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Lack of law that accommodates project bundling as an effort to increase the feasibility of road procurement through a cooperation scheme between the government and small-scale business entities (KPBU)

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Lack of law that accommodates project bundling as an effort to increase the feasibility of road procurement through a cooperation scheme between the government and small-scale business entities (KPBU)

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Abstract

The provision of road infrastructure in the regions is still constrained by financing, and the PPP scheme is still unable to solve this problem. PPP project bundling is one potential option to increase the feasibility of small-scale PPP projects. There needs to be regulations supporting bundling to run well and regularly and achieve its objectives. This research examines the legal basis for implementing PPPs and answers whether existing laws can support bundling projects. The method used in this research is a normative juridical method using statutory and conceptual approaches. This research concludes that the legal basis for PPPs cannot support PPP bundling because there is a lack of laws governing bundling and legal inconsistencies at the ministerial regulation level. Policies need to be revised or interventions to support the implementation of project bundling for small-scale projects.

Keywords: PPP, project bundling, small-scale projects

1. Introduction

Infrastructure development is one of the strategic choices to accelerate growth and equalize the Indonesian economy. In the National Long-Term Development Plan (RPJPN) 2005-2025, one of the National Development Directions is to realize equitable and just development. These ideals are outlined in the National Medium-Term Development Plan (RPJMN) 2020-2024 (National Long-Term Development Plan). The government's attention to infrastructure in recent years has increased the quantity and quality of infrastructure in Indonesia.

Even though infrastructure development has become the government's focus, the quality of infrastructure in Indonesia has not received a good assessment. Based on The Global Competitiveness Report 2018, Indonesia's infrastructure competitiveness is still in the 71st position out of 140 countries, even lagging compared to other countries in Southeast Asia (ASEAN), such as Singapore, Malaysia, and Thailand. Another study by the International Institute for Management Development (IMD) in 2022 stated that Indonesia's competitiveness for basic infrastructure was still 32nd out of 63 countries.

National roads, which have a proportion of 8% of the entire existing network, have reached a steady condition of 92.81%. In contrast, regional roads comprise 92% of the entire road network and have only reached a steady condition of 68.49% for the provinces and 58.8% for districts/cities. The quality of existing roads is also not fully supported by adequate road equipment, especially drainage, which prevents road damage due to standing water. This is a worrying condition, where roads are an essential basic infrastructure supporting various activities, which will later influence economic growth and equitable development.

With poor road conditions, the quality of roads in Indonesia will continue to decline; one of the factors causing the decline is the difficulty in finding a source of funding. The total indicative ceiling for the Directorate General of Highways 2023 is 40.24 trillion rupiah. The road and bridge preservation budget allocates 24.64 trillion rupiahs or 61.22% of the total

indicative ceiling for 2023. In the 2020-2024 RPJMN, note that the government's ability to fund is only IDR 2,385 trillion, while infrastructure spending needs reach IDR 6,445 trillion (only 37 percent of total needs). Additional financing is needed to cover 63 percent of the total financing needs. This limitation in financing will of course, hamper infrastructure development, especially with other obstacles such as institutional/bureaucratic, political instability, and so on.

To solve this problem, it is necessary to develop financing schemes. One is involving (private) business entities in providing basic infrastructure through the Government and Business Entity Cooperation (KPBU) scheme. The participation of business entities in providing infrastructure is mandatory because there is a financing gap between the funds that can be provided by the government and the funding needed to provide the required infrastructure.

However, implementing private sector participation in providing infrastructure is still minimal and faces various problems. Based on a study conducted by the World Bank (2014), several problems faced in implementing small-scale PPPs include:

- 1) The same approval process for all PPP projects (all types and sizes of projects);
- 2) Small-scale projects face lengthy processes, complicated legal grounds, and the same technical documents and due diligence processes as large-scale projects;
- 3) There are no standard documents specific to small-scale projects;
- 4) Small-scale projects have no bundling option to increase scale and feasibility.

Even in 2023, this problem is still being complained about by the Minister of Transportation of the Republic of Indonesia, who feels that the PPP process is complicated and takes a long time. The process is long and complicated, as well as high preparation costs, meaning that implemented PPP projects require quite a high amount of investment and complexity. Transaction costs are higher than the value, and the return on investment is small. It will be challenging to achieve the desired value for money. Thus, projects with a small investment value are often considered unfeasible and not commensurate with the transaction costs and complexity of the PPP project.

Public participation in providing and improving the quality of infrastructure also still faces problems. There are several cases in the 2022-2023 period regarding the involvement of the private sector or non-governmental organizations in improving road quality. In April 2022, there was a case of self-supporting road infrastructure development from the community carried out by Joko Suranto. Joko Suranto chose to build the road himself because he was annoyed that there had been no repair efforts from the local government for years. Another case is Bambang in Pekanbaru, who repaired his road but was terrorized by unknown people.

PPP should be able to provide solutions for resolving problems in areas that require smaller costs and faster processes. One option can be implemented is project bundling, which combines several PPP projects to achieve cost-effectiveness and value for money. There are already legal regulations that cover the practice of PPP schemes in Indonesia. However, there needs to be a legal study to see whether this bundling option has an excellent regulatory umbrella. If not, you can find out what problems are being faced and the indications of solutions for changing the PPP law.

2. Research methods

The method used in this research is a normative juridical method with a statutory and conceptual approach. The research objective is to identify whether PPP laws and regulations in Indonesia can cover small-scale PPP practices and analyze the suitability of regulations with the values and concepts that support the implementation of small-scale PPPs. This research also refers to the Guidance on PPP Legal Framework prepared by the World Bank to consider aspects of PPP scale, PPP project bundling options, and project exclusions from existing investment parameters. This research is hoped to provide insight into legislative regulations related to PPPs

and road management and evaluate whether these regulations support small-scale PPP practices. The implication is that there are recommendations for changes or improvements to regulations that can increase the effectiveness of small-scale PPP implementation and achieve continuity between related regulations.

3. Results and Discussion

Basic Road Rules

Law no. 2 of 2022 states that implementation is based on participatory principles and road management regulations that aim to realize community participation in road management. It is further explained that what is meant by the participatory principle is the principle underlying road management, which involves community participation both directly and indirectly in every stage of road management, starting from regulation, guidance, construction, and supervision. So, based on this law, all road management activities, including the statutory regulations under it, open up opportunities for community participation.

Article 33, paragraph 1 states that the budget for the construction of public roads is the responsibility of the central government, regional government, and village government. However, article 34 states that in managing the public road construction budget, the central government, regional government, and/or village government can develop a financing model based on service availability to accelerate road service improvements. The two articles above state that for the construction of public roads, responsibility remains with the government. However, there is room for developing financing models to accelerate road service improvements.

In Perppu no. In 2022, article 103, which changes the contents of Law no. 2 of 2022, regulates the participation of micro, small businesses and cooperatives in public infrastructure, only regulating business participation in rest areas and services on toll roads. There are no changes to Law No. 2 of 2022, which further regulates the participation of business entities in providing public infrastructure. Likewise, in PP 34/2006, which is supposed to regulate the rights and obligations of the community per Article 62 of Law 38/2004, there is no detailed explanation regarding the options or limits of community participation in road maintenance. From the explanation of the legal road regulations, it can be concluded that financing models outside of conventional financing (APBN/APBD) are not prohibited. However, the limits of such financing have not been explained in more depth (amount of budget, category of public roads, parties involved, etc.). When this article was written, the Government Regulation (PP), which regulates derivatives of Law No. 2 of 2022, is also still in the discussion stage, so it is necessary to look at other laws that regulate financing schemes for the provision of public infrastructure.

PPP Principles

The primary law that regulates PPPs in providing infrastructure in Indonesia is Presidential Decree Number 38 of 2015 concerning Government Cooperation with Business Entities in Providing Infrastructure. Matters that were taken into consideration in the formation of this Presidential Decree include:

- 1) The availability of adequate and sustainable infrastructure is an urgent need,
- 2) To accelerate infrastructure development, it is necessary to take comprehensive steps to create an investment climate, encourage the participation of business entities in providing infrastructure and services based on healthy business principles,
- 3) Regulations are needed to protect and safeguard the interests of consumers, society, and business entities reasonably.

It can be seen that the participation of business entities is one of the crucial points in providing infrastructure through the PPP scheme, which is derived from one of the PPP objectives, namely

meeting funding needs sustainably in providing infrastructure through the mobilization of private funds.

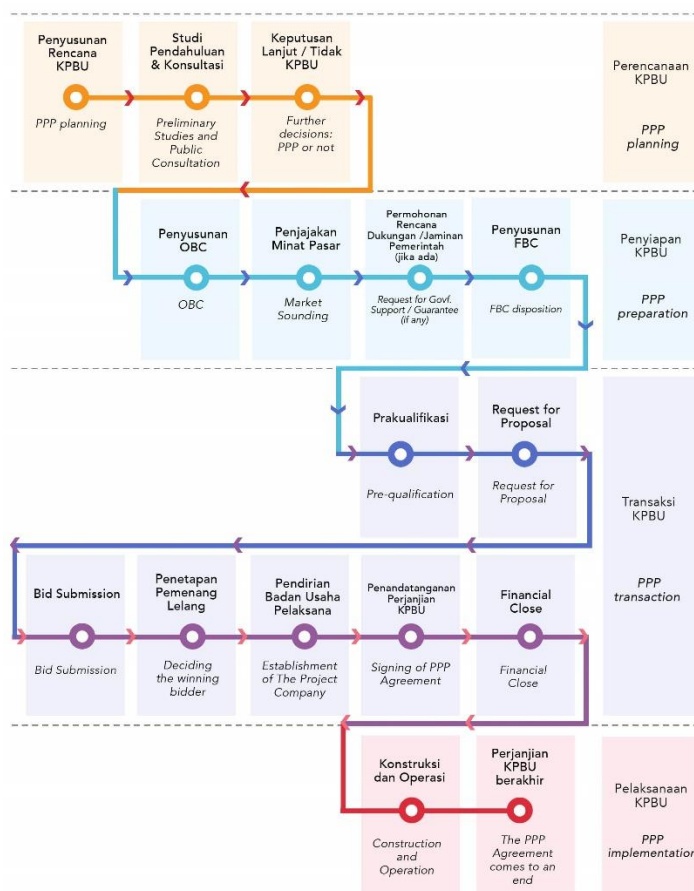
However, this Presidential Decree cannot support the implementation of small-scale PPPs to provide road infrastructure. There are no different regulations for various PPP scales, nor does it provide room for further separation of regulations. The Presidential Decree does not yet provide for bundling options for small-scale projects but allows for bundling for projects of different types of infrastructure. So, the law still provides opportunities for bundling PPP projects because it is not limited to the project size but does not yet regulate how bundling should be carried out and what stages are followed to carry out bundling.

Because the regulations do not separate stages and requirements based on scale, the regulations will apply to all PPP projects. This condition can also occur in Ministerial regulations, which are derivatives of this Presidential Decree. Presidential Decree 38/2015 has regulated the basics of PPP: the parties involved and their authority, implementation stages, and the requirements and documents needed. If no separation or space is given for further explanation in the Ministerial regulations, then there will be no Ministerial regulations that explicitly regulate small-scale PPPs.

Procedures for Implementing PPP

Procedures for implementing PPP are further regulated in VAT Ministerial Regulation 2/2020. The following are the PPP stages:

Figure 1
 PPP Stages



The stages described above are the stages of implementing the PPP as a whole, consisting of PPP planning, PPP preparation, PPP transactions, up to PPP implementation. It can be seen that the PPP process is a long journey that will be a burden, especially for small-scale projects.

Small-scale and large-scale projects need to follow all the PPP steps. Moreover, in an unsolicited PPP, the planning and preparation stages of the PPP are carried out by the business entity itself. However, even though the PPP is carried out on a solicited basis, the preparation and planning stages will burden the Person in Charge of the Cooperation Project (PJPK), if it is carried out for each project, large or small. So, it is necessary to carry out PPP bundling for projects compatible with other projects.

In VAT Ministerial Decree 2/2020, the option for PPP bundling has been included as stated in article 8, where a PPP can be a combined PPP consisting of a combination of two or more PJPKs for one type of infrastructure or a combination of two or more types of infrastructure. This provision allows bundling to be carried out across regions/authorities (PJPK). This opens up space for project collaboration, for example national road projects with provincial roads, or provincial roads with district roads. Projects with a smaller scale and capability of the GCA can follow larger projects. So, collaboration between these projects can later be developed to support feasibility by increasing value for money.

There is already a legal umbrella for bundling, but there are still other problems, namely synchronizing infrastructure programs. The differences in authority that exist in road administration are a barrier that creates problems that make it difficult to synchronize programs, especially road infrastructure. There needs to be regulations or policies that mix and match infrastructure at the national, provincial, district/city scale, even at the village level. For example, one program that could be developed is a regional PPP on a national scale, accompanied by a PPP for road construction and preservation of existing roads to meet the needs of the area. Thus, bundling of PPP projects can be carried out to increase value for money and encourage synchronization of regional infrastructure and support small-scale PPPs in a top-down manner, which will directly or indirectly increase the application of small-scale PPPs for road provision.

This synchronization effort can be carried out as explained in article 18 regarding the list of PPP plans. Determining the list of PPP plans is carried out by considering the level of PPP readiness and the benefits to society by the national development plan. Later, the list of PPP plans will be considered in preparing the Government Work Plan (RKP) and providing government support and guarantees. However, it is not explicitly explained regarding the stages and conditions for synchronization to accommodate differences in PPP scales.

At the PPP preparation stage, a pre-feasibility study, an application for government support and/or government guarantees, and an application for determining the PPP location are required. At this stage, transaction costs will become large, and many things need to be studied in the pre-feasibility study. Moreover, the pre-feasibility study was carried out in two stages, the initial and final stages. However, the preparation of a pre-feasibility study can be carried out in one stage if the project to be collaborated on is a priority project, a national strategic project, has examples of similar cooperation projects with high interest in assessing market interest (market sounding), or the project is of great interest in market sounding. The conditions for the pre-feasibility study provisions can be explained in several points, namely:

- 1) There is no separation of provisions in pre-feasibility studies, so that the preparation of pre-feasibility studies for small-scale projects will be the same as for large-scale projects.
- 2) It is easy to shorten the process for priority projects or national strategic projects, which are usually large-scale projects, so that for small-scale projects it will be more difficult to obtain convenience in preparing pre-feasibility studies in terms of priorities.
- 3) Logically, demand for small-scale projects will be greater than for large-scale projects, because there will be more companies capable of taking on these projects, especially MSMEs. This will increase the possibility of facilitating the process of preparing pre-

feasibility studies, provided that these projects receive high interest in the market sounding process.

- 4) To simplify pre-feasibility studies for small-scale projects, there is still the possibility of bundling projects with large projects that are priorities/PSN, as well as with projects that are of interest in market sounding.
- 5) There needs to be regulations that regulate the requirements for bundling so that small-scale projects can be bundled with priority projects and projects that are of interest in market sounding.

So, it can be concluded that even though there is no separation of the provisions for preparing a pre-feasibility study, there are still options that can be taken because these options are not prohibited in VAT Ministerial Decree 2/2020, but further regulations need to be provided so that bundling is carried out in collaboration with small projects, especially local road infrastructure.

Another important activity in the PPP planning and preparation stages is public consultation. This public consultation has the potential to obtain input from the public regarding the PPP. However, it has not been explicitly regulated, which only explains the purpose of the public consultation. There should be differences in how public consultations are carried out based on their scale. Small-scale projects (district/city scale) will require more public consultation from the community because these projects will directly impact local communities.

Arrangements for public consultations are also essential to synchronize programs with national and regional development plans. Input from the community during national/regional development deliberations (musrenbang). The preparation of better regional development plans includes the possibility of PPP, especially in the National/Regional Medium Term Development Plan (RPJM). Later, during the public consultation, further discussions will be carried out on what was discussed at the musrenbang, with the hope that projects can be identified in an integrated manner. What projects will be bundled, what projects will be prioritized, and what strategies will be used to accommodate small-scale PPP projects can be planned well.

The above activities can be carried out when preparing a preliminary study in a needs analysis regulated in the explanation of VAT Ministerial Decree No. 2 of 2022. In the explanation, it is stated that the need analysis includes:

- 1) Infrastructure needs have a technical and economic rationale with sustainable demand and are measured from inadequate services, both in quantity and quality, based on analysis of available secondary data;
- 2) Identify options for providing services. Includes the scope of services, solutions, provider availability, work targets, and financing schemes based on infrastructure needs and
- 3) PPP certainty has received support from relevant stakeholders, one of which is through public consultation.

In this needs analysis, initial efforts can be made to synchronize the PPP program, where technocratic analysis (technical and economic) is found with community needs during public consultations. There needs to be additional explanation in this regulation, which regulates the identification of projects that will be bundled with larger projects and how the needs of the community during public consultations are aligned with the needs of the community during the musrenbang. So that the project carried out can be by the development plan that was prepared at the beginning.

PPP can be implemented on the initiative of a business entity (unsolicited), where this unsolicited PPP also has great potential in road procurement. Of course, if the project is to be bundled, the question arises as to whether business entities can carry out PPP initiatives that have been bundled. However, the regulations and explanations do not explain bundling for

unsolicited PPPs. There needs to be arrangements for bundling unsolicited PPPs. The following are the differences between unsolicited and solicited PPPs:

Table 1.

Difference between Solicited and Unsolicited PPP

| PPP Solicited | PPP Unsolicited |
|--|--|
| Government initiative | Business entity initiative |
| The government carries out project preparation. | Business entities carry out project preparation. |
| Can get government support (fiscal and non-fiscal) | Can receive compensation: 1) Providing an additional 10% value 2) <i>Right to match</i> , and/or 3) Initiative purchasing |
| Can get government guarantees | Can get government guarantees |

In unsolicited PPPs, business entities carry out project preparation with the risk of not getting the project, namely being rejected by the Minister/head of Institution/regional head or losing in the tender process. Business entities that wish to carry out an unsolicited PPP but the project is small scale will find it challenging to submit a project because the long and complex preparation process will be burdensome for the business entity. This is important to consider considering the existence of BUMDes, Regency/City BUMDs, and private MSMEs that have the potential to improve the quality of roads in Indonesia through the PPP scheme. So, there needs to be additions/revisions to the unsolicited PPP regulations to accommodate bundling projects in unsolicited PPPs.

For example, regulations that can be added to support bundling in unsolicited PPPs include:

- 1) If the proposed PPP is considered large-scale, it is necessary to add small-scale PPPs, especially local infrastructure, which can be new development or preservation.
- 2) Options for adding PPPs can be carried out by conducting public consultations so that the projects that will be added are infrastructure needed by the community or planned in the RPJM.
- 3) The addition of a small-scale PPP can be a choice from the Implementing Business Entity (BUP) or PJPk, with the value being reconsidered for its economic and financial feasibility in a pre-feasibility study.
- 4) In PPPs that are based on service availability (availability payment), the PJPk still pays according to the availability of services for all projects, where bundling is only carried out to unify the PPP preparation, planning and transaction processes.
- 5) The BUP can be the same BUP or form a consortium with another business entity after the BUP agrees that the bundling is carried out (if the bundling is carried out for different infrastructure).
- 6) Bundling is carried out by considering BUP's financial capacity to finance the implementation of infrastructure provision.
- 7) Revisions to the pre-feasibility study carried out after BUP agrees to carry out bundling can be submitted in the pre-feasibility study or directly in the feasibility study.

PPP Project Transaction Preparation and Implementation Facilities

One of the keys to success in procuring a PPP project is preparing a comprehensive and reliable project before offering it to the private sector. To support the availability of quality project tender documents, the government provides project preparation facilities or Project Development Facilities (PDF). The regulations governing PDF are PMK No. 73 of 2018

concerning Facilities for Preparation and Implementation of Government Cooperation Project Transactions with Business Entities in Providing Infrastructure.

Facilities are one of the fiscal policies prepared, provided, and implemented to support the provision of infrastructure through the PPP scheme to provide services to the community by the provisions in PMK No. 73 of 2018. These facilities include project preparation facilities, transaction assistance facilities, or project preparation facilities and transaction assistance facilities. The scope of facilities for this project preparation facility is preparing a pre-feasibility study and all supporting studies. Meanwhile, transaction assistance facilities include procurement of BUP, signing of PPP Agreements, and obtaining financing for PPP projects (financial close).

However, this facility is provided for priority PPP projects, PPP projects for the construction and/or development of domestic oil refineries, and/or other PPP projects that meet the criteria. This facility is vital for increasing the feasibility of small-scale PPP projects, although this Ministerial Regulation has not been accommodated explicitly, especially in project preparation facilities. There needs to be additions to the regulations for providing facilities for bundling projects that have been carried out, especially for bundling, which includes small-scale PPP projects.

One of the crucial factors influencing PDF's success is the commitment of the PJPK leadership. This factor is also influenced by other factors, namely the readiness of the technical team, public support and understanding of the GCA. Based on these factors, the success of the PDF will be determined by the PPP planning and preparation process discussed previously. Public support and a good understanding of PJPK will lead to a good commitment from PJPK leadership, which determines PDF's success. Public consultations based on the previous explanation will produce good public support. In contrast, the legal basis for the PPP preparation and planning stages will produce a good understanding of the GCA and the readiness of the technical team. Thus, it further strengthens the reasons for strengthening VAT Ministerial Regulation Number 2 of 2022, which explains the procedures for implementing PPP.

Service Availability Payments

Small-scale projects, especially public roads (new construction/preservation), will likely use a payment scheme based on service availability. This is because public road infrastructure is a public good for which users cannot be asked to pay. Financing based on service availability is by the previous explanation regarding the road law, namely Law Number 2 of 2022, where a financing model based on service availability can be developed to speed up road infrastructure. Therefore, it is necessary to look at the legal basis regarding the procedures for paying for services provided in PPP projects in the context of providing infrastructure. These procedures are regulated through PMK Number 8 of 2016 concerning Procedures for Payment for Service Availability in PPP Projects in the Context of Providing Infrastructure and Minister of Home Affairs Regulation (Permendagri) Number 96 of 2016 concerning Payment for Service Availability in the Context of Regional Government Cooperation with Business Entities in Providing Infrastructure in the area.

Permendagri Number 96 of 2016 it explains PPP in the regions but does not explain the bundling option if the PJPK is a combination of regional government and ministries/institutions. This also creates the potential for legal confusion or inconsistency with VAT Ministerial Regulation Number 2 of 2020 because this Minister of Home Affairs Regulation also explains the stages of KPDBU implementation. In the future, these differences in regulations will also have an impact on differences in the parties involved and their authority, differences in documents, and differences in stages.

For example, in article 33 it is explained that the governor submits the KPDBU plan document, which contains, among other things, the Outline Business Case (OBC) and Final

Business Case (FBC) as well as projections for calculating payments for service availability to the Minister of Home Affairs for consideration. Meanwhile, the regent/mayor submits the KPDBU plan document to the governor for consideration. The governor's recommendations still need to be consulted with the Minister of Home Affairs through the Directorate General of Regional Financial Development. This Permendagri only regulates special conditions, namely that KPDBU activity plans include central government support for PDF or Viability Gap Fund (VGF) or guarantee support, so consideration is given after a coordination meeting between the Ministry of Home Affairs and the Ministry of Finance.

The conditions above can cause several impacts, including:

- 1) There is no clarity regarding the stages if the PPP is carried out in bundling with the condition that the PJKP combines the central government (ministries/institutions) and regional governments.
- 2) The regulations also do not explain if there is a condition that the PJKP is a combination of the provincial regional government (governor) and the district/city regional government (regent/mayor).
- 3) The approval process is lengthy for small-scale projects if approval is required up to the Minister of Home Affairs for district/city scale PPPs.
- 4) Potential legal inconsistencies where there are regulations at the same level in statutory regulations (Ministerial regulations), both VAT Ministerial Regulation Number 2 of 2020, which explains the procedures for implementing PPP, and PMK Number 8 of 2016 concerning payment for service availability, which needs to be followed in the PPP process.
- 5) Increased coordination efforts if there is a PDF from the central government, where the Ministry of Home Affairs must coordinate with the Ministry of Finance for regional-scale projects, increasing the effort and time of the PPP process.
- 6) Legal inconsistencies and increased coordination efforts can discourage regional governments and BUPs from implementing PPPs, which will impact the process of accelerating the implementation of local infrastructure in the regions.

This impact can give rise to several options, including:

- 1) There is a need for integrated regulations regarding PPPs so that whoever the PJKP is and how the PPP scheme is implemented, the following regulations remain the same and do not confuse the PJKP and BUP in carrying out PPP bundling.
- 2) The possibility of deletion or status does not apply to Minister of Home Affairs Regulation Number 96 of 2016, and regulations regarding payment for service availability are merged in PMK Number 8 of 2016.
- 3) Minister of Home Affairs Regulation Number 96 of 2016 still regulates the PPP process with regional government PJKPs; however, if bundling is carried out with the conditions of regional government PJKPs and ministries/institutions, there is a possibility that it will not follow Minister of Home Affairs Regulation Number 96 of 2016, by adding exceptions to the regulation.
- 4) Intervene in policy by creating a PPP node to facilitate coordination and make it easier for local governments to carry out PPPs.

4. Conclusion

Regulations regarding Government and Business Entity Cooperation (PPP) in the context of PPP bundling are still unclear and detailed. There are deficiencies in the law that cannot address situations arising from PPP bundling and inconsistencies between comparable laws and regulations. Therefore, it is necessary to change or revise PPP regulations to encourage the bundling of small-scale projects and conduct a comprehensive review of national development plans. In addition, if regulatory revisions are not carried out, there needs to be further policies

that address shortcomings and inconsistencies in PPP law and assistance to construction and management service providers (PJKP) to reduce transaction costs related to PPP bundling. Implementing these suggestions is expected to increase effectiveness and efficiency in using the PPP bundling model and overcome problems related to cross-government PPP bundling.

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