



Amended divestment rules for foreign mining companies in Indonesia

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Recent changes to the mining investment regime remind us that it is more important than ever to think ahead and carefully plan your mining divestment strategy.

Introduction

With the aim of improving effectiveness and delivering the maximum benefit for the state, the Ministry of Energy and Mineral Resources (MEMR) issued a new regulation on 25 September 2018 on mandatory divestment for foreign mining companies. MEMR Regulation No. 43 of 2018 (Regulation 43/2018) amends the initial divestment regulation MEMR Regulation No. 09 of 2017 (Regulation 09/2017). The precursor for this regulation is a share divestment by a major foreign-owned mining company.

Regulation 43/2018 provides several changes and additions to Regulation 09/2017.

New divestment method: Issuing new shares

In addition to share transfers, Regulation 43/2018 introduces the issuance of new shares as a method of divestment. Similar to share transfers, new share issuances for the purpose of divestment under Regulation 43/2018 must be offered to Indonesian parties in the following order (i) central government; (ii) regional government; (iii) state-owned enterprises (SOE) or regional-owned enterprises (ROE); and (iv) Indonesian private entities.

Power of the central government in determining divestment share prices

Similar to Regulation 09/2017, Regulation 43/2018 stipulates that the central government must evaluate and negotiate the divestment share price within 90 days of receipt of an offer from a mining company. In evaluating the share price, the MEMR can be assisted by an independent appraiser.

Under Regulation 09/2017, in the case of any disagreement on the divestment price, it was the central government that could ultimately decide on the appropriate value. This power has been revoked under Regulation 43/2018.

Divestment share price – fair market price

Regulation 43/2018 provides a more detailed pricing mechanism for divestment shares. It states that the share price shall be based on the fair market value, which may be calculated by

- discounted cash flow on the economic benefit from the divestment period until the expiry of the mining license; and/or
- market data benchmarking.

Regulation 43/2018 also stipulates that such fair market value shall not consider the mineral or coal reserves that can be mined within the validity period of the mining license.

Government's collaboration in purchasing the divestment shares

To ensure the effectiveness of share divestment, Regulation 43/2018 provides that the central government, through the MEMR, may collaborate with regional governments (provincial and municipal governments), SOEs, and ROEs in purchasing the divestment shares at the first stage (i.e., when the divestment shares are offered to the central government). This collaboration can be implemented by

- the parties discussing the divestment scheme and their respective share allocations; or
- the parties establishing or appointing a holding special purpose vehicle (SPV) to purchase the divestment shares.

The above was not previously regulated under Regulation 09/2017.

Direct offer to SOEs and ROEs

Regulation 43/2018 states that mining companies can only offer shares to SOEs or ROEs which are established in the geographic area where the mining operations are undertaken. This was not previously regulated under Regulation 09/2017.

Another significant change in Regulation 43/2013 is that mining companies do not need to undertake a tender process to offer the divestment shares to an ROE or SOE. Mining companies only need to submit an offer letter to the SOE or ROE, and if such SOE or ROE wishes to buy the divestment shares, they must respond with a letter of interest.

Separately, if more than one SOE or ROE is interested in purchasing the divestment shares, the MEMR or governor (as relevant) will at their discretion allocate the shares to be purchased by such SOEs and/or ROEs.

Due diligence process

Accommodating the current practice, Regulation 43/2018 requires mining companies to provide access to Indonesian participants to undertake due diligence. The regulation does not provide

further detail on what type of due diligence is to be carried out, but based on what we see in practice, it may include technical, financial, and legal due diligence.

According to our discussions with the directorate general of minerals and coal of the MEMR, the MEMR is currently having internal discussions with the aim of issuing a "standard operational procedure" for the divestment scheme based on Regulation 43/2018.

Why is this important to my business?

All shareholders of foreign-owned Indonesian mining companies must divest at least 51 percent of their equity stake in the company by their 10th year of production.

Our mining and energy team has the capability to assist you with structuring share divestments and navigating through the ambiguities and complexities of the regulatory framework in Indonesia. We understand that commercially and legally-viable solutions are important to our clients, and we provide the best.

For further information on our Indonesian Mining and Energy practice, please do not hesitate to contact us.

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