



Client Alert

On New Regulation for Private Participation through Limited Concession of State and SOE Assets

On 18 February 2020, the Indonesian Government enacted Presidential Regulation No. 32 of 2020 on Infrastructure Financing through Limited Concession Rights (“PR 32/2020”) which introduces an alternative scheme for financing public infrastructure through utilization of existing assets that are currently being operated by the Central Government (“State”) and/or State-Owned Enterprises (“SOE”). This alert outlines the following key principles of the regulation: (1) eligibility, (2) business process, (3) key terms and conditions, (4) project structure and (5) potential constrains.

Overview

Infrastructure is widely recognized as one of the key factors affecting economic growth, as well as reductions in inequality and poverty, particularly in developing economies. To supply the increasing demand for quality infrastructure, the Government has long been planning to introduce a framework for the monetization of Government’s infrastructure assets. Through such framework, private sectors are encouraged to be involved in a major role in improving the performance of existing assets and delivering new infrastructure.

PR 32/2020 is an enabling regulation which allows private sector investment for operations of existing assets owned by the State or SOEs. For example, the Government can grant private sectors a ‘limited concession’ for the operation of a brownfield toll road. The granting of such operational rights is dubbed as the Limited Concession Scheme (“LCS”).

Aside from benefitting from the operation of a commercial asset, private sectors participating in LCS will also partake in the financing of new infrastructures. Private sectors will be required to pay a premium to compensate the State or SOE for the granting of the 'limited concession'. This way, the Government or SOEs will be able to deploy funding for development of new infrastructure assets.

Eligibility

PR 32/2020 elaborates the categories of infrastructures asset that can be offered to private sectors through LCS. The following table is an extract of eligible infrastructure sectors.

Table 1 – List of eligible infrastructure sectors

No.	Sectors	
1.	Transportation	Seaport
		Railway
		Airport
		Bus Terminal
2.	Toll Road	
3.	Water Resources	
4.	Drinking Water Supply System	
5.	Wastewater Treatment System	
6.	Waste Management System	
7.	Telecommunication and Information System	
8.	Electricity	
9.	Oil, Gas, and Renewable Energy	

PR 32/2020 sets forth minimum criterion for public assets to be privately operated through LCS, such asset:

1. must be commercially operated for a duration of at least 2 (two) years;
2. requires an increase efficiency of operation pursuant to applicable international standards;
3. indicative lifecycle of assets for at least 10 (ten) years going forward;
4. if the asset is recorded as State owned, there needs to be an audited financial report of Ministries/Agencies in accordance to Government Accounting Standard for the prior period; and
5. if the asset is recorded as SOE owned, it must record a positive cash flow for at least 2 (two) consecutive years and has been audited for at least 3 (three) consecutive years in accordance to the applicable accounting standards in Indonesia.

Business process

PR 32/2020 requires prior planning process to be carried out by the Minister/ Head of Agency acting as user of relevant State asset or President Director of SOE (hereinafter referred to as “GCA”) facilitated by Committee for the Acceleration of Infrastructure Delivery/ *Komite Percepatan Penyediaan Infrastruktur Prioritas* (KPPIP). The output of this planning process is a list of Asset Management Plan which acts as a pipeline of assets that are available to be offered for LCS.

In case of assets recorded as State owned, PR 32/2020 requires a competitive tender process to be carried out in offering LCS assets to pre-qualified investors. At this stage, the Minister/ Head of Agency (as asset owner) will carry out the transaction process.

Once the transaction process have been concluded, the Government, through a Public Service Agency/ *Badan Layanan Umum* (BLU) under the Ministry of Finance will take over the assets and enter into agreement with the winning bidder.

In case of assets recorded as SOE owned, the President Director will carry out the transaction in accordance with selection procedures applicable for such SOE. After conclusion of the selection process, the SOE will enter into an agreement with the winning bidder. Specific for this type of transaction, the SOE and winning bidder may establish a special purpose company.

Key terms and conditions

1. Payment of compensation/ Up-front payment:

As previously discussed, private sectors must compensate the State or SOE for the utilization of State or SOE asset. Such payment must be made up-front, no later than 6 (six) months after execution of agreement.

As a rule of thumb, PR 32/2020 prescribes that the amount of up-front payment must be formulated (as owner’s estimate) by the GCA. Prior to transaction, the GCA is also required to predetermine on how it will reinvest the up-front payment.

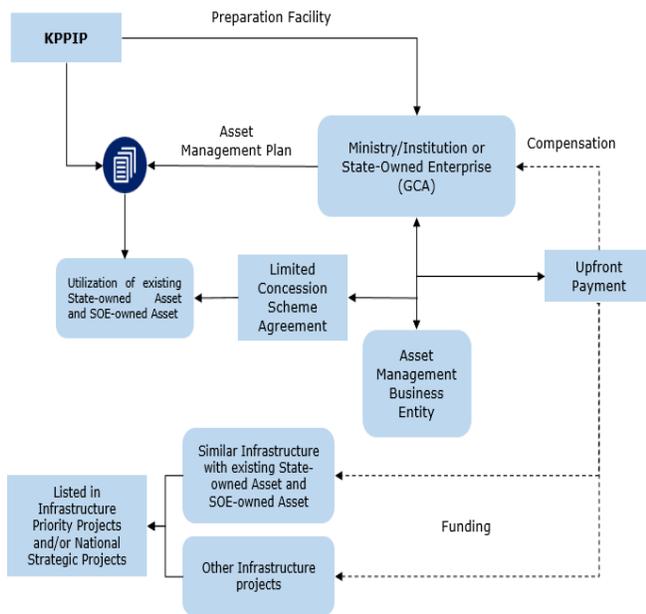
2. Handback of assets:

PR 32/2020 puts strong emphasis on handback of assets. It is understood that all LCS must be performed on an ‘operate and transfer’ basis with asset handback requirements, similar to requirements in a typical Public-Private Partnership (“PPP”) arrangement. Therefore, all assets (existing and any improvements) under an LCS arrangement must be transferred back to the GCA upon expiry or early termination.

3. Intellectual property:

Any background or future intellectual property to be used in connection with any LCS projects must be granularly standardized in the agreement. Such intellectual properties must always be available to be employed for the purposes of the agreement.

Project structure



Under PR 32/2020, we are of the view that the asset utilization is beneficial for the asset owner. This asset utilization has been proposed to reduce the risk which may incur when the government or SOE utilize the respective asset by itself. In most cases, the government or SOE may not have sufficient capacity to manage the assets. Therefore, the private sector is hopefully could manage the asset as well as bring innovation to the project.

On the other side, as an alternative to conventional funding, the implementation of LCS is similar to asset recycling which deemed as a way for government to build much-needed infrastructure without plunging into more debt, while maintaining or potentially improving existing infrastructure service delivery.

Potential constrains

It is undisputable that LCS will create benefits for both private sector and the Government. On the flip side, however, it is highly likely that maturation of PR 32/2020 will depend on several factors, including overarching regulations and investment restrictions.

For example, prior to PR 32/2020, the Government have established regulatory framework for utilization of State/ Region Owned Assets and PPPs. This creates overlap in regulation of similar matter, which could potentially be a stumbling block in its implementation.

Secondly, current negative list of investment and sectoral regulations limits the participation of private sector in the development and operations of specific infrastructure. Such restrictions may be seen as an added complexity and therefore hinders feasibility of a proposed LCS.

We will continue to monitor any development of this matter and provide you with an update accordingly.

For further information and/or queries related to this alert, please contact:

Irawati Hermawan

Senior Partner

Hermawan Juniarto & Partners

Email: irahermawan@hjplaw-deloitte.com

Anthony Pratama Chandra

Partner

Hermawan Juniarto & Partners

Email: anchandra@hjplaw-deloitte.com

Anggara Narendraputra

Counsel

Hermawan Juniarto & Partners

Email: anarendraputra@hjplaw-deloitte.com

Mu'amar Wicaksono

Senior Associate

Hermawan Juniarto & Partners

Email: mwicaksono@hjplaw-deloitte.com



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms, and their related entities (collectively, the “Deloitte organisation”). DTTL (also referred to as “Deloitte Global”) and each of its member firms and related entities are legally separate and independent entities, which cannot obligate or bind each other in respect of third parties. DTTL and each DTTL member firm and related entity is liable only for its own acts and omissions, and not those of each other. DTTL does not provide services to clients. Please see www.deloitte.com/about to learn more.

Deloitte is a leading global provider of audit and assurance, consulting, financial advisory, risk advisory, tax & legal and related services. Our global network of member firms and related entities in more than 150 countries and territories (collectively, the “Deloitte organisation”) serves four out of five Fortune Global 500® companies. Learn how Deloitte’s approximately 312,000 people make an impact that matters at www.deloitte.com.

Deloitte Asia Pacific Limited is a company limited by guarantee and a member firm of DTTL. Members of Deloitte Asia Pacific Limited and their related entities, each of which are separate and independent legal entities, provide services from more than 100 cities across the region, including Auckland, Bangkok, Beijing, Hanoi, Ho Chi Minh City, Hong Kong, Jakarta, Kuala Lumpur, Manila, Melbourne, Osaka, Shanghai, Singapore, Sydney, Taipei, Tokyo and Yangon.

About Deloitte Legal

Deloitte Legal means the legal practices of Deloitte Touche Tohmatsu Limited member firms or their affiliates that provide legal services.

About Hermawan Juniarto & Partners

Hermawan Juniarto & Partners is a member of Deloitte Legal, the international network of legal practices working with Deloitte all over the world. Hermawan Juniarto & Partners provides only legal services, and it is legally separate and independent from other Deloitte entities. "Deloitte Legal" means the legal practices of Deloitte Touche Tohmatsu Limited member firms or their affiliates that provide legal services. For legal, regulatory, and other reasons, not all member firms provide legal services.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited (“DTTL”), its global network of member firms or their related entities (collectively, the “Deloitte organisation”) is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser.

No representations, warranties or undertakings (express or implied) are given as to the accuracy or completeness of the information in this communication, and none of DTTL, its member firms, related entities, employees or agents shall be liable or responsible for any loss or damage whatsoever arising directly or indirectly in connection with any person relying on this communication. DTTL and each of its member firms, and their related entities, are legally separate and independent entities.