



New Indonesian Regulation Requires Ministerial Approval for Changes to Shareholdings or Board Members of Companies doing Business in the Field of Energy and Mineral Resources

Overview

On 14 July 2017, the Minister of Energy and Mineral Resources ("MEMR") issued MEMR Regulation No. 42 of 2017 on the Supervision of the Implementation of Business Activities in the Field of Energy and Mineral Resources ("Reg 42/2017"), which affects businesses in the energy and mineral resources industry, namely in the power, geothermal, oil and gas, and minerals and coal mining sectors. The regulation also provides the mechanism for the procurement of bio-diesel fuel. The regulation came into effect on 17 July 2017.

Impact on the Power Sector

Reg 42/2017 requires a power project company (commonly referred to as an independent power producer – IPP) which holds an Electric Power Supply Business License (*Izin Usaha Penyediaan Tenaga Listrik* – "IUPTL") to obtain prior approval from MEMR for any transfer of shares in the company or any change to its Board of Directors ("BOD") or Board of Commissioners ("BOC").

Changes to Shareholdings

Under Reg 42/2017, any share transfer in an IUPTL holder requires prior approval from MEMR, and is only possible if:

- a. the power plant has reached its Commercial Operation Date ("COD"); **or**
- b. the transfer is to an affiliate, 90% of the shares of which are owned by the funder (Sponsor) who wishes to transfer the shares and the shares may only be transferred to one level below, ie to a 90% owned direct subsidiary of the Sponsor.

In order to obtain MEMR approval, the IUPTL holder must submit a written application to MEMR accompanied by the administrative and financial requirements, which include among other things, approval from PT PLN (Persero) ("PLN"). The following documents must be submitted to MEMR through the Director General of Electric Power:

1. the written application;
2. the basis or reason for the share transfer;
3. a copy of the notarial deed of the General Meeting of Shareholders resolutions on the share transfer;
4. a copy of the company's latest Articles of Association along with their Minister of Law and Human Rights ("MOLHR") decree;
5. a copy of the company's valid IUPTL;
6. the letter of approval from the power purchaser (ie PLN);
7. a written statement (duly stamped) that the submitted documents are correct;
8. digital copies of the required documents;
9. the transferee's annual tax return (*Surat Pemberitahuan Tahunan Pajak Penghasilan*) report for the last 2 years and Taxpayer Registration Number (NPWP); and
10. the transferee's financial statements for the last 2 years audited by a public accountant.

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Changes to the BOD or BOC

IUPTL holders also require prior approval from MEMR for any change to their BOD or BOC. Therefore, any change to the BOD or BOC must now be 'approved' by both PLN and MEMR (as PLN must issue a recommendation for any change to board members). The following documents must be submitted to MEMR:

1. the written application;
2. a copy of the notarial deed of the General Meeting of Shareholders resolutions on the change;
3. a copy of the company's latest Articles of Association along with their MOLHR decree;
4. the profile of the new member of the BOD or BOC along with a copy of his/her identity card (KTP) for an Indonesian citizen or passport for a foreign citizen;
5. the new BOD or BOC member's annual tax return (*Surat Pemberitahuan Tahunan Pajak Penghasilan*) report for the last 2 years and Taxpayer Registration Number (NPWP); and
6. a recommendation from the power purchaser.

We believe the requirement to submit the transferee's or BOD/BOC member's annual tax return report still leaves the question of what happens when a foreign company or a newly arrived foreign citizen does not yet have Indonesian tax documents.

Noteworthy issues concerning Reg 42/2017

a. No clear timing for the power purchaser's approval or recommendation

One of the documents that must be submitted to MEMR in order to obtain its approval is a recommendation/approval from the power purchaser. Therefore, IUPTL holders must apply for a recommendation/approval from PLN (as the sole off-taker under the Power Purchase Agreement ("PPA") with PLN). The regulation does **not** set a time limit for the issuance of the required PLN approval or recommendation (as applicable) which creates a degree of uncertainty regarding how long PLN will take to issue its approval or recommendation. In addition, it is also unclear whether an integrated IUPTL holder needs an approval or recommendation from all its power purchasers, ie all the tenants in an industrial area.

b. No clear process after a rejection or non-approval by MEMR

The above requirements are not merely administrative as MEMR can reject the application within 14 working days of receipt of the complete and correct application. Reg 42/2017 is silent on possible causes of a rejection and there is no 'deemed acceptance' by MEMR after a certain period. Reg 42/2017 only states that if MEMR rejects an application, the applicant will be informed in writing along with the reason through the Director General of Electric Power. It does not explain what steps the IUPTL 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, we believe the Project Company can ultimately seek recourse in the State Administrative Court (PTUN). However, this remains untested and will certainly be time-consuming.

c. Temporary IUPTL holders may also have to satisfy the requirements under Reg 42/2017

As Reg 42/2017 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 42/2017. However, this brings up a new issue, as before the PPA is signed there is no 'power purchaser' to obtain an approval or recommendation from.

d. Share Transfers and the Enforcement of Security

Before Reg 42/2017 came into force, restrictions on project companies changing their shareholdings were imposed under the PPA, specifically the Sponsors' Agreement between the project company and PLN, rather than in a regulation. However, PPAs generally require the Sponsors to hold a certain percentage of shares after the lock-in period (usually 5 years after COD) if a share transfer is to occur. PLN approval is usually only required for a share transfer by the Sponsors, especially one which may affect PLN's interests, not for a change to the BOD or BOC of the Project Company. Now, under Reg 42/2017, any change to the shareholdings or the BOD or BOC of the Project Company requires an approval and/or recommendation from PLN.

Following the issuance of Reg 42/2017, lenders also need to revisit their current company structure and security, in particular with regard to share pledges at project company level. The regulation is silent on whether MEMR approval is required for the enforcement of a pledge of shares. However, since the enforcement of a share pledge will result in a share transfer, it should not be exempt. 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 under Reg 42/2017. Therefore, offshore security (over upper-level shares) now plays a much more important role in protecting the interests of the lenders than previously.

e. No limit on transfers of shares in the Sponsors

Reg 42/2017 only specifically addresses changes to shareholdings in (and board members of) IUPTL holders. It imposes no requirements on an initial sponsor which has transferred its shares to its 90% (or even 100%) owned subsidiary. 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 42/2017. Neither is there a requirement for the initial sponsor to remain the ultimate owner of the Project Company.

Therefore, it would appear that a Sponsor can transfer its shares in the Project Company this way. 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 42/2017.

Impact on Other Sectors

Similar rules apply not only to the power sector, but also to the oil and gas, mining and mineral resources and geothermal sectors as follows:

Oil and Gas

Similar rules apply to the oil and gas sector. 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 liabilities 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 3 years of the expiry of the exploration period. MEMR approval based on a consideration from SKK Migas is also required for a share transfer which causes a change to direct control and for any change to the BOD or BOC of the Contractor.

Meanwhile, a transfer of a majority of shares or a change to the BOD or BOC of a downstream business entity only requires prior approval from MEMR (without any recommendation from SKK Migas).

In both upstream and downstream cases, MEMR should grant its approval or reject the application within 14 working days of receipt of the complete and correct application.

Minerals and Coal Mining

Holders of a Mining Business License or Special Mining Business Production Operations License for processing and/or refining now require approval from MEMR for any transfer of shares or change to their BOD or BOC. Again, MEMR will provide its approval or reject the application within 14 working days of receipt of the complete and correct application.

Geothermal

Likewise, for a transfer of shares or change to the BOD or BOC of an IPB holder, prior approval from MEMR is required. However, MEMR should grant its approval or reject the application within only 10 working days instead of 14 working days of receipt of the complete and correct application.

Conclusion

According to the regulation's introductory considerations, the regulation has been issued to increase the level of the MEMR's supervision of businesses in the energy and mineral resources sector. The aim of Reg 42/2017 is to make sure the government 'participates' in the management of the state's natural resources for the greatest benefit of the Indonesian people, as mandated under the 1945 Constitution of the Republic of Indonesia. Now, under this regulation, MEMR has full control over share transfers conducted both before and after the COD. As explained above, if a power plant has not yet reached the COD, only a share transfer to a direct subsidiary, 90% of the shares of which are held by the Sponsor, is allowed.

However, despite the above justification, this 'non-investor friendly' Reg 42/2017 seems not to have been issued in the same spirit as the government's 35,000 megawatt (MW) program or to promote an investor friendly environment. According to the media, the President has instructed MEMR to revise its recently issued controversial regulations that are not investor friendly, one of which regulations we believe would be Reg 42/2017.

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