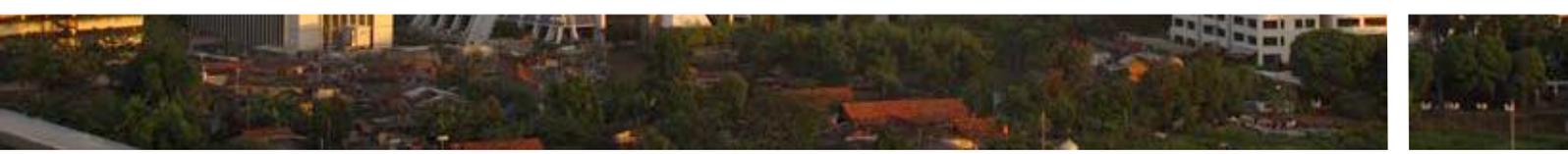




# PwC Indonesia Legal Alert



April 2020 / No. 09

COVID-19 Regulatory Updates<sup>P1</sup>

## COVID-19 Regulatory Updates

The Coronavirus disease, named *COVID-19* and declared a pandemic by the World Health Organization<sup>1</sup>, has spread rapidly to many countries all around the world – including to Indonesia, which announced on 2 March 2020 the first case of its citizens testing positive for the virus.

Prompted by the increasing death toll in Indonesia due to COVID-19, Indonesia's President has declared a Public Health Emergency. The National Agency for Disaster Countermeasures (*Badan Nasional Penanggulangan Bencana* or "**BNPB**") has also extended a special status condition of disaster emergency in light of the COVID-19 pandemic until 29 May 2020.

The COVID-19 pandemic, which is categorised as a non-natural disaster in Indonesia<sup>2</sup>, has reportedly had an adverse impact on various business industries in Indonesia, with the ones hardest hit being the tourism, food and beverage, retail, and transportation industries. Declining demand and sales in these industries, among other impacts, may hinder the performance of businesses to fulfill their obligations to their stakeholders, such as lenders, suppliers, and employees.

In response to this COVID-19 situation, the Indonesian Government has issued and is expected to continue to issue several economic stimulus packages. This legal alert summarises some of the key stimulus packages and other regulatory reliefs publicly available and accessible as at 6 April 2020, and also briefly discusses the applicability of "force majeure" to the COVID-19 pandemic in Indonesia.

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<sup>1</sup> <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>, visited on 6 April 2020.

<sup>2</sup> <https://bnpb.go.id/berita/status-keadaan-tertentu-darurat-bencana-wabah-penyakit-akibat-virus-corona-di-indonesia->, visited on 6 April 2020.

For the avoidance of doubt, this legal alert does not discuss any tax or customs related regulations.

## I. Key Economic Stimulus Packages and Regulatory Reliefs

### A. National Financial Policy

#### 1. Government Regulation In Lieu of Law No. 1 of 2020 on State Financial And Financial System Stability Policies For The Handling Of COVID-19 Pandemic And/Or Threats That Imperil The National Economy And/Or Financial System Stability

- This emergency regulation (commonly referred to by the Indonesian acronym “Perppu”) has the immediate full power of Law despite it having been issued only by the Executive Branch, but it will need to be ratified as Law by the Parliament within one year from its issuance if all its stipulations need to continue to have the force of law.
- This Perppu regulates further that the Indonesian Government may establish certain state financial and financial stability system policies for the purposes of implementing the State Budget for the handling of the COVID-19 pandemic and threats that imperil the national economy and financial stability system which are not regulated under Law No. 20 of 2019 on State Budget and Revenue, among other things through policies on taxation, financing, state expenditures and regional finance, as well as policies on the handling of financial institution difficulties.
- The state financial policy will cover four main areas: state budgeting and financing, regional financing, tax and customs relief, and implementing a national economic restoration programme. The latter may be carried out through state capital participations or the Government’s investments, fund placements, or underwriting in the real estate and financial sectors.
- Under the Perppu, the Financial System Stability Committee, Bank Indonesia, Loan Guarantee Agency, and Financial Services Authority (“OJK”) will have expanded authorities, such as the following:
  - a) Bank Indonesia will be authorised to extend liquidity loans/sharia-principle-based financing to all banks whether systemic or non-systemic, and grant funding access to cooperatives and the private sector; and
  - b) OJK will be authorised to require financial services institutions to carry out certain corporate actions (e.g., merger or acquisition), refusal to do which is subject to imprisonment of up to 12 years and a fine of up to Indonesian Rupiah (“IDR”) 1 trillion; and relax the enforcement of its regulations, including the mandatory reporting/disclosure and the conduct of General Meeting of Shareholders (“GMS”).

- This Perppu has been effective as of 31 March 2020.

## **B. Industry-Specific Stimuli and Regulatory Reliefs**

### **1. Financial Services Industry**

#### **a) OJK Regulation No. 11/POJK.03/2020 on National Economic Stimulus As Countercyclical Policy Over COVID-19 Outbreak Impact**

- This OJK regulation was issued in order to push the banking industries to maintain the stabilisation of the financial system and support Indonesia's economic growth in response to the outbreak.
- The regulation provides a regulatory framework and guidance for Indonesian banks to implement certain policies in order to support their debtors, including small, micro and medium enterprises, which are experiencing difficulties in complying with their contractual obligations due to the COVID-19 pandemic, which may include the following:
  - 1) To determine the collectability of loans (up to IDR 10 billion) already extended to their COVID-19-affected debtors solely based on the promptness of payment by the debtors of their loans' principal amount and/or interest; and
  - 2) To restructure loans already extended to their COVID-19-affected debtors and record such restructured loans as performing loans.
- Indonesian banks can apply these policies until 31 March 2021.

#### **b) Bank Indonesia Regulation No. 22/4/PBI/2020 on Incentives For Banks That Provide Funding For Certain Economic Activities To Support The Handling of Economic Impacts Of The Coronavirus Epidemic**

- Effective as of 1 April 2020, this regulation enables Bank Indonesia to relax the enforcement of the daily rupiah mandatory reserve requirement (GWM) for certain Indonesian banks which provide funding for export and import activities, small, micro and medium enterprise activities, and other specified activities.
- Starting from 16 April 2020 until 31 December 2020, the granting of this incentive (i.e. relaxation) will be done on a monthly basis.

c) **OJK Letter No. S-9/D.05/2020 on Countercyclical Policy Over COVID-19 Pandemic Impact To Financing Companies, dated 30 March 2020, addressed to the Executive Board of The Indonesian Financing Company Association, Board of Directors of Financing Companies, and Board of Directors of Sharia Financing Companies**

- This Letter highlights OJK's countercyclical policy in response to the COVID-19 pandemic impact to non-banking financial services institutions, which is effective as of 30 March 2020 and includes:
  - 1) extending the deadline for submission of periodical reports applicable to financing companies;
  - 2) enabling the conduct of fit and proper tests against the primary parties of financing companies via video conferences;
  - 3) allowing financing companies to determine the collectability of financing up to IDR 10 billion extended to their debtors affected by the COVID-19 pandemic solely based on the promptness of payment for the principal amount and/or interest (or its equivalent); and
  - 4) allowing financing companies to restructure the financing already extended to their debtors by taking into account the specified considerations, and to record the restructured financing as performing financing (*lançar*).
- This Letter was followed by an announcement made by the Indonesian Financing Company Association which offers certain financing restructuring options to the debtors of financing companies facing financial distress due to the COVID-19 pandemic. Customers which meet the specified criteria are invited to submit restructuring applications to financing companies starting from 30 March 2020.

d) **OJK Letter No. S-7/D.05/2020 on Relaxation Of Deadline For Submission Of Mandatory Non-Banking Financial Services Institution Reports To OJK, dated 23 March 2020, addressed by Non-Banking Financial Services Institutions**

- This Letter extends the deadlines for submission to OJK of mandatory reports by non-banking financial services institutions, which include insurance, financing, venture capital, and pawn shop companies; and pension funds.
- The normal deadlines as currently governed by OJK are extended by 14 business days until two months depending on the type of the reports.

## 2. Capital Market Industry

- a) **OJK Circular Letter No. 3/SEOJK.04/2020 on Additional Conditions Constituting Significantly Fluctuating Market On The Implementation Of Shares Buyback Of Issuers Or Publicly Listed Companies (“OJK CL No. 3/2020”)**
- OJK CL No.3/2020 has stipulated additional “other significantly fluctuating market conditions” which allow issuers and public companies to buy back their shares: 1) significant stock-trading pressure at the IDX, as indicated by an IHSG decrease of 18.46%; and 2) worsening global and regional economic conditions due to the COVID-19 pandemic.
  - Under these conditions, share buyback up to a maximum level of 20% of paid-up capital can be done without the approval of the GMS, provided that, among other conditions, the free-float shares amount to at least 7.5% of paid-up capital.
- b) **OJK Circular Letter No. S-92/D.04/2020 on Relaxation Of Mandatory Reporting And General Meeting Of Shareholders**
- This Circular allows issuers and public companies may hold their annual GMS by 31 August 2020 (at the latest) through an electronic GMS system as provided by depository and settlement institution PT Kustodian Sentral Efek Indonesia.
  - The deadlines for submission to OJK of the annual financial statement and annual report of issuers and public companies as well as other reports as specified in this letter are extended to two months from the normal deadlines as governed by OJK.
- c) **OJK Circular Letter No. S-101/D.04/2020 on Extension Of Validity Period Of Financial Statements And Valuation Reports In The Capital Markets, Extension Of Initial Offer Period, And Postponement/Cancellation Of Public Offering**
- This Circular has stipulated that cut-off dates for the date of the financial statement and appraisal date of the appraiser report used for the purposes of public offerings as well as material, affiliated, and conflict of interest transactions are extended by:
    - 1) Three months (if using the financial statement and appraiser report dated before and until 30 November 2019); and
    - 2) Two months (if using the financial statement and appraiser report dated after 30 November 2019),

each from the normal cut-off dates as governed under the relevant capital market regulations.

- Similarly, the maximum period for confirmation on change information and delivery of information on the securities offering amount and price, the underwriter, and/or the interest rate for bonds or sukuk yields in public offerings is extended for two months.
- The “other significantly fluctuating market conditions” as specified in OJK CL No.3/2020 are declared “another event that significantly impacts on the business continuity of issuers”, due to which issuers may postpone or even public offerings by request to OJK within the prescribed period.

**d) Trading Mechanism Related Rules<sup>3</sup>**

- The bottom threshold for the call option and put option prices that may trigger the auto rejection mechanism is lowered from 10% to 7% under the preference price.
- Restriction on the short selling transactions for all IDX members as of 2 March 2020 until the specified deadline.
- Implementation of a trading halt for as long as 30 minutes if IHSG plunges by more than 5%.
- Adjustment by the Indonesia Clearing and Guarantee Corporation (KPEI) of the haircut parameter for shares other than LQ45 shares for the purpose of calculating the collateral and net adjustment capital for every securities company.

**3. Healthcare and Pharmaceutical Industries**

**a) Indonesian Investment Coordinating Board Head Decree No. 86 of 2020 on Business Licensing Convenience For Certain Business Sectors Relating To The Handling Of The COVID-19 Pandemic**

- Valid as of 1 April 2020 until BNPB terminates the emergency status relating to the COVID-19 pandemic, the medical device and pharmaceutical industries are eligible for reduction and relief of business licensing requirements, acceleration of the business licensing process, and special assisted services.

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<sup>3</sup> Director of Indonesian Stock Exchange Decision Letter No. KEP-00025/BEI/03-2020 of 2020 on Amendment to the Regulation II-A on Equity Securities Trading and OJK and Self-Regulatory Organization Joint Press Release No. SP21/DHMS/OJK/III/2020 and PR No. 033/BEI.SPR/o3-2020 on Maintaining Organized, Fair and Efficient Trading Activities in Indonesian Stock Exchange and Capital Market Services to All Stakeholders.

#### 4. Intellectual Property Rights

a) **Law and Human Rights Minister Regulation No. HKI-OT.02.02-12 on Amendment To Intellectual Property General Director Announcement No. HKI-OT.02.02-08 On Intellectual Property Related Services In The Context Of COVID-19 Outbreak Prevention**

- The Intellectual Property General Director of the Republic of Indonesia pronounces, among other things, the extension of dispensation of delays in all types of fulfilments of documents relating to intellectual property applications which are due during the period of 23 March until 21 April 2020.

#### II. Applicability of Force Majeure Concept to the COVID-19 Pandemic

- The COVID-19 pandemic is expected to affect many business players facing challenges in performing their contractual obligations. Business players therefore should anticipate potential breaches of contract triggering defaults, penalties, sanctions, fines, or even termination of the underlying contracts due to late or non-performance of their contractual obligations. However, these risks can be mitigated if it can be proven that the late or non-performance is caused by “force majeure”.
- The “force majeure” concept is recognized in Indonesia’s legal system and governed in general under the Indonesian Civil Code (“ICC”), particularly Articles 1244 and 1245 which principally suggest that an obligor (debtor) acting in good faith should not be held responsible for a late or non-performance of their obligations which is caused by a circumstance(s) that is(are) unforeseeable or beyond their control<sup>4</sup>. However, proving this may be difficult, as under the ICC, doctrines and certain relevant Supreme Court decisions, the following elements must be present in order to claim the situation of “force majeure”:
  - a. the obligor must have no bad faith; and
  - b. the circumstance must not have occurred directly or indirectly due to the act or responsibility or intention of the obligor; or
  - c. the performance of the relevant obligations if performed would constitute a prohibited act for the obligor.
- In addition to this, under the principle of freedom of contract, contracting parties are free to agree on what events constitute force majeure for the purposes of their contractual obligations and whether it can be invoked in the case of late or non-performance. The absence of clear stipulation of the actual circumstances<sup>5</sup> which

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<sup>4</sup> Note that the Indonesian employment law does not negate the obligation of employers to compensate their employees against termination of employment relations on force majeure grounds ( *vide* Article 156 of Law No. 13 of 2003).

<sup>5</sup> Some regulations in certain business sectors in Indonesia, such as banking and mining, provide examples of circumstances generally considered force majeure (*keadaan memaksa*), such as war, fire, earthquake, flood, epidemic, and natural disasters (beyond the control of human beings). However, these are industry-specific regulations and therefore not applicable to other industries. Therefore, the parties to a contract usually agree to govern in their contract a specific force majeure clause relevant to their business case.

were beyond their control rendering the obligations difficult to be performed and fulfilled may make it difficult to enforce a condition of “force majeure”.

- In the case of the COVID-19 pandemic, arguably it is a force majeure event due to many factors including the negative impacts it has obviously already caused. However, the matter is not as straightforward for an obligor to request release of responsibility, as there must be a clear connection for the non-performance or late performance of any obligations, especially because many contracts might not have defined a specific situation similar to the COVID-19 pandemic to be a force majeure event.
- Generally, therefore, unless there is a clear legal basis for excusing the non-performance (e.g., in the case above based on the OJK and tax regulations), then there will still need to be negotiations and agreement between the parties that non-performance will not be considered as a breach of contract and the release of obligations should be clearly documented in writing so it is clear and self-evident to all, including third parties.

## Your PwC Indonesia contacts:

Please feel free to contact our Legal Specialists.

### **Melli Darsa**

Managing & Senior Partner  
Melli Darsa & Co., Advocates & Legal Consultants  
[melli.darsa@pwc.com](mailto:melli.darsa@pwc.com)

### **Indra Allen**

Partner  
Melli Darsa & Co., Advocates & Legal Consultants  
[indra.allen@pwc.com](mailto:indra.allen@pwc.com)

### **Danar Sunartoputra**

Junior Partner  
Melli Darsa & Co., Advocates & Legal Consultants  
[danar.sunartoputra@pwc.com](mailto:danar.sunartoputra@pwc.com)

### **Puji Atma**

Junior Partner  
Melli Darsa & Co., Advocates & Legal Consultants  
[puji.atma@pwc.com](mailto:puji.atma@pwc.com)

[www.pwc.com/id](http://www.pwc.com/id)

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