

# coal metal asia

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## New regulation in Indonesia seeks to strike a balance in mineral and coal mining business

The Government of Indonesia has issued a regulation to implement the recent amendments made to the Mining Law. Principally, this new regulation, Government Regulation No. 96 of 2021 regarding the Operation of Mineral and Coal Mining Business (“GR 96/2021”), enacts a new licensing scheme for mining business activities and overhauls the divestment obligation for foreign investment companies holding a Mining Business License.

GR 96/2021 was issued following the enactment of Law No. 3 of 2020 and Law No. 11 of 2020 regarding Job Creation (together, the “Mining Law Amendment”), which amends Law No. 4 of 2009 regarding Mineral and Coal Mining (the “Mining Law”). GR 96/2021 serves as an implementing regulation to the Mining Law and replaces Government Regulation No. 23 of 2010 regarding the Operation of Mineral and Coal Mining Business, as amended several times, most recently by Government Regulation No. 8 of 2018 (“GR 23/2010”).

We discuss the key changes introduced by GR 96/2021

### Business licensing

In line with the changes introduced under the Mining Law Amendment, GR 96/2021 introduces several changes to the mining business licensing regime. Under GR 23/2010, mining business activities were required to be implemented based on a Mining Business License (Izin Usaha Pertambangan,

“IUP”), Community Mining License (Izin Pertambangan Rakyat, “IPR”) or Special Mining Business License (Izin Usaha Pertambangan Khusus, “IUPK”). Now GR 96/2021 divides business licensing for mining activities into (i) Business Identification Number (Nomor Induk Berusaha, “NIB”); (ii) Standard Certificate; and/or (iii) License.

This new business licensing categorization is in accordance with Government Regulation No. 5 of 2021 regarding Risk-Based Business Licensing (“GR 5/2021”), where the required business licensing to engage in certain business activities is determined based on the level of risk of the activity. Mineral and coal mining are generally categorized as high-risk under GR 5/2021 and therefore require an NIB and License.

GR 96/2021 sets out the following Licenses for mining activities:

- a. IUP;
- b. IUPK;
- c. IUPK as a Continuation of Operation Contract/Agreement;
- d. IPR;
- e. Rock Mining License (Surat Izin Penambangan Batuan, “SIPB”);
- f. Assignment License (for the mining of radioactive minerals);
- g. Transportation and Sales License;
- h. IUP for Sales; and
- i. Mining Service Business License.

### Obtaining a WIUP and WIUPK

GR 96/2021 streamlines the process to obtain an IUP and IUPK. Similar to GR 23/2010, under GR 96/2021

the obtainment of an IUP and IUPK is preceded by securing a Mining Business License Area (Wilayah Izin Usaha Pertambangan, “WIUP”) or Special WIUP (WIUP Khusus, “WIUPK”). The key changes to the process for obtaining a WIUP and WIUPK are as follows:

- WIUP

#### Auction process

A WIUP for metal mineral and coal commodities is obtained by way of an auction. The Ministry of Energy and Mineral Resources (“MEMR”) will announce an auction for a WIUP between 14 and 60 days prior to the date of the auction. In the previous regime under GR 23/2010, auctions were announced by the MEMR or the relevant governor or regent/mayor at the latest three months prior to the auction date.

#### Application for non-metal mineral WIUP

A WIUP for non-metal mineral commodities is obtained by way of an application to the MEMR. To obtain a WIUP for non-metal minerals, applicants must fulfill administrative requirements, provide geographic coordinates prepared based on a national geographic information system, pay non-tax state revenue to reserve the mining area and for map-printing, and obtain approval from the relevant IUP or IUPK holder in cases where the proposed WIUP overlaps with existing IUP or IUPK areas.

WIUP for non-metal minerals are granted on a first come, first served basis,



whereby the first applicant to submit a complete WIUP application for an area shall be prioritized.

GR 23/2010 did not specify the above requirements to obtain a non-metal mineral WIUP, only stating that applicants that had completed the geographic coordinates and paid the relevant non-tax state revenue would be prioritized in obtaining a WIUP. It also required the MEMR and the governor to obtain a recommendation from the relevant governor (for the MEMR) or mayor/regent (for the Governor), which is no longer the case with GR 96/2021.

- **WIUPK**

Generally, the auction procedures and requirements to obtain a WIUPK are similar to those for the WIUP. The key differences between obtaining a WIUP and a WIUPK are that the WIUPK is prioritized for state or regional-owned enterprises, and applicants are required to have at least three years of experience in

the mining sector.

The key change introduced by GR 96/2021 with respect to applications to obtain a WIUPK is the mechanism by which the MEMR coordinates with interested state and/or regional-owned enterprises for the granting of a WIUPK where there is more than one interested state or regional-owned enterprise. GR 23/2010 did not provide such coordination mechanism and interested state and regional-owned enterprises instead had to participate in an auction.

**IUPK for continuation of operation contract/agreement**

Holders of an IUPK for Continuation of Operation Contract/Agreement (“Continuation IUPK”) are required to carry out domestic coal development and/or utilization activities. The implementation of coal development and/or utilization activities by a Continuation IUPK holder must be based on a coal

development and/or utilization plan that has been approved by the MEMR. The procedures for the granting of a development and/or utilization plan approval shall be further regulated in a ministerial regulation.

A Continuation IUPK holder can either conduct the development and/or utilization by themselves or cooperate with another party that will conduct the development and/or utilization business activities. The cooperation with another party shall be in the form of:

- i. direct share ownership of at least 25% in the business entity that will conduct the development and/or utilization business activities; and
- ii. the Continuation IUPK holder must provide a guarantee of the availability of an adequate supply of coal throughout the commercial operation period of the development and/or utilization being conducted by such business entity.

## ANALYSIS

In addition, the business entity with whom the Continuation IUPK holder is cooperating must itself hold either an IUP or IUPK for Production Operation and own the coal development and/or utilization facility or be another party that carries out coal development business activities that are not integrated with mining activities and whose business license is issued based on the laws and regulations in the industrial sector.

### New obligations for IUP and IUPK Holders

GR 96/2021 imposes new obligations for IUP and IUPK holders, among others:

- a. Continuous exploration and funds: IUP and IUPK holders are now required to carry out continuous exploration every year, and to allocate a portion of their annual budget for mineral/coal reserves.
- b. Utilization of domestic and/or national mining service company: IUP and IUPK holders must use a domestic and/or national mining

service company. The use of a foreign investment mining service company is allowed only after an announcement has been made in the local and/or national mass media but no local or national mining service company is available.

- c. Obligation to use mining roads: IUP and IUPK holders must utilize mining roads in carrying out their mining activity, which they shall construct themselves or in cooperation with other IUP or IUPK holders or other parties having roads that comply with mining safety aspects. Public roads may be used for mining activities if mining roads are unavailable.

### Foreign ownership restriction

GR 23/2010 stipulated foreign ownership caps for domestic capital investment companies holding an IUP or IUPK that converted to foreign capital investment companies. GR 96/2021 removes the foreign ownership restrictions stipulated in GR 23/2010, allowing

domestic capital investment company IUP and IUPK holders to convert into foreign capital investment companies with 100% foreign ownership, subject to the divestment obligation as discussed below.

### Divestment obligation

Foreign investment company IUP and IUPK holders are required to divest 51% of their shares to Indonesian participants, i.e. the central government, regional government, state-owned enterprises, regional-owned enterprises, and Indonesian domestic investment companies.

In the previous regime, GR 23/2010 imposed a blanket provision requiring all foreign investment company IUP and IUPK holders with more than 49% foreign ownership to divest their foreign shareholding gradually from the fifth year until tenth year of production, so that by the tenth year of production the Indonesian participant(s) held at least 51% of shares in the IUP or IUPK holder.

Article 147(2) of GR 96/2021 changes this divestment timeline to the following:

No.	Applicability	Year of production	Minimum Indonesian shares
1.	IUP-OP holders implementing open-pit method and not integrated with processing, refining and/or coal development and utilization facilities	10 <sup>th</sup>	5%
		11 <sup>th</sup>	10%
		12 <sup>th</sup>	15%
		13 <sup>th</sup>	20%
		14 <sup>th</sup>	30%
2.	IUP-OP holders implementing open-pit method and integrated with processing, refining and/or coal development and utilization facilities	15 <sup>th</sup>	51%
		15 <sup>th</sup>	5%
		16 <sup>th</sup>	10%
		17 <sup>th</sup>	15%
		18 <sup>th</sup>	20%
		19 <sup>th</sup>	30%
3.	IUP-OP holders implementing underground method and not integrated with processing, refining and/or coal development and utilization facilities	20 <sup>th</sup>	51%
		15 <sup>th</sup>	5%
		16 <sup>th</sup>	10%
		17 <sup>th</sup>	15%
		18 <sup>th</sup>	20%
4.	IUP-OP holders implementing underground method and integrated with processing, refining and/or coal development and utilization facilities	19 <sup>th</sup>	30%
		20 <sup>th</sup>	51%
		20 <sup>th</sup>	5%
		21 <sup>st</sup>	10%
		22 <sup>nd</sup>	15%
		23 <sup>rd</sup>	20%
		24 <sup>th</sup>	30%
		25 <sup>th</sup>	51%



Under the new regime, the divestment timeline applicable to IUP-OP holders depends on the method of mining and whether the mining area is integrated with processing, refining and/or coal development and utilization facilities.

#### **Mandatory share offer**

GR 96/2021 provides that foreign investment company IUP holders with more than 49% foreign shares are allowed to transfer the foreign shares to a third party before the commencement of the divestment timeline. However, they are required first to offer the foreign shares to a state-owned enterprise.

From a plain reading of the provision, we understand that this requirement applies only if the foreign shares amount to more than 49% of the total issued and paid-up shares. Upon receiving the offer, the state-owned enterprise must provide a written response within 75 calendar days. If the state-owned enterprise rejects the offer or does not provide a written response within the stipulated time, the relevant IUP holder can apply for MEMR approval to transfer shares to a third party, as required under Article 93A of the Mining Law.

Given the novelty of this provision, it is still unclear whether the mandatory share offer is required in the case of a share transfer to other existing shareholder(s) of the IUP holder, and how the mandatory offer would be reconciled if the Articles of Association of the IUP holder give shareholders pre-emptive rights in the event of a share transfer. GR 96/2021 also fails to provide many of the details for the offering and transfer of shares to state-owned enterprises, such as how many state-owned enterprises the shares must be offered to and the calculation of the purchase price. It simply provides that the procedures for the mandatory offer will be regulated in an implementing regulation to be issued by the MEMR.

The immediate consequence of failing to offer the shares to a state-owned enterprise is that the MEMR will not grant approval for the share transfer to the third party. If a share transfer is carried out before the state-owned enterprise issues a written rejection of the mandatory share offer or before the end of the 75 calendar days allowed for a written response, the IUP holder will be subject to administrative sanction in the form

of (i) written reprimand, (ii) temporary suspension of all or part of exploration or operation production activities, and/or revocation of IUP.

#### **Conclusion**

In line with the Mining Law Amendment, GR 96/2021 seems to be trying to strike a balance between the interests of business actors and the government. It introduces a major overhaul of the share divestment process for foreign investment company IUP and IUPK holders by providing a longer divestment timeline, especially for miners employing a certain mining method and which carry out their own processing/refining activities. At the same time, it also seeks to control share transfers prior to the divestment due date by requiring IUP holders to offer the shares for state-owned enterprises. With further implementing legislation in the form of MEMR regulations and decrees still to be enacted, it remains to be seen exactly how GR 96/2021 will be implemented in practice. 



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