and financial requirements.

The detail on the implementation of this provision action will be further regulated in a Government Regulation. Furthermore, IUP or IUPK holders are prohibited from guaranteeing their IUP or IUPK, including the mining commodities, to other parties.

The same requirements above will also apply to any change of shareholder in the IUP or IUPK holders.

Divestment Obligation

Previously, the Mining Law required IUP and IUPK holders whose shares are owned by foreign shareholders to divest their shares to Indonesian entity (Government, Regional Government, State-owned Entity, Regional-owned Entity, national private entity) **after 5 years of production**. After that, the Government issued GR 23/2010 that set out the stages of the divestment process, i.e starting from 20% on the 6th year of production and reaching 51% by the 10th year of production. Currently, the Bill only regulates that the IUP and IUPK holders whose shares are owned by foreign shareholders must gradually divest 51% of its shares to Indonesian entity, without mentioning at which point of time during the operation production phase will this divestment obligation be triggered.

The Bill left this detail to be further regulated in the implementing Government Regulation. As such the Government will have the freedom

to determine the direction of the divestment obligation, for example whether it will be more encouraging for foreign investor by determining a later point of time as the triggering period for the divestment, say after 10 years of production as opposed to after 5 years production or the other way around. In this connection, foreign investors may have difficulty in making their decision as they can only get more certainty after the Government has issued the relevant implementing Government Regulation. Even if the Government has issued the implementing Government Regulation, we do not think the foreign investors will be in a very comfortable position as the Government can amend the Government Regulation if they want to do so.

Closing Remarks

The Government and the lawmakers have done a very good job in tying up loose ends resulting from the issuance of the Mining Law in 2009 and issues that has arisen to date. However, this does not mean that the work is done, because to determine whether this Bill is a success or not it will heavily depend on how well and clear the implementing regulations will be drafted and the readiness of the relevant government institutions in implementing those regulations.

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