

## Granting of WIUP and WIUPK After Constitutional Court Decision No. 160/PUU-XXIII/2025

### Background

On 8<sup>th</sup> September 2025, five (5) petitioners filed an application for judicial review of several provisions of Law No. 2/2025 on the Fourth Amendment to Law No. 4/2029 on Mineral and Coal Mining (“**Mining Law**”) to the Constitutional Court. The application was registered under case number 160/PUU-XXIII/2025 on 10 September 2025. The Court deliberated on 1 July 2026 and pronounced its decision in open session on 16 July 2026.

In the case, the Constitutional Court examined the following provisions of the Mining Law:

- a. Article 51 paragraphs (1), (3), (4), (5), and (6);
- b. Article 60 paragraphs (1), (3), (4), (5), and (6);
- c. Article 75 paragraphs (3), (5) and (7);

which, in substance, regulate the mechanism for granting Mining Business License Areas (Wilayah Izin Usaha Pertambangan or “**WIUP**”) on a priority basis to certain parties.

- d. Articles 51A paragraphs (1), (3), (4) and (5), 60A paragraphs (1), (3), (4) and (5), and 75A paragraphs (2), (3), (4) and (5);

which, in substance, allow the Central Government to grant a WIUP or a Special Mining Business License Area (Wilayah Izin Usaha Pertambangan Khusus or “**WIUPK**”) on a priority basis to a BUMN, a regional government-owned enterprise or a private business entity, for the benefit of universities. The Petitioners challenged the phrase “private business entity” in these provisions.

The judicial review application essentially arose from changes in the policy governing the granting of WIUP. These provisions provide priority rights to certain groups or business entities to obtain WIUP without being subject to the same mechanism applicable to other business actors. This policy raises a number of legal issues, including equal opportunity in accessing natural resources, legal certainty, transparency and accountability in the granting of WIUP, and the potential for differential treatment among business actors in the mining sector.

The application may generally be divided into two (2) main clusters of issues, as follows:

- 1. Priority Granting of WIUP to Business Entities, Individual Companies, MSMEs, Cooperatives, and Business Entities Owned by Religious Community Organizations**

These provisions have drawn attention because they establish a priority scheme for certain business groups to obtain WIUP. The petitioners essentially question whether such priority treatment is consistent with the principles of equality before the law and equal opportunity to access natural resources, and whether the different treatment has a constitutionally justified basis and purpose.

In addition, the mechanism raises questions concerning the parameters, requirements, and limitations for determining the parties entitled to receive such priority, considering that WIUP forms part of the management of natural resources that are under the control of the State.

## **2. Priority Granting of WIUP and WIUPK to Business Entities for the Benefit of Universities**

The second cluster concerns the priority granting of WIUP to private business entities for the purpose of supporting the independence and excellence of universities. This provision raises a separate issue because it expands the priority scheme for WIUP to serve purposes that are not solely related to mining activities, but also to the development and financing of higher education. It should be noted that, under Articles 51A, 60A and 75A, the license area is granted to a BUMN, a regional government-owned enterprise or a private business entity, and not to the university itself. The university's entitlement is a share of the profits under a cooperation agreement, and the Supreme Audit Agency (*Badan Pemeriksa Keuangan* or BPK) periodically audits both the business entity and the university.

Accordingly, this provision should be considered from the perspective of whether the purpose of granting priority access to WIUP is consistent with the principles governing the management of natural resources, as well as how such priority granting can be ensured to remain based on objective, transparent, measurable, and accountable criteria.

The judicial review of these provisions is relevant to consider because the Constitutional Court's decision may provide legal certainty regarding the constitutionality of the priority mechanism for granting WIUP, including the limits of the legislature's authority to provide preferential treatment to certain groups or business entities.

Furthermore, the decision may affect the implementation of the WIUP granting policy and may have implications for business actors that have obtained, or may seek to obtain, WIUP through the priority mechanism provided under the Mining Law.

In general, what was challenged is the rule on "granting priority" for WIUP in Articles 51, 51A, 51B, 60, 60A, 60B, 75, and 75A of the revised Mining Law. These articles provide that cooperatives, MSMEs, religious organizations, universities, and private business entities can obtain a WIUP through a "priority" mechanism, rather than through a regular auction. The problem is, the law does not clearly explain who is entitled to priority and on what criteria. The phrase "by way of granting priority" is precisely what became the focus of the application.

In summary, the provisions challenged were Articles 51, 51A, 60, 60A, 75 and 75A of the Mining Law. These articles allow cooperatives, small and medium business entities, business entities owned by religious mass organizations and private business entities to obtain a WIUP or a WIUPK through a priority mechanism rather than through auction. The law does not, however, set out who qualifies for priority or on what criteria. The phrase “by way of granting priority” (*dengan cara pemberian prioritas*) became the focus of the application. Articles 51B and 60B, which allow a WIUP to be granted on a priority basis to BUMN and private business entities for downstream processing (*hilirisasi*) purposes, were not challenged; as explained below, they are nonetheless affected by the decision.

### The Petitioners Arguments

Five petitioners filed the case, comprising a private business actors, a university lecturer, a university student, and the Chairman of the Pagar Nusa Student Forum (collectively, the “**Petitioners**”).

In their application, the Petitioners argued that the challenged provisions are inconsistent with the 1945 Constitution of the Republic of Indonesia (“**UUD NRI 1945**”), relying on different constitutional grounds for each cluster. In relation to Articles 51, 60 and 75, the Petitioners invoked Article 28D paragraph (1), on fair legal certainty and equal treatment before the law, together with Article 33 paragraph (3), on State control of natural resources for the greatest prosperity of the people. In relation to Articles 51A, 60A and 75A, the Petitioners invoked Article 28H paragraph (2), Article 31 paragraph (5) and Article 33 paragraph (3).

The Petitioners’ grounds for the application may be summarized as follows:

- a. Petitioners contend that the use of the disjunctive term (“or”) in Article 51 paragraph (1) and Article 60 paragraph (1) of the Mining Law creates the possibility of granting WIUP without a tender process, thereby leaving room for unequal treatment in the allocation of WIUP. The Petitioners argue that, as a consequence of such statutory construction, the absence of a clear tender mechanism arising from the use of the disjunctive term may result in the granting of mining licenses being subject to favoritism toward certain parties
- b. The Petitioners contend that there is a significant difference in terminology between the phrase “priority granting” (*pemberian prioritas*) used in Article 51 paragraph (1) and Article 60 paragraph (1) of the Mining Law, particularly when contrasted with the term “priority offering” (*penawaran prioritas*) used in Article 83A of Government Regulation No. 25/2024. The latter provision constitutes the historical basis for the introduction of the priority mechanism for granting WIUP to business entities other than state-owned enterprises.

The Petitioners argue that the term *pemberian* requires the Government to take an active role in granting or determining the recipient of a particular right. This suggests a mechanism based on direct determination or allocation, rather than an offering process. In contrast, the

term *penawaran* suggests that an opportunity is first offered to eligible parties before the recipient is determined.

The Petitioners further refer to the civil law concept of *pemberian* as regulated under Articles 1666 to 1693 of the Indonesian Civil Code (*Kitab Undang-Undang Hukum Perdata*), which *pemberian* is generally understood as a unilateral agreement whereby a person or party voluntarily confers something upon another party without expecting consideration in return.

- c. The Petitioners argue that, if the “priority granting” mechanism is maintained, there can be no assurance of a fair mechanism for granting WIUP among business groups that fall within the priority category, as the phrase “priority granting” inherently implies a mechanism of direct appointment.
- d. The Petitioners contend that the two mechanisms placed within a single provision which are auction (*lelang*) and the granting of priority, are contradictory in character. An auction is open and competitive, whereas the granting of priority rests on the Government’s own assessment. Applying both to the same license areas and the same class of applicants therefore produces preferential treatment for those who obtain a license outside the auction.
- e. In relation to Articles 51A, 60A, and 75A, the Petitioners argue that granting mining concessions to education institutions would undermine the institutional function and independence of higher education institutions. According to the Petitioners, universities should remain independent institutions focused on advancing education, rather than being reduced to instruments for legitimizing the interests of mining businesses.

In essence, the Petitioners contend that, without clear criteria, “priority” could turn into direct appointment an opening for favoritism. The Petitioners further argue that granting priority access to WIUP for the benefit of universities may undermine their independence and institutional function by turning them into instruments for mining interests. Such mechanism is therefore considered inconsistent with the state’s obligation to manage natural resources for the greatest prosperity of the people as mandated by Article 33 of the UUD NRI 1945.

#### **The Court’s Consideration: Partially Granting the Petitioners’ Application**

- a. In relation to Articles 51 and 60 of the Mining Law, the Constitutional Court found that the provisions do not clearly prescribe the mechanism or criteria for determining the granting of priority by the State. In the Court’s view, the absence of clear parameters may give rise to subjectivity in the Government’s determination of which entities should be granted a Mining Business License Area (*Wilayah Izin Usaha Pertambangan* or “WIUP”). Accordingly, the Court considered that the term “granting of priority” (*pemberian prioritas*) creates the potential for subjective favoritism on the part of the Government. The Court therefore held that the granting of mining licenses must be carried out in an objective, transparent, and accountable

manner. On this basis, the Court declared the phrase “granting of priority” in Article 51(1) and Article 60(1) to be contrary to the UUD NRI 1945, and without binding legal force. Unless interpreted to mean priority “which may only be granted on clear parameters, through an objective, transparent and accountable assessment process, so that the granting of priority is not automatically understood as an act of direct appointment”.

- b. Applying the same reasoning, the Court extended that interpretation to the phrase “by way of granting priority” (*dengan cara pemberian prioritas*) as contained in Article 51(1), (3), (4), (5), and (6), as well as Article 60(1), (3), (4), (5), and (6) of the Mining Law, which are likewise conditionally unconstitutional unless read in the same manner.
- c. The Court applied the same interpretation to the phrase “shall receive priority” (*mendapat prioritas*) in Article 75 paragraph (3), and to the phrase “by way of priority” in Article 75 paragraphs (5) and (7) of the Mining Law. Article 75 paragraph (3) is significant in practice, as it grants priority in obtaining an IUPK to BUMN, regional government-owned enterprises, cooperatives, small and medium business entities and business entities owned by religious mass organizations and where only private business entities are required to proceed through a WIUPK auction under Article 75 paragraph (4).
- d. However, the Court rejected the application challenging to the phrase “private business entity” (*Badan Usaha swasta*) in Articles 51A, 60A, and 75A. The Court considered that, from a constitutional perspective, the 1945 Constitution of the Republic of Indonesia does not prohibit universities from engaging in activities intended to generate financial profits, provided that such activities remain within, and do not deviate from, the primary purpose for which universities are established, namely, the advancement and development of knowledge. The Court added, however, that such involvement must remain within the framework of the *tridharma* of higher education and must not extend to universities acting directly as operators or managers of the mining business.
- e. Notwithstanding that rejection, the Court applied the conditional interpretation to the phrase “by way of priority” (*cara prioritas*) in Articles 51A paragraphs (1), (3) and (5); 60A paragraphs (1), (3) and (5); and 75A paragraphs (2), (3) and (5) of the Mining Law. The priority route for the benefit of universities is therefore subject to the same requirement of clear parameters and an objective, transparent and accountable assessment process.
- f. Finally, the Court held that any other provision of the Mining Law containing the phrases “by way of granting priority”, “by way of priority”, “shall receive priority” or comparable wording in connection with IUP, IUPK, WIUP or WIUPK, that is not specifically considered in the decision, must conform to the decision. This brings within the scope of the decision, among others, the downstream processing priority route under Articles 51B and 60B, and Article 75A paragraph (1), neither of which appears in the operative part of the decision.

The Constitutional Court granted this application partially (not in full, and not rejected in full). The Court's core reasoning are as follow:

- “Priority” may only be granted through clear parameters, via an assessment process that is objective, transparent, and accountable, not through direct appointment.
- Mining areas are limited, so without clear criteria, subjective elements will dominate and risk increasing environmental damage.
- Mining permits may not be valid forever, there must be a revocation mechanism if the requirements are no longer met.
- Licensing must return to its function as a preventive instrument of supervision. The Court set out five requirements: (i) licenses granted selectively on strict and measurable parameters; (ii) rational time limits; (iii) clearly regulated extraction procedures; (iv) intensive and periodic supervision; and (v) revocation together with environmental remediation sanctions where breaches occur.
- Specifically for universities: a university is a non-profit institution, different from a business entity seeking profit. If a university receives WIUP priority, the proceeds must still support the education, research, and community service, not turn into a purely profit-seeking mining business that threatens the university's independence.
- One part of the application was rejected: the request to remove the phrase “private business entity” entirely from the law was not granted.

### **What This Means in Practice**

The decision is final and binding from the date of its pronouncement. Its practical consequences for business actors in the mineral and coal sector may be summarized as follows:

- The priority route for obtaining a WIUP or a WIUPK remains available. It has not been removed from the Mining Law, and licenses already granted are not automatically invalidated.
- Priority may no longer be treated as an automatic entitlement arising from the status of the applicant. It must rest on clear parameters and on an assessment process capable of being shown to be objective, transparent and accountable.
- Implementing regulations will be required to give effect to those parameters. Until they are issued, priority awards made without a demonstrable assessment process carry legal risk.

- The standard applies across the priority mechanisms in the Mining Law, including the downstream processing route under Articles 51B and 60B, which was not itself challenged but is caught by the Court's direction that comparable provisions conform to the decision.
- Priority-based licenses are exposed to periodic evaluation and, where license conditions or environmental obligations are breached, to review or revocation.

## Further information

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