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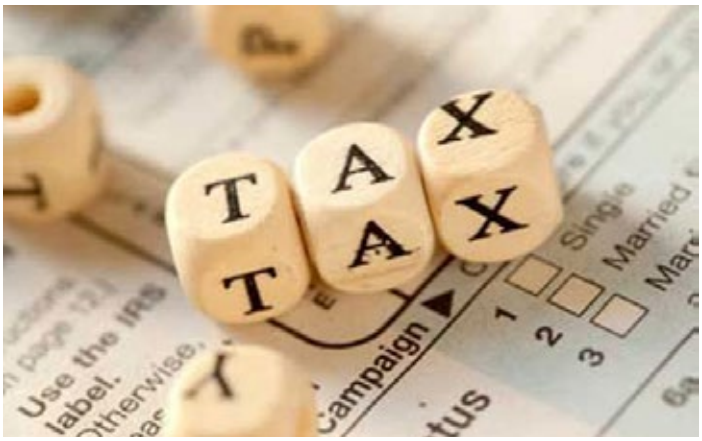
The Amendment of Procedures for Validating a Legal Entity and Approving an Amendment of Article of Association

by Febi Jaya Conggih



On January 7, 2016, the Minister of Law and Human Rights ("**MOLHR**") enacted the Regulation of MOLHR No. 1 of 2016 on Validating a Legal Entity, Approving an Amendment of Articles of Association and Company's Data ("**Regulation of MOLHR No. 1/2016**"). In principle, Regulation of MOLHR No. 1/2016 only enhances the procedures for validating a legal entity, and approving an amendment of articles of association and data of a limited liability company ("**Company**"), which had previously been set in Regulation of MOLHR No. 4 of 2014 ("**Regulation of MOLHR No. 4/2014**"). Regulation of MOLHR No. 1/2016 came into force on the date of promulgation, January 25, 2016.

One of the changes in the Regulation of MOLHR No. 1/2016 is the tightening supervision over tax issues. This stricter supervision now commences with the establishment of the Company. Pursuant to Regulation of MOLHR No. 1/2016, the founders of the Company must make a statement letter on the company's commitment to secure a Taxpayer Identification Number (*Nomor Pokok Wajib Pajak* or "**NPWP**") and receipt on annual tax return report before its establishment. It needs to be submitted by the notary to the MOLHR for obtaining the decree of validation of a legal entity. After the establishment, a copy of NPWP and the receipt on the annual tax return report also needs to be submitted to the MOLHR if the Company wants to submit an application for approving an amendment of the articles of association or Company's Data. Accordingly, all companies must ensure that they comply with their tax filing requirements.

Besides the tax requirements, under Regulation of MOLHR No. 1/2016 the Companies that are required to have their financial statements audited by public accountants must ensure their compliance with this requirement before making any amendments to their Articles of Association and/or Company Data. Indonesian Company Law and other relevant regulations require certain companies to have their financial statements audited by public accountants. Those Companies must attach their balance sheet and profit and loss statement every time they apply for an approval, or file a notification of changes to their Articles of Association and Company Data through a notary. Those Companies include:

(a) Companies that have lines of business relating to pooling of public funds such as insurance companies or banks;
(b) Public companies;
(c) Companies that issue acknowledgements of indebtedness to the public;
(d) State-owned Companies in the form of Persero;
(e) Companies that have assets and/or an annual turnover of Rp.50,000,000,000 or more.

According to Indonesian Company Law, the Company's Data includes the data concerning the transfer of shares, the change of Board of Directors and Board of Commissioners, and the dissolution of the Company.

The Procedures and Requirements for Granting Recommendation for the Overseas Sale of Processed and Refined Mineral Products

by Auraylius Christian

The Minister of Energy and Mineral Resources ("**MEMR**") issued Regulation No. 5 of 2016 ("**Regulation of MEMR No. 5/2016**") on February 5, 2016. Regulation of MEMR No. 5/2016 addresses holders of Mining Business Licenses (*Izin Usaha Pertambangan* or "**IUP**") for production operation; Special IUP (*Izin Usaha Pertambangan Khusus* or "**IUPK**") for production operation; Production Operation IUP specifically for Processing and/or Refining; production operation IUP specifically for hauling and sale; and holders of Contracts of Work.

The IUP and Contracts of Work holders may conduct the export of listed mineral products which conform to the minimum refining and processing requirements, provided that they have obtained export approval from the Director General of Minerals and Coal. To obtain export approval, IUP holders and holders of Contracts of Work must first obtain a recommendation from the Director General of Minerals and Coal. The procedure for the recommendation application is set forth in this regulation. The recommendation is valid for 6 months with the possibility of extension upon expiration of its validity.

To obtain a recommendation from the Directorate General of Minerals and Coal, an application must be submitted to the Ministry of Energy and Mineral Resources by way of the Director General of Mineral and Coal in the form provided in Attachments IIA and IIB of Regulation of MEMR No. 5/2016. The requirements for the recommendation are stipulated under Article 5 Paragraph (2) of this regulation, among others:

- a statement of the validity of the document in accordance with the format as contained in Attachment I to this Ministerial Regulation;
- a copy of the certificate of Clear and Clean to IUP for metals production operation holders;
- Report of Analysis (RoA) or Certificate of Analysis (CoA) for metal products that have met the minimum limit of Processing, issued 1 (one) month from inspection by the independent surveyor appointed by the Government;
- evidence of payment of non-tax state revenue payments obligations for 1 (one) year;
- a copy of the joint operation/cooperation agreement with IUP for metals production operation that have acquired clear and clean certificate and/or Contracts of Work.
- Contracts of Work specialized in respect of metal minerals where the production operation holder requires a Production Operation IUP specifically for Processing and/or Refining;

- the Refining facility's development plans approved by the Director General on behalf of the Minister which includes, among other things, the development schedule of the refining facility, technology, investment value, and production capacity per year;
- Report of the Refining facility's construction cost, audited by a public accountant registered with the Ministry of Finance;
- work plan and budget for the current year approved by the licensor in accordance with its authority;

Furthermore, according to Articles 14 and 15 of this regulation, to obtain a recommendation for Export Approval, holders of Special IUP for production operation, Production Operation IUP specifically for processing and/or refining, and Contracts of Work must deposit funds into an escrow account in a State-owned bank as a "guarantee of seriousness" to build a domestic refining facility. The guarantee funds are calculated as 5% of the total investment (if new) or of the residual unrealized investment value (if the project is already underway).

The enactment of this regulation supersedes the previous regulation of the Minister of Energy and Mineral Resources under No. 11 of 2014 and regulation of Director General of Mineral and Coal No. 861K/30/DJB/2014 on the Evaluation Procedure of the granting of Approval of Processed and Refined Metal Minerals. The main difference between the new regulation and the previous regulation is related to the evaluation of the application for recommendation. Article 10, paragraph (3) of Regulation of MEMR No. 5/2016 states that if the development of mineral processing and refinement facilities does not reach 60% (sixty percent) of the target calculated cumulatively, the extension of the recommendation given following the progress of construction of the Refining facilities, will rate the same as the achievements of the previous period. The previous regulation did not make any such provision regarding the extension of the recommendation.

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Capital Adequacy for Commercial Banks

by Alfons Emanuel Moller

On 2nd February 2016, the Indonesia Financial Services Authority (Otoritas Jasa Keuangan or "**OJK**") issued regulation No. 11/POJK.03/2016 on the Minimum Capital Requirement for Commercial Banks ("**POJK No. 11/2016**"). Similar to the previous regulation i.e., Bank Indonesia Regulation No. 15/12/PBI/2013 on the Minimum Capital Requirement for Commercial Banks ("**BI Regulation No. 15/2013**"), POJK No. 11/2016 aims to mitigate the risks arising in the event of financial and economic crisis and/or excessive bank credit growth. Essentially, this POJK No. 11/2016 mandates commercial banks to increase their capital quality and quantity to an international standard, by way of: (i) mandatory capital requirement; and (ii) formation of a certain capital buffer.

Minimum Capital Requirement

In accordance with the international standard and similar to BI Regulation No. 15/2013, commercial banks must maintain adequate capital. Such adequate capital is calculated by using the Capital Adequacy Ratio (CAR) and linking it to each bank's risk profile. Set out below are minimum capital requirements for various risk profiles:

Risk Profile Rate	Capital Amount
1	8 % of weighted Risk Weighted Assets (***"Aset Tertanggung Menurut Risiko/ATMR"***)
2	9% to less than 10% of ATMR
3	10% to less than 11% of ATMR
4 or 5	11% to 14% of ATMR

Local Banks

Similar to BI Regulation No. 15/2013, POJK No. 11/2016 regulates banks' capital based on their residency status. For banks having their head office in Indonesia, OJK requires 2 types of capital which must be in place (in 2012, BI imposed 3 types of capital), namely: (i) Core Capital or Tier 1 (Modal Inti) in the amount of at least 6% of ATMR; and (ii) Supplementary Capital or Tier 2 (*Modal Inti Tambahan*).

Foreign Banks

In contrast to local banks, branch offices of foreign commercial banks ("**Branch Offices**") which operate in Indonesia are subject to Capital Equivalency Maintained Assets (CEMA). This CEMA is governed under Article 24 to 26 of POJK No. 11/2016. In other words, CEMA is a reserve of non-tradeable funds of Branch Offices. The OJK requires that Branches should allocate some of their business funds for CEMA. The minimum amount of CEMA is set at 8% of Branches' liabilities and with a minimum sum of Rp.1.000.000.000.000,- (one trillion Rupiah) ("**CEMA Minimum**"). CEMA Minimum must be provided by no later than the 6th of every month; the transitional stages for CEMA implementation are as below:

(i) As of November 2017, CEMA Minimum is set at 8% of Branch Office's liabilities;

(ii) As of December 2017, CEMA Minimum is set at 8% of Branch Office's liabilities and with minimum sum of Rp.1.000.000.000.000,- (one trillion Rupiah).

For banks with subsidiary(s), these minimum capital adequacy requirements are applicable to the banks individually as well as in consolidation with their subsidiary(s). To ensure that Banks are in compliance with such requirements, the OJK prohibits any distribution of profits, if such distribution will cause banks to fail in fulfilling their capital requirement.

Mandatory Capital Buffers

Further, Article 3 of POJK No. 11/2016 also stipulates that as of 1st January 2016, commercial banks (with their respective subsidiary) should gradually provide additional capital which will serve as a buffer against financial and economic risks, in the form of the following:

Type of Additional Capital	Amount Percentage (of ATMR)	Applicability
Capital Conservation Buffer **additional capital which will serve as buffer if crisis occurs.*	• 0.625% as of 1st January 2016; • 1.25% as of 1st January 2017; • 1.875% as of 1st January 2018; • 2.5%, as of 1st January 2019.	Applicable for: (i) Banks with Core Capital ranging from Rp. 5.000.000.000.000,- to less than Rp. 30.000.000.000.000,- (BUKU 3); and (ii) Banks with Core Capital in the amount of Rp. 30.000.000.000.000.
Countercyclical Buffer **additional capital to anticipate losses from an excessive bank credit growth.*	0% to 2,5% as of 1st January 2016	Applicable to all Commercial Banks.
Capital Surcharge for Domestic Systematically Important Bank ("D-SIB") **additional capital which is applicable for D-SIB to reduce the adverse effect to the financial system, in case of bank failure.*	1% to 2.5% as of 1st January 2016	Applicable for D-SIB (to be determined by OJK).

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New Public Private Partnership Regulation for Railway Business in Indonesia

by Arien Kartika Sari

Since the ground-breaking inception of the Jakarta - Bandung high speed train project, the government of Indonesia has been very keen on encouraging development of the railway infrastructure in the country. On January 21, 2016, the Minister of Transportation issued Minister of Transportation Regulation No. PM. 15 of 2016 regarding Concessions and Other Types of Partnership Between the Government and Private Company in General Railways (MOT Regulation No. 15/2016). The regulation generally sets out provisions regarding the conduct of a partnership between the government and private companies in the field of public train transportation, which may be in the form of concession, joint utilization, tenancy, borrow-to-use, built-operation-transfer / built-transfer-operation, or cooperation to provide infrastructure. This regulation signals the growing viability of cooperation between the government and the private company for both railway facilities and infrastructure, and for new and existing public trains operations.

The following table shows activities that have now opened up for private business partnerships with the government under MOT Regulation No. 15/2016:

No.	Activities
1.	Development, operation, maintenance and cultivation of new railway infrastructure
2.	Operation, maintenance, and/or cultivation of existing railway infrastructure
3.	Procurement, operation, maintenance, and/or cultivation of railway facilities
4.	Operation, maintenance, and/or cultivation of train depots
5.	Utilization of railway infrastructure by provider of general or special train facilities
6.	Operation, maintenance, and/or cultivation of railway tools
7.	Management and cultivation of existing railway stations
8.	Special trains serving occasional public interest
9.	Special trains converted into general railways

The new regulation sets out the procedures to convert special trains that no longer operate its main business activity to serve as public transportation. The concession for this change of status must be obtained by way of tender or direct appointment by the government. Once the special train has changed its status to a public train, all of its facilities and infrastructure must be transferred to the government. The regulation also stipulates that in special cases, such as high demand for train transportation, the government may assign special train providers to serve public transportation.

Private companies are given a chance to initiate a new cooperation project that is not included in the priority list of the government. To do so, the initiated project must be technically integrated into the railway master plan, economically and financially feasible, and not need financial support from the government that is in the form of fiscal contribution.

Concessions for development of new railway infrastructures shall be granted by way of tender or direct appointment. However, a private business may only obtain a concession through direct appointment if the land has been fully acquired by it and the investment does not use any financing from state or regional budgets. The company that initiates the project must also submit a pre-feasibility study of the project to the Directorate General of Railways at the Ministry of Transportation for evaluation. At the end of concession period, which is 50 years, all of the railway infrastructure and facilities will be transferred to the government, unless agreed otherwise in the concession agreement.

If the concession holder is using the land or assets owned by the government, it will be subject to a concession fee. Under MOT Regulation No. 15/2016, the concession agreement may be terminated single-handedly without court order by the government of Indonesia if the private business: (i) fails to pay its contribution for 3 consecutive years; (ii) fails to share its profits in 3 consecutive years; or (iii) fails to fulfill its obligation other than (i) and (ii) as stipulated in the concession agreement.

Once the concession period is over or terminated, all of the railway facilities must be transferred to the government with free and clear status. The government may hold a re-tender to select and decide the business entity which undertakes the business of railway infrastructure for the next concession period.

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