



THE STATE'S POSITION AS A SHAREHOLDER OF DWIWARNA SHARES IN THE PRIVATIZATION OF STATE-OWNED-HOLDING-MEMBERS-COMPANIES

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ABSTRACT

According to Government Regulation 72/2016, the formation of state-owned-holding-companies ("SOHC") is accomplished using the transfer mechanism, which transforms State shares in SOEs into equity in other SOEs, resulting in a change in the status of share ownership of holding-member-companies from being owned directly by the State to being owned by the holding company. GR 72/2016 also requires the state to own shares with special rights in holding-members-companies originating from ex-SOE, which can only be owned by the state, known as Dwiwarna shares. Potential issues arise because of the ambiguity of the controlling authority role in managing a SOHC, whether the state still holds it or has been transferred to the parent company, including in terms of selling shares of holding-member-companies. Hopefully, this study will provide the State with legal certainty, benefits, and justice in privatizing holding-member companies. The research methodology used is a normative juridical approach with qualitative normative legal research that relies on secondary data from the library. This study indicates that the State's Controlling Rights are based on state ownership of Dwiwarna shares in holding-member companies originating from ex-SOE, implying that the sale of company shares only sometimes results in reduced state control and ownership. As a result, the sale of series B shares may be accomplished using corporate regulations in line with their respective authorities. Meanwhile, the State must carry out the sale of Dwiwarna shares, per GR 33/2005. The author recommends that the State create a new mechanism for exercising Dwiwarna shareholder privileges so that the implementation of the absolute authority and rights for Dwiwarna shareholders can proceed in an orderly and legal manner.

Keywords: State Controlling Rights; State-owned-holding-companies; Dwiwarna

1. INTRODUCTION

The 1945 Constitution's Article 33, paragraphs (2) and (3) stipulates that the state is responsible for managing and using all land, water, and natural resource-related matters for the benefit of the populace as a whole.¹ One of the mandates for state control is in the form of commercial enterprises whose capital is directly owned by the state, namely State-Owned Enterprises ("SOE"). The provisions for managing this business entity are outlined in SOE Law Number 19 of 2003. The role of SOE differs from that of private companies in general, as it is characterized by an obligation to serve the community and the commercial aim of SOE to earn a profit.²

In its development, based on Government Regulation Number 72 of 2016 ("GR 72/2016"), the Government of Indonesia has developed a new structure in the management of SOEs in Indonesia, namely State-Owned-Holding-Companies ("SOHC"), through the Ministry of SOEs as a proxy for the States of Indonesia as SOE's ultimate shareholders. GR 72/2016 was formed as a derivative of the SOE Law, intended to improve the existing arrangements in GR 44/2005. This sequence of laws and regulations becomes the

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- 1 Nurul Listiyani and M. Yasir Said, "Political Law on the Environment: The Authority of the Government and Local Government to File Litigation in Law Number 32 Year 2009 on Environmental Protection and Management," *Resources* 7, no. 4 (November 23, 2018): 9 of 13, <https://doi.org/10.3390/resources7040077>.
 - 2 Putu Samawati, "Demonopolization SOEs Policy as An Efforts To Restructured Roles and Institutions in Facing Global Competition," *Bappenas Working Papers* 2, no. 1 (March 25, 2019): 120, <https://doi.org/10.47266/bwp.v2i1.34>.

foundation for implementing government activities, including economic development, through SOEs.³

A holding is formed through the transfer (*inbrengr*) mechanism of a large amount of State shares in one SOE transferred to another SOE. The shareholder structure of holding member companies changed once the holding was formed. The company that receives the share transfer becomes the holding company and retains its SOE status. The companies whose shares were transferred became holding member companies and subsidiaries, with the State owning only a tiny portion of the company in the form of one Dwiwarna share. Dwiwarna shares are shares with special rights in holding-member companies originating from an ex-SOE, which can only be owned by the state. 15 SOHCs formed until 2022, with 44 companies altering their status to become holding subsidiaries.⁴ The SOHC directly controls the majority of holding member companies, allowing for the establishment of more optimal corporate market value-creation.⁵ The structure of a holding company with a sectoral approach that is supposed to produce corporate synergy may result in setbacks because strong companies are obliged to carry the weight of weak enterprises.⁶

The change in company status due to the establishment of this SOHC structure has the potential to spark controversy, particularly given the uncertainty of the State's role in SOE holding management. In fact, the aspect of legal certainty as one of the constitutional rights in doing business, as stated in Article 28D paragraph (1) of the 1945 Constitution, is needed to create order between the norms that apply in society.⁷ This ambiguity stems from the arrangement that an SOE holding subsidiary originating from ex-SOE is entirely subject to the Limited Liability Company Law ("LLC Law"). However, the company retains its status as a State Company because the State still owns shares in the company, even if it is only one share, so it should also be subject to the provisions of state finances and comply with corporation regulations. This ambiguity may need clarification because there are no further technical arrangements for managing business entities after the holding is established. This includes, for example, the Ministry of SOEs and/or the state-owned-holding-company, as the party mandated by the State to manage the company, feeling the need to sell shares of holding member companies, for example, because there is limited capital for business expansion by fundraising through an initial public offering ("IPO"), or even selling the subsidiary company wholly.

In the latest news, the Ministry of SOEs plans to carry out an IPO for several state-owned holding subsidiaries, both those originating from ex-SOE and non-SOE companies, including PT Pertamina Hulu Energy, Palm Co., PT Pupuk Kalimantan Timur, and PT Inalum. The question is, what is the state's position, and what is the mechanism for the sale of shares (privatization) of state-owned holding member companies originating from ex-SOEs, for example, the sale of PT Inalum shares ?

Potential problems arise with the ambiguity of the State's position in the SOHC in the case of the sale of shares of the state-owned holding member companies originating from ex-SOEs. What is then interesting to study is the position of the State in the privatisation of holding member companies, mainly because privatisation involves the State's controlling rights based on Article 33 of the 1945 Constitution. It is hoped that the results of this thesis can provide certainty, benefit, and justice for the State in implementing the privatization of state-owned holding member companies in the future.

Some previous studies related to the state's controlling rights in establishing a SOHC, for example, have been conducted by Giso Christianto and Nabila Aulia Rahma. Both studies have quite similar focuses but different objects. Christianto's research is about the meaning of the state's controlling rights toward mineral

3 Ida Hanifah and Andryan Andryan, "The Rights to Review Policy Rules in the Perspective of Rule of Law," *Jurnal Penelitian Hukum De Jure* 21, no. 3 (September 28, 2021): 321, <https://doi.org/10.30641/dejure.2021.V21.321-330>.

4 Huta Disyon and Elisatris Gultom, "Critical Review of the Implementation of the Making of SOE as a Holding from Anti-Monopoly and Unfair Business Competition Perspective," *Jurnal Penelitian Hukum De Jure* 22, no. 2 (June 30, 2022): 197, <https://doi.org/10.30641/dejure.2022.V22.191-204>.

5 Joshua Bagus Christian Widjoseno, Siti Mahmudah, and Aisyah Ayu Musyafah, "Kajian Yuridis Terhadap Pembentukan Holding Company pada PT Pertamina," *Diponegoro Law Journal* 11, no. 3 (2022), <https://doi.org/10.14710/dlj.2022.32182>.

6 Kyunghoon Kim, "Matchmaking: Establishment of State-Owned Holding Companies in Indonesia," *Asia & the Pacific Policy Studies* 5, no. 2 (May 2018): 324, <https://doi.org/10.1002/app5.238>.

7 Miftahul Huda, "Hak Atas Memperoleh Kepastian Hukum dalam Perspektif Persaingan Usaha Melalui Telaah Bukti Tidak Langsung," *Jurnal HAM* 11, no. 2 (August 28, 2020): 258, <https://doi.org/10.30641/ham.2020.11.255-267>.

and coal resources.⁸ In contrast, Rahma's research is about the concept of the state's controlling rights in the establishment of SOHC.⁹ The main conclusion regarding the state's controlling rights conception is that state control can be exercised by carrying out policies, management, regulation, management, and supervision by the state. The novelty of this study is that the author focuses his research on the state's position in the sale of shares in state-owned holding member companies originating from ex-SOEs, using the legal approach of the State's Controlling Right. To the best of the author's knowledge, there is no other research on this topic, either nationally or internationally, so this study is the author's idea.

In the next section, the author first provides a general description and review of the concept of State Controlling Rights regarding the management of SOEs in the form of a holding company and the privileges owned by the State as a Dwiwarna shareholder in State-owned Holding Member Companies. Furthermore, based on the general review referred to, the author will conduct an analysis regarding the position of State Controlling Rights in the formation of SOHC and in the implementation of the sale of shares in state-owned holding member companies originating from former SOEs.

2. METHOD

The research method applied in this study is a normative juridical method because the research focuses on secondary data, in this case, the norms contained in a statute regulation,¹⁰ specifically concerning the administration of state-owned holding member companies. The study was conducted by evaluating legal provisions and comparing them to reality regarding the position of State Controlling Rights in the management practices of SOEs and holding member companies, particularly in selling shares (privatization), to identify gaps.

To obtain the data needed in writing this research, it was carried out through library research. The data collecting technique employed was a literature study, which involved looking for as much comprehensive data as possible from secondary data originating from primary and secondary legal sources that were the relevant topics, followed by a qualitative analysis.¹¹ All three of which are secondary data will become the main data in this study, supported by primary data as secondary data support.¹² The data sources in this study are as follows: The 1945 Constitution, the State Finance Law, the SOE Law, and court rulings—both judicial reviews at the Supreme Court and the Constitutional Court.

Secondary legal materials, namely library materials, are closely related to the law of primary legal materials and can help analyze and understand primary materials. In contrast, the secondary materials used consist of writings by legal experts in the form of books, papers, articles, and documents relevant to this title. Books, journals, and legal research findings linked to the subject under consideration were employed as secondary legal materials in this study. Tertiary legal materials include legal dictionaries, electronic mass media pieces, and other required reading sources.

3. FINDINGS AND DISCUSSION

In this section, the author first provides a general description and review of the concept of State Controlling Rights regarding the management of SOEs in the form of a holding company and the privileges owned by the State as a Dwiwarna shareholder in State-owned Holding Member Companies. Furthermore,

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- 8 Giso Christiano, "Ratio Legis Asas Hak Menguasai Negara Terhadap Sumber Daya Mineral Dan Batubara" (Magister Thesis, Tarakan, Universitas Borneo Tarakan, 2022), <https://repository.ubt.ac.id/repository/UBT14-06-2022-084606.pdf>.
 - 9 Nabila Aulia Rahma, "Analisis Konsep Hak Menguasai Negara Dalam Pembentukan Holding Badan Usaha Milik Negara (BUMN)" (S1 Thesis, Malang, Universitas Brawijaya, 2021), <http://repository.ub.ac.id/186765>.
 - 10 Andri Gunawan Wibisana, "Menulis di Jurnal Hukum: Gagasan, Struktur dan Gaya," *Jurnal Hukum & Pembangunan* 49, no. 2 (July 5, 2019): 482, <https://doi.org/10.21143/jhp.vol49.no2.2014>.
 - 11 Kornelius Benuf and Muhamad Azhar, "Metodologi Penelitian Hukum sebagai Instrumen Mengurai Permasalahan Hukum Kontemporer," *Gema Keadilan* 7, no. 1 (April 1, 2020): 26, <https://doi.org/10.14710/gk.2020.7504>.
 - 12 Arif Hidayat and Zaenal Arifin, "Politik Hukum Legislasi Sebagai Socio-Equilibrium di Indonesia," *Jurnal Ius Constituendum* 4, no. 2 (October 15, 2019): 150, <https://doi.org/10.26623/jic.v4i2.1654>.

based on the general review referred to, the author will conduct an analysis regarding the position of State Controlling Rights in the formation of SOHC and in the implementation of the sale of shares in state-owned holding member companies originating from former SOEs.

3.1 The Conception of State's Controlling Right

In three cases of judicial review of Law Number 20 of 2002 concerning Electricity, namely: cases Number 001/PUU-I/2003, Number 021/PUU-I/2003, and Number 022/PUU-I/2003, the Constitutional Court has confirmed the interpretation of the phrase “controlled by the State” in Article 33 of the 1945 Constitution, that the right to control the state must be understood broadly to include the concept of sovereignty of the Indonesian people, namely public ownership and the collected of the Indonesian people, which gives the State a mandate to implement policies and management actions, regulation, management, and supervision of natural resources intended for the welfare of the people.¹³

In line with this, the Constitutional Court has repeatedly reaffirmed the conception of the State's Controlling Right (*Hak Menguasai Negara*) in Article 33 of the 1945 Constitution, as referred to in several judicial review decisions on Law Number 27 of 2007, Law Number 22 of 2001, and Law Number 7 of 2004. The Constitutional Court also provides an interpretation of the benchmarks for achieving the management and utilization of natural resources for the greatest prosperity of the people in Decision Number: 03/PUU-VIII/2010 regarding the judicial review of Law Number 27 of 2007. These benchmarks are the benefits of natural resources for the community, equity benefits of natural resources for the community, and community participation in determining the benefits of natural resources.¹⁴

Philosophically, Article 33 paragraph (3) of the 1945 Constitution employs the term “to be controlled” about the state's function of providing prosperity to the people. In a legal sense, controlled means that an institution that controls does not have the legal right to transfer these things other than for their use.

According to Jimly Asshiddiqie, the notion of “controlled by the State” in Article 33 paragraph (3) of the 1945 Constitution also encompasses the notion of private ownership.¹⁵ Furthermore, If the notion “controlled by the state” is only interpreted as ownership in the sense of civil (private), then the said thing is not enough for the implementation of the right of ownership to achieve the goal of “the greatest prosperity of the people”.¹⁶ According to Bagir Manan, Article 33 of the 1945 Constitution serves as the fundamental framework for the growth of economic law in Indonesia. This constitutional guideline establishes the economic structure and the State's ability to regulate economic activity and reflects the ideals and beliefs leaders have long fought to uphold.¹⁷

Taking the experts' opinions into account, the authors conclude that the state's controlling right is the right of the state and the Indonesian people to control all of Indonesia's natural resources, which the government collectively represents in their utilization, management, and exploitation, including supervision. As a result, the utilization of all of Indonesia's natural resources, whether carried out by the state or by a third party authorized to manage them, should be capable of achieving the highest possible welfare for the Indonesian people.

13 Jefri Porkonanta Tarigan, “Inkonstitusionalitas Sistem Unbundling dalam Usaha Penyediaan Listrik,” *Jurnal Konstitusi* 15, no. 1 (March 29, 2018): 189, <https://doi.org/10.31078/jk1519>.

14 Giri Ahmad Taufik, “The Interpretation of Article 33 of the Indonesian Constitution and Its Impact on Independent Regulatory Agencies,” *Australian Journal of Asian Law* 20, no. 2 (March 1, 2020): 314, <https://search.informit.org/doi/10.3316/agispt.20211005054448>.

15 Tri Hayati, “Hak Penguasaan Negara Terhadap Sumber Daya Alam dan Implikasinya Terhadap Bentuk Pengusahaan Pertambangan,” *Jurnal Hukum & Pembangunan* 49, no. 3 (November 5, 2019): 779, <https://doi.org/10.21143/jhp.vol49.no3.2199>.

16 Anna Triningsih and Zaka Firma Aditya, “Pembaharuan Penguasaan Hak Atas Tanah Dalam Perspektif Konstitusi,” *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 8, no. 3 (December 11, 2019): 337, <https://doi.org/10.33331/rechtsvinding.v8i3.355>.

17 Aditya Nurahmani, M Robi Rismansyah, and Puspita Nur Suciati, “Reorientasi Perekonomian Nasional Berdasarkan Pancasila Melalui Perubahan Pasal 33 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Dengan Model Directive Principles Of State Policies,” *Majalah Hukum Nasional*, 139-165, 48, no. 2 (December 3, 2018): 155, <https://doi.org/10.33331/mhn.v48i2.106>.

3.2 SOE Management in Holding Companies Construction

According to Article 1 of the SOE Law, an SOE is a business entity which all or most of the capital is owned by the state through direct participation from the segregated state assets. SOEs in the form of Limited Liability Companies, with state ownership of at least 51%, are referred to as Persero. Persero, which has made a public offering on the capital market, are referred to as Public Limited Companies (“PLCs”). The definition of the SOE Law highlights the importance of majority share ownership to achieve de jure control over a company.¹⁸

The SOE Law continues to provide recognition for the existence of companies whose shares are owned by the State in a minority (less than 51%), for example, in holding member companies whose shares are only owned by the State in the amount of one Dwiwarna share, namely by referring to the formulation of the Elucidation of Article 14 paragraph (1) of the SOE Law.

The SOE Law governs restructuring and privatization, with reform aimed at strengthening SOE to operate efficiently, transparently, and professionally. Meanwhile, SOE privatization is underway to boost the company’s performance and added value, as well as promote community engagement in shareholder ownership.

According to Faisal Basri, structuring an SOE cannot only use one method or instrument. If an SOE that manages a business with high social benefits loses out because it is inefficient, it must be revitalized by restructuring or corporatization. If SOEs that generate high externalities are already efficient, they should continue to be maintained to be healthier. Without much consideration, the government should immediately liquidate SOEs with low and inefficient social benefits. If a SOE has low externalities but high efficiency, it should be considered for privatization. The conceptual framework for structuring an SOE in question can be briefly described as follows:¹⁹

Figure 1. Conceptual Framework for Structuring an SOE

EFFICIENCY EXTERNALITY	LOW	HIGH
HIGH	<ul style="list-style-type: none"> • Restructuration • Corporatization • Strategic alliances/ partnerships 	<ul style="list-style-type: none"> • Have no problem. • Do not disturb; do not merge with those who are still sick, whose business is a substitute, or whose business model is very different.
LOW	<ul style="list-style-type: none"> • Liquidation • Sell (cut loss) 	<ul style="list-style-type: none"> • Privatization • The IPO is a top priority

Source: Faisal Basri, <https://faisalbasri.com/2017/02/15/konsep-holding-bumn-berbahaya-dan-menyetakkan/>.

The procedure for constructing an SOE holding by transferring State shares is by reducing the State Equity Participation (*Penyertaan Modal Negara*, “SEP”) in the one SOE that will become a holding member and then adding SEP to the holding company. This transfer (*inbreng*) mechanism, as GR 72/2016, is basically only a shift in government investment in state companies since there has been no change in the absolute value of state ownership and no loss or disposal of SOE assets or state assets.

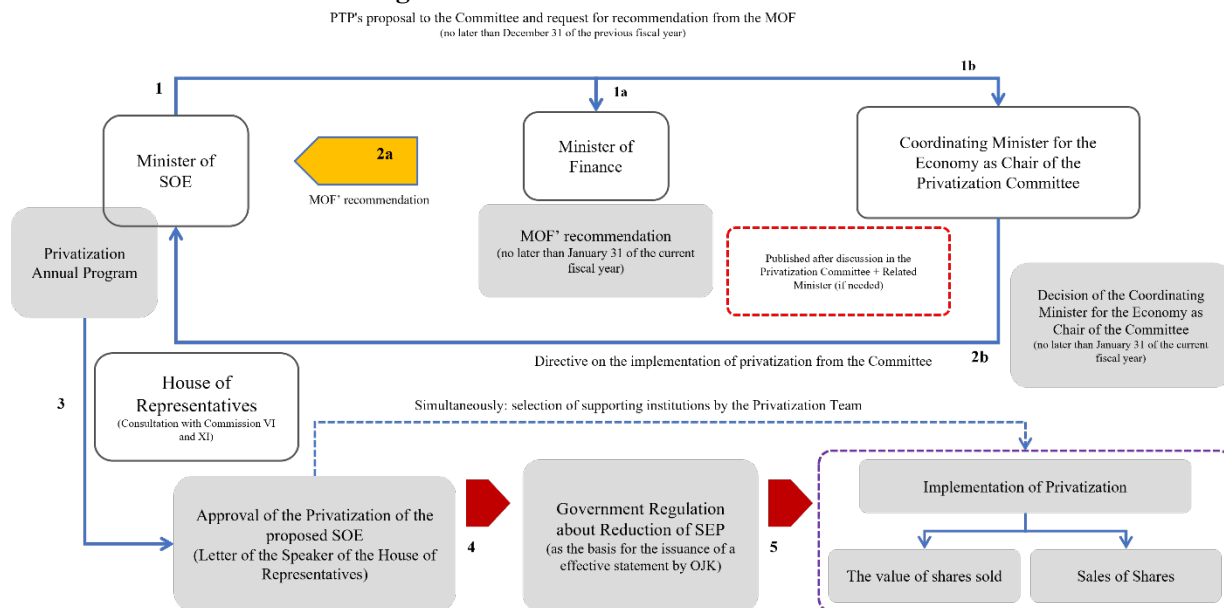
According to Article 78 of the SOE Law, privatization of SOE is accomplished by selling shares, namely: IPO, strategic sales, or employee and management buyout (EMBO). Strategic sales can be made to SOEs that require strategic partners’ know-how and expertise. The privatization of SOE is carried out following the regulations of GR 33/2005. At the planning stage, privatization begins with internal processes at the Ministry of SOE. The proposal for the privatization of SOE was then submitted by the Minister of SOE to the Minister of Finance and the Coordinating Minister for Economic Affairs as the Privatization Committee to request recommendations and directions, which were determined as the Annual Privatization Program. Furthermore,

18 Kurnia Togar P Tanjung, “Penguasaan dan Posisi Tawar dalam Perjanjian Kemitraan: Sebuah Diskursus tentang Penyalahgunaan Posisi Tawar dalam Perjanjian Kemitraan antara UMKM dan Usaha Besar,” *Jurnal Persaingan Usaha* 2, no. 2 (December 31, 2022): 96, <https://doi.org/10.55869/kppu.v2i2.56>.

19 Faisal Basri, “Konsep Holding BUMN Berbahaya Dan Menyesatkan,” faisalbasri.com, February 15, 2017, <https://faisalbasri.com/2017/02/15/konsep-holding-bumn-berbahaya-dan-menyetakkan/>.

the Government requested approval for the privatization of the House of Representatives by consulting it with Commissions VI and IX. Based on the House of Representatives' approval, privatization was carried out by issuing a Government Regulation regarding reducing State Equity Participation.

Figure 2. SOE Privatization Process Flow



Source: Author, processed from GR 33/2005.

According to Emanuel S. Savas, privatization is not only driven by the goal of efficiency in the government's bureaucracy but also there are several other driving factors, namely:

- 1) pragmatic factors that privatization can direct more cost-effective public services;
- 2) ideological factors, that the government is too dominant and interferes too much in people's lives so that it is dangerous for democracy;
- 3) commercial factors that the private sector should manage the government's huge budget;
- 4) populist factors, society should be empowered to define and determine general needs using a sense of community.²⁰

One of the driving factors for the privatization of SOEs is pressure from international financial institutions, such as the International Monetary Fund ("IMF") and the World Bank.²¹ Economic factors, one of which is the IMF's main demand when negotiating loans with developing countries, are the main driving force behind privatization in Indonesia.²²

3.3 Dwiwarna Shareholder Privileges in State-owned Holding Member Companies

Considering the Supreme Court's considerations in case Number 21 P/HUM/2017, the presence of Dwiwarna shares in SOE holding member companies, namely shares with special rights (*golden shares*),²³ as

- 20 Joseph Okeyo Obosi, "Public-Private Partnership and Public Policy in Africa," in *Routledge Handbook of Public Policy in Africa*, by Gedion Onyango, 1st ed. (London: Routledge, 2021), 217, <https://doi.org/10.4324/9781003143840-22>.
- 21 Sarah Babb and Alexander Kentikelenis, "International Financial Institutions as Agents of Neoliberalism," in *The SAGE Handbook of Neoliberalism*, by Damien Cahill et al. (1 Oliver's Yard, 55 City Road London EC1Y 1SP: SAGE Publications Ltd, 2018), 16, <https://doi.org/10.4135/9781526416001.n3>.
- 22 Isis Ikhwasnyah, Man S. Sastrawidjaja, and Rahmi Yuniarti, *Hukum Perusahaan : Analisis Privatisasi BUMN Dalam Hukum Persaingan Usaha Tidak Sehat*, ed. Nurul Falah Atif, Cetakan Kesatu (Bandung: Refika Aditama, 2019), 29–30.
- 23 Peacecelia Nonny Suhantri, Jemmy Sondakh, and Friend H. Anis, "Pengaturan Pertanggungjawaban Holding Badan Usaha Milik Negara Sektor Asuransi dan Penjaminan pada Sistem Hukum Nasional di Indonesia," *Journal on Education* 5, no. 2 (January 25, 2023): 4309, <https://doi.org/10.31004/joe.v5i2.1145>.

alluded to in Article 2A paragraph (2) GR 72/2016, is the major determining element for direct state control in the state-owned holding structure. The state's rights as the owner of the Dwiwarna share must be governed by the Articles of Association of each state-owned holding member company. According to the provisions of the Elucidation of Article 2A paragraph (2) GR 72/2016, Dwiwarna shareholders in SOE holding companies have the special right to approve at the GMS on four matters, namely: the appointment of companies' Board of Commissioners and the Board of Directors, changes to the articles of association, changes to the shareholding structure, and corporate actions in the form of mergers and acquisitions by other companies.

The author mapped the four Dwiwarna shareholder privileges mentioned in the Articles of Association of several SOE holding companies, resulting in each company regulating the four Dwiwarna shareholder privileges in its Articles of Association. State interference is strictly limited to two factors critical to the company's existence: company capital and company existence (in connection with mergers and acquisitions). Meanwhile, implementing other privileges, including appointing the company's BOC and BOD and modifying the articles of association, can be delegated to the main shareholder, typically the holder of the most Series B shares. Applying these two distinctive privileges, particularly at PT Inalum, requires consultation with and prior agreement by Dwiwarna shareholders. Dwiwarna shareholders also have the unique rights to nominate candidates for members of the BOD and BOC; the right to propose GMS agenda items; the right to request and access Company data and documents; and the right to determine the Company's strategic guidelines, as outlined in the Articles of Association of SOE holding companies. The mapping findings, as detailed in Table 1 below.

Table 1. Four Special Rights of Dwiwarna Shareholders in the Articles of Association of State-owned Holding Member Companies

State-owned Holding Member Companies	Right to Approval for the Appointment of Members of the BOD and BOC	Right to Approval of Amendments to the Articles of Association	Right to Approval for Changes in Share Ownership Structure	Right to Approval of Merger, Consolidation, Separation, Dissolution, and Acquisition by Other Companies
ANTM (Notarial Deed of Jose Dima Satria No: 14, dated May 4, 2021)	▪ Art.5 (4) point c.1.1. ▪ Art.5 (4) point e	▪ Art.5 (4) point c.1.2. ▪ Art.5 (4) point e	▪ Art.5 (4) point c.1.3. ▪ Art.5 (4) point e	▪ Art.5 (4) point c.1.4. ▪ Art.5 (4) point e
PTBA (Notarial Deed of Jose Dima Satria No: 79, dated June 15, 2022)	▪ Art.5 (4) point c.1.1. ▪ Art.5 (4) point e	▪ Art.5 (4) point c.1.2. ▪ Art.5 (4) point e	▪ Art.5 (4) point c.1.3. ▪ Art.5 (4) point e	▪ Art.5 (4) point c.1.4. ▪ Art.5 (4) point e
TINS (Notarial Deed of Fathiah Helmi No: 11 dated July 12, 2018)	▪ Art.5 (4) point c.1.1. ▪ Art.5 (4) point e	▪ Art.5 (4) point c.1.2. ▪ Art.5 (4) point e	▪ Art.5 (4) point c.1.3. ▪ Art.5 (4) point e	▪ Art.5 (4) point c.1.4. ▪ Art.5 (4) point e
PT Inalum (Notarial Deed of Jose Dima Satria No: 138, dated March 21, 2023)	▪ Art.5 (4) point c.3. ▪ Art.5 (5)	▪ Art.5 (4) point c.1. ▪ Art.5 (5)	▪ Art.5 (4) point c.2. ▪ Art.5 (4) point e	▪ Art.5 (4) point c.4. ▪ Art.5 (4) point e
KAEF (Notarial Deed of M. Nova Faisal No: 08 dated May 20, 2022)	▪ Art.5 (4) point c.1.1. ▪ Art.5 (4) point d	▪ Art.5 (4) point c.1.2. ▪ Art.5 (4) point d	▪ Art.5 (4) point c.1.3. ▪ Art.5 (4) point d	▪ Art.5 (4) point c.1.4. ▪ Art.5 (4) point d

State-owned Holding Member Companies	Right to Approval for the Appointment of Members of the BOD and BOC	Right to Approval of Amendments to the Articles of Association	Right to Approval for Changes in Share Ownership Structure	Right to Approval of Merger, Consolidation, Separation, Dissolution, and Acquisition by Other Companies
PT PAL Indonesia (Notarial Deed of Aulia Taufani No: 09 dated March 2, 2022) PGAS (Notarial Deed of Nanette Cahyanie H.A.W. No: 28, dated May 11, 2021)	<ul style="list-style-type: none"> Art.5 (4) (c) no. 3 Art.5 (4) point e Art.5 (4) point c.1.1 Art.5 (4) point e 	<ul style="list-style-type: none"> Art.5 (4) (c) no. 1 Art.5 (4) point e Art.5 (4) point c.1.2 Art.5 (4) point e 	<ul style="list-style-type: none"> Art.5 (4) (c) no. 2) Art.5 (4) point e Art.5 (4) point c.1.3 Art.5 (4) point e 	<ul style="list-style-type: none"> Art.5 (4) (c) no. 4) Art.5 (4) point e Art.5 (4) point c.1.4 Art.5 (4) point e

Source: Author, processed from the Articles of Association of ANTM, PTBA, TINS, PT Inalum, KAEF, PT PAL Indonesia, and PGAS

In the end, the many privileges mentioned nevertheless make the State the main decision-maker on company policy,²⁴ or in other words, the State retains the role of controlling shareholders and even beneficial owners²⁵ in holding member companies. This can also be found in other company documents, such as the Minutes of the 2022 Annual GMS of PT Timah Tbk.,²⁶ ANTM's 2022 Annual Report, and the 2022 PT Inalum's Financial Statements.²⁷

Previously, the holding company, PT Inalum, held unilateral authority²⁸ over ANTM, TINS, and PTBA as members of the SOHC in the mining sector.²⁹ PT Inalum, on the other hand, although the biggest shareholder (51.24%) in PT Freeport Indonesia, does not have unilateral authority over the operations and finances of PT Freeport Indonesia.³⁰ This condition is caused by PT Inalum's inability to control the operational and financial activities of PT Freeport Indonesia since it is the expertise of Freeport-McMoran Inc., an early investor in the Freeport copper mine. Hatta has identified the state's lack of control compared to multinational enterprises. Hatta emphasized that foreign control of Indonesia's natural resources should be limited for the state to reclaim it. In the case of Freeport, the state must immediately master the technological advantages owned by Freeport-McMoran Inc. through PT Inalum to seize complete control of the operations and ownership of PT Freeport Indonesia. Control of PT Freeport Indonesia means that the state has full control of Freeport's mining treasure, which includes gold, copper, silver, and allegedly uranium, valued approx. US\$ 23 billion (IDR 350 trillion).

3.4 Implementation of State's Controlling Right in the Formation of SOHC

The most important issue in relation to changes in SOE management through the SOE holding structure is a change in the legal framework adopted by holding member companies as a result of a change in holding member companies' status from previously SOE to non-SOE. After converting the status to non-SOE, holding member companies are completely subject to the terms of LLC Law. Previously, holding member companies

24 Enggi Syefira Salsabila, "Analisis Yuridis Kewenangan BUMN Untuk Melakukan Monopoli dan atau Pemusatan Kegiatan Dalam Perspektif Kepastian Hukum dan Kesejahteraan," *Audito Comparative Law Journal (ACLJ)* 1, no. 1 (December 28, 2020): 45, <https://doi.org/10.22219/audito.v1i1.12784>.

25 Article 1 point 2 Presidential Regulation Nomor 13 Tahun 2018.

26 "Notarial Deed Rini Yulianti Number 33 concerning Minutes of the 2022 Annual General Meeting of Shareholders of PT Timah Tbk.," Mei 2022, 32–33.

27 PT Indonesia Asahan Aluminium (Persero), *Laporan Keuangan Konsolidasian Tahun 2022* (Kuala Tanjung: PT Indonesia Asahan Aluminium (Persero), 2023), Lampiran 5/3.

28 *Unilateral* is "done by only one of the groups, organizations, or countries involved in an activity or process". Cambridge University Press & Assessment, "Cambridge Dictionary," 2023, <https://dictionary.cambridge.org/dictionary/english/unilateral>.

29 PT Indonesia Asahan Aluminium (Persero), "Laporan Tahunan Tahun 2021," March 18, 2022, 285, https://www.inalum.id/storage/app/media/annual-report/annual_report_2021.pdf.

30 PT Indonesia Asahan Aluminium (Persero), 287.

as a corporation in the form of a Limited Liability Company with state-owned status must comply mainly with the provisions of the SOE Law, as well as the provisions of the LLC Law, the Capital Market Law, and the state financial law regime in connection with the existence of segregated-state-assets (*kekayaan negara dipisahkan*; i.e. SEP in the form of SOE' shares that are directly owned by the State).

Substantively, the establishment of a SOHC is not intended to eliminate State ownership and control rights in state companies but rather to change the form of State ownership in SOE management from direct investment in SOE to indirect investment in a holding member company. The construction of a SOHC is meant to shift a company's status within a group, not to establish a new SOE or company.³¹

The state retains control rights over holding member companies through direct ownership of Dwiwarna shares in holding member companies and indirect ownership of holding member companies in majority by parents companies. The State's ownership of Dwiwarna shares in holding member companies provides the State special rights that other shareholders do not have, including not being owned by the majority shareholder who is the main shareholder, or in other words the State, as the Dwiwarna shareholder is a controlling shareholder (beneficial owner) in holding member companies derived from a ex-SOE. Absolute State interference in SOE holding companies is limited to two factors that are critical to the company's existence: related to company capital; and related to the company's existence.

State ownership of Dwiwarna shares in an SOE holding member company, even if only one share, can keep an SOE holding member company as a State Company; in other words, it does not automatically change the company's status to an ordinary private company. This is consistent with the Supreme Court's reasoning in the matter of judicial review of government regulations governing the formation of a state-owned mining holding company.³²

Mochtar Kusumaatmadja believes that law must contain institutions and procedures in addition to rules and principles that guide people's lives.³³ Renewal of SOE management by the government must be able to realize renewal of regulations, institutions, and processes in managing state assets through state-owned holding companies.

Regarding the rule of law, GR 72/2016, a new regulation, is designed to provide further explanation and confirmation regarding the method for establishing an SOE holding. Aside from that, the Ministry of SOE responded to the renewal of SOE management through the holding company structure by passing a Minister of SOE regulation (Omnibus Law SOE), which superseded 45 regulations linked to SOE management at the same time.

From an institutional aspect, the issuance of GR 72/2016, which served as the foundation for the formation of the state-owned holding company structure, established a new institution within the current segregated state asset management regime, namely the status of a state-owned holding company, SOE holding member company originating from ex-SOEs, and SOE affiliated companies. Furthermore, innovations in segregated state asset management through the SOE holding structure promoted a restructuring of the Ministry of SOEs, namely two Vice Minister positions.

From the process aspect, the most fundamental reform in managing state assets through SOE holding is a shift in company management. This corresponds to a change in company share ownership from being directly owned by the State to being directly owned by SOE as the holding company. In the company's day-to-day operations, it is hoped that the holding structure will give the management of holding member companies more flexibility than when they were still SOEs because strategic business decisions can be made more quickly internally. For example, the authority of the GMS, which the Minister of SOE previously held, can now be delegated to the holding company as the most significant series B shareholder.

31 Amelia Maulanasari, "Pengalihan Hak Atas Saham Dalam Pembentukan Holding Badan Usaha Milik Negara," *Indonesian Notary* 3, no. 1 (March 31, 2021): 496, <https://scholarhub.ui.ac.id/notary/vol3/iss1/6>.

32 Decision of Supreme Court Number: 7 P/HUM/2018, Pusat Studi Hukum Energi dan Pertambangan, Lembaga Konsultasi dan Bantuan Hukum Universitas Sahid Jakarta, Dr. Ahmad Redi, S.H., M.H., Ir. Agus Pambagio, MEA., CPN., Ir. Marwan Batubara, M.Sc., Dr. Ir. Lukman Malanuang, M.Si. 82 (2018).

33 M. Zulfa Aulia, "Hukum Pembangunan dari Mochtar Kusuma-atmadja: Mengarahkan Pembangunan atau Mengabdikan pada Pembangunan?," *Undang: Jurnal Hukum* 1, no. 2 (March 11, 2019): 372, <https://doi.org/10.22437/ujh.1.2.363-392>.

3.5 Implementation of State's Controlling Right in the Privatization of State-owned Holding Member Companies Derived from Ex SOEs

In the construction of SOE holding companies, using the State's Controlling Right conception of SOE holding companies, privatization through the sale of shares of SOE holding member companies does not necessarily result in a decrease in state control and ownership of SOE holding member companies, as long as the sale of shares is not made for Dwiwarna shares. As long as the State owns Dwiwarna shares with special rights, the State's ownership rights are unaffected, even if the State is no longer directly the majority shareholder in a state company, even if company shares are sold. Majority ownership is still required for the state to maintain strategic state assets for national interests.³⁴

Given that the provisions of existing laws and regulations do not expressly prohibit the privatization or sale of shares of SOE holding member companies, it is theoretically possible to sell shares of SOE holding member companies, whether they are SOE subsidiary shares originating from ex-SOE or not, Dwiwarna shares, Series B shares, or shares with other classifications.

The manifestation of the State's Controlling Right in a SOHC is also found in the Elucidation of Article 2A paragraph (6) GR 72/2016, which states that "the Holding Company still owns more than 50% of shares in ex-SOE subsidiary companies." This clause, which stipulates that a state-owned holding company must own at least more than 50 % of all company shares, indirectly caps the total number of shares that may be sold.

In the context of selling shares of state-owned holding member companies originating from ex-SOEs, in order to realize the legal ideals (legal certainty, justice, and benefit),³⁵ in the restructuring of SOE by establishing SOHC structures, just so that SOE can function efficiently.³⁶ In the context of achieving economic development goals, specifically the welfare of the people as much as possible, and by taking into account and paying attention to the following matters:

1. that the present laws and rules lack mechanisms or guidelines for the implementation of the sale of shares of holding members companies;
2. that the only arrangements addressing procedures or provisions for the implementation of the sale of shares of holding member companies are included solely in each company's Articles of Association;
3. that the Articles of Association in a corporation have binding force in the company's operations, as well as the provisions of the LLC Law and provisions of other laws and regulations;
4. that the Government Regulation about the formation of each SOE holding has regulated that the status of ex-SOE holding SOE member companies change to become a limited liability company that fully complies with LLC Law (for example, in Article 4 GR Number 47 of 2017 regarding the formation of mining sector SOE holding, or Article 4 GR No. 6 of 2018 regarding the formation of energy sector SOE holding); and
5. recognizing that order and regularity in development and renewal activities are advantageous or presumably crucial;³⁷

the authors believe that for a legitimate SOHC to be formed and operationalized, the provisions of GR 72/2017 and other laws and regulations must be respected and followed obediently and orderly.³⁸ Thus,

34 Josefhin Mareta, "Prinsip Konstitusi Ekonomi dalam Privatisasi Badan Usaha Milik Negara," *Jurnal Konstitusi* 15, no. 1 (March 29, 2018): 132, <https://doi.org/10.31078/jk1516>.

35 Delfina Gusman, "Kajian Ontologi Problematika Pembentukan Undang-Undang di Indonesia Dikaitkan Dengan Kebutuhan Hukum Masyarakat," *UNES Journal of Swara Justisia* 6, no. 4 (January 3, 2023): 377, <https://doi.org/10.31933/ujsj.v6i4.289>.

36 Bobby Wilda Estanto, "Urgensi Holding BUMN Dalam Peningkatan Sektor Pelayanan Angkutan Darat dan Udara," *Masalah-Masalah Hukum* 47, no. 2 (2018): 93, <https://doi.org/10.14710/mmh.47.2.2018.89-97>.

37 Fira Saputri Januari, Daffa Prangsi Rakisa Wijaya Kusuma, and Jefri Ewardiman, "Konstruksi Teori Hukum Pembangunan Dalam Formulasi Energi Mix Policy di Indonesia," *Jurnal Rechtsvinding* 11, no. 3 (December 2022): 362, <http://dx.doi.org/10.33331/rechtsvinding.v11i3.993>.

38 Ach Faisol Triwijaya, Yaris Adhial Fajrin, and Arif Prasetyo Wibowo, "Quo Vadis: Pancasila Sebagai Jiwa Hukum Indonesia," *Jurnal Pendidikan PKN (Pancasila dan Kewarganegaraan)* 1, no. 2 (November 2, 2020): 119, <https://doi.org/10.26418/jppkn.v1i2.41083>.

the management of holding member companies originating from SOE by corporate organs, including the sale of company shares, should ideally be subject to corporate provisions as stated in the Limited Liability Company Law and the Articles of Association, in line with their respective authorities.

Given that the sale of Dwiwarna shares results in the abolition of the State's Controlling Right, the sale of Dwiwarna shares should, in theory, be carried out by the State itself as the ultimate shareholder, not by the Minister of SOE, particularly by the holding company, which is the proxy of the shareholders based on the mandate in GR 41/2003. Currently, the procedure for carrying out such share sales transactions is governed by GR 33/2005 as amended by GR 59/2009, including the requirements for companies that can be privatized, the need for parliamentary approval, and the depositing of privatization proceeds.

Given that ownership of Dwiwarna shares consists of only one share with a value equal to the nominal value of the shares,³⁹ it is necessary to reclassify the B series shares into series C shares or shares with a share classification that can be withdrawn, followed up with the return of all C series shares to the State, to maximize state revenue from the privatization proceeds. Following the execution of the return, the company once more modified its status by turning back into an SOE. Additionally, the sale of shares was conducted by GR 33/2005. The government has decided to give up ownership and control of the state company. Thus, its existence, as alluded to in the state-owned holding structure, must be considered while carrying out the reclassification and recall of shares. In other words, the selling of Dwiwarna shares is comparable to the sale of a state-owned enterprise. Based on the GMS's decision, the corporation has a mechanism for share reclassification and recall. This mechanism has previously been employed in the practice of forming a holding for mining SOEs based on GR 45/2022 and GR 46/2022.

Even though the sale of Series B shares is implemented in accordance with corporate regulations, the State continues to play a significant role in executing the fulfillment of the State's Controlling Right due to its status as the main shareholder in a holding company that has the authority to approve as a Series B shareholder in the GMS of holding member companies. Along with having privileges related to changes in the capital ownership structure in the implementation of the GMS of holding member companies, this function is in addition to being actively involved as a shareholder of Dwiwarna.

4. CONCLUSION

In the construction of a SOHC, with the State's Controlling Right conception, the State's ownership rights remain unaffected as long as it continues to own Dwiwarna shares, which have special rights to holding member companies. It is possible to sell state-owned holding member companies' shares in accordance with corporate provisions and the authority of each party. The sale of Dwiwarna shares should be carried out by the State as the owner so that the sale mechanism follows the provisions on the privatization of SOEs, namely GR 33/2005. To optimize state revenues from the results of privatization, the government, through the GMS, needs to first reclassify B series shares into shares with the classification of shares that can be recalled, then follow up with the recall of these shares. The author suggests that the State should make a new regulation regarding the mechanism for implementing Dwiwarna shareholder privileges so that the implementation of absolute authority and privileges of Dwiwarna shareholders in the operations of state-owned-holding-companies can proceed on a regular and lawfully with an adequate legal basis.

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39 For example, the nominal value of PT Inalum's Dwiwarna share is IDR 415,000 per share; the nominal value of TINS's Dwiwarna share is IDR 50 per share; the nominal value of PGAS's Dwiwarna share is IDR 500 per share; and the nominal value of ANTM, PTBA, KAEF, and INAF's Dwiwarna shares is IDR 100 per share.

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