



CK law and law 3/2020:

An invitation to investors and mining business stakeholders

Amidst all the controversies surrounding the Job Creation Bill (Undang-undang Cipta Kerja – “CK Law”), the House of Representatives has decided to pass it into law. Although it is heavily focused on manpower related matters, the CK Law will also have an impact on the mining business in Indonesia. This is a result of the promulgation of Law No. 3 of 2020 on Amendment to Law No. 4 of 2009 concerning Mineral and Coal Mining (“Law 3/2020”), which includes matters which were previously in the preliminary draft of the CK Law. It is understood that a major portion of the preliminary draft of the CK Law has been moved to be included in Law 3/2020 instead. Accordingly the following brief elaborates on the provisions of the CK Law and Law 3/2020 and their effect on the mining business industry.

Financial benefits for coal mining

As frequently claimed by the Indonesian President and his ministers, the CK Law is intended to simplify procedures and bureaucracy in important investment sectors in Indonesia which were previously deemed complicated and unappetising for investors. This would mean to include a relaxation of limitations as well as additional benefits to investors, in the hope that more investment will come to Indonesia, which will eventually open new sectors of employment, hence the name “cipta kerja” (job creation).

In the mineral and coal mining sector, the CK Law includes and specifically

mentions that a special tax treatment for coal mining businesses can be given in the form of a 0% (zero percent) royalty payment. This would be applicable to coal mining businesses which have performed the coal value upgrade exercise. This coal value upgrade exercise is referred to in the provision of Article 102 paragraph (2) of Law 3/2020, which stipulates that holders of a mining business license (Izin Usaha Pertambangan – “IUP”) or special mining business license (Special Mining Business License – “IUPK”) can perform an “Upgrade and/or Utilization of coal”. From a regulatory point of view, the Law 3/2020 does not specifically mention (i) what this upgrade/utilization exercise consists of, and (ii) the verification procedures and required documents needed for a holder of IUP or IUPK to claim the special financial benefits. Given the generic provisions in both the CK Law and Law 3/2020, it is believed that this provision must be further elaborated under implementing regulations for Law 3/2020.

VAT imposition on coal sales

Aside from the above, the CK Law also includes changes to the provisions of Law No. 8 of 1983 on Value Added Tax on Goods and Services and Sales Tax on Luxury Goods, as lastly amended by Law No. 42 of 2009 (“Law 42/2009”). Article 112 CK Law amended the provision of Law 42/2009 related to exemptions from Value Added Tax (Pajak Pertambahan Nilai – PPN). Prior to the promulgation of the CK Law, coal mining products were exempted from VAT. The amendment

under the CK Law now specifically states that coal mining products are excluded from the goods exempted from VAT.

Given the financial benefits the CK Law has to offer, the above provisions on the imposition of VAT could be seen as an attempted balancing act on the part of the Government. In the hope that if the CK Law succeeds in coaxing investors or coal mining businesses into escalating their activities, the Government will receive a larger state income from VAT on coal transactions as the transaction value rises. From a transaction point of view, it can be expected that coal mining businesses will revisit their ongoing coal sales contracts to adjust them to this imposition of VAT on the contracts.

A centralized licenses issuance authority

In line with the intended purpose of the CK Law, Law 3/2020 has already accommodated the shift of authority in issuing licenses in the field of mining businesses. Previously, under Law No. 4 of 2009 on Mineral and Coal Mining (“Law 4/2009”) and its implementing regulations, mining business licenses were issued by the Minister of Energy and Mineral Resources, Governor or Regent depending on the (i) nature of the mining business license, and (ii) location of the mining business area.

The CK Law stipulates that business licenses, including those in the field of the mineral and coal mining business, will be issued by the Central Government. This could be seen as an attempt by the Central Government to take more control of the issuance of the licenses, as opposed to the

previous regime in the mining law. The CK Law states that mining business activities must be performed based on a Licence to Do Business (Perizinan Berusaha) issued by the Central Government. The Licence to Do Business comprises (i) a Business Index Number (Nomor Induk Berusaha – NIB), (ii) a standard certificate and/or (iii) a license.

Having mentioned the above, although it seems that the Central Government intends to take a more prominent role in the issuance of mining business licenses, the CK Law stipulates that the Central Government may delegate the authority to issue Licences to Do Business to provincial Governments in accordance with the laws and regulations. This aforementioned provision indicates that regional governments will no longer have the authority to issue business licenses. It is understood that implementing regulations for the CK Law will be issued to accommodate this delegation of authority by the Central Government.

New forms of licenses

Forms of licenses were included in the CK Law draft per February 2020, but no longer in the promulgated version as they have already been stipulated in Law 3/2020. Law 3/2020 introduces new forms of licenses for mining business activities, amongst others: (i) IUPK for the Continuation of Contract/Agreement, (ii) Rock Mining License (Surat Izin Penambangan Batuan - SIPB), (iii) Transportation and Sales License, and (iv) Assignment License.

While the IUPK for the Continuation of Contract/Agreement is clearly intended as a form of extension to a Contract of Work (Kontrak Karya – CoW) and Coal

Contract of Work (Perjanjian Karya Pengusahaan Pertambangan Batubara – CCoW), no further details of the other forms of licenses are given in Law 3/2020. It is also not clear whether these new licenses will replace and/or substitute for the previous license in Law 4/2009 and its implementing regulations, for instance the IUP-OPK for Processing and/or Refining that is no longer mentioned in Law 3/2020. It is believed that the transition of these licenses, along with details of their implementation will be regulated under implementing regulations for Law 3/2020.

Scale and term of mining business licenses

Provisions under Law 3/2020 have made some changes in relation to the mining areas granted to the holders of mining business licenses. The changes are applicable for mining business licenses for (i) metallic minerals, (ii) non-metallic minerals, and (iii) coal, as detailed below:

With the exclusion of a minimum mining area, it can be deemed that this provision is intended to encourage mining businesses and/or investors to apply for and manage a more effective mining area depending on their respective capabilities.

Commodity	Mining area under law 4/2009	Mining area under law 3/2020
Metallic Minerals	100,000 ha	100,000 ha
Non-Metallic Minerals	500 ha – 25,000 ha	A maximum of 25,000 ha
Coals	5,000 ha – 50,000 ha	A maximum of 50,000 ha

Commodity	Period under law 4/2009	Period under law 3/2020
Metallic Minerals	a maximum of 8 years	8 years
Non-Metallic Minerals	a maximum of 3 years	3 years
Certain Type of Non-Metallic Minerals	a maximum of 7 years	7 years
Coals	a maximum of 7 years	7 years

This may result in a growth in the numbers of mining business licenses issued, and accordingly affect the state income from the financial obligations of the holders of mining business licenses.

Aside from the mining areas granted, Law 3/2020 also includes changes in the periods of validity of mining business licenses, as below:

The above changes indicate that the Government intends to provide more certainty for mining businesses, in the sense that mining businesses now have a more definitive framework for the development of mining plans and activities in the mining area.

Extension of Mining Licenses

With regard to the extension of a production operation mining business license, Law 4/2009 only mentioned that mining operation production business licenses are granted for a certain period of time and can be extended 2 (two) times. Many saw this provision as not giving certainty to holders of mining business licenses, as the mining business sector requires a large amount of investment and investors need certainty that their large investment can be continued by securing

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extensions of mining business licenses.

Law 3/2020 accommodates this concern by including a provision that the holders of production operation mining business licenses are guaranteed the grant of 2 (two) extensions, after fulfilling requirements in accordance with the provisions of the laws and regulations. This provision provides more certainty that extensions will be granted to holders of production operation mining business licenses.

Another important matter provided under Law 3/2020 is that holders of production operation mining business licenses which perform (i) integrated processing and/or refining facilities for metallic mineral mining and (ii) integrated development and/or utilization activities for coal mining, can be granted the licences for a maximum of 30 (thirty) years period and are guaranteed the grant of a 10 (ten) year period for each extension, after fulfilling requirements in accordance with the provisions of laws and regulations. This provision is considered to be an attempt by the Government to attract investors with abilities in constructing processing/refining facilities to invest in Indonesia. It appears that unlike holders of other production operation mining business licenses such investors can be granted mining business licenses without any limitation on extension. Although the implementing regulations to this provision have still yet to be issued, this provision of Law 3/2020 is already serving as the ground for investors' business in Indonesia to be truly long-term.

Limitation and prohibition on mining business licenses

Law 3/2020 includes limitations on a holder of a IUP or IUPK (i) transferring its IUP or IUPK to another party or (ii) transferring its share ownership without an approval from the Minister of Energy and Mineral Resources. For the purpose of a transfer of IUP/IUP and transfer of shares,



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holders of IUP and IUPK must have at least (i) completed the exploration activities evidencing the existence of resources, and (ii) fulfilled administrative, technical, environmental and financial requirements. The law also states that the procedures for transfers of IUP/IUPK and/or transfers of shares will be further regulated by or based on a Government Regulation.

Further, with regard to securitization, holders of IUP and IUPK are prohibited from using their IUP or IUPK, including their mining commodities, as security for other parties. By inclusion of this provision, holders of IUP and IUPK will no longer be able to use commodities (i.e. stock of commodities) as a form of security for other parties. Therefore, in the framework of financing schemes, holders of IUP and IUPK will have to provide other forms of security.

Certainty for CoW and CCoW

On the continuity of CoW and CCoW, Law 4/2020 and its implementing regulation provide that CoW and CCoW may be extended into a Production Operation IUPK First Extension without auction procedures following the expiration of the CoW or CCoW, and a Production Operation IUPK Second Extension will then be granted.

Law 3/2020 includes clear provisions that holders of CoW and CCoW are guaranteed grants of (i) 2 (two) extensions each for a period of 10 (ten) years, for CoW and CCoW which have not received any extension, or (ii) an extension of 10 (ten) years after expiration of the first

extension. It should be noted that for the most part holders of CoW and CCoW are mining businesses which have existed in Indonesia for a long time, and accordingly have been investing in the mining business in larger amounts. These provisions of Law 3/2020 provide certainty to holders of CoW and CCoW for the purpose of developing further mining development plans, as the Government provides guarantees on the extension of the license. It can be seen by this provision that the Government is trying to attract more investment in mining business sectors.

Conclusion

The promulgation of the CK Law and Law 3/2020 includes many provisions which may be deemed favorable for the mining business license holders and investors. This is in the hope that business investors are more eager to engage in or become involved in Indonesia's mining business sectors, but also with the purpose of increasing state income generated from the mining business sectors.

It should also be noted that a number of provisions in the CK Law and Law 3/2020 give more clarity on issues in Indonesia's mining business industry that have been highlighted in past years. In particular holders of CoW and CCoW now have clarity on how they can continue to do their mining business in Indonesia.

However, as with many newly promulgated regulations in Indonesia, definitive implementing regulations for the CK Law and Law 3/2020 will be important for legal certainty. 