

New Provisions on the Procedures for Mineral and Coal Mining Business Activities

Amid wide public discussion of the draft of Indonesia's omnibus law, which contains plans to simplify business licensing procedures in Indonesia, including in the mineral and coal sector, the Minister of Energy and Mineral Resources of the Republic of Indonesia ("MEMR") has recently promulgated MEMR Regulation No. 7 of 2020 on the Procedures for Granting Areas for and Licensing and Reporting on Mineral and Coal Mining Business Activities ("**MEMR 7/2020**" or the "**Regulation**"). The Regulation came into effect on 6 March 2020.



The Objectives of MEMR 7/2020

The Regulation was issued with the purpose of ensuring business certainty and increasing effectiveness in the implementation of mining business activities. This Regulation entirely revokes MEMR Regulation No. 11 of 2018 on the Procedures for Granting Areas for and Licensing and Reporting on Minerals and Coal Mining Business Activities as lastly amended with MEMR Regulation No. 51 of 2018 ("**MEMR 11/2018**"), as well as the provisions regarding directors and commissioners in MEMR Regulation No. 48 of 2017 on the Supervision of Concessions in the Energy and Mineral Resources Sector ("**MEMR 48/2017**").

The Regulation should be seen as the government's effort to make it easier for business actors to engage in mining businesses in Indonesia, while at the same time still providing a sizeable presence for the government in conducting its tasks as the regulator and supervisor in the mining sector.

What's new in the Regulation?

At first glance, the majority of provisions in the Regulation are similar to provisions of MEMR 11/2018 but with the following differences:

1. Further Provision on Exploration Seriousness Guarantee (*Jaminan Kesungguhan Eksplorasi*)

MEMR 11/2018 only stipulated that the Exploration Seriousness Guarantee and its interest would be paid out to the government as non-tax state revenue in these conditions:

- i. the holder of the Mining Business License (*Izin Usaha Pertambangan – "IUP"*) of Exploration ("**Exploration IUP**") or Special Mining Business License (*Izin Usaha Pertambangan Khusus – "IUPK"*) of Exploration ("**Exploration IUPK**") did not undertake exploration activities; and
- ii. the IUP of Exploration or IUPK of Exploration was revoked.

In addition to the above conditions, MEMR 7/2020 now also stipulates that the Exploration Seriousness Guarantee and its interest will be paid out to the government as non-tax state revenue in the event that in conducting exploration activities the holder of Exploration IUP or Exploration IUPK did not reach the total minimum expenditure under the holder's submitted exploration activity plan.

This provision is intended to ensure that mining business actors do perform the exploration activities in accordance with the activity plan, as one of the factors in the government granting the exploration rights.

2. Submission Deadline to Upgrade Exploration IUP/IUPK to IUP/IUPK-OP

The Regulation gives holders of IUP of Production Operation ("IUP-OP") and IUPK of Production Operation ("IUPK-OP") flexibility in respect to the deadline for submitting applications to upgrade an IUP or IUPK of Exploration to an IUP-OP or IUPK-OP.

Under the Regulation, the deadline for submission is 1 (one) month before the expiration of the licenses, i.e. (i) Exploration IUP for Metallic Minerals, (ii) Exploration IUP for Specific Types of Non-Metallic Minerals, (iii) Exploration IUP for Coal, (iv) Exploration IUPK for Metallic Minerals, (v) Exploration IUPK for Coal, (vi) Exploration IUP for Non-Metallic Minerals, and (vii) Exploration IUP for Stone.

It was previously provided under MEMR 11/2018 that applications for upgrading licenses had to be submitted no later than 6 (six) months before the expiration of licenses as mentioned in point (i) to (v) above, while applications to upgrade the other licenses had to be submitted no later than 3 (three) months before their expiration. We see that this provision can be deemed a relaxation for holders of exploration licenses, that they can utilize a license almost up to its expiry before deciding to submit an application to upgrade the exploration license to an IUP-OP. By having this provision, exploration license holders are expected to be able to obtain more accurate projections for the mining business activities before entering the production operation stage in order to have a productive operation stage.

3. Adjustment of IUP or IUJP for the PMA License Holders

The Regulation provides that if a company which holds an IUP or Mining Services Business License (*Izin Usaha Jasa Pertambangan – "IUJP"*), i.e. a special Exploration IUP, IUP-OP, special IUP-OP for processing and refining, or a special IUP-OP for transportation and sale, has been transformed into a Foreign Capital Investment (*Penanaman Modal Asing – "PMA"*) company, it must apply to the MEMR for adjustment of its license.

Further guidance on applying for the adjustment for license holders who have changed their status from Domestic Capital Investment (*Penanaman Modal Dalam Negeri – "PMDN"*) to PMA will be given through a MEMR decree. This provision is similar to the provision of MEMR 11/2018, but the wording in the Regulation further emphasizes that the MEMR has the authority to adjust the license as a result of status conversion, in accordance with the terms of the laws and regulations. It can be inferred that an implementing regulation is required to specify procedures and requirements for conversion of licenses.

4. Change of Shares of a Mining Company

MEMR 11/2018 clearly regulated that changes in the shares of a holder of an IUP/IUPK must first be approved by the MEMR before registering the change with the MOLHR. The Regulation contains additional requirements that the MEMR or Governor may reject the change of shares if the holder of the IUP/IUPK does not show good mining performance.

We can see that in the absence of any specific implementing regulations on the above provision, the change of shares will be a lot more complicated, as there are no clear parameters on how a holder of IUP/IUPK can be considered to have been performing well.

While this may be a challenge, this additional requirement also reflects that the government wishes to ensure that a mining business actor is effectively carrying on business under its mining license.

Given that the approval from the MEMR or the governor is mandatory, we can see that any change of shares without having such approval can be challenged by the relevant parties, and then deemed invalid.

5. Change of the Directors and/or Commissioners

MEMR 11/2018 and MEMR 48/2017 previously stipulated that the holder of an IUP or IUPK must obtain prior approval from the MEMR or the Governor (as applicable) for the change in composition of its Board of Directors and/or Board of Commissioners before registering with the Ministry of Law and Human Rights of the Republic of Indonesia ("MOLHR").

The above provision is considered a relaxation by the Regulation, in that a holder of an IUP or IUPK which has changed its directors and/or commissioners composition is only required to submit a report to MEMR or the Governor (as applicable) no later than 14 (fourteen) business days after obtaining the approval from MOLHR. This new provision can be seen as an effort by the government to simplify the procedure for IUP or IUPK holders in conducting business activities.

Although failure to report the change of directors and/or commissioners is punishable with administrative sanctions in the form of written warnings, temporary suspension of business activities and/or revocation of license, we can see that the change of directors and/or commissioners would still be deemed effective so long as it has been performed in accordance with the Indonesian Company Law.

6. Additional Obligations for the Holder of IUJP and Special IUP-OP for Transportation and Sale

To strengthen the supervision in mining business activities, the Regulation adds and amends several obligations for the holders of IUJP and Special IUP-OP for Transportation and Sale.

The holders of IUJP

Compared to the provisions of MEMR 11/2018, the Regulation includes the addition of the following obligations for the holder of an IUJP:

- I. to submit each document of mining service contract entered with the holder of an IUJP, IUP, or IUPK to the MEMR or governor in accordance with its authority;
- II. to use equipment that has been tested for eligibility; and
- III. to fulfill the regulations in the mining business sector.

The newly added obligations for the holder of IUJP, particularly in point (i) above, will enable the government to directly supervise any cooperation that has been entered by the holder of an IUJP.

The holders of Special IUP-OP for Transportation and Sale

Under the Regulation, the holder of a Special IUP-OP for Transportation and Sale must submit a copy of the selling plan documents if performing additional cooperation, through the information system.

The above provision introduces an information system as a platform to submit the selling plan documents. We note that the Ministry of Energy and Mineral Resources already has a system under the name of Minerba Online Monitoring System (MOMS), which may be appointed as the platform by the implementing regulation for the performance of the above obligation.

The Regulation also adds an obligation to regularly submit activities implementation reports through the Sales Verification Module (*Modul Verifikasi Penjualan – “MVP”*). It is believed that the MVP is for the purpose of preventing illegal sales of commodities (especially coal).

7. Amendments to Annual Working and Budgeting Plan (*Rencana Kerja dan Anggaran Biaya Tahunan – “Annual RKAB”*)

The Regulation provides that a holder of a Special IUP-OP, IUPK-OP, and IUP-OP for Processing and Refining may submit revisions of the Annual RKAB after the license holders submit the report for the first quarter and no later than July 31 of the current year. Submission of the revised Annual RKAB is no longer limited to the production capacity as previously stipulated in MEMR 11/2018.

The Regulation also enables the license holders to submit the revisions of Annual RKAB more than once in the event force majeure occurs, which was not provided in the previous MEMR 11/2018.

Information System for Annual RKAB and Mining Reports

The Regulation provides that license holders must submit Annual RKAB and Mining Reports through an information system that will be managed by the Director-General of Energy and Mineral Resources when the information technology system is available.

We note that the Ministry of Energy and Mineral Resources already has a system

under the name of Minerba Online Monitoring System (MOMS), which may be appointed as the platform by the implementing regulation for the performance of the above obligation.

We see that the inclusion of the information technology system is intended to modernize and simplify the reporting procedures. It will be important for the government to issue definitive implementing regulations which would help in achieving such purpose.

Conclusion

From what we have elaborated above, we note that the government has tightened some requirements and procedures for Exploration Seriousness Guarantees, adjustment of PMA license, and procedures for changes of shares of an IUP/IUPK holder. This can be seen as the government’s effort to regulate the mining business industry. While some provisions are stricter than those previously in effect, the Regulation also has some relaxed provisions for changes of directors/commissioners, submission of RKAB and activity reports, and the inclusion of information technology systems to facilitate mining business actors.

With the promulgation of MEMR 7/2020, the government sends a clear message that it aims to make it easier for mining business license holders to conduct business activities in Indonesia and increase the effectiveness of the system. This can be seen from several provisions which seem to relax and simplify the obligations of mining business license holders. However, as with many newly promulgated regulations in Indonesia, definitive implementing regulations for the Regulation will be important for purposes of clarity and legal certainty.

*The article above was prepared by **Maurice Maulana Situmorang (Partner) & Akbar Bayu (Senior Associate)**.*

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