

ANALYSING PUBLIC OFFICIALS' LEGITIMACY AS A COMMISSARY FOR THE STATE-OWNED COMPANY

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The controversy over the concurrent position of a government official surfaced last year when the public learned that the Chancellor of the University of Indonesia also served as a Commissioner in a State-Owned Enterprise (BUMN or SOE). This is because the UI Chancellor (*rektor*) is a State Civil Apparatus (ASN), so the discussion at that time widened to how dual positions of government officials are regulated by laws and regulations.

For the case of the UI Chancellor, Article 35 of PP 68 of 2013 stipulates a prohibition on the Chancellor and Vice-Chancellor in terms of concurrent positions, one of which is prohibited from being 'officials in BUMN/D or private companies'. However, eventually, provisions related to the prohibition were amended to end the polemic through Article 35 PP 75/2021 which stipulates that the Chancellor and Vice-Chancellor were prohibited only from being a director in BUMN/D or private companies. This, makes them allowed to be a commissioner in any company.

But what does the law says about such dual positions of government officials?

In reality, the practice of a concurrent position of a government official that also sits as a BUMN Commissioner is an old practice that has been considered common. Many government officials in various ministries and agencies sit in the high leadership positions (JPT – generally echelon 1 and 2 officials), also get a position as a Commissioner in a BUMN. The question is, how does the law regulate this dual position?

If we look at Law 19/2003 on State-Owned Enterprises, Article 33 says:

Members of the Board of Commissioners are prohibited from holding concurrent positions as:

- (1) Members of the Board of Directors in SOEs, Regionally Owned Enterprises, Private-Owned Enterprises, and other positions that may cause a conflict of interest; and/or*
- (2) Other positions that are prohibited by the legislation.*

Hence, such dual-position may not be contrary to Article 33 of the SOE Law as long it does not cause a conflict of interest and is permitted by other laws and regulations. The provisions of para (2) as above mean that if the sectoral laws and regulations related to the position of the government official in question do not prohibit, the dual position of a public servant as a commissioner is allowed by the current legal framework. The question is, what are the limits of a conflict of interest?

Article 42 and 43 of Law 30/2014 on Administrative Procedure essentially regulate the prohibition of conflict of interest amongst Government Agencies and/or Officials and their relation to any administrative decision or any action issued by them. Article 1 number 14 of the Administrative Procedure Law provides limitations on the boundaries of conflict of interest. It defines conflict of interest as a vested interest of a government official that may benefit themselves or others regarding the uses of their power or authority that may affect the neutrality

and quality of their action or decision. Hence, as long as a dual-position can be carried out professionally, it will not occur as a conflict of interest.

In addition, government officials in carrying out their duties must also comply with the public servant code of ethics and code of conduct. This has been explicitly stipulated in Article 5 paragraph (2) of Law Number 5 of 2014 concerning State Civil Apparatus (ASN). This Law aims to ensure that public servants in carrying out their work can be done professionally and free from conflict of interest.

Furthermore, the dismissal of a public servant due to an illegal concurrent position is stipulated in Article 94, Article 144, and Article 276 of Government Regulation 11/2017. Based on these, no provision prohibits a public servant to be appointed as a Commissioner in a BUMN.

Keeping in mind that the main function of government officials is to serve the public, it is also necessary to look at the regulation of Law Number 25 of 2009 concerning Public Services. The Public Service Act has defined the Public Service Officer as officials, employees, officers, and everyone who works within the public office with the task to carry out public services. Concerning the concurrent position of Public Service Officer as a Commissioner, Article 17 of the Public Service Law stipulates:

Article 17

Public service personnel are prohibited:

- a. *concurrently as a commissioner or an administrator of a business entity for a personnel that works in government agencies, State-Owned Enterprises, and Regional Owned Enterprises;*
- b.

The aforementioned provision of Article 17 of the Public Service Law essentially prohibits the Public Service Officer who are working for government agencies, State-Owned Enterprises, and Regional-Owned Enterprises from concurrently serving as a commissioner and administrator of a business organisation.

However, if we look at Article 17 of the Public Service Law, it says that it "prohibits" a Public Service Officer from concurrently serving as a commissioner. However, upon deeper examination, we can see that such provision is a vague norm since Article 17 does not specifically state that the position of the Commissioner referred by Article 17 is a Commissioner for a BUMN, BUMD, or private sector.

Despite the Public Service Law prohibiting those who are working in government agencies, BUMN, and BUMD from concurrently serving as a **commissioner or an administrator of a business organisation**, it does not explain specifically that such prohibition also applies to dual positions in SOEs. Thus, it can be interpreted that the restriction in Article 17 only prohibits dual positions in the private sector. This is due to that the Public Service Law viewed SOE as a public entity, it did not categorise SOE as the private sector.

Furthermore, the lex specialist legislation in both SOEs and civil service did not prohibit the public servant to be concurrent as a commissioner in the SOE. For instance, dual-position prohibition was not found in the public servant's prohibition list provided by Article 4 Government Regulation (PP) 53/2020 on the Public Officials' Discipline Management. This regulation was silent on the shared ownership of a private company by a public official and

being an administrator or a commissioner. Such prohibition also did not exist in the SOE Law, Civil Service Law, and Administrative Procedure Law as long as it did not cause a conflict of interest.

The existence of a concurrent position as an SOE Commissioner by a government official is a common thing and is considered not to interfere with their performance. This practice has been around for a long time. The purpose of the dual position is in the context of supervision of SOE by the government as the SOE's main shareholder.

Such supervision was intended to make the SOEs management better and can be conducted more professionally, as well as to promote transparency and good governance. In addition, many SOEs engaged in manufacturing and trade need supervision from their supervisory body (through its relevant ministries/technical agencies in their respective area that become their supervisory agency). The same practice is also carried out by several developed countries such as Singapore and Japan in supervising their SOEs.

The commissioner is not directly responsible for the operations of the BUMN. The company's operational affairs are handled by the directors of the BUMN concerned. Meanwhile, the task of the Commissioner is to supervise and assess the extent to which the directors have carried out their duties and responsibilities in managing the company, including supervising the company. Thus, the dual position of a public official that sits as a commissioner in an SOE does not interfere with his duties to conduct public services. The supervision carried out by a public commissioner that also a public servant is different from the daily operational work carried out by the board of directors. Commissioners are in charge of monitoring the company's performance on a regular basis, this task should not interfere with their main duties as government officials. **(January 2022)**