

Legal Certainty in Controlling Terminology in MSME Partnerships in Indonesia

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Abstract- Indonesian Micro, Small, and Medium-Sized Enterprises (“MSMEs”) as stipulated in Law No.20/2008 regulates the partnership of MSMEs with large enterprises. This research aims to examine the interpretation of owning and/or controlling in the implementation of MSME partnerships, those regulated in Article 35 of Law No.20/2008, as well as its comparison with the explanation in the Job Creation Law (“JCL”) jo. Government Regulation (“GR”) on the Implementation of Law No.20/2008 as stipulated in GR No.17/2013 jo. GR No.7/2021 on the Ease, Protection, and Empowerment of Cooperatives and MSMEs. The potential legal uncertainty that may arise due to differences in interpretation and its impact on the achievement of MSME partnership objectives. The normative legal research method applied in this study. The research revealed differences in the interpretation of control and ownership in PP No.17/2013 and JCL. JCL provides less detailed interpretation, which may result in different interpretations and legal uncertainty. In conditions where juridical evidence is not easily obtained. Indonesia Competition Commission (“ICC”) will face difficulties in proving violations related to juridical control and ownership. that clearer guidelines are needed to avoid legal uncertainty in the supervision of MSME partnerships. The government needs to develop guidelines that can be an indicator of whether the act of controlling and/or owning has occurred or not.

Keywords- Certainty, Controlling, MSME, Partnership

I. INTRODUCTION

MSMEs play a significant role in the Indonesian economy by fostering the emergence of innovative industries, producing jobs, and raising the competitiveness of domestic industrial products so they may be sold abroad.[1] To improve the quality of MSMEs so that they can contribute more to the Indonesian economy, one strategy is to implement MSME partnerships with large/medium enterprises. Law No.20/2008 regulates partnerships between MSMEs and large enterprises. According to this rule, a partnership is any direct or indirect economic collaboration founded on the ideas of reciprocity, benefit, trust, and mutual need.[2] The partnership can be implemented in various forms such as: (i) inti-plasma; (ii) subcontracting; (iii) franchising; (iv) general selling; (v) distribution; and (vi) agency; and (vii) different types of partnerships, like outsourcing, joint ventures, operational cooperation, and profit sharing.[2]

Based on Article 5 Law No.20/2008, The MSME Partnership as part of empowering MSME aims to: (i) promote a balanced, developed, and equitable national economic structure; (ii) encourage the growth of micro, small, and medium-sized businesses into resilient, self-sufficient businesses; and (iii) encourage the expansion of these businesses' role in promoting economic development, income equality, and the reduction of poverty.[3] The Indonesian government appointed the Business Competition Supervisory Commission (ICC) to supervise the MSME Partnership.[4] Law No.20/2008 jo. PP No.17/2013 Jo. PP No.7/2021 gives KPPU the authority to oversee MSME partnerships. With the oversight of MSME partnerships by ICC, it can avoid the exploitation, control and ownership of MSMEs by medium/large business actors who become their partners. Because, it has potential to abuse of dominant position and exploitation by large business actors who become partners to MSMEs in the partnerships.[5] The ICC's authority to oversee MSME partnerships initially caused debate among legal experts. The ICC's main task is to oversee business competition. Abuse of dominant position in MSME partnerships is different from abuse of dominant position in business competition law. Article 25 of the Indonesian Business Competition Law stipulates that abuse of dominant

position in business competition occurs when a business actor that has a dominant position (one business actor controls 50% of the market or a combination of business actors that controls 75% of the market) takes anti-fair business competition actions such as setting trade conditions, restricting markets, and inhibiting competing business actors from entering the market. This condition can certainly interfere with the public interest and the country's economy and can harm competing business actors and consumers. The implementation of MSME partnerships is based on agreements between MSME actors and large/medium enterprises. When referring to civil law provisions, agreements must respect the principle of freedom of contract and ensure equality between businesses and communities.[6] Abuse of dominant position in the context of MSME partnerships is an action taken by a large business partnering with MSMEs that deviates from the MSME partnership agreement, starting with controlling decision-making or owning the assets and property of the partnering MSMEs. The ICC decided on 6 (six) MSME partnership cases. 3 (three) of these cases punished business actors suspected of committing violations in MSME partnerships with medium/large enterprises. In general, the business actors convicted in partnership cases were found to have violated the terms of Article 35 of Law No. 20/2008.[7] This is regulated in the terms of Article 35 of Law No.20/2008. Article 35 of Law No.20/2008 regulates the prohibition of owning and/or controlling MSMEs by large/medium enterprises that are their partners.[8]

However, the explanation of the meaning of owning and/or controlling has not been strictly regulated and the indicators are unclear even though it has been further regulated in the JCL jo. GR No. 17 / 2013 jo. GR No. 7/2021. This has the potential to lead to different interpretations between Law Enforcement Officials which can lead to legal uncertainty in the implementation of MSME partnerships. If this is allowed, the purpose of MSME partnerships may not be achieved. Therefore, it is important to study in depth the interpretation of owning and/or controlling as prohibited actions in the implementation of MSME partnerships with large/medium business actors.

II. LITERATURE REVIEW

A. *Violation in MSMEs Partnerships*

The conduct that can be classified as a violation of the law in the partnership of MSMEs with medium/large businesses referred on Article 35 Law No.20/2008 is the act of ownership and/or control of MSMEs by medium/large businesses that are carrying out partnership activities. This is prohibited because such actions have the potential to create an unbalanced bargaining position between MSMEs and the medium/large businesses that are their partners.[9]

This may cause medium and large businesses that partner with MSMEs to act arbitrarily. As a result, the objectives of MSME partnerships stipulated in Law No.20/2008 will not be achieved. Looking at the terms of Article 35 of Law No.20/2008, the keyword of the regulation is the act of controlling and/or owning by medium or large businesses over the assets, properties, and business activities of MSMEs as partners. However, neither Law No.20/2008 nor the various regulations of the Business Competition Supervisory Commission (ICC) governing the procedures for the implementation of MSME partnership supervision strictly and clearly regulate the parameters for violations of Article 35 of the MSME Law in MSME partnerships with medium/large businesses.[10]

B. *Further Arrangements Regarding Violation in MSMEs Partnerships*

Further arrangements regarding the parameters of large enterprises that control and/or own MSMEs are only regulated in Government Regulation No.17/2013. The regulation stipulates that large or medium-sized enterprises that enter into partnerships with MSMEs can be said to have exercised ownership and/or control over MSMEs if it is proven that they own most or all of the assets, shares and capital of micro, small or medium-sized enterprises, or if large enterprises control the decision-making of their partner enterprises. Currently, GR no. 17/2013 has been revoked and replaced by GR no. 7/2021.

However, GR No.7/2021 as the implementing regulation of the JCL does not clearly regulate the meaning of controlling and/or owning in the implementation of MSME partnerships. In fact, GR No.17/2013 has previously regulated this matter. Perhaps the legislator considers it unnecessary to regulate it in GR No.7/2021 because the regulation regarding the meaning of mastering and/or owning in MSME partnerships is sufficiently regulated in the JCL.

JCL provides an interpretation of the act of control and/or ownership in the implementation of MSME partnerships, regulated in Article 35 of Law No.20/2008. Previously, this interpretation was regulated in GR No. 17/2013. Explanation of Article 12 (a) of Government Regulation No. 17/2013 define that "owning and/or controlling

MSMEs" is a condition where large / medium enterprises own most or all of the shares, capital, assets of MSMEs or control the decision making of micro, small and/or medium enterprises that become their partners. As a comparison, explanation of Article 35 of the MSME Law in JCL defined "ownership" is the legal transfer of ownership of a business entity/company and/or assets or property belonging to micro, small and/or medium enterprises by a large enterprise as its business partner in the implementation of a partnership relationship. While, "control" defined as the legal transfer of control over the business activities performed and/or assets or property owned by MSMEs by large enterprises as their business partners in the implementation of partnership relations. Referring to *lex posterior derogat legi priori* principle, then the interpretation of JCL related to the terms of Article 35 of Law No.20/2008 that are currently in effect.[11]

III. METHOD

The normative legal research method was applied in this study. The author makes an inventory of laws and regulations, journals, ICC decisions, and various other literature.[12] The data obtained will be analysed qualitatively, which the author will use as material to examine the importance of legal control and/or ownership in the supervision of MSME partnerships with large/medium business actors.[13] The data obtained will be analysed qualitatively emphasising the quality of the research compared to the quantity of legal events that occur. In this research, the author will draw conclusions using inductive logic, which means changing conclusions from specific methods to general methods. The purpose of using this logic is to obtain the sharpness of analysis in this research.[14]

IV. RESULT AND DISCUSSION

According to the elucidation of Article 35 of Law No.20/2008 in the JCL, it can be interpreted that legal control occurs when there is legal evidence, such as authentic deeds, documents and other evidence, that the business activities, assets or property of an MSME have been controlled by a large economic actor as its partner. Meanwhile, legal ownership can be said to have occurred when there is legal evidence of the transfer of ownership of an object (business unit, enterprise, assets and property) that was originally owned by MSMEs and then belonged to large/medium enterprises that became their partners. In the implementation of MSME partnerships, this is not easy to prove. It is feared that this will make it more difficult for the ICC to enforce the law. Especially if ICC finds a case with the certain situation such as: (i) a large/medium business actor conducting a partnership with MSMEs in reality has the power to regulate business decision-making conducted by MSMEs including those related to asset management, but there is no juridical evidence that shows the large/medium business actor has conducted such practices; (ii) large/medium business actors own assets and property belonging to MSMEs under a nominee scheme/using the name of another party; (iii) the beneficial ownership of an MSME is a large/medium business actor who is its partner

In the above situation, how the ICC obtain legal evidence on the matter? This is even more difficult if the reported party does not cooperate in providing the necessary data and information. It is important to note that ICC, as an institution authorised to supervise MSME partnerships, does not have the authority to take measures such as search and seizure to find evidence related to violations in the implementation of MSME partnerships.[10] This will certainly be an obstacle for ICC in proving the presence or absence of legal control and/or ownership in the implementation of MSME partnerships as one of the elements in Article 35 of Law No.20/2008.

Furthermore, the ICC's prosecution of cases of violations of Law No. 5/1999 frequently uses indirect evidence, which is often equated with evidence of instructions as regulated in the Criminal Procedure Code and ICC Regulation No. 4/2019. However, a number of legal experts have explicitly stated that indirect evidence is not the same as evidence of instructions as defined in Indonesia's various procedural laws and regulations. Therefore, the use of indirect evidence does not have a strong legal basis.[6]

On this basis, it is very reasonable that to date there is no precedent for the use of indirect evidence by the ICC in cases of violation of the implementation of MSME partnerships. In fact, the explanation of Article 35 of the MSME Act, as provided in the JCL, requires juridical control and/or ownership. This must be proven by the existence of documents/authentic deeds that directly show the existence of clauses in agreements, documents & other authentic deeds that indicate that large/medium business actors are taking such actions. This is the reason why the use of indirect evidence in proving whether or not there is a violation of the provisions of Article 35 of the MSME Act.[12][15]

Referring to the comparison definition above, it can be concluded that the definition of ownership and/or control in the clarification of GR No. 17/2013 is more detailed than the definition regulated in JCL. This is because the JCL does not further regulate what is meant by legal control and transfer of ownership, as well as the parameters on the basis of which law enforcement officials will determine whether or not large/medium enterprises that are partners of MSMEs have violated Article 35 of Law No.20/2008. This certainly has the potential to lead to different interpretations, which will ultimately lead to legal uncertainty and hinder the achievement of MSME partnership objectives.

Referring to Law on the Formation of Laws and Regulations No.12/2011 as last amended by Law No. 13 of 2022, There are principles for creating good laws and regulations that must be adhered in every process of forming it. These principles include the following principles: compatibility between type, hierarchy, and content material; clarity of purpose; appropriate institutions or forming officials; implementability; usability and usefulness; clarity of formulation; and openness. Referring to these principles, the lack of explicit and clear indicators of the meaning of owning and/or controlling in the implementation of MSME partnerships has disobeyed a number of the aforementioned legal and regulatory formation principles. The enforceability and formulation clarity principles are two of these concepts.[13]

In relation to the principle of enforceability, the legislator must consider the effectiveness of the law in affecting the community from a philosophical, sociological and legal perspective. In relation to the above issues, the legislator should consider whether the ICC with limited powers and cannot conduct raids and seizures to search for evidence of control of decision-making and/or legal ownership of assets, property of MSMEs by large/medium enterprises in the implementation of partnerships. This is important to avoid the existence of conflicting norms, which may hinder the implementation of a law.[14]

Furthermore, in relation to the principle of clarity of formulation, Any legislation must adhere to the technical standards for the drafting of laws and regulations, including systematics, the use of acceptable terminology, and the use of plain, understandable language. So that it does not give rise to different interpretations in its implementation. In connection with the above-mentioned problems, the lack of further explanation regarding the meaning and indicators of the act of legal control and/or legal possession in the explanatory note to Article 35 of Law No. 20/2008 on JCL may lead to different interpretations by different parties.[15]

If this condition is not resolved immediately, the development of MSMEs in Indonesia through partnerships is potentially hampered. Large businesses will be reluctant to enter into partnerships with MSMEs due to the risk of being accused of violating Article 35 of Law No.20/2008. The absence of clear indicators regarding the meaning of control/ownership as stipulated in Article 35 of Law No.20/2008 has the potential to lead to arbitrary actions and irregularities committed by KPPU as the authority given the authority to oversee partnership activities.

Further arrangements must be created by the government for governing the indicators of the occurrence of acts of control/ownership of MSMEs by large/medium business actors who become partners in the implementation of MSME partnerships. so that there are no more different interpretations of the terminology of controlling/owning, which is a violation of Article 35 of Law No.20/2008 in the implementation of MSME partnerships.

V. CONCLUSION

Based on the foregoing, it is possible to conclude that there are gaps in the definition of owning and/or controlling in the implementation of MSME partnerships as defined in Article 35 of Law No. 20/2008. This can certainly lead to legal uncertainty in the supervision of MSME partnerships, as each party may have its own interpretation of the meaning of controlling and/or owning in MSME partnerships. Therefore, the government, through the relevant ministries/institutions, should develop guidelines that can be an indicator of whether or not the act of controlling and/or owning as prohibited in Article 35 of Law No. 20/2008 has occurred.

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