

Divestment Obligation to be relaxed?

SPEED READ

On 9 September 2021, the Government of Indonesia issued Government Regulation No. 96 Year 2021 on the Implementation of Mineral and Coal Mining Business Activities (**GR 96/2021**). GR 96/2021 provides further elaboration on several provisions of Law No. 3 Year 2020 (the Amendment Mining Law) including the divestment rule. Divestment now starts much later than the previous rule, which was on the sixth year of production and it starts from 5%, which is much lower than 20% under the previous regulation. The timing and the percentage of shares to be divested depends on whether the mining companies have integrated processing or refining facilities and the method of mining undertaken. Another important change under GR 96/2021 is allowing a BUMN to transfer its mining area to its subsidiary.

Divestment obligations for four categories of mining companies

Under the previous rule, all foreign shareholders of IUPs were required to divest at least 20% by the sixth year of production and at least 51% by the tenth year of production. Under GR 96/2021, the divestment obligations now vary depending on whether the mining company has integrated processing or refining facilities and the method of mining undertaken. For the purpose of the divestment obligations, mining companies are now classified into four types, as set out below:

1. Mining Company undertaking open pit Mining method and not integrated with Processing and/or Refining facilities or Development and/or Utilization activities

Number of years after production commences	Minimum shareholding of Indonesian participant
10	5%
11	10%
12	15%
13	20%
14	30%
15	51%

2. Mining Company undertaking open pit Mining method and integrated with Processing and/or Refining facilities or Development and/or Utilization activities

Number of years after production commences	Minimum shareholding of Indonesian participant
15	5%
16	10%
17	15%
18	20%
19	30%
20	51%

3. Mining Company undertaking underground pit Mining method and not integrated with Processing and/or Refining facilities or Development and/or Utilization

Number of years after production commences	Minimum shareholding of Indonesian participant
15	5%
16	10%
17	15%
18	20%
19	30%
20	51%

4. Mining Company undertaking underground pit Mining method and integrated with Processing and/or Refining facilities or Development and/or Utilization

Number of years after production commences	Minimum shareholding of Indonesian participant
20	5%
21	10%
22	15%
23	20%
24	30%
25	51%

After gradually offering the shares to the Central Government, Regional Government, state owned enterprises (**Badan Usaha Milik Negara or BUMN**), regional owned enterprises (**Badan Usaha Milik Daerah or BUMD**), and/or National Private Business Entities, IUP holders may offer the shares divestment in the Indonesia Stock Exchange.

It is interesting to note that now GR 96/2021 requires IUP holders whose shares are owned more than 49% by foreign investors to first offer the shares to BUMN (for any shares transfer prior to the divestment obligation kick-in).

GR 96/2021 provides further elaboration on several provisions of the Amendment Mining Law, among others:

i. Transfer of mining business licenses and mining area.

As introduced in the Amendment Mining Law, IUP holders may transfer their IUP to a third party by obtaining prior consent from the Indonesian Ministry of Energy and Mineral Resources (**MEMR**). GR 96/2021 further elaborates that a BUMN may transfer part of its WIUP to another business entity where at least 51% of shares are owned by the BUMN holding the IUP – provided that the BUMN share ownership in the business entity cannot be diluted to less than 51%. This transfer shall be conducted with prior consent from the MEMR.

ii. Clarification on “integrated” processing and/or refining.

For mining companies that carry out “integrated” mining/coal getting and mineral processing and refining/ coal sourcing and BUMN, in which both may be given a successive ten-year IUP/special IUP (**Izin Usaha Pertambangan Khusus or IUPK**) extension, GR 96/2021 further stipulates that, in order to be deemed “integrated”, the processing and/or refining activities shall be carried out by the holder of the IUP OP. This means an IUP OP that has a sister company to carry out processing and/or refining activities cannot be granted a “life of mine” licence.

iii. Processing and Refining.

The Amendment Mining Law regulates processing and refining activities that are not integrated with mining activities and are not part of the activities regulated/supervised by MEMR. GR 96/2021 provides the transitional provision in which all existing IUP for special production for processing and/or refining will need to be converted to an industrial business licence (Izin Usaha Industri or IUI) no later than one year after the Amendment Mining Law came into force, which was on 10 June 2021. It is expected that future provisions on this will be regulated under laws and regulations in the industrial sector.

Our comments

Once again the Government made changes to the mining regulations in an attempt to spur greater investment. The difference in the timing to divest and the smaller percentage of the shares to be divested is a sign that the Government is hoping for foreign investors to continue to invest in the mining sector.

On the other hand, BUMN mining companies will benefit from this new regulation as they can transfer their mining areas to its subsidiary which, under the old regulation, they would have to relinquish the area first to the government and then for the government to tender the areas to new investors. This will certainly make it easier for BUMN mining companies to partner with foreign investors in developing certain mining areas.

The requirement to offer the shares to BUMN (as stipulated above) is interesting. Will this requirement supersede the right of first right of refusal under the articles of association of the mining companies or any other rights given by the shareholders to any other third party? Will the transfer of shares (prior to divestment) accelerate the foreign shareholder divestment obligation?

For a publicly-listed company, it is still not clear whether the shares owned by the public will be deemed to be Indonesian shares. It is also of interest to see how the other points related to divestment (such as share price determination, and the calculation of fair market value) will be further regulated.



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