

Summary

The Constitutional Court (“MK”) has struck down several articles in the Oil and Gas Law related to BPMigas’ establishment and duties. The MK recommended in its judgment that BPMigas’ duties and functions be performed by the Minister of Energy and Mineral Resources while waiting for the promulgation of replacement laws and regulations. As per MK precedent, all existing production sharing contracts will remain valid until their respective expiration dates. The transfer of duties and functions have been restated in Presidential Regulation No. 95 of 2012, which was promptly promulgated on 13 November, 2012.

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BP Migas Declared Unconstitutional by Constitutional Court

A. Constitutional Court Decision and Revocation of Articles in Oil and Gas Law

On 13 November 2012, the Indonesian Constitutional Court (“MK”) handed down Decision No. 36/PUU-X/2012 (“**Decision No. 36/2012**”) regarding the constitutional review of Law No. 22 of 2001 on Oil and Gas (“**Oil and Gas Law**”) under the Indonesian 1945 Constitution (the “**Constitution**”). This Decision was made based on petition filed by 42 petitioners on 29 March, 2012. Decision No. 36/2012 declared several articles in the Oil and Gas Law to be unconstitutional and unenforceable. The articles concerned are:

- (i) Article 1 item 23 of the Oil and Gas Law, which states that the Executing Agency shall be an agency established to control upstream business activities in the oil and gas sector;
- (ii) Article 4 Paragraph (3) of the Oil and Gas Law, which states that the Government, as the holder of mining concessions, shall establish an Executing Agency as meant in Article 1 item 23;
- (iii) Article 41 Paragraph (2) of the Oil and Gas Law which states that the supervision over the implementation of upstream business activities which is based on joint cooperation contracts shall be conducted by the Executing Agency;
- (iv) Article 44 of the Oil and Gas Law which regulates the functions and duties of the Executing Agency, i.e. to supervise and control upstream oil and gas activities;
- (v) Article 45 of the Oil and Gas Law which regulates the status and the organizational structure of the Executing Agency;
- (vi) Article 48 Paragraph (1) of the Oil and Gas Law which regulates the source of funds/budget for the Executing Agency;
- (vii) Article 59 item a of the Oil and Gas Law which provides the obligation of the Government to establish the Executing Agency within 1 (one) year of the promulgation of the Oil and Gas Law;
- (viii) Article 61 of the Oil and Gas Law which regulates the duties of Pertamina upon the promulgation of the Oil and Gas Law and upon the establishment of the Executing Agency;

- (ix) Article 63 of the Oil and Gas Law which regulates the transfer of the rights and obligations of Pertamina emanating from production sharing contracts to the Executing Agency.

In its considerations, the MK elaborates its views on the meaning of the Constitution (particularly Article 33 Paragraph (3)¹), concluding that the Government should **manage directly** oil and gas resources, as opposed to only performing supervisory duties through the Executing Agency (at p.105).

There is a dissenting opinion attached to Decision No. 36/2012 from one of the judges, who argued the existence of the Executing Agency was constitutional, as the Constitution does not specify which governmental body/agency should exercise control over natural resources. In addition to this, the dissenting opinion states that the petitioners do not have legal standing as it is unclear as to which petitioners' constitutional rights were impaired by the existence of the Executing Agency.

B. The Impact of Decision No. 36/2012 on BPMigas and Existing Production Sharing Contracts

The articles in the Oil and Gas Law that are declared as unconstitutional by the MK under Decision No. 36/2012 relate to the establishment and duties of an Executing Agency, which, under the Oil and Gas Law, has the authority to control and supervise the upstream oil and gas activities in the Republic of Indonesia, including representing the Government of the Republic of Indonesia in signing PSC's. The agency possessing such authority is the Executive Agency for Upstream Oil and Gas Activities ("**BPMigas**"). This means that, upon the announcement of Decision No. 36/2012, all provisions related to BPMigas that are contained in the Oil and Gas Law do not have binding force and BPMigas will cease to exist.

However, the MK acknowledges that this Decision may result in legal uncertainty particularly in relation to ongoing oil and gas business activities. The MK therefore views that, in the meantime, the functions and duties of BPMigas can be performed by the Government as the holder of mining concessions, or in this case, the Ministry of Energy and Mineral Resources ("**MEMR**"), while waiting for the promulgation of replacement laws and regulations. The MK also states in its Decision that all PSCs that have been signed between BPMigas and business entities or permanent establishments will remain valid until their respective expiration dates or as agreed by the parties. This follows a strong line of constitutional precedent regarding the non-retrospectivity of MK decisions.

C. Presidential Regulation No. 95 of 2012 on the Transfer of Duties and Functions of Upstream Oil and Gas Activities

On 13 November 2012, the Government of the Republic of Indonesia issued Presidential Regulation No. 95 of 2012 on the Transfer of Duties and Functions of Upstream Oil and Gas Activities ("**PR No. 95/2012**") containing provisions similar to the MK's recommendations, namely that the implementation of the duties and functions of BPMigas shall be transferred to the MEMR, until the issuance of replacement laws and regulations and that all PSCs that have been signed between BPMigas and business entities/permanent establishments shall remain valid until their expiration date. PR No. 95/2012 further states that all upstream oil and gas activities that were being managed by BPMigas shall in turn be managed by the MEMR.

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¹ Article 33 Paragraph (3) of the Constitution states that land and water and natural resources contained therein shall be controlled by the state and used for the prosperity of the people.