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The Shipping Sector – The Implementing Regulations of the Omnibus Law on Job Creation

The Indonesian Government recently issued Government Regulation No. 31 of 2021 on the Operation of the Shipping Sector (“GR 31/2021”) as the implementing regulation of Law No. 17 of 2008 on Shipping (as amended - the “Shipping Law”). The Shipping Law was recently amended by Law No. 11 of 2020 on Job Creation (the “Job Creation Law”).

In brief, many of the key provisions of the Shipping Law remain the same, such as those on the cabotage principle, the maximum foreign share ownership in a domestic Marine transportation business, the requirement that a foreign investment shipping company must own a GT 5000 vessel, the rules on Hypothec, preferred maritime lines and vessel arrests. However, among other things, the Job Creation Law has removed the requirement to hold an Operating Permit that applies to Special Sea Transportation Companies (*Surat Izin Operasi Perusahaan Angkutan Laut Khusus*) for Special Sea Transportation Activities and added a provision that permits foreign vessels to be

used for Special Sea Transportation Activities. The Job Creation Law also centralizes the licensing regime. It does not remove the authority of local governments to issue licenses. However, their authority is now subject to the norms, standards, procedures and criteria determined by the central government.

The amendments under the Job Creation Law leave certain provisions to be issued under government regulations. GR 31/2021 therefore covers the implementation of the new and amended provisions of the Shipping Law. GR 31/2021 came into effect upon its issuance on 2 February 2021.

The Structure of GR 31/2021

Along with being an implementing regulation of the Shipping Law, GR 31/2021 revokes articles of the following government regulations:

- a. Government Regulation No. 20 of 2010 on Marine Transportation (as amended) (“GR 20/2010”);
- b. Government Regulation No. 61 of 2009 on Port Affairs (as amended) (“GR 61/2009”);
- c. Government Regulation No. 51 of 2002 on Shipping (“GR 51/2002”);
- d. Government Regulation No. 5 of 2010 on Navigation (“GR 5/2010”).

If reference is made to any of the articles that have been revoked in the above, the reference must be adapted to GR 31/2021. The implementing regulations of the above amended government regulations remain valid as long as they do not conflict with GR 31/2021.

GR 31/2021 does not specify which articles of the prevailing regulations are amended (like the Job Creation Law does) but they cover the following areas:

1. guidance in the shipping sector;
2. marine transportation;
3. port affairs;
4. shipping;
5. navigation;
6. certificates, documents and ship notes (*warta kapal*)
7. ship security management; and
8. concessions.

Below is a general overview of GR 31/2021 in conjunction with the provisions of the Job Creation Law.

I. Guidance in the Shipping Sector

GR 31/2021 confirms that the shipping sector is managed by the central government and guidance is provided by the Ministry of Transportation. Its guidance comprises regulation, control and supervision.

II. Marine Transportation

GR 31/2021 makes several key changes regarding Marine Transportation Activities, including the following:

Marine Transportation and Services Related to Marine Transportation Business Licenses

Under GR 20/2010, Marine Transportation Business licenses consist of:

- a. Business Licenses for Marine Transportation;
- b. Business Licenses for Public Marine Transportation;
- c. Business Licenses for River and Lake Transportation;
- d. Business Licenses for Ferry Transportation.

GR 20/2010 provided the details of the licensing for the above, including the requirements, procedures and authority to issue them. Now GR 31/2021 has removed the above licenses and the relevant provisions. It is still not clear whether Marine Transportation Business licenses will still be divided like

under GR 20/2010 above because GR 31/2021 does not specify any special business licensing required; it only refers to business licensing (*perizinan berusaha*).

GR 31/2021 has also removed the types of Services related to Marine Transportation Business licenses and now uses the general term business licensing (*perizinan berusaha*). The business licenses that have been removed are the following:

- a. the Loading and Unloading Services Business License;
- b. the Transportation Management Services Business License;
- c. the Port Waters Transportation Services Business License;
- d. the Rental Services for Marine Transportation or Equipment Business License;
- e. the Tally Self-service Business License;
- f. the Container Depot Services Business License;
- g. the Vessel Management Services Business License;
- h. the Vessel Brokerage and/or Rental Services Business License;
- i. the Ship Crew Agency Services Business License;
- j. the Vessel Agency Services Business License;
- k. the Vessel Maintenance and Repair Services Business License.

It seems that the aim of removing the above specific licenses is to simplify the marine transportation business licensing regime, by limiting the types of license to (i) the national marine transportation company license (*perusahaan angkutan laut nasional*) and (ii) the license required by any other business entity specifically established to engage in certain marine transportation related business activities (such as loading and unloading services for a stevedoring company). However, as the regulation is still new, we are still waiting to see whether the government will issue other regulations with further details of business licensing for marine transportation related business activities.

People's Shipping Marine Transportation Activities

Before the enactment of the Job Creation Law and GR 31/2021, People's Shipping Marine Transportation Activities were regulated under GR 20/2010 which among other things, imposed the requirements and procedure required to obtain a People's Shipping Marine Transportation Business License. However, these have been removed under GR 31/2021 and GR 31/2021 is silent on People's Shipping Marine Transportation Activities.

Special Sea Transportation Activities

The Shipping Law and GR 31/2021 require business entities to only engage in Special Marine Transportation Activities to support their main business activities for their own interest using Indonesian flagged vessels that meet the sea worthiness requirements and are crewed by Indonesian citizens. GR 31/2021 adds the following requirements for Special Marine Transportation Activities:

- a. for Special Marine Transportation Activities, the business licensing from the Central Government requirement must be complied with;
- b. for Special Marine Transportation Activities, seaworthy Indonesian flagged vessels must be used which comply with the conditions and requirements that apply according to the main type of business activity;
- c. Special Marine Transportation Activities may not involve transporting cargo or goods belonging to other parties or transporting general cargo or goods; while interestingly, under GR 20/2010, in certain cases, Special Marine Transportation Activities could involve transporting such cargo or goods with approval from the Ministry of Transportation, under GR 31/2021, this exception has been removed;

- d. Special Marine Transportation Activities must be reported on to the Ministry of Transportation;
- e. a business entity engaged in Special Marine Transportation Activities must be a legal entity and its main business activities must be in one of the following sectors: industry; forestry; tourism; mining; agriculture; fisheries; construction services; or research, education and training.

One of the highlights of the Job Creation Law's amendments of the Shipping Law is the addition of Article 14A under which, if an Indonesian flagged vessel is not available, a foreign flagged vessel may be used for Special Marine Transportation Activities. However, GR 31/2021 requires a shipping agency to be appointed for any foreign vessel to be used for Special Marine Transportation Activities shipping to Indonesian ports or special terminals that are open to internal trade. The agency may only act as the agent for its own vessel. This agency requirement will be regulated further under a separate Ministry of Transportation regulation.

III. Port Affairs

In general, the Job Creation Law centralizes the licensing regime for port-related activities, including port-building permits and business licenses for the provision of port services, applying the norms, standards, procedures and criteria determined by the central government. It does so by moving several authorities, such as the authority to determine which ports are open for international trading from previously the Minister of Transportation to the Central Government (defined as the President of the Republic of Indonesia). GR 31/2021 provides details of the types of business activities that are allowed in ports and business licensing for the construction and operation of ports.

Regarding the construction and operation of a port, under GR 31/2021, a port can be constructed, developed and operated by (i) a port business entity (*Badan Usaha Pelabuhan - BUP*) under a concession or similar cooperation agreement with the Minister of Transportation or (ii) a government agency, which can be a port authority (*Otoritas Pelabuhan*) or port administrator unit (*Unit Penyelenggara Pelabuhan*) with approval from the central government. Previously, GR 61/2009 only referred to the 'operator of a port' (*penyelenggara pelabuhan*) and allowed a port business entity (BUP) to construct a port under a concession or similar cooperation agreement with the port authority. GR 31/2021 also simplifies the regulation as it only contains 10 articles on the construction, development and operation of a port from the previous 4 chapters divided into port construction permits, a port's construction, development and operation. GR 31/2021 refers to ministerial regulations for detailed provisions on these matters.

Regarding business activities in a port, GR 31/2021 does not materially change the provisions of GR 61/2009, as the types of activities that a port business entity can engage in under a concession agreement or similar cooperation agreement on the provision of port services remain the same. However, GR 31/2021 adds provisions on stevedoring (loading and unloading) activities in a multipurpose or conventional terminal to support the development of micro, small and medium-scale enterprises, under which a port business entity (BUP) must have a partnership with a stevedoring company. A port business entity (BUP) may only provide stevedoring services in certain types of terminals ie, container, liquid bulk (via piping), dry bulk (via conveyor) and ro-ro terminals. GR 31/2021 allows a port business entity (BUP) to provide port services to more than 1 (one) terminal without limiting the terminals to being within 1 (one) port.

Regarding special terminals (*Terminal Khusus*) and terminals for own interests (*Terminal untuk Kepentingan Sendiri*), in general, GR 31/2021 does not materially change the provisions of GR 61/2009, but it does simplify the regulation by reducing the number of articles to 11 from the previous 2 chapters. GR 31/2021 refers to ministerial regulations for detailed provisions on these matters. However, GR

31/2021 adds provisions on the use of terminals for own interests to serve other activities or temporarily serve the public interest under a determination from the Minister of Transportation after satisfying certain requirements.

IV. Shipping

GR 31/2021 makes key amendments to the shipping sector under GR 51/2002, including the following:

The Registration of Vessel Ownership Rights

Before GR 31/2021, GR 51/2002 only allowed Indonesian citizens or Indonesian based legal entities to register vessel ownership rights. Now GR 31/2021 applies three conditions for the registration of vessel ownership rights (in line with the Shipping Law issued after GR 51/2002):

1. the vessel must have a minimum gross displacement of 7 GT;
2. the vessel must be owned by an Indonesian citizen or legal entity duly established under the laws of Indonesia and domiciled in Indonesia;
3. if the vessel is owned by an Indonesian legal entity in the form of a joint venture, the majority shareholder must be an Indonesian citizen.

Vessel Ownership Right Transfers

Under GR 51/2002, for a transfer of vessel ownership rights, the new holder must submit an application for a deed and the transfer of the vessel's registration to the vessel registration officer and the registration transfer officer where the vessel is registered within 3 (three) months of the transfer of the vessel ownership rights. The application must be accompanied by:

- a. the evidence of ownership;
- b. the owner's identity;
- c. the *Grosses Deed* of the vessel's registration or the transfer of the vessel's registration;
- d. the Vessel Measurement Certificate (if the vessel has obtained a new vessel measurement certificate).

However, GR 31/2021 removes the above time limit for the application and the supporting documents.

Nationality Certificates

GR 31/2021 removes the term of the applicability of nationality certificates which previously was only 5 (five) years under GR 51/2002. Meanwhile, the term of the applicability of temporary national certificates remains unchanged (3 months).

V. Navigation

Compared to the other government regulations referred to above, GR 5/2010 has been amended the least under GR 31/2021. To highlight two of these amendments, navigation channels are now provided by the Ministry of Transportation, not the Government. Also, business entities may now participate in building, operating and maintaining navigation channels leading to private terminals that are operated by business entities.

Under a new provision on reclamation works of GR 31/2021, port business entities, private terminal operators and special terminal operators must transfer land covering an area of 5% of the total land resulting from the reclamation works to the operator of the port for the interest of the Central Government.

VI. Certificates, Documents and Ship Notes (*Warta Kapal*)

Previously, the Shipping Law required all vessels entering ports to submit their certificates, documents and ship notes (*warta kapal*) to the harbormaster immediately after the ship arrived in the port. Now under the Job Creation Law, certificates, documents and ship notes can be submitted to harbormasters electronically for inspection when the vessels arrive. GR 31/2021 requires them to be submitted by the vessel's owner, operator or captain at least 24 hours before the vessel arrives. The harbormaster must review and verify the vessel's certificates and documents before giving approval for the vessel's activities in the port. The harbormaster will retain the certificates, documents and ship notes to be handed back concurrently with the issuance of the sailing approval document.

VII. Ship Security Management

The Shipping Law requires certain types of ship to comply with the ship security management standards, their compliance to be evidenced by an International Ship Security Certificate ("ISSC"). Further, the port serving the vessel must also comply with certain port facility security standards. The standards follow the International Ship and Port Facility Security Code ("ISPS Code"). Previously, the procedure for auditing and issuing an ISSC and the guidance for implementing the ISPS Code were provided in Ministry of Transportation Regulation No. PM 134 of 2016. Now after the enactment of the Job Creation Law, the procedure is provided in GR 31/2021.

VIII. Concessions

GR 31/2021 requires the use of a concession or similar cooperation agreement with a port business entity to provide port services. The concession will be valid according to the term of the agreement and extendable. Any land or facilities obtained during the term of the concession agreement must be transferred or handed over to the operator of the port. There is no specific change to these provisions; they are the same as the existing requirements.

IX. Sanctions

Under the Job Creation Law, for any violation of the Shipping Law criminal sanctions may be imposed which vary according to the violation which could be being involving in an accident, causing human casualties, a loss of property or harm to health, safety or the environment.

Under GR 31/2021 administrative sanctions can be imposed on anyone who violates the law and inflicts losses, causes an accident or harm to health, safety or the environment, but not causing human casualties.

GR 31/2021 reinstates, amends and adds the following administrative sanctions that can be imposed related to shipping activities:

- a. written warnings;
- b. not providing services (this is a new sanction under GR 31/2021);
- c. freezing business activities;
- d. the revocation of the business license; and
- e. an administrative fine.

According to GR 31/2021, these administrative sanctions can be imposed directly or in stages. Sanctions may be imposed directly for violations that endanger the safety and security of shipping activities. The sanctions that may be imposed directly are the freezing of activities and the revocation of the business license. The sanctions that can be imposed progressively are multiple warnings followed by the revocation of the business license if the violator does not comply with its obligations while its license is frozen. GR 31/2021 does not specify the amount of the administrative fine. It merely states that the amount will be that applicable under the relevant law and regulations. However, the Job Creation Law has increased the fines by approximately 30% to 50%.

X. Other Matters

Along with the key provisions highlighted above, GR 31/2021 does provide some clarity regarding the implementation of other shipping provisions as promised under the Shipping Law. These implementing provisions cover, among other things, business licensing, business activities in ports, the certification of vessels, the procedure for ratifying a vessel's construction and design, and vessel registration.

The government intends to develop investment in the shipping sector by (i) the central government being able to evaluate the acceleration of job creation through GR 31/2021 and (ii) the Ministry of Transportation being given discretion to resolve any issue in the shipping sector if GR 31/2021 does not specifically regulate or is unclear or incomplete or stagnant on it. According to GR 31/2021, business licensing in the shipping sector will now be implemented using a risk-based business licensing approach (which applies generally to all business sectors since the Job Creation Law came into effect).

GR 31/2021 contains a grandfather clause under which (i) the requirements under GR 31/2021 do not apply to business actors holding a business license issued before GR 31/2021 came into effect, unless the provisions of GR 31/2021 are more beneficial for them, and (ii) current business licenses remain valid until they expire.

Foreign Ownership Restrictions

On a different but related matter, the President of the Republic of Indonesia recently issued Presidential Regulation No. 10 of 2021 ("PR 10/2021") on Business Sectors Open for Investment which covers foreign share ownership restrictions in the shipping sector. PR 10/2021 was issued on 2 February 2021 and came into effect 30 days after its issuance. PR 10/2021 places a 49% restriction on foreign share ownership in businesses engaged in the following Marine shipping activities:

- a. Local Liner and Trumper Marine Transportation for Passengers;
- b. Local Marine Transportation for Tourism;
- c. Local Pioneer Marine Transportation for Passengers;
- d. Local Liner and Trumper Marine Transportation for Goods;
- e. Local Marine Transportation for Special Goods;

- f. Local Pioneer Marine Transportation for Goods;
- g. Local People's Marine Transportation;
- h. International Liner and Trumper Marine Transportation for Goods;
- i. International Marine Transportation for Special Goods;
- j. Public Ferry Transportation between Provinces;
- k. Pioneer Ferry Transportation between Provinces;
- l. Public Ferry Transportation between Regencies/ Municipalities;
- m. Pioneer Ferry Transportation between Regencies/ Municipalities;
- n. Public Ferry Transportation within Regencies/ Municipalities;
- o. Lake and River Transportation for Passengers with a Fixed and Organized Route;
- p. Lake and River Transportation for Passengers without a Fixed and Organized Route;
- q. Lake and River Transportation for Tourism without a Fixed and Organized Route;
- r. Lake and River Transportation for General Goods and Animals;
- s. Lake and River Transportation for Special Goods;
- t. Lake and River Transportation for Dangerous Goods.

PR 10/2021 no longer includes international Marine transportation for passengers, providing port facilities or supporting businesses in terminals that were included in the previous negative investment list. Therefore, the relevant activity should be open to all investors (so it is arguably open to 100% foreign shareholdings). However, as it was issued very recently, it is advisable to check with the OSS Agency/BKPM and the Ministry of Transportation to make sure that no unwritten policy applies to the relevant line of business.



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