

Amendment to Mining Law: Resolution at Last?



The official text of the amendment to Indonesia's Mining Law (Law No. 4 of 2009) finally became available to the public last week as Law No. 3 of 2020. This amendment, spanning 93 pages, touched on a host of flashpoints in Indonesia's mining sectors – centralisation of authorities, conversion of COW (*kontrak karya* or contract of work) and CCOW (*perjanjian karya perusahaan pertambangan batu bara* or coal contract of work) and IUP transfer – to name a few, by revising 83 articles, adding 52 new articles, and deleting 18 articles.

Some of the changes, like the prohibition to encumber mining license and commodities, are not entirely new and have been reflected previously in ministry regulation. As such, mining companies should be familiar with these. However, there are other notable changes in the amendment that will affect the way mining companies operate their business.

Broadly, the key changes in the amendment that are worth noting by prospective investors and existing mining business players are as follows:

1. Centralisation of Authorities

The first key change in the amendment is the entrenchment of the revocation of city/regency government's authority to issue and supervise mining licenses under the Government Regulation No. 23 of 2014 on Regional Government. The authority to issue and supervise mining licenses is now solely held by the central government through the Minister of Energy and Mineral Resources ("**Minister**") by revoking the provincial government's authority.

By doing so, the amendment seeks to streamline a process that is often identified as bureaucratic hurdles between different regional governments, including on overlapping of mining areas. Despite the centralisation in the amendment, the Minister can still delegate some of its powers to the regional

government. Accordingly, going forward, regional governments will only be involved in the licensing process if the central government has granted that authority.

But the regional governments still hold the authority to determine mining areas, even though the Minister will still need to declare the regional government's determination officially. This retainment of authority by the regional government is expected as the regional governments are more familiar with their respective regions compared to the central government. The amendment provides a six-month transitional period for the transition of authorities from the provincial governments to the central government.

In addition, while the amendment explicitly says that any existing licenses (including licenses issued by the regional governments – save for IUP Specifically for Processing and/or Refining) will remain valid until its expiry date, it is unclear whether the implementation of the obligations under those licenses, such as submission of reports, work plan and budget, will be supervised by the Minister upon the lapse of the transition period.

Separately, the amendment seems to give more certainty for prospective investors and existing mining companies on business continuity as the government now guarantees:

- a. there will be no amendment or change to existing functionality of previously determined mining areas for which licenses have been issued; and
- b. necessary licenses for mining business activities will be issued, provided that the mining company has complied with all requirements under the prevailing laws and regulations.

2. License for Smelting or Processing Activities

The amendment clarifies the confusion on the type of license required to operate a non-integrated smelter and/or processing facility by requiring a company intending to operate such smelter or processing facilities to obtain a business license for industrial business activities.

This clarification means that an operation production mining business license specifically for processing and/or refining (*Izin Usaha Pertambangan Operasi Produksi Khusus Untuk Pengolahan dan/atau Pemurnian*) is no longer recognised. Consequently, the holder of such a license must adjust their license into an industrial business license within a year of the amendment to continue its operation. However, the actual practice may be challenging as the two licenses fall under the authorities of two different entities: the Minister (who governs operation production mining business license specifically for processing and/or refining) and the Ministry of Industry (who governs the industrial business license).

3. New Licenses

The amendment introduces several new licenses for mining business, including a rock mining certificate (*surat izin penambangan batuan* or “**SIPB**”), an assignment license (*izin penugasan*) and a special mining business license as a continuation of a COW or CCOW (*izin usaha pertambangan khusus sebagai kelanjutan operasi kontrak/perjanjian* or “**Operation Continuation IUPK**”).

A SIPB will be granted to allow a mining company to exploit certain types of rocks to be used for a specific purpose and it will cover the planning, mining, processing, transporting as well as selling of those rocks. But the amendment does not specify the types of rocks that will require a SIPB (as opposed to an IUP).

Meanwhile, an assignment license will be granted to allow the exploitation of radioactive minerals based on the nuclear regulatory framework in Indonesia. Again, the amendment does not provide further details of this license, and we expect that both the SIPB and the assignment license will be explained further in the implementing regulation for the amendment.

4. Operation Continuation IUPK

Perhaps the most anticipated change is the introduction of the Operation Continuation IUPK for the holders of COW and CCOW. In the amendment, the Minister guarantees the issuance of an Operation Continuation IUPK to holders of expired COW or CCOW – effectively extending such COW or CCOW. To obtain the Operation Continuation IUPK, the COW or CCOW holder must apply for conversion between 1-5 years before the expiration date of the COW or CCOW.

Under the Operation Continuation IUPK, COW and CCOW holders will be able to continue their mining operation after the expiry of their COW or CCOW for effectively:

- (a) 20 years (in the form of two 10-year extensions) if the COW or CCOW has never been extended;
or
- (b) 10 years (in the form of one 10-year extension) if the COW or CCOW has been extended before.

The extended operation will be allowed under an Operation Continuation IUPK.

While the amendment uses the term “guaranteed,” the issuance of the Operation Continuation IUPK is, in reality, discretionary, as the Minister will have to consider several factors, including state revenue.

Another key point on Operation Continuation IUPK is that the amendment does not limit the size of the mining area that can be granted under the Operation Continuation IUPK. Presumably, this is one of the government’s efforts to encourage COW and CCOW holders to subject themselves to the licensing regime. This new relaxation seems to accommodate and resolve the concern from

various COW and CCOW holders on issues around the limitation imposed by the government on mining areas upon the conversion of COW or CCOW.

5. Integrated Facilities

To stimulate domestic processing activities, the amendment allows a mining company to operate their own smelter and/or processing facilities (or for a coal company, development and utilisation facilities), by granting a guaranteed 10-year extension to the company's IUP, without limiting the number of the extension.

6. Share Transfer

To clarify the status quo on share transfer in a publicly listed mining company, the amendment expressly exempts the requirement to obtain the Ministry's approval for such share transfer. Also, a share transfer in a publicly listed mining company via the stock exchange can now proceed without the discovery of two prospective mining areas as previously required under the 2009 Mining Law.

7. Transfer of Mining License

Previously, the 2009 Mining Law expressly restricts the transfer of an IUP (mining business license or *izin usaha pertambangan*) and IUPK (special mining business license or *izin usaha pertambangan khusus*). However, the implementing regulation of the 2009 Mining Law states that a company can transfer an IUP or IUPK, provided that, the transferee is a company where 51% or more shares are owned by the holder of the relevant IUP or IUPK. Consequently, this contradiction gives rise to uncertainty for mining companies in practice.

Now, the amendment allows the transfer of an IUP and IUPK if the Minister has approved of such transfer. The Minister will only allow the transfer if, at the minimum, the relevant IUP or IUPK holder has:

- (a) completed the exploration activities, as evidenced by the data on the relevant resources and reserves; and
- (b) fulfilled all administrative, technical, environmental, and financial requirements.

8. Encumbrance Prohibition

Echoing the current prohibition under the Regulation of the Minister of Energy and Mineral Resources No. 7 of 2020, the amendment also expressly prohibits an IUP or IUPK holder from encumbering their IUP or IUPK, as well as their mining commodities, as securities to other parties.

9. Divestment Requirement

All players in the Indonesian mining industry are familiar with the 51% divestment requirement. Previously, an IUP or IUPK holder in the form of a PMA company (a foreign investment company or *perusahaan penanaman modal asing*) must gradually divest its shares to Indonesian parties (based on the order of priority, with the central government at the top and a national private business entity placed last) after the fifth year of its commercial production. This divestment requirement ensures that by the tenth year of commercial production, at least 51% of the total issued shares of the PMA company are owned by Indonesian parties.

Now, the amendment is silent on the 5-10-year timeline. As a result, there is now uncertainty for IUP and IUPK holders, at least until an implementing regulation is issued. While they are still required to divest 51% of their shares, there is no clear timeline as to when they will have to start the divestment and whether the central government will have the sole authority to decide when the divestment will start.

10. Other Provisions

Lastly, the amendment also introduces new obligations for mining companies, namely:

a. Obligation to use a mining road

The amendment requires all IUP and IUPK holders to utilise the so-called “mining road” in their operation. A mining road means a road that is functioned explicitly for mining activities and located within a mining area or project area.

b. Obligation to establish a reserve fund

The amendment requires IUP and IUPK holders entering the production operation stage to establish a “special fund”. This fund will be used for the discovery of new reserves in the future.

As the amendment does not provide further details on these new obligations, we expect that these obligations to be explained further in the implementing regulation of the amendment.

After 11 years, the amendment certainly tidied-up major loose ends that have sprung up under the current mining regulatory framework. But there are still old questions, as well as new ones, which are likely to be addressed in further implementing regulations.

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