

Strengthening of Arrangements regarding the Appointment and Dismissal of Directors and Commissioners of State-owned Enterprises in Government Regulation No. 23 of 2022

In the middle of 2022, the Government promulgated and enacted Government Regulation No. 23 of 2022 concerning Amendment to Government Regulation No. 45 of 2005 concerning the Establishment, Management, Supervision, and Dissolution of State Owned Enterprises (“**GR 23/2022**”). This regulation was issued in order to optimise the role of State Owned Enterprises (“**SOE**”) as agents of national development in support of the national economy and conform to the dynamics of SOE management via the strengthening of SOE institutions and resources based on principles of good corporate governance in relation to SOE affairs. This purpose is reflected in the formulation of the provisions in GR 23/2022 which make the mechanisms and requirements for the appointment and dismissal of members of the Board of Directors, Board of Commissioners, and Board of Supervisors explicit. This article will discuss various new arrangements in GR 23/2022 in relation to the management and supervision of SOE in the form of Government Share Companies.

A. Registers and Track Records

GR 23/2022 has tightened up the process for the appointment of Directors with the existence of a register and track records determined by the Minister of SOE, containing amongst others registers and track records of both existing and future directors with criteria and procedures provided for by the Minister of SOE. Under Article 14 paragraphs (1a), (1b), and (1c), the Minister of SOE can request input from the relevant institutions/agencies in establishing registers and track records. These documents are important because SOE General Meetings of Shareholders (“**GMS**”)/the Minister of SOE are required to pay attention to and take into consideration track records in the appointment of directors.

B. Prohibition of Multiple Positions

Apart from the registers and track records which serve as supporting documents for GMS/the Minister of SOE in the appointment of directors, GR 23/2022 also adds criteria directors and commissioners must meet in relation to the holding of multiple posts.

Previously Government Regulation No. 45 of 2005 concerning the Establishment, Management, Supervision, and Dissolution of State Owned Enterprises (“**GR 45/2005**”) only prohibited directors and commissioners from being the management of political parties and/or candidates for/members of the legislature. Now, Article 22 paragraph (1) and Article 55 paragraph (1) of GR 23/2022 provide that directors and commissioners cannot be:

1. managers of political parties;
2. candidates for/members of legislatures (the People’s Representative Council, Regional Representative Council, Provincial People’s Representative Council, or Regency/City Representative Council);
3. candidates for heads/deputy heads of regions (governor/vice governor, mayor/deputy mayor, or regent/vice regent); and/or
4. heads/deputy heads of regions.

The above prohibitions are intended to avoid conflicts of interest arising. Basically, this provision is in line with Article 25, Article 33 paragraphs (1) and (3), and Article 62 of the State Owned Enterprise Act Law No. 19 of 2003 (the “**SOE Act**”), which prohibit directors and commissioners from holding other positions (a multiplicity of positions) with the potential of causing conflicts of interest.

This prohibition demands directors and commissioners fully devote their energy and thought and/or attention to their duties and obligations and the achievement of the SOE's purpose, always while avoiding any conflict of interest.

C. Reasons for Dismissal

Article 23 paragraph (1) and Article 56 paragraph (1) of GR 45/2005 provided that directors and commissioners of a government share company may be dismissed from time to time pursuant to a GMS resolution for the government share company which mentions the reasons for the dismissal, as provided in paragraph (2) of each of the above articles. GR 23/2022 adds the following list of reasons for dismissal of directors and commissioners:

Reasons for Dismissal of Directors	Reasons for Dismissal of Commissioners
1. Inability to fulfil the obligations agreed upon in the management contract;	1. Inability to carry out the duties properly;
2. Inability to carry out the duties properly;	2. Failure to implement the provisions of laws and regulations and/or of the articles of association;
3. Failure to implement the provisions of laws and regulations and/or of the articles of association;	3. Involvement in actions damaging to the SOE and/or the state finances;*
4. Involvement in actions damaging to the SOE and/or the state finances;*	4. Unethical and/or inappropriate actions;*
5. Unethical and/or inappropriate actions;*	5. Being found guilty by a court decision which has absolute legal effect; or
6. Being found guilty by a court decision which has absolute legal effect; or	6. Resignation.
7. Resignation.	

**new provision*

As shown in the above table, directors and commissioners who commit unethical and/or inappropriate actions may be dismissed at any time through a GMS resolution. Besides, GR 23/2022 also strengthens the role of the GMS/Minister of SOE in the dismissal of directors and commissioners. Under Article 23 paragraph (2a) and Article 56 paragraph (2a), apart from the above reasons for dismissal, the GMS/Minister of SOE may dismiss directors and commissioners for other reasons they think fit for the sake of the SOE's interests and purpose. Nevertheless, GR 23/2022 does not further explain what "reasons they think fit" includes or what the yardstick for their assessment might be.

Article 25 of GR 23/2022 and Article 58 of GR 45/2005 provide that further provisions regarding the dismissal of directors and commissioners will be made by a regulation of the Minister of SOE.

If we consider the regulations issued by the Minister of SOE prior to GR 23/2022, the dismissal of director on the basis of reasons the GMS/Minister of SOE thinks fit is provided for in Regulation of the Minister of SOE No. PER-11/MBU/07/2021 concerning the Requirements and Procedures for the Appointment and Dismissal of Directors of State Owned Enterprises ("**Ministerial Regulation 11/2021**") and the regulation of the Minister of SOE revoked by Ministerial Regulation No. 11/2021, Regulation of the Minister of SOE No. PER-03/MBU/02/2015 concerning Requirements and Procedures for the Appointment and Dismissal of Directors of State Owned Enterprises ("**Ministerial Regulation 03/2015**"). Ministerial Regulation 03/2015 provides one condition in which the GMS/Minister of SOE might think fit to dismiss a director, viz., lack of harmony between directors. On the other hand, Ministerial Regulation 11/2021, which to date is still in effect, does not provide any elucidation on the dismissal of directors for other reasons the GMS/Minister of SOE thinks fit.

Similar arrangements can be found on the topic of the dismissal of commissioners. Regulation of the Minister of SOE No. PER-02/MBU/02/2015 concerning the Requirements and Procedures for the Appointment and Dismissal of Commissioners and Supervisors of State Owned Enterprises, as amended by Regulation of the Minister of SOE No. PER-10/MBU/10/2022 concerning Amendment of Regulation of the Minister of SOE No. PER-02/MBU/02/2015 concerning the Requirements and Procedures for the Appointment and Dismissal of Commissioners and Supervisors of State Owned Enterprises provides that commissioners may be dismissed by the GMS/Minister of SOE for other reasons they think fit for the sake of the SOE's interests and purpose, among which are: (1) in the context of company restructuring; (2) reaching retirement age for Civil Servants, for commissioners who are assigned from technical ministries or other government agencies.

The regulation of provisions regarding the dismissal of directors and commissioners for other reasons the GMS/Minister of SOE thinks fit at the level of a government regulation strengthens the authority of the GMS/Minister of SOE to dismiss directors at the discretion of the Minister of SOE or by a resolution of the GMS.

D. Exemption from Accountability of Directors and Commissioners

GR 45/2005 confirmed that each director and commissioner is obliged to perform his/her duties in good faith and full accountability for the SOE's interests and business, and so they are personally fully responsible if they are proven to be at fault or negligent in the performance of their duties. By the issuance of GR 23/2022 the government has provided an explicit demarcation of the positions of directors and commissioners if the SOE suffers losses. Article 27 paragraph (2a) and Article 59 paragraph (2a) of GR 23/2022 provide that no director or commissioner can be held liable for the losses of an SOE if the following can be proven:

Exemption from Accountability of Directors	Exemption from Accountability of Commissioners
<ol style="list-style-type: none"> 1. The losses were not due to his/her fault or negligence; 2. He/she carried out the management in good faith and prudently for the interest of and in accordance with the purpose and objectives of the SOE; 3. He/she had no conflict of interest, direct or indirect, in the actions of management which resulted in the losses; and 	<ol style="list-style-type: none"> 1. He/she carried out the supervision in good faith and prudently for the interests of the company and in accordance with the purpose and objectives of the SOE; 2. He/she had no conflict of interest, direct or indirect, with the actions of management of the board of directors which resulted in the losses; and 3. He/she gave advice to the directors to avoid the losses arising or continuing.

<p>4. He/she took action to avoid the losses arising or continuing, including measures to obtain information regarding the actions of management which could result in losses, amongst others through the forum of the meeting of the board of directors.</p>	
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The arrangements described above mirror Article 97 paragraph (5) and Article 114 paragraph (5) of the Limited Liability Companies Act Law N. 40 of 2007 which has often been mentioned as an application of the principle of the Business Judgement Rule. This principle originates from common law countries which still serve as topics of discussion in the field of corporate law in Indonesia.

Hopefully, by providing for limits on the responsibility of directors and commissioners, the directors and commissioners can avoid doubts in carrying out corporate acts or actions of management/supervision because such actions are now protected by regulations, so long as there is no conflict with such

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Comparison between GR 45/2005 and GR 23/2022

No.	GR 45/2005	GR 23/2022
1.	Register and Track Record in the Appointment of Directors	
	<p style="text-align: center;">Article 14</p> <p>(1) The appointment and dismissal of members of the Board of Directors shall be carried out by the GMS for Share Companies and by the Minister for Public Companies.</p> <p>(2) In appointing directors, the Minister may seek input from the Minister of Finance and/or Technical Ministers.</p>	<p style="text-align: center;">Article 14</p> <p>(1) The appointment and dismissal of members of the Board of Directors shall be carried out by the GMS for Share Companies and by the Minister for Public Companies.</p> <p>(1a) In the appointment of directors contemplated in paragraph (1) the Minister shall determine a register and track record.</p> <p>(1b) In the register and track record contemplated in paragraph (1a), the Minister may request input from the relevant government institutions/agencies.</p> <p>(1c) In the appointment of directors contemplated in paragraph (1), the GMS/Minister shall pay attention to and take into consideration the track records contemplated in paragraph (1a).</p> <p>(2) In appointing directors, the Minister may seek input from the Minister of Finance and/or Technical Ministers.</p>
2.	Elucidation of Criteria for Prospective Directors Eligible for Appointment	
	<p style="text-align: center;">Elucidation of Article 17</p> <p>Sufficiently Clear</p>	<p style="text-align: center;">Elucidation of Article 17</p> <p>(1) The registers and track records established by the Minister shall evaluate the integrity, good conduct, and honest behavior of the prospective directors.</p> <p>(2) Sufficiently Clear</p> <p>(3) Sufficiently Clear</p>
3.	Conduct and Behaviour Directors Must Have	
	-	<p style="text-align: center;">Article 17A</p> <p>In their day-to-day conduct, directors must be loyal and fully adhere to Pancasila, the 1945 Constitution of the Republic of Indonesia, the Unitary State of the Republic of Indonesia, and the Government.</p>

4. Prohibition of Multiple Posts for Directors	
<p style="text-align: center;">Article 17</p> <p>(1) SOE directors are prohibited from being the management of political parties and/or candidates for/members of the legislature.</p> <p>(2) Further provisions regarding the prohibition contemplated in paragraph (1) shall be made by a Regulation of the Minister.</p>	<p style="text-align: center;">Article 17A</p> <p>(1) SOE directors are prohibited from being the management of political parties and/or candidates for/members of the legislature, candidates for heads/deputy heads of regions and/or heads/deputy heads regions.</p> <p>(2) Further provisions regarding the prohibition contemplated in paragraph (1) shall be made by a Regulation of the Minister.</p>
5. Reasons for Dismissal of Directors	
<p style="text-align: center;">Article 23</p> <p>(1) Directors may be dismissed at any time by a GMS resolution for Share Companies or the Minister for Public Companies, mentioning the reason therefor.</p> <p>(2) The dismissal of directors contemplated in paragraph (1) shall be carried out if in actual fact the director concerned:</p> <ul style="list-style-type: none"> a. is unable to fulfil the obligations agreed upon in the management contract; b. is unable to carry out the duties properly; c. fails to implement the provisions of laws and regulations and/or of the articles of association; d. is involved in actions damaging to the SOE and/or the state; e. is found guilty by a court decision which has absolute legal effect; or f. resigns. <p>(3) The Minister or the official appointed by him/her shall inform the director concerned of the planned dismissal contemplated in paragraph (1) orally or in writing.</p>	<p style="text-align: center;">Article 23</p> <p>(1) Directors may be dismissed at any time by a GMS resolution for Share Companies or the Minister for Public Companies, mentioning the reason therefor.</p> <p>(2) The dismissal of directors contemplated in paragraph (1) shall be carried out if in actual fact the director concerned:</p> <ul style="list-style-type: none"> a. is unable to fulfil the obligations agreed upon in the management contract; b. is unable to carry out the duties properly; c. fails to implement the provisions of laws and regulations and/or of the articles of association; d. is involved in actions damaging to the SOE and/or the state finances; e. commits unethical and/or inappropriate acts; f. is found guilty by a court decision which has absolute legal effect; or g. resigns. <p>(2a) Apart from the reasons for dismissal of a Director contemplated in paragraph (2), a Director may be dismissed for other reasons the GMS/Minister thinks fit for the interest and purpose of the SOE.</p> <p>(3) The Minister or the official appointed by him/her shall inform the director concerned of the planned dismissal contemplated in paragraph (1) orally or in writing.</p>

ANNEX

	<p>(4) The resolution for dismissal due to the reasons contemplated in paragraphs (2) a, b, c, and d, shall be adopted after the person concerned has been given the opportunity to defend himself/herself.</p> <p>(5) The defence contemplated in paragraph (4) shall be delivered in writing to the GMS for a Share Company or to the Minister for a Public Company or the official appointed by him/her within 14 (fourteen) days as from when the director concerned was informed as contemplated in paragraph (3).</p> <p>(6) While the planned dismissal is still in process, the director concerned must carry out his/her duties as he/she should.</p> <p>(7) Dismissal for the reasons contemplated in paragraphs (2) d and e shall constitute a dishonourable discharge.</p>	<p>(4) The resolution for dismissal due to the reasons contemplated in paragraphs (2) a, b, c, d, and e, shall be adopted after the person concerned has been given the opportunity to defend himself/herself.</p> <p>(5) Deleted</p> <p>(5a) It will not be necessary to provide the opportunity for defence contemplated in paragraph (4) if the person concerned does not object to the dismissal.</p> <p>(6) While the planned dismissal is still in process, the director concerned must carry out his/her duties as he/she should.</p> <p>(7) Dismissal for the reasons contemplated in paragraphs (2) d and f shall constitute a dishonourable discharge.</p>
6. Implementing Regulations		
	Article 25	Article 25
	Further provisions regarding the appointment and dismissal of Directors will be made by a Regulation of the Minister.	Further provisions regarding the appointment and dismissal of prospective Directors and the compilation of registers and track records shall be made by Regulation of the Minister.
7. Exemptions from Accountability of Directors		
	Article 27	Article 27
	<p>(1) Each Director shall perform his/her duties in good faith and full accountability for the interests and business of the SOE.</p> <p>(2) Each Director shall be personally fully responsible if the person concerned is at fault or negligent in performing his/her duties in accordance with the provision contemplated in paragraph (1).</p>	<p>(1) Each Director shall perform his/her duties in good faith and full accountability for the interests and business of the SOE.</p> <p>(2) Each Director shall be personally fully responsible for the SOE's losses if the person concerned is at fault or negligent in performing his/her duties in accordance with the provision contemplated in paragraph (1).</p>

ANNEX

	<p>(3) The owner of the capital may file suit in the courts on behalf of a public company against a Director who caused losses to the public company due to his/her fault or negligence.</p>	<p>(2a) No Director shall be held accountable for the losses contemplated in paragraph (2) if it can be proved:</p> <ul style="list-style-type: none"> a. the losses were not due to his/her fault or negligence; b. he/she carried out the management in good faith and prudently for the interest of and in accordance with the purpose and objectives of the SOE; c. he/she had no conflict of interest, direct or indirect, in the actions of management which resulted in the losses; and d. he/she took action to avoid the losses arising or continuing, <p>(3) The owner of the capital may file suit in the courts on behalf of a public company against a Director who caused losses to the public company due to his/her fault or negligence.</p>
8. Conduct and Behaviour Commissioners Must Have		
	-	<p style="text-align: center;">Article 50A</p> <p>In their day-to-day conduct, commissioners must be loyal and fully adhere to Pancasila, the 1945 Constitution of the Republic of Indonesia, the Unitary State of the Republic of Indonesia, and the Government.</p>
9. Prohibition of Multiple Posts for Commissioners and Supervisors		
	<p style="text-align: center;">Article 55</p> <p>(1) Commissioners and Supervisors are prohibited from being the management of political parties and/or candidates for/members of the legislature.</p> <p>(2) Further provisions regarding the prohibition contemplated in paragraph (1) shall be made by a Regulation of the Minister.</p>	<p style="text-align: center;">Article 55</p> <p>(1) Commissioners and Supervisors are prohibited from being the management of political parties and/or candidates for/members of the legislature, candidates for heads/deputy heads of regions and/or heads/deputy heads regions.</p> <p>(2) Further provisions regarding the prohibition contemplated in paragraph (1) shall be made by a Regulation of the Minister.</p>

10.	Reasons for Dismissal of Commissioners and Supervisors	
	<p style="text-align: center;">Article 56</p> <p>(1) Commissioners and Supervisors may be dismissed at any time by a GMS resolution for Share Companies or the Minister for Public Companies, mentioning the reason therefor.</p> <p>(2) The dismissal of commissioners and supervisors contemplated in paragraph (1) shall be carried out if in actual fact the commissioner or supervisor concerned:</p> <ol style="list-style-type: none"> a. is unable to carry out the duties properly; b. fails to implement the provisions of laws and regulations and/or of the articles of association; c. is involved in actions damaging to the SOE and/or the state; d. is found guilty by a court decision which has absolute legal effect; or e. resigns. <p>(3) The Minister or the official appointed by him/her shall inform the commissioner or supervisor concerned of the planned dismissal contemplated in paragraph (1) orally or in writing.</p> <p>(4) The resolution for dismissal due to the reasons contemplated in paragraphs (2) a, b, and c shall be adopted after the person concerned has been given the opportunity to defend himself/herself.</p> <p>(5) The defence contemplated in paragraph (4) shall be delivered in writing to the GMS for a Share Company or to the Minister for a Public Company or the official appointed by him/her within 14 (fourteen) days as from when the commissioner or supervisor concerned was informed as contemplated in paragraph (3).</p>	<p style="text-align: center;">Article 56</p> <p>(1) Commissioners and Supervisors may be dismissed at any time by a GMS resolution for Share Companies or the Minister for Public Companies, mentioning the reason therefor.</p> <p>(2) The dismissal of commissioners and supervisors contemplated in paragraph (1) shall be carried out if in actual fact the commissioner or supervisor concerned:</p> <ol style="list-style-type: none"> a. is unable to carry out the duties properly; b. fails to implement the provisions of laws and regulations and/or of the articles of association; c. is involved in actions damaging to the SOE and/or the state finances; d. commits unethical and/or inappropriate acts; e. is found guilty by a court decision which has absolute legal effect; or f. resigns. <p>(2a) Apart from the reasons for dismissal of a commissioner or supervisor contemplated in paragraph (2), a commissioner or supervisor may be dismissed for other reasons the GMS/Minister thinks fit for the interest and purpose of the SOE.</p> <p>(3) The Minister or the official appointed by him/her shall inform the commissioner or supervisor concerned of the planned dismissal contemplated in paragraph (1) orally or in writing.</p> <p>(4) The resolution for dismissal due to the reasons contemplated in paragraphs (2) a, b, c, and d shall be adopted after the person concerned has been given the opportunity to defend himself/herself.</p> <p>(5) Deleted</p>

	<p>(6) While the planned dismissal is still in process, the commissioner or supervisor concerned must carry out his/her duties as he/she should.</p> <p>(7) Dismissal for the reasons contemplated in paragraphs (2) c and d shall constitute a dishonourable discharge.</p>	<p>(5a) It will not be necessary to provide the opportunity for defence contemplated in paragraph (4) if the person concerned does not object to the dismissal.</p> <p>(6) While the planned dismissal is still in process, the commissioner or supervisor concerned must carry out his/her duties as he/she should.</p> <p>(7) Dismissal for the reasons contemplated in paragraphs (2) c and e shall constitute a dishonourable discharge.</p>
11.	Exemptions from Accountability of Commissioners	
	Article 59	Article 59
	<p>(1) A Commissioner or Supervisor shall perform his/her duties in good faith and full accountability for the interests and business of the SOE.</p> <p>(2) A Commissioner or Supervisor shall be personally fully responsible if the person concerned is at fault or negligent in performing his/her duties in accordance with the provision contemplated in paragraph (1).</p> <p>(3) The owner of the capital may file suit in the courts on behalf of a public company against a Supervisor who caused losses to the public company due to his/her fault or negligence.</p>	<p>(1) A Commissioner or Supervisor shall perform his/her duties in good faith and full accountability for the interests and business of the SOE.</p> <p>(2) A Commissioner or Supervisor shall be personally fully responsible of the SOE's losses if the person concerned is at fault or negligent in performing his/her duties in accordance with the provision contemplated in paragraph (1).</p> <p>(2a) No Commissioner or Supervisor shall be held accountable for the losses contemplated in paragraph (2) if it can be proved:</p> <ul style="list-style-type: none"> a. he/she carried out the supervision in good faith and prudently for the interests of the share company/public company and in accordance with the purpose and objectives of the share company/public company; b. he/she had no conflict of interest, direct or indirect, with the actions of management of the board of directors which resulted in the losses; and c. he/she gave advice to the directors to avoid the losses arising or continuing. <p>(3) The Minister may file suit in the courts on behalf of a public company against a Supervisor who caused losses to the public company due to his/her fault or negligence.</p>

12.	SOE Employees	
	<p style="text-align: center;">Article 95</p> <p>(1) SOE employees are workers for the SOE whose appointment, dismissal, rights, and obligations are determined by a contract of employment in accordance with the laws and regulations in the labour affairs sector.</p> <p>(2) All of the provisions on employee affairs and hierarchy of ranks applicable to Civil Servants do not apply to SOE.</p>	<p style="text-align: center;">Article 95</p> <p>(1) SOE employees are workers for the SOE whose appointment, dismissal, rights, and obligations are determined by a contract of employment in accordance with the laws and regulations in the labour affairs sector.</p> <p>(2) All of the provisions on employee affairs and hierarchy of ranks applicable to Civil Servants do not apply to SOE.</p> <p>(3) In daily life, SOE employees must be loyal and fully adhere to Pancasila, the 1945 Constitution of the Republic of Indonesia, the Unitary State of the Republic of Indonesia, and the Government.</p> <p>(4) In order to meet demand and/or enhance the performance of SOE, the Board of Directors may recruit employees and/or fill positions/posts under the Board of Directors via professional hire.</p>
	<p style="text-align: center;">Article 96</p> <p>(1) If an SOE employee is appointed to become a Director of an SOE, the person concerned shall retire as an SOE employee with his/her highest rank in the SOE counted as from when he/she was appointed as a Director.</p> <p>(2) Further provisions regarding employees who are appointed as Directors shall be made by a Regulation of the Minister.</p>	<p style="text-align: center;">Article 96</p> <p>(1) If an SOE employee is appointed to become a Director of an SOE, the person concerned shall retire as an SOE employee with his/her highest rank in the SOE counted as from when he/she was appointed as a Director.</p> <p>(2) The provision contemplated in paragraph (1) shall apply to employees who have already reached the age of 50 (fifty) at the time of their appointment or after their appointment as a Director.</p> <p>(3) If the employee is appointed as a Director in another SOE, the person concerned may request retirement when he/she has already reached the age of 50 (fifty), at the time of the appointment or after serving, with the retirement rank and rights according to the provisions applicable in the SOE concerned.</p>

ANNEX

		<p>(4) For as long as the SOE employee has been appointed as a Director as contemplated in paragraphs (2) and (3) but has not yet retired, the employee's rank shall continue in accordance with the provisions in the SOE concerned.</p> <p>(5) Further provisions regarding SOE employees who are appointed as Directors in the SOE concerned as contemplated in paragraph (1) and employees who are appointed as Directors in another SOE as contemplated in paragraph (3) shall be made by a Regulation of the Minister.</p>
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Note:

GR 23/2022 came into effect on the date of its enactment. When GR 23/2022 came into effect, all regulations which constitute implementing regulations of GR 45/2005 were declared still in effect in so far as they do not conflict with the provisions in GR 23/2022.

