



Update on the Ministerial Regulation which Revokes and Replaces the Previous Ministerial Regulation on the Supervision of Changes to the Shareholdings or Board Members of Companies doing Business in the Field of Energy and Mineral Resources

Overview

The Minister of Energy and Mineral Resources (“MEMR”) recently issued MEMR Regulation No. 48 of 2017 on the Supervision of the Implementation of Business Activities in the Field of Energy and Mineral Resources (“Reg. 48/2017”) revoking and replacing the previous MEMR Regulation No. 42 of 2017 (“Reg. 42/2017”). The issuance of Reg. 42/2017 sparked multiple debates and objections due to the regulation’s ‘not so investor friendly’ requirements.

Major changes were made under Reg. 48/2017 in particular to the provisions relating to the electric power supply business. However, almost no changes were made to the other provisions of Reg. 42/2017, ie in the geothermal, oil and gas, and minerals and coal mining sectors, or the mechanism for the procurement of bio-diesel fuel. Reg. 48/2017 came into effect on the date of its issuance, 3 August 2017.

Impact on the Power Sector

Definition of an Electric Power Supply Business License (*Izin Usaha Penyediaan Tenaga Listrik* – “IUPTL”) Holder.

Reg. 48/2017 limits IUPTL Holders with a power plant business to those which sell their electric power to PLN. Therefore, it is now clear that Reg. 48/2017 does not apply to integrated IUPTL holders. In our unofficial oral discussion with an official at the Directorate General of Electric Power, we were told that Integrated IUPTL holders are not subject to the requirements under Reg. 48/2017, even if they sell their excess electric power to PLN.

Reg. 48/2017 includes specific provisions on IUPTL Holders that generate electric power from (i) new and renewable energy, other than geothermal energy; as well as (ii) geothermal energy, which sell their electric power to PLN.

Now, under Reg. 48/2017, **no prior MEMR approval is required, only a post-report must be submitted to MEMR.** Under Reg. 48/2017, a power project company (independent power producer – IPP) which holds an IUPTL (“Project Company”) is only required to report to MEMR (through the Director General of Electric Power) any transfer of shares in the Project Company or any change to its Board of Directors (“BOD”) or Board of Commissioners (“BOC”). However, particularly for a share transfer, prior approval from PT PLN (Persero) (“PLN”) (as the buyer under the Power Purchase Agreement (“PPA”)) is still required under Reg. 48/2017.

Specifically for IUPTL Holders that generate electric power from new and renewable energy, other than geothermal energy, the report must be copied to the Director General of New, Renewable Energy and Conservation of Energy (*Direktur Jenderal Energi Baru, Terbarukan dan Konservasi Energi*).

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Changes to Shareholdings

As explained above, transfers of shares in an IUPTL holder remain prohibited **before** the Commercial Operation Date/COD, except for a transfer to an affiliate of the funder (Sponsor) one level below, ie to a 90% owned direct subsidiary of the Sponsor. The regulation is silent on any transfer of shares **after** the COD, which arguably should not be subject to the limitation under Reg. 48/2017.

A transfer of shares requires prior approval from PLN (as the electric power buyer). The transfer must then be reported in writing to MEMR through the Director General of Electric Power within 5 (five) working days of the latest edition of its Articles of Association ("AOA") being approved by the Minister of Law and Human Rights ("MOLHR"). As a change to the shareholders does **not** require any amendment to the AOA, we believe that Reg. 48/2017 here actually refers to the date of the MOLHR receipt for the notification of the change to the shareholders, **not** the MOLHR approval of the latest AOA. The written report must be accompanied by the following supporting documents:

- a) a copy of the notarial deed of the General Meeting of Shareholders' ("GMS") resolutions on the share transfer (we believe this should be the deed regarding the GMS' approval for the share transfer and the change to the shareholders together with the relevant MOLHR receipt for the notification);
- b) a copy of the company's latest AOA along with their MOLHR approval decree (which we believe does not apply to a change to the shareholders); and
- c) a copy of the power purchaser's (ie PLN's) approval.

Changes to the BOD or BOC

IUPTL holders must also report any change to their BOD or BOC to MEMR. The written report must be submitted to MEMR through the Director General of Electric Power within 5 (five) working days of the latest edition of their AOA being approved by the MOLHR. As for a share transfer, we believe that the reporting deadline refers to the date of the MOLHR receipt for the notification of the changes to the BOD or BOC, **not** the MOLHR approval for the latest AOA. The written report must be accompanied by the following supporting documents:

1. a copy of the notarial deed of the GMS resolutions on the share transfer (we believe this should be the deed regarding the change to the BOD and/or BOC together with the relevant MOLHR receipt for the notification); and
2. a copy of the company's latest AOA along with their MOLHR approval decree, (which we believe does not apply to a change to the shareholders).

By regulation, IUPTL holders using geothermal energy are exempt from the reporting requirement, although they will still be subject to the requirements under Reg. 48/2017 as Geothermal License (*Izin Panas Bumi – 1PB*) holders (as further explained below).

Noteworthy issues concerning Reg. 48/2017

a. Temporary IUPTL holders may still have to satisfy the requirements under Reg. 48/2017

As Reg. 48/2017 does not differentiate between a temporary IUPTL and a permanent IUPTL, any change to the shareholdings or board members of a temporary IUPTL holder should arguably also comply with the requirements under Reg. 48/2017. However, this brings up a new issue, as before the PPA is signed, there is no 'power purchaser' to obtain approval or a recommendation from.

b. Share Transfers and the Enforcement of Security

Following the issuance of Reg. 48/2017, lenders also need to revisit their current company structure and security, in particular with regard to share pledges at project company level. In the unlikely event that the pledge is enforced before the project's COD, the pledge may not be completed due to the 90% direct subsidiary restriction which still applies under Reg. 48/2017. Therefore, we believe offshore security (over upper-level shares) will play a much more important role in protecting the interests of the lenders.

c. No limit on transfers of shares in the Sponsor's subsidiary

Reg. 48/2017 only addresses changes to shareholdings in IUPTL holders. It is silent on any further changes to holders of shares in the 90% (or even 100%) owned subsidiary of the Sponsor. Therefore, arguably, the Sponsor can transfer its ownership of 90% of the shares in its subsidiary (which owns shares in the IUPTL holder) to another party without having to comply with the requirements under Reg. 48/2017. Neither is there a requirement for the initial sponsor to remain the ultimate owner of the Project Company.

Alternatively, a Sponsor can also establish a 100% owned special purpose vehicle ("SPV") to hold shares in the Project Company. Afterwards, any new investor can participate in the project by acquiring or subscribing to new shares in the SPV company, which arguably, should not be subject to the requirements under Reg. 48/2017.

Impact on Other Sectors

Oil and Gas

An upstream contractor with partnership contracts ("**Contractor**"), which is a business entity or a permanent establishment, requires prior approval from MEMR based on a consideration from The Special Taskforce for Upstream Oil and Gas Business Activities ("**SKK Migas**") to transfer its "participating interest" (*partisipasi interes*) ie the rights, interests and obligations of the Contractor under a partnership contract. In addition, a Contractor may not transfer a majority of its participating interest to a non-affiliate within the first 3 years of the exploration period.

For a transfer of shares in the Contractor which causes a change of direct control over the Contractor, MEMR approval based on a consideration from SKK Migas is also required. Meanwhile, a share transfer which causes an indirect change of control only needs to be reported in writing to MEMR through the Head of SKK Migas.

A change to the BOD or BOC must be reported in writing to MEMR through the Director General of Oil and Gas. Reg. 48/2017 does not list the documents required to accompany the report, but we believe the deed of the GMS resolutions on the share transfer or change to the BOD/BOC along with the relevant MOLHR receipt for notification should be submitted, as well.

Meanwhile, in the downstream oil and gas business, any transfer of shares in or a change to the BOD or BOC of a business entity which holds a downstream business license must be reported in writing to MEMR through the Director General of Oil and Gas accompanied by the latest edition of its AOA and their MOLHR approval decree. Again, we believe this refers to the notarial deed of the GMS resolution approving the share transfer or the change to the BOD/BOC along with the MOLHR receipt for the notification of the relevant notarial deed.

Minerals and Coal Mining

Under Reg. 48/2017, holders of a (i) Mining Business License (IUP) or Mining Business License for Production Operations specifically for processing and/or refining issued by MEMR; (ii) Special IUP (IUPK); (iii) Contract of Work (KK); and (iv) Coal Mining Undertaking Work Agreement (PKP2B) require approval from MEMR for any transfer of shares or change to their BOD or BOC. MEMR will provide its approval or reject the application within 14 working days of receipt of the complete and correct application. Like Reg. 42/2017, Reg. 48/2017 is silent on the possible causes of a rejection and there is no 'deemed acceptance' by MEMR after a certain period. It does not explain what steps the license holder can take upon receipt of the rejection, or what happens if MEMR does not issue its approval or rejection within 14 working days. If MEMR withholds its approval for no clear reason or rejects the application, it may be possible for the license holder to ultimately seek recourse in the State Administrative Court (PTUN). However, this remains untested and it will certainly be time-consuming.

Various administrative and financial supporting documents must be submitted to MEMR to obtain its approval for a share transfer or change to the BOD and BOC including, among others, the transferee's annual tax return (*Surat Pemberitahuan Tahunan Pajak Penghasilan*) for the last 2 years and Taxpayer Registration Number (NPWP), unless the transferee is a new company or the new member of BOD or BOC is a foreigner who has not obtained an NPWP yet. Reg. 48/2017 only exempts new companies; it is silent on the transferee being an individual. This leaves the question of what happens when a foreign citizen transferee does not yet have the required Indonesian tax documents.

Geothermal Energy

IPB holders, Geothermal Resources Proxy Holders (*Kuasa Pengusahaan Sumber Daya Panas Bumi*), Contractor of Joint Operation Contracts for Geothermal Resources Businesses (*Kontraktor Kontrak Operasi Bersama Pengusahaan Sumber Daya Panas Bumi*), and Geothermal Resources Business License Holders (*Izin Pengusahaan Sumber Daya Panas Bumi*) may transfer their shares on the Indonesian Stock Exchange after completing the exploration stage. Likewise, prior approval from MEMR is required, for which a written application must be submitted to MEMR through the Director General of New, Renewable Energy, and Energy Conservation. This approval must be obtained before the Initial Public Offering or any change to the composition of their shareholders listed on the Indonesian Stock Exchange ("IDX"). MEMR should grant its approval or reject the application within 14 working days of receipt of the complete and correct application. Various administrative and financial supporting documents need to be submitted together with the application. Again, Reg. 48/2017 is silent on the possible causes of a rejection and there is no 'deemed acceptance' by MEMR after a certain period. It does not explain what steps the license holder can take upon receipt of the rejection, or what happens if MEMR does not issue its approval or rejection within 14 working days. If MEMR withholds its approval for no clear reason or rejects the application, it may be possible for the license holder to ultimately seek recourse in the State Administrative Court (PTUN). However, again, this remains untested and it will certainly be time-consuming.

Any transfer of shares other than on the IDX or change to the BOD/BOC must be reported to MEMR through the Director General of New, Renewable Energy, and Energy Conservation within 5 (five) working days of the latest edition of its AOA being approved by MOLHR (we believe this refers to the MOLHR receipt for the notification). The written report to MEMR must be accompanied by (i) a copy of the GMS resolution (we assume this is the deed approving the share transfer or change to the BOD/BOC together with the MOLHR receipt for the notification) and (ii) a copy of the company's latest AOA along with their MOLHR approval decree (which should not apply in this case).

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