

RISK-BASED BUSINESS LICENSE AND PROBLEMS ARISING AFTER THE JOB CREATION ACT

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Abstract

The emergence of the Job Creation Act, one of the aims of creating employment opportunities. In general, the administrative licensing process in Indonesia is a barrier to business transformation. Many licensing processes do not have clear protocols, demanding, lack transparency, and costly. So that the fundamental transformation in the Job Creation Law is the transformation of the business licensing paradigm in Indonesia. Switch from the traditional license-based licensing approach to risk-based licensing. This research aims to reveal how risk-based licensing actually is and what problems can arise in licensing when risk-based licensing is applied. This is a doctrinal study that takes a conceptual and legal approach. The analysis is in the form of primary, secondary, and tertiary legal materials. The data and materials collected were analyzed qualitatively and described by descriptive analysis. This paper concludes that risk-based licensing relies more on a thorough risk analysis. In the implementation of risk-based licensing, the regulator assesses several factors such as business activities, business performance history, and the risk management system in place. Based on these matters, the regulator then places business actors into several groups, according to the level of risk. Risk-based licensing, on the other hand, has a couple of problems. The first issue is ambiguous risk assessment as a result of the omnibus legislative format. Second, the volatile risk hasn't been taken into account. Third, neither cumulative nor systemic risks have been taken into account. Fourth, there are unanticipated implementation challenges. Finally, there is the possibility of regulatory capture.

Keywords: *Business activities; Risk-based licensing; Risk management system.*

1. INTRODUCTION

The true law cannot be separated from human life. This statement is also emphasized by the adage of Marcus Tullius Cicero (106-43 BC), that *Ubi Societas Ibi Ius*. It means where there is society; there is the law. It explains why the role of law is crucial as a rule in life and human life.¹ In the Republic of Indonesia, The 1945 Constitution of the Republic of Indonesia that is emphasized in article 1 paragraph (3) states that “the State of Indonesia is a state of law”. Necessarily, Indonesia should stand within the legal framework in carrying out state life. The president, as head of state and head of government, has a strategic role in the process of forming laws and is given the power to form laws.²

¹ Adithya Tri Firmansyah, Ema Sarila Sinaga, And Fenia Aurully Aisyah, “Hilangnya Sendi Demokrasi Dan Otonomi Daerah Melalui Korporatokrasi Ruu Omnibus Law,” *Widya Yuridika: Jurnal Hukum* 3, No. 2 November 27, 2020: 131–40, <https://doi.org/10.31328/Wy.V3i2.1492>.

² Hariyanto, 2022, *Hukum Kelembagaan Negara: Teori Dan Sejarah Ketatanegaraan Republik Indonesia*, Ed. Majbarro Azizah, Pustaka Ilmu, Yogyakarta, Pg. 2.

Law of the Republic of Indonesia No. 11 of 2020 on Job Creation-- hereinafter referred to as the Job Creation Act -- is a product of the state of law. The Job Creation Act has a major influence on the regulatory system in Indonesia. The Job Creation Act uses the Omnibus Law concept, which is a form of simplifying regulations by revising and making several laws at once. This concept is a solution to the problems that arise because of the frequent overlapping of regulations and the phenomenon of excessive regulation.³ Therefore, the concept of omnibus law can actually be a solution to overcome too many, as Indonesia is currently experiencing.⁴

One of the goals of the Job Creation Act is to create jobs. As stated in the preamble to the Job Creation Act, the need to amend various aspects of the rules relating to the convenience, protection, and empowerment of MSMEs, strengthening the investment environment, speeding national projects, and increasing worker protection and welfare are all significant aspects of the Job Creation Act.⁵ There are 11 clusters in the Job Creation Act, namely simplification of licensing, investment requirements, employment, empowerment and protection of MSMEs, ease of doing business, research and innovation support, government administration, imposition of sanctions, land acquisition, ease of investment and government projects, and special economic zones.

Regarding licensing, the licensing bureaucracy is one of the problems that becomes an obstacle to the development of the Indonesian business world in general. The number of licensing processes that do not have clear procedures, convoluted, not transparent, uncertain time and high costs that must be incurred, not to mention that there are still unofficial levies causing people to often go back and forth from one office to another and from one table to another when it wants to get a permission. This, in turn, makes the public feel manipulated by the apparatus without being able to react in the form of demands or complaints, resulting in the emergence of a bad image of government performance and decreased trust.⁶

One way to cut the complicated and long-winded bureaucracy mentioned above, one of the solutions is through the Job Creation Act. This strategy, on the other hand, will cause discord between the central government and regional governments. Since this law reduces or eliminates some regional autonomy authority. This law can cause the investment climate in the regions to be reduced. In addition, it also creates disharmony between the central government and local governments due to reduced regional revenues.⁷ In the end, the problem will be exacerbated by plans to implement

³ Antoni Putra, "Penerapan Omnibus Law Dalam Upaya Reformasi Regulasi," *Jurnal Legislasi Indonesia* 17, No. 1 March 31, 2020: 1–10, <https://doi.org/10.54629/Jli.V17i1.602>.

⁴ *Ibid*

⁵ UU No. 11 Tahun 2020 Tentang Cipta Kerja [Jdih Bpk Ri], Accessed April 22, 2022, <https://Peraturan.Bpk.Go.Id/Home/Details/149750/Uu-No-11-Tahun-2020>.

⁶ Wieky Rusmanto, "Evaluasi Kebijakan Pelayanan Perizinan Dan Non Perizinan Kota / Kabupaten Di Wilayah Propinsi Jawa Barat," *Jurnal Ilmiah Magister Administrasi* 11, No. 2, 2017.

⁷ Husen La Ode Islamuddin Andi And Muh. Rinaldy Bima, "Perbandingan Kewenangan Kepala Daerah Menurut Undang-Undang No 23 Tahun 2014 Dan Undang-Undang No 11 Tahun 2020 Tentang Cipta Kerja," *Journal Of Lex Theory* 2, No. 10 2021: 2610–25, <http://Www.Pasca-Umi.Ac.Id/Index.Php/Jlg/Article/View/690>.

administrative sanctions for local governments that use *perda* (local regulations) that contradict the Job Creation Act.

The fundamental change in licensing proclaimed through the Job Creation Act is a transformation of the licensing paradigm in Indonesia, especially business licensing. The change is from the usual license-based model (license approach) to risk-based licensing. The goal is to simplify business licensing in Indonesia. This approach allows the government to issue permits based on the level of risk and threat to the external environment of business activity. Consequently, the government gives confidence to each business actor to carry out business activities according to the risk standards set by the government.

Several arrangements tend to threaten environmental sustainability. First, it is about simplifying licensing. It is related to the concept of an environmental permit being an environmental agreement that removes administrative lawsuits through the court if a violation occurs. Second, strict liability disorientation almost changed the definition of strict liability to liability based on fault, which can weaken justice to the community. The third is the reduction of community participation in decision-making on the environment. It is only limited to directly affected communities.⁸

Environmental licensing is one of the simplified regulations in order to create jobs. It should be noted that the existing legal instruments in environmental licensing are administrative instruments. The environmental law aspect is administratively born when a wise decision by the authorities is contained in the form of ruling decisions (*beschikking*), for example, in licensing procedures, determination of environmental quality standards, and procedures for analyzing environmental impacts. A permit is a legal instrument that controls the behavior of people or institutions in a preventive manner.⁹ The previous environmental permit application used the Licensed Approach or known as the “Regulatory Approach”. With the existence of the Job Creation Act and its derivative regulations, environmental licensing has been changed to risk-based licensing. Changes in risk-based licensing in environmental licensing certainly cause debate among academics and society in general. Therefore, this article describes risk-based licensing and the problems that can occur as a result of the implementation of risk-based licensing after the Job Creation Act is implemented.

There are several articles related to risk-based licensing, including an article written by Ade Juang Nirboyo, which reviews the potential for corruption in environmental licensing after the issuance of regulations on risk-based licensing.¹⁰ The next article was written by Roni Sulistyanto Luhukay about the logical ratio of removing environmental

⁸ Sigit Riyanto dkk, 2020, *Kertas Kebijakan Catatan Kritis Terhadap Uu No 11 Tahun 2020 Tentang Cipta Kerja*, Fakultas Hukum Universitas Gadjah Mada, Yogyakarta, pg. 6.

⁹ Ridwan Juniarto And Achmad Sodik, 2016, *Hukum Tata Ruang Dalam Konsep Kebijakan Otonomi Daerah*, Bandung: Penerbit Nuansa, Pg. 73.

¹⁰ Ade Juang Nirboyo, “Potensi Korupsi Dalam Perizinan Lingkungan Melalui Sistem Online Single Submission Pasca Peraturan Pemerintah Nomor 5 Tahun 2021 Tentang Penyelenggaraan Perizinan Berusaha Berbasis Risiko,” *Jatiswara* 36, No. 2 August 2, 2021: 219–28, <https://doi.org/10.29303/Jatiswara.V36i2.316>.

permits in providing ease of completion and supervision.¹¹ Moreover, the article from Fatchullah et al., which discusses environmental permit procedures based on PP no. 5 of 2021.¹² Based on this, this article focuses more on the risk-based licensing model and the problems that can occur as a result of this licensing model after the Job Creation Act comes into effect.

This research is doctrinal research. Doctrinal legal research uses a conceptual approach, and a legal approach. It is done by searching and analyzing legal materials, both primary legal sources and secondary sources, and tertiary sources. The approach in doctrinal law research uses a qualitative approach. Meanwhile, the data and materials that have been collected are then analyzed qualitatively and described using descriptive analysis.¹³

2. DISCUSSION

Application of Risk-Based Business Licensing

1. Definition of Business Licensing

The law, in essence, is shaped by the reality of society.. The influence of society on the law is known as the realist aspect of the law.¹⁴ It is the same as business activities cannot be separated from trade law or business law.¹⁵ In business, one of the factors that draw a lot of attention is the licensing factor. There are several forms and types of permits that must be obtained so that a business can be realized according to the laws and regulations, both generally applicable and specifically applicable in the business sector. Utrecht believes that if the legislators generally do not prohibit an action but still allow it as long as it is carried out in a manner determined for each factual matter, the decision of the state administration to allow it is a permit.¹⁶

According to experts, there are several meanings of permission, among which are; Bagir Manan argues that permission in a broad sense means an agreement from the authorities based on the laws and regulations to allow certain actions or actions that are generally prohibited.¹⁷ Prajudi Atmosudirdjo that a permit is a stipulation which

¹¹ Roni Sulistyanto Luhukay, "Refleksi Atas Pemisahan Pemilu Nasional Dan Pemilu Local," *Legalitas: Jurnal Hukum* 12, No. 2 December 23, 2020: 187–97, <https://doi.org/10.33087/Legalitas.V12i2.205>.

¹² Muchamad Ja'abik Fatchullah, Budi Ispriyarso, And Nabitatus Sa'adah, "Pelaksanaan Prosedur Perizinan Lingkungan Berdasarkan Pp No.5 Tahun 2021 Tentang Penyelenggaraan Perizinan Berusaha Berbasis Risiko Beserta Hambatan Pelaksanaannya," *Diponegoro Law Journal* 11, No. 2 2022, <https://Ejournal3.Undip.Ac.Id/Index.Php/Dlr/Article/View/33599>.

¹³ Kadek Cahya Susila Wibawa and Sri Nurhari Susanto, "Establishing A Special Autonomy Model In Bali As A Means Of Preserving Hindu Balinese Culture And Space," *International Journal of Scientific & Technology Research* 9, no. 4 (2020), <https://www.ijstr.org/paper-references.php?ref=IJSTR-0420-33837>.

¹⁴ Hariyanto Hariyanto, "Pembangunan Hukum Nasional Berdasarkan Nilai-Nilai Pancasila," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 1, no. 1 June 7, 2018: 53–63, doi:10.24090/VOLKSGEIST.V1I1.1731.

¹⁵ Maharroh Azizah and Hariyanto Hariyanto, "Implementasi Etika Bisnis Islam Terhadap Konsep Green Economics," *Supremasi Hukum: Jurnal Kajian Ilmu Hukum* 10, no. 2 (December 31, 2021): 237–52, <https://doi.org/10.14421/SH.V10I2.2392>.

¹⁶ Victorianus M.H. Randa Puang, 2015, *Hukum Pendirian Usaha Dan Perizinan*, Deepublish Publisher, Yogyakarta, pg. 36.

¹⁷ Bagir Manan, 1995, "Ketentuan-Ketentuan Mengenai Pengaturan Penyelenggaraan Hak Kemerdekaan Berumpul Ditinjau Dari Perspektif UUD 1945", Jakarta, pg. 8.

is a dispensation to a prohibition by law.¹⁸ Meanwhile, Ateng Syafrudin argues that permits are intended and meant to remove obstacles, things that are prohibited become permissible.¹⁹ Therefore, a permit is an agreement from the authorities based on a law or government regulation to deviate from the provisions of the statutory prohibition in certain circumstances. By giving permission, the ruler allows the person who asks him to perform certain actions that are actually prohibited.

Meanwhile, related to licensing in business activities in Indonesia is known as business licensing. According to Government Regulation Number 24 of 2018, it is stated that:

*“A business license is a registration that is given to business actors to start and run a business and/or activity and is given in the form of an approval as outlined in a letter/decision or fulfillment of requirements and/or commitments”.*²⁰

Meanwhile, in the Job Creation Act, it is stated that:

*“Business Licensing is the legality given to business actors to start and run their businesses and/or activities”*²¹

Business Licensing is divided into Business Permits and Commercial or Operational Permits.²² A business license is a permit issued after the business actor registers and starts a business until before the commercial or operational implementation. It is valid as long as the business actor runs his business.²³ Commercial or operational permits are permits issued after business actors obtain business permits and to carry out commercial or operational activities, which are valid in accordance with the time period stipulated in the laws and regulations governing each permit.²⁴ There are a total of 488 permits regulated in PP No. 24 of 2018, which consists of 20 sectors.

The content of Government Regulation No. 24 of 2018 regulates Electronically Integrated Business Licensing or also called Online Single Submission (abbreviated to OSS). The implementation of business licensing as regulated in this government regulation includes: a) Registration; b) Issuance of Business Permits and issuance of Commercial or Operational Permits based on Commitments; c) Fulfillment of Business License Commitments and fulfillment of Commercial or Operational Permit Commitments; d) Payment; e) Facilitation; f) Validity period; g) Supervision.²⁵ This OSS mechanism is different from the previous licensing mechanism, and introduces the concept of commitment in licensing. Commitment is a statement by a business actor to fulfill the requirements for a business license and/or commercial or operational license.

¹⁸ Ridwan HR, 2016, *Hukum Administrasi Negara*, Rajawali Pers, Jakarta, pg. 197.

¹⁹ *Ibid*, pg. 198.

²⁰ Article 1 Point 4 In “Pp No. 24 Tahun 2018 Tentang Pelayanan Perizinan Berusaha Terintegrasi Secara Elektronik [Jdih Bpk Ri],” Accessed April 24, 2022, <https://Peraturan.Bpk.Go.Id/Home/Details/82994/Pp-No-24-Tahun-2018>.

²¹ Article 1 Number 4 In “UU No. 11 Tahun 2020 Tentang Cipta Kerja [Jdih Bpk Ri].”

²² See Article 5 In “Pp No. 24 Tahun 2018 Tentang Pelayanan Perizinan Berusaha Terintegrasi Secara Elektronik [Jdih Bpk Ri].”

²³ Article 1 Number 8 And Article 79 Paragraph (1) In “Pp No. 24 Tahun 2018 Tentang Pelayanan Perizinan Berusaha Terintegrasi Secara Elektronik [Jdih Bpk Ri].”

²⁴ Article 1 Point 9 And Article 79 Paragraph (2) In “Pp No. 24 Tahun 2018 Tentang Pelayanan Perizinan Berusaha Terintegrasi Secara Elektronik [Jdih Bpk Ri].”

²⁵ Article 20 In “Pp No. 24 Tahun 2018 Tentang Pelayanan Perizinan Berusaha Terintegrasi Secara Elektronik [Jdih Bpk Ri].”

Prior to the OSS system, new permits could be issued after business actors submitted all the necessary requirements, and all documents had been verified and technical reviews had been carried out. With the OSS system, the issuance of permits can be carried out in advance through a declaration of the business actor's commitment to fulfilling the requirements later.

Before the OSS system, business actors had to go through a process of fulfilling requirements, which had to be verified and technically reviewed before a permit could be issued. Such a system causes business actors to have to wait a long time before they can start operating. With the OSS system, compliance with requirements can be carried out parallel with company operations. In addition, the OSS system utilizes information technology to create an integrated system. So, that the licensing process that previously had to be carried out through various channels and government agencies with the OSS system can be carried out through one door.²⁶

2. Definition and objectives of risk-based licensing

The government's role does seem to be dominant in licensing because many laws and regulations come from the government related to licensing.²⁷ The government uses permits, which are legal instruments, to exert influence over residents. This is done in the hope that residents will be willing to follow the way provided by the government in order to attain a specific goal. Permits serve as the foundation of legal tools, acting as directors, engineers, and designers of a just and prosperous society. So that through permission, it can be seen how the picture of a just and prosperous society is realized.²⁸

Licensing instruments are used to guide or control (rules) specific actions, prevent threats that may be caused by specific activities, protect specific objects, restrict the distribution of rare objects, and select particular people and/or activities. With such a goal, each permit basically limits individual freedom. Thus, limiting authority should not violate the basic principles of the rule of law, namely the principle of legality.²⁹

The licensing system in Indonesia has changed again with the introduction of a risk-based licensing model or approach. This permit is relatively innovative as a licensing instrument, compared to licensing which is usually done by granting a permit only if the applicant meets certain requirements and criteria. Risk-based licensing was created as an effort to manage risk more responsively and dynamically³⁰ and first emerged in the 1980s/1990s in the UK at the insistence of the public, who felt that there was excessive regulation and inflexibility from regulators. Regulators are considered not to pay attention to the regulatory costs imposed and are too much "burdening the industry". Such sentiments lead to the creation of a situation where Cost-Benefit Analysis or Cost-Benefit Analysis is widely supported.³¹

²⁶ Dhaniswara K. Harjono, 2021, *Hukum Bisnis*, Uki Press, Jakarta, Pg. 21.

²⁷ Safri Nugraha Dkk, 2007, *Hukum Administrasi Negara*, Ed. Sri Mamudji, Fakultas Hukum Universitas Indonesia, Depok, Pg. 138.

²⁸ Ridwan HR, *Op. Cit*, Pg. 208.

²⁹ Philipus M Hadjon Dkk, 2019, *Pengantar Hukum Administrasi Indonesia*, 13th Ed., Gadjah Mada University Press, Yogyakarta, Pg. 122.

³⁰ Michael Howlett And Ishani Mukherjee, 2018, *Routledge Handbook Of Policy Design*, Abingdon: Routledge.

³¹ Bridget M Hutter, "The Attractions Of Risk Based Regulation Accounting For The Emergence Of Risk Ideas In Regulation," 2005, <https://Web.Actuaries.Ie/Press/Erm-Resource-Database/Attractions-Risk-Based-Regulation-Accounting-Emergence-Risk-Ideas>.

In the implementation of risk-based licensing, the regulator assesses several factors such as business activities, the history of the business performance, and the risk management system in place. Based on these matters, the regulator then places business actors into several groups according to the level of risk. Each group is then charged with different requirements, such as the amount of fees to be paid and the number of documents to be submitted. Therefore, risk-based licensing encourages business actors to reduce the level of business risk in order to reduce financial costs and regulatory costs.³²

The risk referred to by the regulator in terms of risk-based can mean the risk of accidents, financial risks, or environmental risks. In general, risk can be defined as a concept that integrates the probability and severity of adverse consequences that can occur to society within the scope of the regulation concerned.³³ Risk-based regulation is usually associated with safety and benefits. The term safety refers to the fact that the primary purpose of regulation is to achieve safety, which is defined as the absence of danger or risk. While related to the concept of benefits, it is usually used in 2 contexts, one of which is that the balance between the benefits and costs of an action indicates the level of risk of the action. This is commonly referred to as Cost Benefit or Cost Effectiveness Analysis.³⁴

If you can understand risk as well as possible, a regulator can make better decisions in mitigating risk. For this reason, risk-based regulation relies more on a more thorough risk analysis. There are several objectives of implementing a risk-based approach, including:

- a. Ensure effective distribution of resources and improve compliance of high-risk business actors;
- b. Improve consistency in risk assessments and regulated business actors and enable regulators with a broad mandate to compare risk “across the regulated population broadly within the same framework”;
- c. Proving that the risk is not too regulated or under-regulated;
- d. Comply with the law, which in many jurisdictions increasingly requires a risk-based approach.³⁵

Risk-Based Business Licensing Issues After the Job Creation Act

The Job Creation Act covers one of the issues regarding the improvement of the investment ecosystem and business activities. One of the things included in the scope of improving the investment ecosystem and business activities is the application of risk-based business licensing. The risk-based Business Licensing applied by the Job Creation Act is basically a risk-based licensing (risk-based licensing) with three levels of business activity risk and a business scale rating of business activities.³⁶ The level of risk and scale

³² Michael Howlett And Ishani Mukherjee, *Op. Cit.*,

³³ Greg Paoli And Anne Wiles, “Key Analytical Capabilities Of A Best-In-Class Regulator,” 2015, <https://www.law.upenn.edu/live/files/4710-paoliwiles-ppr-researchpaper062015pdf>.

³⁴ *Ibid.*

³⁵ Julia Black, “Risk-Based Regulation: Choices, Practices And Lessons Being Learnt,” April 9, 2010, Pg. 189, <https://doi.org/10.1787/9789264082939-11-En>.

³⁶ Article 7 Paragraph (1) In “Uu No. 11 Tahun 2020 Tentang Cipta Kerja [Jdih Bpk Ri],” Accessed April 24, 2022, <https://peraturan.bpk.go.id/Home/Details/149750/Uu-No-11-Tahun-2020>.

of business is obtained based on an assessment of the level of danger and the potential for harm to the following aspects: 1) Health aspects; 2) Safety aspects; 3) environmental aspects; 4) Aspects of resource utilization and management; 5) Other aspects according to the nature of business activities.³⁷

The hazard level assessment is carried out by considering several factors such as type of business activity, criteria for business activity, location of business activity, limited resources, and/or risk of volatility. The level of hazard is then estimated with the potential for occurrence, divided into categories: 1) almost unlikely; 2) unlikely to happen; 3) likely to occur; or 4) it is almost certain to occur.³⁸ Based on the assessment of the level of danger and the potential for it to occur, each business activity is then determined the level of risk and the scale of its business to be; 1) Low-risk business activities; 2) Medium risk business activities; 3) High-risk business activities.³⁹

Meanwhile, if we look at the different sides of the licensing model approach, it is based on license approach with a risk-based approach. Infact, we can see that the license approach and the risk-based approach both take into account risks in the same business activities. However, in regulations with a risk-based approach, the level of risk becomes the main factor in regulation. If we refer to the difference between the license approach and the risk-based approach made by the coordinating ministry for the economy, we can see the following:

Source: Director General of Marine Spatial Management, Coordinating Ministry for Economic Affairs of Indonesia, 2020.

Table 1 The difference between the license approach and the risk-based approach

License Approach	Risk-Based Approach
Every business activity is required to have a permit.	Business actors process permits according to the indications of the risk of their business activities.
Obesity regulation and types.	permits Granting of permits and supervision based on the level of risk.
Settings in Norms, Standards, Procedures, and Criteria are not standard and do not all have a time duration.	Regulation leads to the determination of the level of risk and the type of permit required.
Supervision of business activities is not standard and not optimal.	Encouraging K/L/D to have compliance data of business actors as a basis for supervision.

Based on the table above, one of the advantages of the Risk-Based Approach that stands out is the issuance of permits and regulations that are simpler and more focused. However, this does not mean that the application of risk-based licensing in the Job Creation Act is without challenges. Some of the problems that can arise in environmental licensing issues include:⁴⁰

³⁷ Article 7 Paragraph (2) And Paragraph (3) In “Uu No. 11 Tahun 2020 Tentang Cipta Kerja [Jdih Bpk Ri].”

³⁸ Article 7 Paragraph (5) And Paragraph (6) In “Uu No. 11 Tahun 2020 Tentang Cipta Kerja [Jdih Bpk Ri].”

³⁹ Article 7 Paragraph (7) In “Uu No. 11 Tahun 2020 Tentang Cipta Kerja [Jdih Bpk Ri].”

⁴⁰ Mohamad Mova Al'afghani And Bisariyadi Bisariyadi, “Konsep Regulasi Berbasis Risiko: Telaah Kritis Dalam Penerapannya Pada Undang-Undang Cipta Kerja,” Jurnal Konstitusi 18, No. 1 May 27, 2021: 066-090, <https://doi.org/10.24127/jk.v18i1.2021.066-090>.

1. The risk assessment is ambiguous due to the Omnibus law format

According to Julia Black, that risk-based regulation requires regulators to define their regulatory objectives explicitly.⁴¹ The Job Creation Act in the omnibus law format clearly states the objectives of its creation as follows:

- a. create and increase job opportunities by providing convenience, protection, and empowerment to cooperatives and MSEs as well as national industry and trade as an effort to be able to absorb Indonesian workers as widely as possible while taking into account the balance and progress between regions in the national economic unity;
- b. ensure that every citizen gets a job and gets fair and proper remuneration and treatment in an employment relationship;
- c. make adjustments to various regulatory aspects related to alignments, strengthening, and protection for cooperatives and MSEs and national industries; and
- d. make adjustments to various regulatory aspects related to improving the investment ecosystem, facilitating and accelerating national strategic projects oriented to national interests based on national science and technology guided by the ideology of Pancasila.⁴²

The above objective becomes a problem in itself when we see that the Job Creation Act in the omnibus law format also includes the Environmental Protection and Management Law (Law No. 32/2009). The Environmental Protection and Management Law has a clearly different purpose from the objective of the Job Creation Act. The objectives of making the environmental law are:

- a. protect the territory of the State of Indonesia from environmental pollution;
- b. ensure safety, health and human life;
- c. ensure the continuity of the life of living things and the preservation of the ecosystem;
- d. maintain the preservation of environmental functions;
- e. achieve harmony, harmony, and environmental balance;
- f. ensure the fulfillment of justice for present and future generations;
- g. guarantee the fulfillment and protection of the right to the environment as part of human rights;
- h. manage use wisely; natural resources
- i. realizing sustainable development; and
- j. anticipating global environmental issues.⁴³

Due to the different regulatory objectives between the Job Creation Act and the Environmental Protection and Management Law mentioned above, it can create confusion for regulators in determining risk and assessing business activities. This is because it is not clear which goals should be the reference for regulators. Unclear

org/10.31078/Jk1814.

⁴¹ Black, "Risk-Based Regulation: Choices, Practices And Lessons Being Learnt."

⁴² Article 3 In "UU No. 11 Tahun 2020 Tentang Cipta Kerja"

⁴³ "UU No. 32 Tahun 2009 Tentang Perlindungan Dan Pengelolaan Lingkungan Hidup [Jdih Bpk Ri]," Accessed April 24, 2022, <https://Peraturan.Bpk.Go.Id/Home/Details/38771/Uu-No-32-Tahun-2009>.

regulatory objectives can lead to subjectivity in determining risk. So that risk-based business licensing cannot be implemented properly in Indonesia because the risk determination tends to be subjective and requires a lot of data.⁴⁴

2. Volatile risks have not been considered

All risks are not stable, meaning that it is not necessarily a risk that is currently defined as low risk. It will continue to be categorized as low. It is possible that this risk will turn into a high risk or vice versa in the future. In relation to business licensing, for a business activity that is currently determined to be high risk, it must meet various licensing requirements which are more than low risk business activities. However, these business activities may shift the risk category to low risk in the future. In such circumstances, the business activity will no longer require the previously required permit documents. To overcome this, provisions should be made regarding reviews of risk classifications that are carried out periodically, in order to ensure that each grouping of business activities based on risk is still appropriate.

3. Cumulative and systemic risks have not been considered

It cannot be done by considering only a narrow scope in assessing risk. There are risks that indicate the level of danger and the potential for occurrence is low when viewed per capita. However, this risk can result in a large risk when viewed broadly. This kind of risk is cumulative risk.⁴⁵ One example of cumulative risk is the risk of groundwater extraction activities. When viewed per capita or per person, groundwater extraction is a low-risk activity. However, if everyone in one area extracts groundwater, then this activity becomes a high-risk activity and can cause drought and environmental damage.⁴⁶ The current Job Creation Act does not accommodate the cumulative risk type as illustrated above. Thus, an activity may be classified as a low-risk business activity because it only considers one business actor doing it. In fact, if it is carried out by many business actors, it becomes a high-risk business activity.

4. Implementation barriers have not been considered

The provisions of laws and regulations in theory are not always the same as in practice. The Job Creation Act has not carefully considered the implementation of the provisions of the article regarding the application of risk-based Business Licensing. There are several things that are still being asked, including:

- a. The level of government that carries out the risk assessment;
- b. How to obtain data needed for risk assessment;

⁴⁴ I Wayan Bhayu Eka Pratama, "Model Perizinan Berbasis Resiko Yang 'Penuh Resiko' Dalam Uu Cipta Kerja," Accessed April 22, 2022, <https://www.mongabay.co.id/2020/10/10/Model-Perizinan-Berbasis-Resiko-Yang-Penuh-Resiko-Dalam-Uu-Cipta-Kerja/>.

⁴⁵ Harjono, Hukum Bisnis, Pg. 35.

⁴⁶ Al'afghani And Bisariyadi, "Konsep Regulasi Berbasis Risiko: Telaah Kritis Dalam Penerapannya Pada Undang-Undang Cipta Kerja."

- c. How to ensure that there is a common perception of risk between the government and the community (political risk mitigation);
- d. Readiness of government institutions in implementing risk-based regulations, both for licensing and supervision; and
- e. Implications for regulator accountability.

5. Potential Regulatory Capture

Regulatory capture is an event when state intervention in economic activities, including regulatory processes such as the formation of laws and regulations, licensing and monitoring activities, is directed by certain interests.⁴⁷ Studies on capture explain that if the interests of a group are large and the number of groups is small, then the group will have a better position in influencing the course of regulation.⁴⁸ The entrepreneur group has a greater per capita interest than consumers, labor or other groups and also has greater resources to influence regulation.

Therefore, in the context of the Job Creation Act, this big business interest can “play” or be manifested in the form of lobbying for easier licensing, supervision or lighter standards. So, in environmental licensing, it is very likely that it will be very dangerous if it is determined top-down, namely health, safety, environment and/or utilization of natural resources, although there is still a gap that for “certain” activities can include other aspects. However, this does not mean that all activities or businesses should be closely monitored. Strict supervision is only required in high-risk activities by taking into account the capacity and compliance record of the company. It means that supervision can be looser if the company complies and the internal control mechanism is good. The problem is that if the risks faced are actually high, a regulatory response should be required in the form of permits, standards and strict supervision. However, this high risk was successfully countered with arguments that turned it into a low risk.⁴⁹ Finally, efforts that must be made to reduce the risks and impacts caused by disasters on the community are required mechanisms for transparency and public involvement.

3. CONCLUSION

Based on the description above, there are several conclusions related to the topic of the problems raised in this paper. Whereas risk-based licensing is an approach or licensing method that relies on risk analysis, it is carried out more carefully. Risk-based licensing requires regulators to evaluate a variety of factors, including corporate operations, past performance, and the risk management system in place. After that, the regulator places business actors into several groups, according to the level of risk. The

⁴⁷ Ernesto Dal Bo, “Regulatory Capture: A Review,” Oxford Review Of Economic Policy 22, No. 2 (2006): Pg. 203, https://Faculty.Haas.Berkeley.Edu/Dalbo/Regulatory_Capture_Published.Pdf.

⁴⁸ Bo, “Regulatory Capture: A Review.”

⁴⁹ Al’afghani And Bisariyadi, “Konsep Regulasi Berbasis Risiko: Telaah Kritis Dalam Penerapannya Pada Undang-Undang Cipta Kerja,” Pg. 83-84.

level of risk and scale of business is obtained based on an assessment of the level of danger and the potential for harm to the following aspects: 1) Health aspects; 2) Safety aspects; 3) environmental aspects; 4) Aspects of resource utilization and management; 5) Other aspects according to the nature of business activities. Risk-based licensing, on the other hand, has a couple of problems. The first issue is ambiguous risk assessment as a result of the omnibus legislative format. Second, the volatile risk hasn't been taken into account. Third, neither cumulative nor systemic risks have been taken into account. Fourth, there are unanticipated implementation challenges. Finally, there is the possibility of regulatory capture.

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