



Indonesia in focus

Indonesian water annulment – draft regulations under review but no new law to plug the gap

October 2015

In February 2015, the Indonesian Constitutional Court annulled Law No. 7 of 2004 regarding Water Resources ("**Law 7/2004**") on the grounds that it was unconstitutional. In the same judgment, the Court decided that the previous water law, enacted in 1974, was to be reinstated. This has severely dented investor confidence in the Indonesian water industry, and has stalled potential public-private deals. Over 180 days later, a new water law still has not been passed in order to plug the gap left behind by the annulment of Law 7/2004.

The outcome of the case largely rested on a perceived breach of Article 33 of the 1945 Constitution which stipulates that the land, the water and the natural resources contained therein shall be controlled by the State and utilised to the greatest extent for the prosperity of the Indonesian people ("**Article 33**").

In the context of water management, the Constitutional Court's view was that in order to implement Article 33, certain strict restrictions must be put in place, namely:

1. every water management activity shall not disturb, set aside or nullify the people's right to water;
2. the State shall fulfil the people's right to water;
3. sustainable environment must be observed;
4. the control and supervision of the State over water is absolute;
5. state owned companies or regional government owned companies are given priorities for water management; and
6. the government may allow private companies to manage water subject to certain stringent conditions.

To fill the gap until a new water law is passed, the Indonesian government intends to issue two subordinate regulations that are reportedly in close to final form. The first draft government regulation governs upstream water management ("**Water Resources GR**") and the other regulates downstream water management, namely the distribution and procurement of drinking water ("**Drinking Water GR**"). Arguably, this may increase legal uncertainty rather than reducing it by putting in place new implementing regulations before the headline water law is carried into effect.

The draft Water Resources GR is likely to determine the governing principles for water management, the types of water resource managements, allocation/utilisation of water resources, the government agencies authorised to issue water management licenses, terms and conditions for the grant of the licenses, and penalties for breach of those licenses. Although the draft Water Resources GR may cover a broad range of water management issues, it is unclear if it is to also govern certain matters like extraction of groundwater and its related license, the License to Extract Water (SIPA).

In particular, stakeholders are concerned about the proposed structure for private sector participation in the water industry going forward, together with licensing issues. If the Constitutional Court's guidelines are strictly followed, it is likely that the outcome will not be positive for private investors. Some observers have speculated that private sector participation is likely to be framed as a joint operation between local contractors and foreign contractors; however the exact terms are currently unclear.

Similarly to the Water Resources GR, the draft Drinking Water GR is likely to seek to tighten private entities' involvement in managing and distributing drinking water.

Despite the different expectations between the public and private sector, Indonesian organisations such as the Supporting Agency for the Development of Drinking Water System have tried to minimise the gap by hosting numerous discussions and other consultations with the private sector in the course of drafting the Water Resources GR and Drinking Water GR. It is hoped that these consultations have and will be taken into account as the Indonesian government proceeds to finalise the guidelines for the new regime.

For further information, we would be happy to get in touch:



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