

## The Dilemmatic of the Absence of a Notary's Deed in an Individual Company after the Enactment of the Job Creation Law as a Form of Legal Certainty



Bella Eunika<sup>1</sup>, Johannes Ibrahim Kosasih<sup>2</sup>, Putu Ayu Sriasih Wesna<sup>3</sup>

<sup>1,2,3</sup>Warmadewa University & Terompong No.24, Sumerta Kelod, Denpasar, Bali 80239

**ABSTRACT:** The existence of an Individual Company, which aims to ease abbreviate by reducing or simplifying the rules, raises a dilemma in its regulation which shifts the meaning of a company as a legal entity. The method used is normative legal research, with the legal approach used is conceptual and statutory approach. The existence of an Individual Company as a legal entity that can be recognized as a legal subject is only passed with a Statement of Establishment of an Individual Company and registered to the Ministry of Law and Human Rights based on the Job Creation Law. The convenience found was only based on an economic point of view. Practically speaking, there are more hazards in the society. As an example, the Individual Company credit facility, which is hesitant to be granted by the bank as the creditor because it is still categorized as individual credit. Although it has the status of a legal entity, its establishment by one person and without a Notary may not ensure certainty for all parties in the Individual Company.

**KEYWORDS:** Individual Company, Limited Liability Company, Legal Certainty, Notarial Deed, Credit

### I. INTRODUCTION

Indonesia is a state of law (*Rechtstaats*) based on Pancasila and the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), hence everything from all aspects is regulated by law. One of the aspects within it, is economic or business activities that are closely linked in the society (Johannes I.K. & Lindaway S, 2007). Business activities that are closest to people's lives are the presence of Limited Liability Company (LLC), which is one of the platforms to improve national economic development in the era of globalization to create prosperity and welfare of the entire population. The presence of LLC is one of the most essential keys for the society in running and fulfilling their life needs.

The provisions of Article 1 paragraph (1) of Regulation Number 40 of 2007 Concerning Limited Liability Companies (UU PT), defines a LLC as: "*a company, is a legal entity which is an alliance of capital, established based on an agreement, conducting business activities with authorized capital which is entirely divided into shares and fulfills the requirements set forth in this law and its implementing regulations.*"

Article 7 paragraphs (1) of the UU PT states that a LLC can be established when there are two or more people with a Notarial Deed created in the Indonesian language. The provisions of Article 1 point (7) of Law Number 2 of 2014 Concerning the Amendment to Law Number 30 of 2004 Concerning the Position of Notary (UUJN-P) explained that a Notarial Deed is "*an authentic deed made by or before a Notary according to the forms and procedures stipulated in this Law*". Based on these regulations, in the process of making an authentic deed, it may be concluded that there is a role of a Notary.

Notary is a public official who has a role in services in order to fulfill the broad interests and the matters of concern of the Notary itself (R. A. Emma Nurita, 2012). Accordingly, this emphasizes the existence of a deed that will be made in the presence of a Notary has an important role to establish a LLC. The deed of establishment has an important role that contains the rights and obligations of the parties to the company that operates the LLC (Munir F, 2017).

However, as time passes, a new type of company form has emerged, known as an Individual Company based on Regulation Number 6 of 2023 concerning Job Creation, which the government believes will provide more flexibility for the public. The fulfillment of the requirements in the establishment of an Individual Company only requires one person in it, can be formed based on a statement of establishment, and fulfill the criteria of Micro and Small Enterprises (MSE).

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Through the explanation above, although the new regulation created in relation to Individual Companies does not remove the provisions in the UU PT, it indirectly changes several elements, namely the concept of establishing an Individual Company which is owned by only one person. This is distinctly different from the concept regulated in the LLC, where the LLC itself is a capital alliance, which was interpreted to simply refer to the fact that there are several individuals who contribute capital to organize a company.

Moreover, the provision in Article 109 of the Job Creation Law that requires the establishment of a company with a Notarial Deed remains in place. This is certainly contrary to the provisions of Article 153A paragraph (2) of the Job Creation Law which determines the establishment of an Individual Company with only a statement of establishment registered with the Ministry of Law and Human Rights. The issuance of a Notarial Deed is only carried out by an Individual Company when it wants to change its status to a LLC.

The existence of the regulation on Individual Companies in the Job Creation Law which eliminates the involvement of Notarial Deed has a substantial difference with LLC in general, it will obviously lead to the potential problems related to the existence of Individual Companies as legal subjects, such as legal entities, which will be further questioned as well as in its implementation, specifically how in the provision of credit provided by banks to MSE business actors (I. Bambang, I. N. Sujana & P. A. S. Wesna, 2022)

According to the problem above, the formulation of problems that can be drawn in this study are how are the deed requirements for the existence of an Individual Company to become a legal entity that can be recognized as a legal subject and how is the existence of an Individual Company established without a Notary deed after the enactment of the Job Creation Law.

### **II. METHOD**

The method used in this research is normative legal research. Normative legal research is a process to find a rule of law, legal principles, or doctrine with the aim of addressing the legal issues faced (Peter M. Marzuki, 2010). The legal approach used is a statutory approach which is defined as an approach that proceeds from legislation and related implementation regulations, especially those related to the case at hand (Peter M. Marzuki, 2016). Furthermore, the second approach is conceptual, which is defined as an approach taken by analyzing the resolution of the issue in legal research, which is seen from the aspect of the legal concept contained in the enactment of a regulation. The study employs secondary data, which derived from primary, secondary, and tertiary legal materials as data sources. The data collection method employed is literature research connected to this research as well as literature relevant to the problems in writing research, which included examining laws and regulations. The conclusion in this research uses descriptive analysis and purposive sampling. Descriptive means that the research results are presented systematically and thoroughly in regard to facts related to research issues. However, analysis means that the facts related to the research are analyzed in detail, thereby obtaining the conclusion of the research results. While purposive sampling is a sampling technique with consideration of obtaining information (Sugiyono, 2019).

### **III. RESULT AND DISCUSSION**

#### **A. Ease of Establishment of Individual Company**

The establishment of an Individual Company after being formed with the Job Creation Law is a significant breakthrough in implementing the concept of Ease of Doing Business (EoDB). EoDB is a method carried out by the Government by changing and simplifying the requirements on regulations in order to improve economic policy rules by increasing the level of Ease of Doing Business / investment. The ease that exists in this Individual Company is passed by reforming the concept of the first Individual Company, which is an Individual Company that fulfill the MSE criteria in accordance with the provisions of Article 153A (1) of the Job Creation Law. The purpose of forming an Individual Company is to facilitate development in forming a business entity for MSE actors by being able to form a business entity with the legal entity of a Limited Liability Company (M. Faiz Aziz & Nunuk Febrianingsih, 2020). Furthermore, the term sole trader is recognized in an Individual Company, which has the concept that in its business activities it is carried out and formed by one person, without a deed executed before a Notary.

The establishment of an Individual Company is facilitated by the application of a Statement of Establishment written in Indonesian language, and does not require a Notarial Deed, simply by filling in the form electronically. After registration of the form through the website of the Directorate General of AHU electronically to the Minister of Law and Human Rights in accordance with the contents described. Furthermore, a company organ that directly concurs in the role of the Board of Directors and Shareholders at the same time in the person of one person and the founder of an Individual Company that meets the criteria of MSEs can only establish one Individual Company within a period of one year.

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## ***B. Individual Company in the Dilemma of Business Transactions***

Business transactions occur when an individual needs to fulfil their interests by conducting relations or interactions with other people, therefore their interests are regulated by law (H. Indra M.A, et. Al, 2016). Business transactions are based on the existence of a contract in the form of a written agreement regarding legal actions taken by each party, two or more parties. (Soesi Idayanti, 2020).

The contract approved in the agreement must be based on the consensus or agreement of the parties who have drawn up the agreement, as the provisions of Article 1320 of the Civil Code explain that it becomes one of the conditions that must be fulfilled in order for a valid agreement to occur. The agreement shall be considered to have existed or to have been born, when there is an agreement or conformity of will between the parties dealing with a subject matter.

Furthermore, in carries out its activities, a founder of an Individual Company will definitely not be separated from the interaction with third parties/other parties. The problem that will arise when a company is operated individually is the possibility of fraud committed by shareholders against other parties. Thus, the shareholder of an Individual Company who is also a Director needs to utilise limited liability and conduct proof when there is a loss suffered by third parties.

Therefore, it can be concluded that the one who will be responsible is on behalf of the person, not the body (company). Further, an Individual Company in its formation does not go through a procedural process, it still seems haste, therefore the main focus of this Individual Company is still very vague.

## ***C. The Issues Imposed by the Absence of a Notarial Deed in an Individual Company***

The first issue that forms the basis of the problem is the concept of legal entity in an Individual Company. A legal entity can be interpreted as a group of people who establish an organization to become a company/organization. If the existence of an Individual Company is traced through the concept of the Omnibus Law, it is found that the issuance of the Omnibus Law went through a legalization process from a Common Law country whereas Indonesia is a Civil Law country, not a Common Law country.

The other issue that arises is the absence of a Notarial Deed which results in the non-fulfillment of the concept of agreement in it, due to the fact that an Individual Company is only established by one person. This will lead to a conflict of interest in terms of legal acts and the implementation of operational activities and assets for the founder of the MSE, as it is one person who manages the entire sustainability of business activities. One person who concurrently serves as the Board of Directors as well as a shareholder will cause a conflict of interest due to differences in bid positions and potential conflicts that occur in the future.

The existence of an Individual Company as a legal entity is also inseparable from all legal risks and consequences. In addition, the absence of a Notarial Deed will cause a conflict in the meaning of the provisions of Article 7 of the UU PT which explains that at least two founders are required, and emphasizes that a Notarial Deed is an absolute requirement in the establishment of a LLC.

In addition, the provisions of Article 38 of the Commercial Code (KUHD) emphasize that the establishment of a company must be by authentic deed, the absence of a Notarial Deed may render the company invalid. This is also supported by the function of the Notarial Deed as a *solemnitas causa*, which means that when it is not written in the form of a Notarial Deed, the company is not qualified (M. Muhamad Yahya H, 2009).

## ***D. Legal Certainty as a Solution in the Existence of Individual Company***

One of the legal principles that is the main basis in carrying out legal actions is legal certainty. Legal certainty expects and requires the law to be create definitively in written form (Satjipto Rahardjo, 2014). With the existence of an Individual Company as a solution, it is expected that the Government will be able to review the legal entity status given to Individual Company because the facts that are passed are still triggering many dilemmas and differences. Particularly matters relating to the Statement of Establishment, the balance of organ structure, limited liability, and potential losses that can be received by parties who have legal relation with the Individual Company. Therefore, there is a necessity for the maturity of concepts that need to be regulated in the rules of an Individual Company in order not to cause any confusion in interpretation and its implementation will be easy to implement, such as the establishment of a special law that regulates the model of entity separation and limited liability contained in an Individual Company.

## ***E. Provision of Credit for Individual Company***

In order to encourage the economy of the lower middle economic class, it requires improvement and empowerment through business development where the existence of Small and Medium Entrepreneurs has a role and potential in providing current economic development. With the formation of a new type of company, namely an Individual Company in the form of a legal entity, it is expected that it will provide facilities for business actors who want to carry out their business activities. One of the forms offered to the community is the provision of bank credit facilities.

However, the reality that occurs according to I Wayan Nopi Antara, the head of the Credit section explained that the granting of credit facilities cannot be given easily by the bank (interview with BPR Padma Head Office, Denpasar). He further added that

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there are two risks involved in granting credit to Individual Companies: first, document risk because with the new regulation, the Notary deed as an important element is absent thus the lack of guaranteeing legality when in the future the debtor commits legal defects. The second risk is the potential death of the shareholder, given that the Board of Directors is the sole holder, therefore this is a huge obstacle in granting credit.

Komang Sari Yani as the Head of Operations in BPR Padma Head Office, Denpasar explained that the extension of credit to Individual Company is actually categorized as individual credit, since though it has the status of a legal entity, it is still established by one person therefore what is analyzed in this case is the individual as well (Interview on April 22, 2024 at BPR Padma Head Office). Thus, the granting of credit in an Individual Company has a difficult process because the bank also has to conduct research on the Individual Company and also the individual. Because of this, the creditor hesitant in providing credit also the Notary Deed is actually a much needed element in providing credit however it is eliminated in an Individual Company regulation.

### ***F. Government Policy Directive on the Establishmen of an Individual Company***

The issuance of policies formed by the government through Individual Company is based on the need for development that occurs in society. The development carried out is the emergence of a type of activity that can provide many benefits and advantages to the public. The Individual Company for MSE actors is one of the breakthroughs carried out by the government to strengthen the role of MSEs as one of the business actors in Indonesia since the field of business that will be pursued is close to the basic needs of everyday life, consequently it cannot be denied that MSE actors are the largest economic business actors in the country. The purpose of government policy on Individual Company is to improve the welfare of the people, create a conducive climate and justice in business activities among business actors, which raises a legal dilemma. The fact is that the establishment of an Individual Company by the government actually provides new problems. The outcomes found in the society regarding Individual Company have to do with the Notary profession, where the absence of an authentic deed will not be able to guarantee certainty. Registration of an Individual Company with only a Statement Letter could not bind all parties who will play a role in it, and the absence of it is also difficult to be held accountable. In this case as well, the government should provide direction to the public that with the existence of an Individual Company, it is important to ensure that the registration of the Company is authentic.

### ***G. Dilemma of Individual Company as Business Entity or Legal Entity***

The existence of the Job Creation Law with a new concept, which is the Omnibus Law, is a new breakthrough that has been made by the government in order to implement an ease of doing business policy that can be perceived by all levels of society. It is well known that this concept is a new thing for the Indonesian state which adheres to the civil law system. (I Gede Agus Kurniawan, 2022) The presence of the new regulation has caused a lot of problems in society.

The benefit of law is the achievement of order and tranquility in people's lives. Satjipto Rahardjo also provides the same view that the theory of legal benefits is used as a complement to society to create order and peace (Satjipto Rahardjo, 1991). Therefore, the law will provide guidance on behavior in the form of norms. Every legal norm will basically provide benefits and the expected results through this legal benefit are the actual legal objectives.

In this case, the issue of order and prosperity has not become a new matter and is sought after in such a way that the Government rushes to form a new policy, namely the Individual Company. Both of these are not problems that should be worried about because legal certainty in its presence in the business world has existed for a long time, namely the presence of individual business entities such as business trading.

The existence of business trading will greatly assist MSE owners in carrying out their business activities. Indeed, business trading is not a legal entity, however its establishment is carried out with a Notary deed, thus that when in the future business actors want to lend capital at the bank, the bank already understands and immediately processes the request desired by the debtor. Legality is also guaranteed when there is a Notarial Deed.

Both are established by one person, the only difference lies in their legal status. However, this is not something crucial and difficult to choose for MSME founders. Both have their own advantages and disadvantages. Upon closer examination, what needs to be done by establishing policies for Sole Proprietorships is extensive government-led socialization to all stakeholders. It begins with educating the public so they understand the differences and similarities with other business and legal entities, the strengths and weaknesses involved, and how to address issues related to credit applications, as these aspects are interconnected.

Therefore, the dilemma of Individual Company being recognized as legal entities needs to be reconsidered by taking various initial steps to make it known to many people, as done through extensive socialization. It is possible that Individual Company may also be recognized as business entities because, in terms of benefits, they share similarities with business trading. Hence, with the existence of Individual Company, the government needs to pay more attention to the policies it formulates.

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## IV. CONCLUSION

The deed requirement as the existence of an Individual Company to be recognized as a legal entity subject to the laws is only passed with a Statement of Establishment of an Individual Company and registered to the Ministry of Law and Human Rights based on the Job Creation Law. The establishment of an Individual Company is an initiative by the government to implement the concept of ease of doing business. The fact remains that the criteria for an Individual Company are unable to be categorized as a legal entity. The authentic deed which is a fundamental requirement in the establishment of a Company becomes a new issue which results in a displacement of the concept's meaning. Accordingly, the existence of an Individual Company should be given a legal supervision in order that its implementation can fulfill the provisions stipulated by the Law. The conclusion in addressing the second problem formulation is that the existence of an Individual Company established without a Notarial Deed after the enactment of the Job Creation Law certainly provides convenience in its initial purpose. However, the convenience found was only based on an economic point of view. In reality, the practice in the society has a greater risk. For instance, an Individual Company credit facility that is hesitant to be provided by the bank as a creditor considering that it is still categorized as an individual credit. Although it has the status of a legal entity, its establishment by one person and without a notary is unable to guarantee certainty for all parties in the Individual Company.

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