

Legal Alert on Limited Concession Scheme

I. Introduction

Infrastructure development in Indonesia plays a significant role in its economic growth. However, the limited State Budget ("*Anggaran Pendapatan dan Belanja Negara* or "**APBN**") poses a challenge in meeting the nation's vast infrastructure needs. For instance, as reported by various news channels, the need for 1,000 trillion rupiah for piped drinking water can only be 37% financed by the APBN. Similarly, infrastructure plans for roads and bridges that are estimated to cost 573 trillion rupiah can only be financed less than half by the APBN. To provide an alternative way to fund infrastructure development, the Indonesian government has established the Limited Concession Scheme, known as *Hak Pengelolaan Terbatas* ("**HPT**"), through Presidential Regulation No. 32 of 2020 ("**PR 32/2020**"), recently amended by Presidential Regulation No. 66 of 2024 ("**PR 66/2024**"). While this regulatory framework has been established since 2020, this legal alert will discuss the recent amendments that aim to clarify existing provisions and broaden the scope for eligible infrastructures for HPT.

II. Overview of HPT in Indonesia

1. HPT in Indonesia

In Indonesia, this approach leverages the resources of business entities to optimise the operational function of State-owned Property (*Barang Milik Negara* or "**BMN**") or State-owned Enterprises' Assets ("**BUMN Assets**"). By granting limited management rights to business entities, the revenue gained from asset optimisation will be allocated to finance other infrastructure projects. Despite the potential benefits and the existing challenge of limited infrastructure funding, recorded implementation of the HPT scheme is yet to be seen.

2. Eligibility criteria for infrastructures to obtain HPT

There are 14 types of infrastructures eligible for HPT, but other infrastructure types may be proposed by the ministers/heads of institutions or the directors of State-owned Enterprises ("**BUMN**") to the Coordinating Minister. Furthermore, the BMN or BUMN Assets must be partially or fully operational, have a partner to improve commercial value and/or efficiency, and have a minimum of ten years of usefulness lifespan. The BMN must be recorded in the

ministry/institution's audited financial statements, whereas BUMN Assets must be recorded in audited bookkeeping for at least three consecutive years. If certain requirements cannot be met, the HPT can still be obtained on a condition that the assets pass the Eligibility Study (*Studi Kelayakan*).

3. Flow process of HPT

a. Asset management planning

The ministers/heads of institutions as users of BMN, or the directors of BUMN as the persons in charge of the relevant BUMN Assets are responsible for the Asset Management Plan. They may consult with, or be facilitated by the Committee for the Acceleration of Infrastructure Provision (*Komite Percepatan Penyediaan Infrastruktur Prioritas* or "**KPPIP**"). The Asset Management Plan must contain at least three elements: (1) the name of the infrastructure for asset management, (2) the estimated value of the proceeds gained from asset management and (3) the allocation of the proceeds. Infrastructure selection is also based on three considerations: (1) the correlation between infrastructures, (2) cost-benefit analysis and (3) social analysis.

b. Asset management transaction

i. For BMN

Persons in Charge of the Asset Development (*Penanggung Jawab Proyek Kerja Sama* or "**PJPK**"), the Public Service Agency (*Badan Layanan Umum* or "**BLU**") and the selected accompanying business entity prepare for the transaction by drafting the required documents and agreements, exploring market interest, setting the amount of funds and their allocation, and appointing the Asset Management Business Entity (*Badan Usaha Pengelola Aset* or "**BUPA**"). The transaction is completed once a business entity is selected, an Asset Management Agreement is signed, the BLU takes over the BMN and the funds earned from the asset management are fully deposited.

ii. For BUMN Assets

The PJPK is responsible for preparing and executing the transaction for selected BUMN Assets in accordance with the relevant regulations. The transaction includes selecting the BUPA, signing the Asset Management Agreement and disbursing the funds collected from asset management.

c. Monitoring, evaluation and reporting

The final step of asset management will be conducted by the Coordinating Minister as the chairman of the KPPIP. This involves monitoring and evaluating the execution of the asset management, as well as reporting to the President at least once every six months and other times as needed.

4. Key parties in asset management under HPT

a. BUPA

Appointed by the PJPK through a Beauty Contest or direct appointment, a BUPA executes the asset management and

deposits all the revenue generated to the BLU's account. The payment is made in advance (upfront payment) within six months after they signed the Asset Management Agreement, with a one-time extension upon written request. They are also prohibited from pledging the managed assets as collateral to third parties.

b. PJKP

PJKP, the ministers/heads of institutions, or directors of BUMN are responsible for the use of BMN or BUMN Assets in accordance with their respective regulations. They are tasked with appointing the BUPA, prepare the transaction of BMN Asset management on the listed infrastructure, supervising the Asset Management Agreement with the BLU, disbursing the performance guarantee if the BUPA fails to submit the upfront payment on time and receiving the handover of BUMN Assets at the end of the Asset Management Agreement.

c. BLU

The BLU works with the BUPA to execute asset management for BMN. The BLU may disburse the performance guarantee if the BUPA fails to meet the payment deadline. The BLU's duties include overseeing BMN Asset management, managing the BMN submitted by the PJKP before signing of the Asset Management Agreement, signing the aforementioned agreement with the PJKP and the BUPA, receiving and depositing funds from asset management into their account as income, managing the funds as the BLU's income, supervising the Asset Management Agreement with the PJKP, receiving asset management rights then the agreement expires, handing over the expired management rights to BMN and handling other related tasks as agreed upon.

d. KPPIP

In Indonesia's HPT scheme, the KPPIP, led by the Coordinating Minister, accelerates the provision of priority infrastructure. They are tasked with determining other eligible infrastructure types for asset management, approving the Eligibility Study, consulting the ministers/heads of institutions for preparation and facilitating asset management planning, adjusting the estimated value of funds obtained from asset management, setting out asset management planning, and monitoring and evaluating its execution.

5. Asset Management Agreement

The entirety of the HPT framework is governed by the Asset Management Agreement. This legally binding document outlines the obligations, rights and responsibilities of all parties involved, ensuring transparency and accountability. The duration of the agreements is further elaborated in the regulations regarding the management of BMN and in the Asset Management Agreement for BUMN Assets. Moreover, the parties responsible for asset management for BMN and BUMN Assets are different and therefore regulated separately in the agreement in compliance with PR

32/2020. It is also worth noting that the amount of revenue collected from asset management does not need to be specified in the Asset Management Agreement for BUMN Assets, in contrast to the Asset Management Agreement for BMN, which specifies the amount.

III. Key amendments and implications of PR 66/2024

1. More infrastructure types eligible for HPT
In PR 66/2024, the range of infrastructure types eligible for HPT have been expanded, allowing more varieties and numbers of asset management. Previously, PR 32/2020 listed nine infrastructure types, namely transportation (ports, airports, railways and bus terminals), toll roads, water resources, drinking water, wastewater management, waste management, telecommunications and informatics, electricity, oil and gas, and renewable energy infrastructures. With the amendment, this list now includes infrastructures in designated areas, tourism, government office buildings and housing infrastructures. Furthermore, ministers/heads of institutions or directors of BUMN may propose other infrastructure types to the Coordinating Minister.
2. Infrastructure proposals from business entities
HPT projects are originally initiated by ministers/heads of institutions or directors of BUMN, but PR 66/2024 allows business entities to participate further in this scheme by proposing an infrastructure for HPT. To do this, the business entity must prove that their proposal adds financial value to the infrastructure, fits with broader industry plans and that they have sufficient funds to carry out the plan. Moreover, this proposal must be followed by a submission of a Feasibility Study to the relevant ministers/heads of institutions or directors of BUMN. If the study is approved, they will begin the Asset Management Plan. It is important to note that while the PJKK still has to select the BUPA for asset management, the original proposing business entity is entitled to match the highest bidding offer from other business entities if they want to continue executing their proposal.
3. Excess profits distribution
Any excess profit from the asset management of both BMN and BUMN Assets is now required to be transferred along with the upfront payment, as governed by the Asset Management Agreement. This amendment promotes transparency in handling excess profits and ensures that additional funds are allocated for the sole purpose of funding other infrastructures.
4. BUPA selection method
The BUPA selection method, previously referred to as "*tender prakualifikasi*" had no further elaboration on the eligibility factors. In PR 66/2024, the selection method is called "Beauty Contest" and selects the business entity with the best financial/technical offering. These highlighted changes provide more clarity and transparency to the execution of asset management.

IV. Potential challenges

While the amendment strives to provide clarity, certain aspects may require further elaboration. One of them being the term “*terbatas*” in HPT, which lacks context regarding what is limited in this scheme, potentially leading to multiple interpretations. The first possibility is that “*terbatas*” refers to the limitations in rights and/or obligations granted by the Government to the BUPA in asset management, as outlined in the Asset Management Agreement. The second possibility concerns the limitations for eligible BMN or BUMN Assets to obtain HPT. However, the Eligibility Study enables assets that fail to fulfill certain criteria to proceed with asset management. The third possibility refers to the limitations on business entities that can manage assets, as they must be appointed by the PJPk.

Additionally, the benefit that the users of BMN and/or BUMN as asset owners receive from this scheme is not disclosed in both regulations. While it can be assumed that they have their assets managed by the BUPA, it would provide more clarity and incentive for the asset owners/users to know what they gain in return through HPT. Lastly, the distribution of the excess profit is done with reference to the Asset Management Agreement and existing laws. However, without a clear clause explicitly outlining that some of it may go to the BUPA, the benefit that the BUPA gains through this scheme remains vague, as it is also not disclosed in both regulations.

V. Conclusion

The introduction of HPT demonstrates a commendable effort from the Government to engage with business entities to support infrastructure development. While the amendments in PR 66/2024 have broadened the scope and clarified several aspects, there is still room for refinements to avoid misinterpretations. Moreover, public campaigns for this new scheme could be conducted more frequently to raise awareness and promote more infrastructure projects. Explicitly outlining the benefits for business entities and/or asset owners/users may serve as an incentive for their participation in this scheme, ensuring its success.

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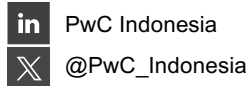
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