

## The Problems of Implementation of Electronic GMS on the Making of Relaas Notary Deed

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**Abstract.** *This study examines the development of the digitalization era in the legal field, especially the electronic General Meeting of Shareholders (GMS) regulated by law. The formulation of the research problem is how the electronic GMS according to positive law in Indonesia and how the impact on the notarial deed related to the implementation of the electronic GMS. The research method used is normative and literature study, based on primary legal materials (statutory regulations), secondary legal materials (scientific works, journals, books, documents and other literature), and tertiary legal materials (legal dictionaries). The results of this study are that the E-GMS has been legally enforced, because it is regulated in Article 77 of the Company Law and POJK Number 16/Pojk.04/2020, so that the organs of the Limited Liability Company can carry out the GMS as usual without being physically present in order to break the chain of the Covid-19 pandemic. Although the e-GMS arrangements have been clearly regulated in the legislation, the *lex specialist derogat lex generalist* principle cannot be ignored, Article 16 paragraph (1) letter (m) and Article 18 UUJN are still prioritized, so that the electronic deed of the GMS cannot be carried out or will resulting in the legal force of the proof being a private deed.*

**Keywords:** E-GMS; Notary; Pandemic; Relaas.

### 1. INTRODUCTION

Advance technology and information rise cyber space. These advance makes easier communication by using gadget and internet, the all activities are running smoothly, effectively and efficiently. One of the sector which get advantages are business and trades, supported by various features and interesting offers for attracting the consumers, then help the workers in all companies all over the world to develops and introduces the product which resulted by world wide, the entrepreneurs can also collaborate with business partners to run their business continuously in order to make a profit.

Limited Liability Companie "*Perseroan Terbatas*" (known as PT) comes from English term "Limited" or limit, it has mean limited capital of a company, exclude personal

assets of the shareholder.<sup>1</sup> PT is shareholder association and acts as artificial person by the court, a law firm that authorizes to accept, hold and transfer the assets, suing or being sued and perform other authorities mandated by the law.<sup>2</sup> PT which has legal entity status, acts as legal subject that has obligations and rights. It also has meaning that the legal entity of Limited Company doesn't according to founder's will, but is determined by the law.<sup>3</sup>

Limited Liability Companies as an artificial legal subject should be equipped by the organ which supported the function of its legal entity. As stipulated in Article 1 number 1 Law No. 40 of 2007 concerning Limited Liability Companies (called by UUPT), states a legal entity or "company" which constitutes an alliance of capital established pursuant to a contract in order to carry on business activities. And with an authorised capital all of which is divided into shares and which fulfils the requirements stipulated in this Act and its implementing regulations. Related to each organ in a company, can be explained as follows:

a. General Meeting of Shareholders (hereinafter called the "GMS") means the Company Organ which has authority not given to the Board of Directors or Board of Commissioners.

b. Board of Directors" means the Company Organ with full authority and responsibility for the management of the Company in the interests of the Company in accordance with the Company's purposes and objectives and to represent the Company in and out of court in accordance with the provisions of the articles of association.

c. Board of Commissioners means the Company Organ with the task of general and/or specific supervision in accordance with the articles of association and giving advice to the Board of Directors.

The company has established by 2 (two) or more people, each of them should be has a share then make a deed of establishment by a notary. That is does not applied for State-Owned Enterprise, its establishment is according to special regulation, because it has special status and characteristics.<sup>4</sup> After signing the deed jointly or through a proxy, a Notary, send a request to the legal entity administration system (SABH) to issue a decision from the Ministry of Law and Human Rights of the Republic of Indonesia (Kemenkumham) regarding the legalization of the legal entity.<sup>5</sup>

In article 1 paragraph 1 Law No. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning notary profession (hereinafter called UUJN), the point is provides a statutory that was already in the UUJN or other laws that a Notary is a public official who then in that position also contains the authority to be able to make a deed, hereinafter referred to as an authentic deed along with other authorities in accordance

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<sup>1</sup> Hilman Hadikusuma, 2005, *Bahasa Hukum Indonesia*, Bandung: PT. Alumni, p. 111

<sup>2</sup> Munir Fuady, 2003, *Perseroan Terbatas Paradigma Baru*, Bandung: PT. Citra Aditya Bakti, p. 3-12

<sup>3</sup> Gunawan Widjaja, 2003, *Tanggung Jawab Direksi Atas Kepailitan Perseroan*, Jakarta: PT Raja Grafindo, p. 18

<sup>4</sup> I.G.A. Rai Widjaya, 2000, *Hukum Perusahaan*, cet.1, Jakarta : Kesaint Blanc, p. 153.

<sup>5</sup> Ridwan Khairandy, 2006, *Pengantar Hukum Dagang*, cet.1 , Yogyakarta : FH UII Press, p. 39.

with the relevant laws and regulations. In addition to making a deed of establishment, a notary also has another role to help a limited liability company run its business, to put the minutes of the GMS in the form of a deed or to be present at the GMS.

A GMS minutes should be made, otherwise the GMS being deemed does not valid and never executed. Consequently, all deals can not be carried on. The GMS that be carried on before the notary, it is contained on position deed, while the other things that executed without notary present, stipulated in a minutes meeting written by Attorney in fact party, such as Directors or company legal staff.<sup>6</sup>

On March, 2<sup>nd</sup> 2020, Indonesia confirmed *Corona Virus Disease* (COVID-19) first time. This plaque spreaded rapidly, as shown with increasingly cases across countries and areas, it have an impact to politics, economics, social, culture, defences and security and society welfare, including in Indonesia. Until September, 2<sup>nd</sup> 2022, recorded 6.362.902 cases confirmed COVID-19 spread in 34 Indonesia provinces,<sup>7</sup> then many proffesion must be running by work form home using platform for interacting with others, like as zoom or google meet.

Regarding to emergency conditions caused by the pandemic, the government has issued a new regulation that is Finance Service Authority Regulation Republic of Indonesia No. 16/Pojk.04/2020 concerning implementation of E-GMS in Public Companies, which been expected to prevent Covid-19 spreading. Beside that, it has an objective for technology utilizing as communication tools with electronics system.<sup>8</sup> If E-GMS hold and request a notary for his present to record all the things that seen, witnessed, heard, then it will be rise problems for the notary, pursuant in Article 16 paragraph m UJUN the point is provides regulation when reading the deed then a notary must physically present and followed by at least two witnessess who signing the deed before the parties, notary and all witnesses. Article 18 of Notary public also regulates that a notary has a working area in the entire province, regions in his scope work. The E-GMS deed draft has impact to not give legal certainty with physical and attendance contacts, then notary will obtain obstacles and perhaps emerge a new problem.

The research was used to obtain updated results concerning the obstacles that has impact to the deed validity made by a notary in E-GMS agenda, also with statutory provision which been established for strengthen the legality of E-GMS. Based on descriptions above, the writer will explain the problem in the research titled "THE PROBLEMS OF IMPLEMENTATION OF ELECTRONIC GMS ON THE MAKING OF RELAAAS NOTARY DEED". The problems formulation are; 1) How is the E-GMS in positive law perspective? 2) How is the impacts of E-GMS implementation on notarial deed? The objectives of this research was to analysis the E-GMS based on Indonesia positive law and the impact on notarial relaas deed, then it is expected to contribute knowledge to academics and practitioners in law.

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<sup>6</sup> Sudaryat, 2008, *Legal Officer*, Cet,I, Bandung : Oase Media, p. 18.

<sup>7</sup> <https://covid19.go.id/> , accessed on 2 September 2022

<sup>8</sup> Rachmadi Usman, 2004, *Dimensi Hukum Perseroan Terbatas*, Bandung: Alumni, p. 156

## 2. RESEARCH METHODS

The method of this research was normative and literature, where the writer will review an object based on related law material, both primary such as relevant regulation, then secondary as literature and other sources, also all primary and secondary material such as law dictionary. Then all the material had been inventoried and observed through the positive law in Indonesia.<sup>9</sup> The research was based on statute approach and descriptive qualitative. The qualitative approach provides descriptive data like as a writing or oral from the informants and observed behaviour did not written in variable or hypothesis.<sup>10</sup>

## 3. RESULTS AND DISCUSSION

The minutes of GMS in underhand was stipulated on Deed of Meeting Resolutions (PKR) by the notary in 30 maximum period since the date of the GMS decision. In every Articles of Association amendments, through an authorized notary who submits an application for approval or notifies to Law and Human Rights Ministry.<sup>11</sup>

### 3.1. E-GMS according to positive law in Indonesia

GMS term according to English is general shareholder's meeting, then in Netherlands is *algemene vergadering van aandeelhouders*, is one of organs of Limited Company except Commissioners and Director.<sup>12</sup> The shareholders which been GMS organs member has highest power and execute top leader over the company<sup>13</sup>, things that will be discussed in GMS concerning to company condition information that said by the Board of Commissioner and Director. The Annual GMS should be held no later than 6 months after financial-year ended, while other GMS can be held anytime as company needed.

The holding of the GMS is at the domicile of the company or at the place where the company has its activities according to the articles of association. However, it can also be held through electronic media which gives all GMS participants the opportunity to see and hear each other and participate in the meeting. There are two forms of teleconference, audio conference; meeting participants can only hear the sound while the video conference; participants can hear voices as well as see the form of other participants.<sup>14</sup> The conditions that must be met according to the Company Law so that the electronic GMS can be carried out legally, the first is the provisions regarding

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<sup>9</sup> Bambang Waluyo, 1991, *Penelitian Hukum dalam Praktik*, Jakarta: Sinar Grafika, p. 14

<sup>10</sup> Lexy J. Moleong, 2000, *Metodologi Penelitian Kualitatif*, Cet. 13, Bandung: Remaja Rosdakarya, p. 2

<sup>11</sup> Erick Agustian, 2011, *Eksistensi Akta Risalah Rapat Umum Pemegang Saham Yang Dibuat Notaris Dalam Kaitan Perubahan Anggaran Dasar Perseroan Terbatas (Studi Kasus Putusan Mahkamah Agung RI Nomor.209/K/Tun/2004)*, Tesis, Magister Kenotariatan, Universitas Diponegoro, p. 18

<sup>12</sup> Munir Fuady, *Op.Cit.*, p. 135

<sup>13</sup> H.M.N. Purwosutjipto, 2005, *Pengertian Pokok Hukum Dagang Indonesia 2: Bentuk-bentuk Perusahaan*, Cet. 10, Intan Sejati Klaten, Jakarta, p. 130.

<sup>14</sup> M.N.K. Dewi, *Kedudukan Hukum Akta Risalah Rapat Umum Pemegang Saham (Rups) Melalui Media Elektronik*, *ARENA HUKUM Volume 9, Nomor 1, April 2016*, DOI: <http://dx.doi.org/10.21776/ub.arenahukum.2016.00901.7> , p. 113

electronic media that are permitted to be used<sup>15</sup>; such as videoconferencing, then teleconferencing as well as other electronic media that are still included in that category. Then there is also a requirement that all participants must participate directly in the meeting and at the same time must be able to see and hear clearly and directly. In addition to these requirements, there are also requirements regarding the attendance quota in the GMS agenda forum and the number of votes to be able to take a decision, the first is regarding the attendance quota there is at least  $\frac{1}{4}$  part of the total shares that have voting rights, are present, can also be represented. Then a decision can be taken to be considered valid if the decision has been agreed upon by more than half of the total votes.

This provision is also different from the provisions of the GMS with an agenda to amend the articles of association of the company. In the GMS which contains the agenda for amendments to the articles of association, forum quota is at least  $\frac{2}{3}$  of the total shares with voting rights present and can also be represented. Then for the agenda for amendments to the articles of association,  $\frac{2}{3}$  of the votes are required to agree, so that it can be said that the decision taken is said to be a valid decision. The provisions are also different if the GMS held with the agenda of consolidation, then regarding the submission of the company's application for a declaration of bankruptcy, then separation, acquisition, then extension of the period of establishment of the company until the dissolution of the company is held, then the requirements given are for a forum quota at least  $\frac{3}{4}$  part of the attendance of the total shares that have a vote or are present or can also be represented. Then to be able to declare the decision taken as a valid decision, it is necessary  $\frac{3}{4}$  part of the total votes.

In addition to being regulated by the Company Law, the electronic GMS is now increasingly legal to implement due to the establishment of POJK 16/Pojk.04/2020 regarding the Implementation of the Electronic GMS. The POJK covers the availability of regulations and technical infrastructure. The e-GMS Implementation System is an electronic system to support the availability of information, implementation, and reporting of the GMS of a Public Company. E-GMS is equipped with electronic voting (e-voting) and electronic proxy. By means of e-proxy, shareholders can authorize third parties to attend the GMS on their behalf, so that the recipient of the power of attorney is positioned as a shareholder in a remote press conference, as well as voting through e-voting. E-GMS can be implemented in various ways, such as:

The first is with the e-GMS which has been provided by the provider with the provision that it fulfills the provisions, as stipulated in the relevant laws and regulations that it must be registered in the system from the agency that has the authority that the party is indeed declared as the organizer. Then of course the organizers give full access to users to be able to access the e-GMS. Furthermore, the provider as the organizer must also have and stipulate provisions regarding standard operating procedures governing the implementation of the e-GMS which is conducted electronically. And what is certain is that the provider as the organizer must also ensure that the entire GMS is carried out electronically properly and correctly. Then the provider is also obliged to ensure all the e-GMS security and also its reliability. The e-GMS system service provider used is required to inform users regarding any developments or changes to the service system or features available on the system. In addition, the provider of the e-GMS service

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<sup>15</sup> M. Yahya Harahap. 2009. *Hukum Perseroan Terbatas*, Jakarta: Sinar Grafika, p. 314

system must also have backup data as a form of partner background in the GMS holder as a guide for monitoring steps as well as for data to be used if something unwanted happens in the future, such as a dispute, The stored data can be used as verification material, then testing material, and can also be used as law enforcement material. As a fulfillment of the force majeure factor, the e-GMS provider must also provide facilities that can be used as a data center and problems recovery center related to an e-GMS implementation in the territory of Indonesia which is of course in a safe place and separate from the data center. Then, the e-GMS system provided by the provider must be included in the minimum standards that have been determined as the minimum standards of information technology that can be used, as is the case with all security and then disturbances and failures of information technology systems in the system provided. Of course, the provider must also store all data related electronically with a guaranteed security system. And of course the provider of the e-GMS system used, must be responsible for all losses that will be incurred in the future, provided that there are errors or omissions in the implementation and management of all systems in the electronic GMS.

The second is the e-GMS system provided by a public company. The requirements that must be met by the company to be able to hold an e-GMS are that the system used must first display or show all the rules for the implementation of the GMS then all the materials needed and everything that is done in the event, which is of course required for the consideration of all shareholders in making decisions at the GMS. The system used must also be able to provide services and ensure that all participants participating in the GMS can interact with one another. Then the system used must also provide the required attendance forum quota in accordance with the provisions of the laws and regulations governing it. The system used to conduct the GMS must also be able to carry out voting and its calculations, including if there are more than one share classification. Then the system used to hold the GMS electronically must also be able to record all interactions in the forum, both audio, visual and both or in the form of non-audio visual and store the database properly. Finally, the system must also be able to provide grant power of attorney related to the GMS participants electronically.

According to POJK 16/Pojk.04/2020 concerning the Implementation of the Electronic GMS, in particular Article 8, it also regulates the procedures used in the implementation of the e-GMS, the first is regarding the implementation of the e-GMS conducted by a Public Company then its holding must contains all information related to the planning of the GMS holding to the implementation with attachment by notification of the agenda to the OJK, it must also contain all information related to the innovation for the GMS. Then the public company must also be able to hold a GMS that is physically carried out which is attended by at least one member of the Board of Directors and/or a member of the Board of Commissioners, also attended by professionals who support capital market matters to participate in helping the GMS run. Furthermore, the second is that the public company must also provide a place to carry out the e-GMS which is used to carry out physically related to what has been referred to in the first provision regarding the physical GMS. Furthermore, the third is regarding the obligation of shareholders as well as all those who have the power to represent to be able to attend the GMS physically even though the GMS is conducted through electronic media with a service system that has been provided by a public company as a provider. Then the fourth is related to the provisions of the participants who attend the forum quota that has been determined. The e-GMS provider is also required to regulate who can

physically attend the GMS by considering who can physically attend first up to a predetermined maximum number. Then the fifth is related to the forum quota which also counts the shareholders who are unable to physically participate, their attendance will still be counted on a forum quota basis through the e-GMS system that has been provided by the provider.

Until then, a public company that provides an e-GMS service system for a company, is also required to make an efficient order of the GMS agenda which at least contains the opening and then the determination of the attendance forum quota that will be used as well as any opinions or questions comes from each participant or his proxies electronically in every agenda item of the GMS, then until a decision is made on the agenda while still referring to the provisions governing the validity of a decision and until at the closing.

The e-GMS minutes must be stated in a notarial deed registered with the OJK without requiring signature from the participants. The e-GMS provider must submit to a notary a copy of the list of shareholders attendance at the e-GMS, then those present with an electronic power of attorney, then also a final recapitulation of the forum quota for attendance and the forum quota used for decision making. Until also submitted transcripts of all interactions that exist in the e-GMS to be included or attached or attached to the minutes of the GMS.

### **3.2. Impact on the Notary deed related to the implementation of the electronic GMS**

The development of science and technology provides convenience and welfare, but it can also cause new problems, for example the manufacture of electronic deeds.<sup>16</sup> Now, the need for certificates as evidence is getting higher in line with business developments in various national or international business fields.<sup>17</sup> One of the authentic deed whose proving strength is recognized is a notarial deed. Notaries must pay attention to the principle of carrying out their duties and positions which consist of; the principle of equality, trust, legal certainty, accuracy, providing reasons, prohibition of abuse of authority, prohibition of acting arbitrarily, proportionality, and professionalism.

Cyber space provides new opportunities for notaries to serve the interests of clients effectively and efficiently who carry out their duties and positions electronically, which is then known as cyber notary, the concept of transitioning the function of a notary which was originally done conventionally, is now applied via the internet to realize electronic transaction security, using public infrastructure and electronic signatures.<sup>18</sup> Electronic signatures consist of embedded electronic information connected to other information as a means of verification and authentication.<sup>19</sup> Article 5 of Law No. 11 of

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<sup>16</sup> Siagian, S. S. S., *Legalitas Cyber Notary dan Tandatangan Dalam Rapat Umum Pemegang Saham*, Jurnal, Magister Kenotariatan Fakultas Hukum Universitas Sumatra Utara

<sup>17</sup> Sjaifurahman & Habi Adjie, 2011, *Aspek Pertanggungjawaban Notaris dalam Pembuatan Akta*, Bandung,: CV. Mandar Maju, p. 8.

<sup>18</sup> Zainatun Rossalina. et,al., *Keabsahan Akta Notaris Yang Menggunakan Cyber notary Sebagai Akta Otentik*, Jurnal Hukum, Pascasarjana Fakultas Hukum Universitas Brawijaya

<sup>19</sup> Sentosa Sembiring, *Himpunan Perundang-Undangan Republik Indonesia tentang Informasi dan Transaksi Elektronik*, Nuansa Aulia, Bandung, 2009, p.4

2008 concerning Information and Electronic Transactions (hereinafter referred to as the ITE Law) explains that electronic information and/or electronic documents and/or its printed results are legal evidence and are an extension of legal evidence pursuant to Procedural law applicable in Indonesia.

The ITE Law was issued to provide legal protection and certainty for internet-based activities, whether transactions or the use of information, to meet the needs of business people and the public, with the recognition that electronic evidence and digital signatures are legal evidence in court.<sup>20</sup> Electronic signatures according to the ITE Law can be made in various ways; A digital code attached to an electronic message will specifically identify the sender.<sup>21</sup>

Minutes of the GMS are authorized to one of the people who attending at the e-GMS to make a notarial deed, which is the deed of the Statement of Meeting Resolutions which minimally caused problems because the deed was made conventionally.<sup>22</sup> However, problems will arise if the deed is made by a notary who is also present at the e-GMS. The notary is in charge of draw up minutes of all matters discussed and decided at the GMS and ensuring that the implementation has met the formality requirements, pursuant applicable laws and regulations, in order to maintain the authenticity and validity of the deed made. On the other hand, if the deed does not contain formal or material truths, the aggrieved parties can be held accountable, and even sanctioned if found guilty. The Minutes of the e-GMS made by a Notary contains an explanation that is seen, heard and witnessed directly by him so that the actions of the parties are stated in the form of a deed and are legal and perfect evidence.

The concept of a cyber notary regarding the obligation to read the deed before the parties is based on Article 16 paragraph (1) letter m of the UUJN, it can be conducted when drawn up the deed of the GMS, and only applies to that. Because the deed does not regulated by law yet.<sup>23</sup> However, the UUJN is coercive (*dwingend recht*) which cannot be ignored or set aside by stakeholders<sup>24</sup>, so that basically the e-GMS does not fulfill one of the requirements for drawing up a notarial deed, because the shareholders are not attending in the same place and the same time dealing with a notary, so that the deed made has the potential to be degraded underhand.

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<sup>20</sup> Dewi, A.S.K., *Penyelenggaraan Rups Melalui Media Elektronik Terkait Kewajiban Notaris Melekatkan Sidik Jari Penghadap*, Arena Hukum Volume 8, Nomor 1, April 2015

<sup>21</sup> Grace Wahyuni, *Keabsahan Tanda Tangan Elektronik RUPS Telekonferensi Berdasarkan UU No.40 Tahun 2007 Tentang PT Dan UU No.30 Tahun 2004 Tentang Jabatan Notaris*, Tesis, FH Universitas Indonesia, Jakarta, 2010.

<sup>22</sup> Waringin Seto dan Hudi Asrori S., *Keabsahan Rapat Umum Pemegang Saham Perseroan Terbatas Dengan Bukti Kehadiran Para Pemegang Saham Secara Online*, Jurnal, Surakarta: Magister Kenotariatan Universitas Sebelas Maret, p. 5

<sup>23</sup> Dwi Merlyani, et al., "Kewajiban Pembacaan Akta Otentik Oleh Notaris di Hadapan Penghadap Dengan Konsep Cyber Notary," *Repertorium Jurnal Ilmiah Hukum Kenotariatan*, Vol. 9 No. 1 (Mei 2020), p. 36-47,

<sup>24</sup> B.D. Talitha, *Keabsahan Penyelenggaraan Rapat Umum Pemegang Saham Secara Teleconference*, Jurnal, Surabaya: Fakultas Hukum Universitas 17 Agustus 1945, p. 2



#### 4. CONCLUSION

The E-GMS has been effectively legal now, because it has been ruled specifically in Article 77 of the Company Law and POJK Number 16/Pojk.04/2020, so that the organs of the Limited Liability Company can carry out the GMS as usual without having to be physically attending to break the chain of the pandemic Covid-19. Although the regulation of the e-GMS has been clearly regulated in the legislation, the principle of *lex specialist derogat lex generalist* cannot be ignored, in the case of making a deed of the e-GMS minutes which is seen, heard and witnessed directly by a notary, then Article 16 paragraph (1 ) letter (m) and Article 18 of the UUJN still to be prioritized, so that the making of an electronic deed cannot be carried out or will result in the legal force of proving the deed being an underhand deed.

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