

Constitutionality of the unbundling system in the electric power sector <sup>P1</sup>

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### I. Background

The Constitutional Court of the Republic of Indonesia (*Mahkamah Konstitusi* or MK) conducted a judicial review of Law No. 30 of 2009 concerning Electricity (the “**Electricity Law**”), following amendments introduced by Law No. 6 of 2023, which validated Government Regulation in Lieu of Law Number 2 of 2022 on Job Creation (the “**Job Creation Law**”). The petitioners, including the workers' union of PT Perusahaan Listrik Negara (Persero) (PLN) and other individuals, argued that these amendments contained provisions that were unconstitutional. This review began in April 2023 and culminated in MK Decision No. 39/PUU-XXI/2023, issued on 29 November 2024 (“**MK Decision 39/2023**”).

The petitioners raised four main points in their petition:

1. The Job Creation Law reintroduces the concept of unbundling, which is unconstitutional in regulating electricity supply businesses for public interest.
2. It removes public oversight by the House of Representatives in establishing the National Electricity General Plan (*Rencana Umum Ketenagalistrikan Nasional* or RUKN).
3. The sale of surplus electricity for public interest is only allowed in areas not served by state-owned electricity enterprises.
4. The practice of leasing electricity networks is unconstitutional.

This legal alert focuses on the first point, concerning the reinstatement of the unbundling concept in the power sector, which is argued to be unconstitutional within the framework of regulating electricity supply businesses for the public interest.

Practically, two models exist: the integrated model (bundling), where generation, transmission, distribution and retail supply are managed by a single entity, and the non-integrated model (unbundling), where distinct entities handle these stages. Bundling allows a single company to control all stages, while unbundling allocates these stages to different companies.

## II. Summary of decision

Regarding the unbundling concept challenged under Article 10 paragraph (2) in Article 42 number 6 of the Job Creation Law, MK declared the word “can” within this provision unconstitutional and non-binding. The enactment of the Job Creation Law was argued to have reactivated Article 10 paragraph (2) of the Electricity Law, which stated: “The provision of electricity for public interest as referred to in paragraph (1) can be carried out in an integrated manner.” Previously, this article was declared unconstitutional. MK re-evaluated this provision because “can” implied that electricity provision need not be integrated, permitting unbundling. Accordingly, MK expressly ruled that the unbundling system is unconstitutional via MK Decision 39/2023.

Since 2002, MK has reviewed the constitutionality of the unbundling system multiple times, issuing various rulings. In the decision preceding MK Decision 39/2023, specifically MK Decision No. 111/PUU-XIII/2015 (“MK Decision 111/2015”), the unbundling system was declared conditionally constitutional, allowing unbundling as long as it did not undermine state control according to the principle of “controlled by the state”. In reference to the phrase “controlled by the state,” the legal considerations articulated within MK Decision 111/2015 state that, according to Article 33 paragraph (2) of the 1945 Constitution, it should remain under state control. This means it must be managed by the state through State-Owned Enterprises (*Badan Usaha Milik Negara* or BUMN), with private national or foreign companies participating through partnerships, equity participation or loans only when invited to collaborate. MK noted that if PLN is capable and efficient, it should continue to manage electricity, but if not, it could share responsibilities with other state enterprises or Local-Owned Enterprises (*Badan Usaha Milik Daerah* or BUMD), with PLN acting as a “holding company”.

Following MK Decision 111/2015, the Ministry of Energy and Mineral Resources (MEMR) issued regulations affirming that electricity supply business for public interest in Indonesia may be conducted in an integrated manner, indicating no outright prohibition of unbundling in the power sector. MEMR also permits joint utilisation of electricity networks between holders of different types of Electricity Supply Business Licences for Public Interest (*Izin Usaha Penyediaan Tenaga Listrik Untuk Kepentingan Umum* or IUPTLU), suggesting that electricity transmission and distribution can be conducted separately.

## III. Impacts of MK Decision 39/2023

The divergence between MK Decision 111/2015 and MK Decision 39/2023 may impact the Indonesian electricity industry. MK Decision 111/2015 previously allowed unbundling under state control, whereas MK Decision 39/2023 does not clearly address its applicability to electricity business actors whose licences were issued under the Job Creation Law and MEMR regulations, which may be interpreted as

permitting the unbundling system. Consequently, questions may arise as to whether the current electricity business actors operating under the unbundling system could be deemed unconstitutional.

In our perspective, current practices should remain unaffected as long as state control is present. As observed in MK Decision 111/2015, MK Decision 39/2023 and other MK decisions pertaining to the energy sector in Indonesia, state control can manifest through various means, from prioritising BUMN to regulatory control over licensing and tariffs. We believe MK Decision 39/2023 may not impact the current business model of Independent Power Producers (IPPs), as they do not control electricity supply for public interest; electricity is procured by PLN and prices are regulated by MEMR, illustrating state control consistent with MK's principles. Additionally, the Electricity Law allows private sector participation, which aligns with constitutional provisions.

From the Government's perspective, as per Press Release No. 648.Pers/04/SJI/2024 issued by the MEMR on 9 December 2024, the Director General of Electricity announced ongoing consultations with legal experts to interpret the Constitutional Court's decision.

#### **IV. Conclusion**

In conclusion, MK Decision 39/2023 declares the unbundling system unconstitutional, prohibiting its implementation in Indonesian electricity business practices. This decision generates uncertainty among electricity business actors concerning the impact on their current activities. However, the Government is actively collaborating with legal experts to interpret MK Decision 39/2023. This collaborative endeavour among relevant ministries and agencies aims to formulate policies that ensure electricity provision aligns with public welfare, in response to MK Decision 39/2023. Currently, existing regulations remain unchanged pending further Government directives. Therefore, it is prudent to await Government guidance regarding the development of existing regulations in light of MK Decision 39/2023, as it may introduce uncertainty for business actors.

This legal alert is intended to provide a general overview of the constitutionality of the unbundling system in the Indonesian Electricity Law and may not cover all related aspects. Please contact us for more detailed advice or specific inquiries.

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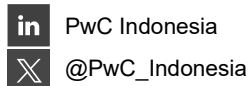
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