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The Impact of Regulation of the Minister of Energy and Mineral Resources No. 42 of 2017 on Electrical Power Business Activities in Indonesia



Important matters needing your attention

We provide below important matters related to the electrical power sector in connection with the issuance of Permen 42/2017, which could affect the implementation of power station projects in Indonesia by obliging companies holding Electricity Provider Business Licences (“IUPTL”) to obtain the approval of the Minister of ESDM for transfers of shares and changing directors and commissioners.

1. The process of transferring shares and changing the directors and/or commissioners will become longer for companies holding an IUPTL with additional conditions that must be fulfilled.
2. In order to be able to transfer shares, a company holding an IUPTL must first have reached the Commercial Operation Date unless the transfer is to an affiliate of the sponsor (one level below) at least 90% of whose shares the transferor holds. Apart from providing an additional requirement for the transfer of shares, this provision has a stricter definition of affiliate than in other regulations.
3. An agenda item for transferring shares and changing the composition of the board of directors and/or board of commissioners must be made in the form of a Deed of GMS Resolution, and the process of approval from the electricity purchaser (PLN) or the Investment Coordination Board (“BKPM”) will take quite some time. Thus, in the end, before filing a recordal at the Ministry of Law and Human Rights, a company will have to ...

On 14 July 2017, the Minister of Energy and Mineral Resources (“ESDM”) issued Regulation of the Minister of ESDM No. 42 of 2017 concerning the Supervision of Exploitation in Business Activities in the Energy and Mineral Resources Sector (“Permen 42/2017”). This regulation regulates the need for an approval from the Minister in connection with agenda items transferring a participating interest in businesses in the upstream oil and natural gas sector, transferring shares, and changing directors and commissioners of companies in the energy and mineral resources sector. This regulation applies to oil and natural gas, electrical power, minerals and coal, and geothermal energy businesses.

- re-state the resolution if 30 (thirty) days have elapsed since the date of the GMS (Article 56 of the Limited Liability Companies Act Law No. 40 of 2007). In such a case, the company will have to assume the costs of making a deed of re-statement.
4. Articles 19 and 22 of Permen 42/2017 say that after the Minister’s approval is issued, the company must file the approval, ratification, recordal, or other form with BKPM and/or the Minister of Law and Human Rights.
The provisions regarding this matter are made by the government agencies concerned. In order to avoid potential inter-institution conflicts of regulation, this regulation from the Ministry of Law and Human Rights for fulfilment of this condition should not have been made because it is very possible for the provision to provide approvals, ratification, recordal, or other form to be amended from time to time or even repealed by BKPM and/or the Minister of Law and Human Rights, thus making what was provided in Permen 42/2017 in relation to this matter become unnecessary but still having to be done because this provision would still have to be fulfilled.
5. It is possible for the Ministry of ESDM to reject an agenda item submitted to transfer shares or change the composition of the board of directors and/or commissioners. In addition, it is not clear what would be the result or what further action would need to be taken if an application submitted does not receive a response from the Ministry of ESDM within 14 days as required in Permen 42/2017.

This could give rise to a situation of uncertainty, which would not be good for the investment climate including the bankability of a project.

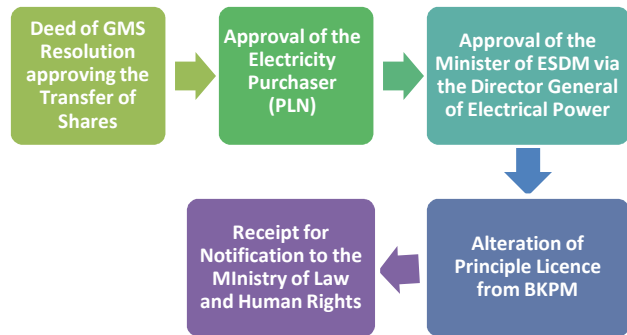
6. The terms of transfers of shares or changes of directors and/or commissioners should be agreed among the parties directly related to the realisation of a project as is currently the case. The terms made by the parties would of course take into consideration the aspects of the project's sustainability stressing win-win solutions. Government interference will limit the parties' room for manoeuvre in realising a project.

The process for transferring shares and changing the composition of a board of directors and/or commissioners for companies holding an IUPTL as provided for in Permen 42/2017

A. Transfers of Shares:

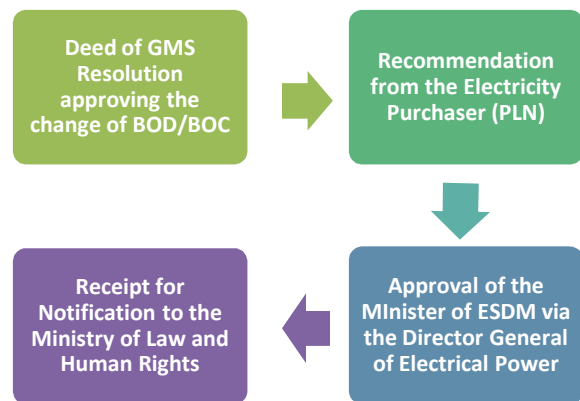
1. Only transfers of shares belonging to shareholders in companies holding an IUPTL need the approval of the minister (Article 17 paragraph (1));
2. IUPTL shareholders may transfer shares provided they meet the following conditions:
 - a. the power station must have reached its Commercial Operation Date; or
 - b. it must be a transfer to an affiliate more than 90% (ninety per cent) of whose shares are held by the sponsor intending to transfer the shares (Article 17 paragraph (2));
3. Such transfers of shares can only be made to an affiliate one level below (Article 17 paragraph (3));
4. The holder of an IUPTL wishing to transfer shares must provide certain administrative and financial requirements (Article 17 paragraph (4));
5. One of the administrative requirements is that the IUPT holder must first obtain an approval from the electricity purchaser (i.e., PLN), and provide the transferee's tax returns and financial reports audited by a public accountant for the last 2 (two) years (Article 17 paragraph (4)); and
6. After the process of obtaining the Minister's approval as mentioned above, IUPTL holders in the form of a Foreign Investment Company ("PMA") must still apply for an Alteration of Principle Licence in relation to the agenda item changing the composition of shares in the company (Article 23 of Regulation of the Head of BKPM No. 14 of 2015 concerning Guidelines for Principle Licences).

Thus, the steps for a transfer of shares for a PMA company holding an IUPTL are as follows:



B. Change of Composition of Board of Directors and/or Board of Commissioners

Something else which is new in Permen 42/2017 is that if a company wishes to change the composition of its board of directors and/or board of commissioners, it must first obtain a recommendation from the Electricity Purchaser and the Minister's approval. The Minister will issue an approval for the agenda item changing the composition of the board of directors and/or board of commissioners within 14 (fourteen) business days from the company's complete and correct application for the approval. The company can then apply for recordal at the Ministry of Law and Human Rights.



At present the Ministry of ESDM is in the process of amending Permen 42/2017 whereby, according to information received as of 27 July 2017, the form of approval will be changed to a form of report.

Hendra Ong, S.H., LL.M., a Partner of Hanafiah Ponggawa & Partners who is a member of the board of management in the legal division of the Indonesian Association of Private Electricity Producers (APLSI) took part in the discussions regarding the amendment of Permen 42/2017.

*The article above was prepared by **Hendra Ong** (Partner) and **Monica Elizabeth Dina** (Associate).*

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