

Yesterday. Today. Tomorrow.

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Year in review,
Year to come
Indonesia

December 2018



Year in review

Indonesian Law in 2018

A broad range of regulatory updates were made in 2018 in a number of key sectors in Indonesia including FinTech, oil and gas and power. Other broader changes include the introduction of a new centralised licensing system and takeover rule for public companies.



Indonesian Government introduces new centralised licencing system:

On 21 June 2018, the Government issued Government Regulation 24 of 2018 on Electronically Integrated Business Licensing Service (“GR 24/2018”) to significantly cut down the lead time for completing investments and commencing business. Except for financial services sectors and certain subsectors in energy and mineral resources, public works and housing, tax and foreign representative offices, most business and operational licences in Indonesia must be applied for through the new Online Single Submission System (“OSS System”). All business entities must now have a Business Identification Number (*Nomor Induk Berusaha*) which is a single unique entity number that will replace the different identification numbers previously issued for the purposes of the business registration certificate (TDP), importer identification (API) and custom rights access. Another significant change is that GR 24/2018 abolishes the requirement for foreign investment companies (commonly known as PMA companies) to obtain prior approvals from the Investment Coordinating Board (*Badan Koordinasi Penanaman Modal* or “BKPM”) for any foreign investment activities, including company establishment, share transfers and capital increases. The OSS System is intended as a “post facto” approval and audit system; therefore, foreign investment companies now only need to notify investment activities in the OSS System post-completion.

Public company takeover rules updated:

OJK has issued a new takeover rule for public companies, OJK Regulation 9/POJK.04/2018 (“POJK 9/2018”), which replaces a 10-year old regulation issued by its predecessor, Bapepam-LK. The key changes in POJK 9/2018 seek to clarify existing rules and tighten deemed loopholes in the exemptions from a mandatory tender offer (“MTO”) obligation in its predecessor regulation. For example, a takeover of a public company through a rights issue (a hitherto popular structure for a takeover by a “standby purchaser”) will no longer benefit from an MTO exemption.

POJK 9/2018 also clarifies that: (i) the test for “controller” and “control” set out in POJK 9/2018 (which is based on a direct or indirect ownership of more than 50% of voting shares, or the ability to exercise *de facto* control) would take precedence over the tests set out in sectoral regulations (such as banking and insurance regulations, which have a 25% control threshold); and (ii) the new controlling shareholder may designate a subsidiary to undertake the MTO that is triggered. The mandatory sell-down (which applies if the new controller holds more than 80% of the voting shares) must now be completed within two years; it does not contemplate that an extension will be permitted.

New FinTech regulation

To provide more legal certainty for the growing FinTech sector in Indonesia, the Financial Services Authority (“OJK”) issued OJK Regulation 13/POJK.02/2018 on Digital Financial Innovation in Financial Services Sector (“POJK 13/2018”) on 16 August 2018. POJK 13/2018 applies to FinTech businesses that are not in the payment services space (which is under the remit of Bank Indonesia) such as investment, insurance and crowdfunding. POJK 13/2018 is intended as an umbrella regulation, as it foreshadows further implementing regulations that will more specifically regulate each type of FinTech activity in more detail. That said, the introduction of an OJK-supervised regulatory sandbox is notable. This regulatory sandbox is intended to provide the OJK (through its newly established Centre for Digital Financial Technology) with greater flexibility within the existing regulatory framework to facilitate product innovations and accelerate financial inclusion. FinTech services providers may operate in the regulatory sandbox for up to 1.5 years, after which OJK would determine whether such FinTech services may continue to operate.

New takeover rule for public companies

The Financial Services Authority (OJK) has issued a new takeover rule for public companies and revoked the preceding Capital Market and Financial Institution Supervisory Body Rule.

New centralised licensing system

The Government introduced a new centralised licensing system to cut down the lead time for completing investments and commencing businesses.

OJK revamps e-money regulation:

Bank Indonesia issued a new e-money regulation, BI Regulation 20/6/PBI/2018 (“PBI 20/2018”), on 3 May 2018, to replace the previous e-money regulation which was first issued in 2009. The new rules reflect a paradigm shift on the regulation of e-money issuers, and recognises the need to introduce limited prudential regulatory measures in view of the growing prevalence of e-money. Compared to the previous e-money regulation, Bank Indonesia has introduced more stringent requirements that include: (i) a minimum capital-to-managed floating fund ratio; (ii) licensing requirements for closed-loop e-money issuers; (iii) a single presence rule; and (iv) a minimum holding period for its shareholders. There is also now a foreign ownership cap of 49 per cent, which is significant as the previous regulation permitted 100 per cent foreign ownership.

New insurance sector foreign ownership rules:

The Government issued a long-awaited regulation on foreign ownership limits in April 2018. Government Regulation 14 of 2018 regarding Foreign Ownership in Insurance Companies (“GR 14/2018”) provides that the foreign ownership cap in insurance companies remains at 80% for private insurers (this cap does not apply to listed insurers). However, unlike the previous regulatory regime, the 80% foreign ownership cap for private insurers under GR 14/2018 is a “hard” cap – there is no exemption allowing the foreign investor to dilute the local shareholder through subsequent capital raisings. Foreign investors whose ownership in private insurers exceeded 80% under the previous regulatory regime are grandfathered, but through the “hard” cap rules, would be expected to be diluted back to 80% over time. Foreign ownership under GR 14/2018 captures both direct and indirect foreign ownership. This is a new concept in the insurance sector, and OJK has indicated that it would seek to adopt an “effective interest” approach in calculating the level of foreign ownership.

Restructuring of natural gas business:

The Government issued Minister of Energy and Mineral Resources (“MEMR”) Regulation 4 of 2018 on Utilisation of Natural Gas by Downstream Oil and Gas Business as part of its ongoing efforts to restructure the Indonesian gas market. Under the new regulation, the Government will determine the gas infrastructure masterplan and tender each portion of an area to a business entity for the purpose of creating an efficiently integrated infrastructure network and avoiding any overlapping in infrastructure construction. Each business entity is required to construct its own infrastructure for integration into a national integrated gas infrastructure network. The Government hoped that this new scheme would shift businesses’ focus on to the provision of gas infrastructure, instead of on securing gas allocations. Additionally, the new regulation also provides for non-pipeline gas business activities (CNG and LNG) to anticipate the potential future need to import gas. However, the challenge for the implementation of this regulation is the Government’s ability to ensure a steady supply of gas.

Relaxation of licensing requirements for oil and gas supporting business activities:

In line with the Government’s promise to facilitate doing business in the oil and gas industry, the Government issued MEMR Regulation 14 of 2018 on Oil and Gas Supporting Business Activities (“MEMR 14/2018”). This replaced the MEMR Regulation 27 of 2008 on Oil and Gas Supporting Business. The MEMR 14/2018 was intended to simplify the layered licensing approach taken under the previous regulation. The Government now classifies oil and gas supporting business into three types: (i) construction business (construction consultancy, actual construction work and integrated construction work); (ii) non-construction business (geological and geophysical services, drilling services, O&M services, inspection services); and (iii) supporting industry business (production of materials and tools used in upstream oil and gas operations). The new regulation provides for a single operating licence requirement, called the Certificate of Capability to Provide Supporting Business (*Surat Kemampuan Usaha Penunjang* or “SKUP”). This will be issued to the qualified businesses by the Director General of Oil and Natural Gas (“MIGAS”).

Government affirms its position on the performance of post-operation liabilities:

The older Indonesian production sharing contract (“PSC”) model does not typically have clear provisions for post-operation liabilities. Post-operation liabilities were only clearly regulated in PSCs signed from 2001. In particular, provisions on the abandonment and site restoration fund (“AARF”, the fund reserved to cover the post-operation liabilities) were only included in the post-2003 PSC model. Therefore, the applicability of post-operation liabilities to older model PSCs has been the subject of debate between the government and the PSC contractors. In the MEMR Regulation 15 of 2018 on Post-Operation Activities in Upstream Oil and Gas Business Activities, the Government affirmed that contractors are liable for post-operation liabilities regardless of its PSC model. As a result, the AARF fund reservation model will apply to an older model PSC throughout its term, with expenses for post-operation liabilities treated as the PSC’s operating costs. However, as most older model PSCs will expire soon, it remains to be seen whether the new regulation could be effectively implemented.

Government maintains its commitment to exclude Letters of Credit (“L/C”) requirement for export of oil and gas products:

After some changes to the Government policy on the use of L/C as the payment means for oil and gas export and import transactions, the Government issued the Minister of Trade Regulation No. 102 of 2018 on Amendment of Minister of Trade Regulation No. 94 of 2018 on Provisions of the Use of Letters of Credit for Export of Certain Commodities. This excludes oil and gas products from the commodities which will be subject to the L/C requirement.

Relaxation of requirements for oil and gas activities

To facilitate doing business in the oil and gas industry, the Government issued a new regulation (MEMR 14/2018) to simplify the licensing approach.

Geothermal working area and geothermal licensing:

In the geothermal sector, the Government issued MEMR Regulation 37 of 2018 which addresses (i) procedures for the offering of geothermal working areas; (ii) the issue of geothermal licences; and (iii) assignments of geothermal business. This regulation also incorporates comprehensive tender mechanisms. The MEMR is also authorised to assign Public Service Bodies (*Badan Layanan Umum*) or State-Owned Enterprises operating within the geothermal sector to undertake the exploration, exploitation and/or utilisation of working areas. The regulation has been in force since 5 July 2018 and replaces several provisions set out under the previous regulations, specifically those relating to the offering of geothermal working areas, as well as geothermal licences.

PPA Basic Provisions:

The Government also issued MEMR Regulation 10 of 2018 ("MEMR 10/2018"). This serves as the second amendment to Regulation 10 of 2017 on Basic Provisions of Power Purchase Agreement ("PPA") ("MEMR 10/2017"). This applies to PPAs between PT Perusahaan Listrik Negara (Persero) ("PLN"), as the state-owned enterprise assigned by the Government to implement an electricity supply business, and the IPP. This amendment further addressed concerns of investors and lenders to IPPs in relation to political risk allocation for IPP projects following the issuance of MEMR 10/2017. The ordinary market practice is that where there is a change in law or change in policy affecting the project, IPP should be entitled to compensation (i.e. "deemed dispatch payments" and increased cost protection) where the plant would otherwise be available to generate power. However, as MEMR 10/2017 stated that both parties are released from any obligations relating to FM, this cast doubt on the availability of the market practice of providing these protections as a result of a change in law / change in policy, which would clearly be a key bankability point. MEMR 10/2018 removed change in law or regulation from the list of FM events for which PLN would be released from its obligations. These deletions (and other consequential changes) in our view mean that PLN is permitted to provide under the PPAs for the remedies and reliefs to apply in respect of a change in policy/change in law consistent with precedent and market practice.

Year to come

Indonesian Law in 2019

Significant changes are expected to take place in 2019 including the introduction of the new oil and gas law and revisions to the negative list on foreign investment.



New oil and gas law:

During the last few years, the oil and gas industry has been anticipating a major overhaul of its regulatory regime. Draft oil and gas legislation, as well as presidential regulation of the gas sector, has been publicly circulated on several occasions. Anticipated changes include the introduction of an Upstream State-Owned Entity (the BUK) which will manage upstream activities and a Gas Aggregator which will manage the downstream gas business activities. The anticipated changes seem to be taking effect, especially given the acquisition of the government's stake in PT Perusahaan Gas Negara (Persero) Tbk. ("PGN") by PT Pertamina (Persero) ("Pertamina") and the proposed acquisition of Pertamina's gas trading arms by PGN. However, there has been no clear deadline set for these changes to be implemented.

BKPM to take over the OSS System:

BKPM is preparing to take over the OSS System which is currently administered by the Coordinating Ministry for Economic Affairs ("CMEA"). BKPM, as an institution in charge of capital investment in Indonesia, is tasked under GR 24/2018 to act as the operator of the OSS System. However, given the time required to provide adequate personnel and infrastructure for this, the CMEA will still run the OSS System until 21 December 2018. Despite this, it appears that a full transition from CMEA to BKPM will take place in early 2019. We also expect this transition to be followed by an amendment to GR 24/2018 and other sectoral regulations.

Revisions to the 2016 Negative List:

In September 2018, CMEA initiated several discussions with the ministries and institutions on the revisions to the Presidential Regulation 44 of 2016 on the Types of Business Lines which are Closed and Conditionally Open in the Field of Capital Investment ("2016 Negative List"). A number of investment relaxations are proposed for the new Negative List, and mid-November, the Coordinating Ministry of Economic Affairs ("CMEA") issued the 16th Economic Policy Package that identified over 50 business lines that are expected to be 100 per cent open to foreign investment.

The soon to be fully liberalised business lines include non-route specific public transportation, internet access services, content telecommunication services, medical devices industries, large-scale power generation and drilling services in the oil and gas and geothermal sectors. Further simplification of the licensing requirements in certain subsectors are also being contemplated. These suggestions are still being reviewed by CMEA together with the other ministries.

Changes to the in-country data centre requirement:

The long-anticipated amendment to Government Regulation No. 82 of 2012 on the Implementation of Electronics Systems and Transactions is planned to be issued no later than the first quarter of 2019. One of the most closely market-monitored amendments is the change to the data localisation requirement. Under current rules, all Indonesian companies must store their data in a local data centre. This requirement is generally viewed as unpragmatic and is a barrier to effective data storage by businesses (e.g. a multinational group may have a centralised data centre for all of its group companies outside of Indonesia, and local businesses see this as a hindrance to efforts to use cloud-based storage). Based on a draft of the amendment published earlier in 2018, the Government appears to be prepared to take a more pragmatic approach to data localisation requirements, by recognising different categories of data, and applying different requirements on localisation based on such categories.

Minimum selling area of supermarkets that can be owned by a foreign investment company:

Foreign investment is permitted only in large-scale retail. Under current rules, in the context of operating modern stores, foreign-invested companies may only operate supermarket that have a minimum selling area of more than 1,200sqm and mini-markets that have a minimum selling area of more than 400sqm. The Government is now considering reducing the minimum selling area requirements for certain types of modern stores, such as department stores and wholesale stores, owned by foreign-invested companies. This amendment is aimed at facilitating the opening of more modern stores in less developed regions in Indonesia.

New oil and gas law

A new oil and gas legislation is expected to be introduced in 2019. Anticipated changes include the introduction of an Upstream State-Owned Entity to manage upstream activities and a Gas Aggregator to manage downstream gas activities.

What now?

Your contacts

We hope that you have found this guide useful. Please contact your usual Widyawan & Partners or Linklaters contact, if you would like to discuss any of these matters further.



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