

## THE LEGAL CONSEQUENCES OF A MARRIED COUPLE AS BEING THE SOLE FOUNDERS IN THE PARTNERSHIP

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### **Abstract**

A Partnership Firm ("Firma") and a Limited Partnership/Commanditaire Vennootschap ("CV") in Indonesia are regulated in the First Book of the Commercial Code of Indonesia, chapter the Third (Regarding the various Companies), in the First and Second section. Both partnerships are considered to be the special form of the civil partnership/Maatschap, which is regulated in the Civil Code of Indonesia (Article 1618 – 1652). According to Rudhi Prasetya, "In practice, it is not uncommon for us to see a Firma or CV that has only 2 partners, of which they are husband [and] wife". Therefore the main issue will be the legitimacy of the said partnership if it has only a husband and wife as the founders/partners, especially if the said husband and wife do not make any separate marital property agreement. What will be the legal consequences if the said condition happens, especially the external liability to the third party. The main objective of this writing is to give an argumentation and the legal standing that a married couple can actually establish and be the sole founders/partners in a partnership with all of its consequences, even though they did not make any separate marital property agreement.

**Keywords:** Partnership; Married Couple; External Liability

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## Introduction

Nowadays in Indonesia, except for the cooperation, at least there are three forms of companies which can be chosen by the people as the vehicle to generate profit, among others:

- (1) the sole proprietorship,
- (2) the limited liability company, and
- (3) the partnership, general as well as a special form of partnership (Yetty Komalasari Dewi, 2016: 1-2).

According to Rudhi Prasetya, Firma and CV are the special forms of the Civil Partnership/Maatschap, therefore the characteristic of the Civil Partnership/Maatschap can be found in those partnerships:

“Since Firma and CV are the *species* form of the Maatschaap, then the characteristics of the Maatschap are embedded in, as long as it has not been particularly regulated in and not deviating from the Commercial Code.

According to a classic opinion, Maatschaap is the *genus* (general) form of a Firma and CV (Rudhi Prasetya, 2002:2).

Regarding the Firma and CV, Rudhi Prasetya has mentioned: “In a classic opinion, Firma is the general form (*genus*) of CV, or in other words, a CV is a special form (*species*) of the Firma (Rudhi Prasetya, 2002: 3)”. Therefore to know about a CV, is to understand a Firma first, since a CV is a special form of a Firma, while both, Firma and CV, are the special form (*species*) of the Civil Partnership (*Maatschap*). Provisions in the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata) (KUHPer) (*Burgerlijk Wetboek voor Indonesie*) regarding Civil Partnership (Persekutuan Perdata - *Maatschap*) shall be applied to Firma unless provisions relating to the Civil Partnership are in direct contradiction to the provisions specifically relating to the Firma (Andrew I. Siro, 2006: 33).

Therefore the regulations in the Civil Code are considered to be applicable to the Firma and CV, as long as the said regulations are not specially deviated or in contradiction with the Commercial Code, as mentioned in Article 1 of the Commercial Code, “The Civil Code is applicable to commercial matters, in so far, as it has not been specially deviated from in this code”. The article 16 of the Commercial Code of Indonesia defines the meaning of the Partnership Firm as follows “Partnership under a firm is that, which two or more persons enter into, with the view of trading under a common name”. So, the most essential part to set up a Firma or a CV, as the special form of a Firma, is to have at least two or more founders, who make an agreement to become partners in the said partnership, in order to conduct a “trading” (nowadays that term has been translated to a “business” or “company”), using a common/unison name.

According to Kurniawan, the term “Company” has been used since the reformation of the Commercial Code, it was when some of the articles in the first book of the Commercial Code were invalidated, then the term “trader” and “trading” could not sufficiently represent the interest of the trader (specifically), and in general for the people who are related to or having an interest or being part in a business activities

(Kurniawan, 2014: 72). The partnership agreement is based on a “freedom to make a contract” principle, it means that the partners are free to make their own “rule” for their partnership, usually, it can be found in their Articles of Association or bylaws.

“The source of the freedom to make a contract is the individual freedom, thus the starting point is the individual interest, so it is understandable that the individual freedom delivers the freedom to make a contract (Ghansam Anand, 2011: 95)”. According to Mohammad Zamroni, through a contract, the parties will create a legal relationship which empowers their own rights and duties. So, basically, the contract law delivers the freedom to make a contract, as long as it did not violate the public order and morality (Mohammad Zamroni, 2016: 521-522). The role of a contract to give legal protection is based on a *pacta sunt servanda* principle which is attached to any contract, as has been regulated in Article 1338 BW: “All agreement made legally shall be enacted as the laws for them who made that (Natasya Yunita Sugiastuti, 2015: 32)”.

Regarding the authority of the partners in the partnership to do legal acts, Article 17 of the Commercial Code of Indonesia regulates that:

Each of the partners not specifically precluded from doing so is entitled to act, pay and receive money, in the name of the partnership, to bring it under engagements to third parties and vice-versa.

Transactions, foreign to the partnership, or to which the agreement existing between the parties, does not authorize them, are not included in the foregoing rule.

If none of the partners is exempted from the authority to do legal acts on behalf of the partnership, then it can be assumed that each of the partners has been granted a reciprocal general power of attorney, for and on behalf of all partners, to do any legal acts with the third party. These will include all acts, including to appear before a Judge, whether the said acts are considered as the ordinary daily business activities or not (H.M.N Purwosutjipto, 1982: 59). Regarding the responsibilities of a partner in a partnership firm, Article 18 of the Commercial Code of Indonesia regulates that “In a partnership under a firm, each of the partners as regards the engagements of the partnership, is individually responsible for the whole”. It means that each partner has to be liable for all consequences arising from any engagements done by any partners in the said partnership, up to their private possessions, if necessary.

According to the abovementioned Articles, it can be concluded that a Firma is not a legal entity. The reasons are:

- a. there is no separation of assets between the partnership’s and each of the partner’s private assets, so each of the partners shall be liable personally for the whole.
- b. there is no requirement for the deed of the establishment to be ratified by the Minister of Law and Human Rights (Abdul Kadir Muhammad, 2010: 90).

According to Rudhi Prasetya “Those three forms: *maatschap*, firma and CV should be considered as “the association of persons” (*personen associatie*). The meaning of “the association of persons” is an association to assemble people” (Rudhi Prasetya, 2016: 4). Based on that theory, the partners are all the owners of that partnership and the partnership is not a separate entity from its partners. This will create a common

interest in the partnership's asset, which is called "a tenancy in partnership", a concept of which, every partner shall jointly own a partnership's property. In Dutch, it is called "*mede eigendom*" or "co-ownership" concept, if one or more person(s) have a joint proprietorship of an asset, and in the partnership, it shall be called "*gebonden mede eigendom*", a binding joint proprietorship (Yetty Komalasari Dewi, 2016: 64).

What if the partnership has only a married couple as the only or as the sole partners? The reason why this issue is very crucial to be discussed because many have considered the joint property of a married couple has prevented them to establish or be the sole partners in any partnerships. A joint marital property, according to Indonesian Law which has been regulated in Article 35 Law Number 1 Year 1974, concerning the Marriage, is the asset acquired during a marriage, either from the husband or the wife. The joint property, or commonly called the marital property, is the property owned by the husband and wife. Even though it is registered under one party only, the husband or the wife (Sri Harini Dwiyatmi, Indirani Wauran, 2017: 98)."

A marital agreement is a term taken from the heading of Chapter V Law Number 1 Year 1974 which contain only one article, that is 29, while regarding the definition of the marital agreement is not explained, only regulating when it should be made, the legitimacy, the validity, and the possibility to amend the said agreement (Haedah Faradz, 2008: 249). In practice, it is not uncommon for us to see a Firma or CV that has only 2 partners, of which they are husband [and] wife. For such a condition, the applicable law should treat it as "the Sole Proprietorship Company" (one man business or "*eenmanszaak*" in Dutch). Unless they make a separate marital property agreement or they are contributing their personal properties (Rudhi Prasetya, 2002: 37-38).

The main issue would be, is the partnership still legitimate if it has only a married couple as the founders/partners, of which the said couple does not make any separate marital property agreement and not contributing their personal properties? What will be the legal consequences if the said condition happens?

## Research Method

The research method used is normative juridical research. The type of data used is secondary data. Secondary data in the form of data obtained from library studies in the form of legal materials such as legislation, books, journals or seminar materials using qualitative analysis (Salim & Nurbani, 2014).

## Discussion

### 1. Partnership Firm ("FIRMA")

According to Article 16 of the Commercial Code, a Firma is a civil partnership which is established to conduct a company under a common [unison] name. The Firma is regulated in Article 16 to Article 35 of the Commercial Code. A Firma is a special form of civil partnership. The distinctions are in three compulsory elements as a supplement to the civil partnership, as follows:

- a. conducting a company (Article 16 of the Commercial Code);
- b. using a common [unison] name or Partnership Firm's name (Article 16 of the Commercial Code); and

- c. the responsibilities of the partners are personal for the whole (Article 18 of the Commercial Code) (Tuti Rastuti, 2015: 27).

During its progress, many partnership firms are utilized to conduct professional services rather than commercial trade activities. This is happening because of the business persons prefer to utilize a limited partnership or limited liability company (Julius Caesar Transon Simorangkir, 2015: 245).

Because a Partnership Firm is a special form of a civil partnership, then the establishment process is similar, starting from making an agreement. So, the establishment is by a consensus, but it can be done by a formal agreement, in a written deed. The establishment of a Firma does not need to follow a specific form. It means, it can be established by orally or written, by authentic deed or by a private deed. Practically, the people prefer it to be done by an authentic deed, it means the notarial deed, because it is closely related to the evidential matter. According to Article 22 of the Commercial Code, a partnership firm should only be established by an authentic deed, but the said absence shall not be used to deprive any third party's right. It seems that the said requirement is not imperative. Moreover, according to Rudhi Prasetya, basically, an agreement to establish a partnership firm is a *form free*. It means not necessarily in the form of a deed with an invalidity threat when that form is not met. The deed is more [likely] for the evidence of the existence of the said partnership firm. So, basically, the establishment of a firma is referring to the establishment of the partnership, upon the consensus. The establishment by deed will have a better and stronger evidential value. There are three important elements in Article 22 of the Commercial Code, as follows:

- a. a partnership firm should be established by an authentic deed;
- b. a partnership firm can be established without an authentic deed, and
- c. a partnership firm which is not established by an authentic deed, should not deprive any third party's right (Julius Caesar Transon Simorangkir, 2015: 28-29).

After the establishment of the partnership firm, the next step is to register it to the authority. Formerly the registration should be done at the Civil Registry in the District Court where the Firma is domiciled, as mentioned in Article 23 of the Commercial Code "Partners under a firm are bound to have the deed recorded in the registers of the Court of Justice, where the partnership is established", but from August 1, 2018, the registration should be done at the Ministry of Law and Human Rights of the Republic of Indonesia, as mentioned in the Ministerial of Law And Human Rights of the Republic of Indonesia Regulation Number 17 Year 2018 Regarding The Registration of Commanditaire Vennootshcap, Partnership Firm, And Civil Partnership (*Peraturan Menteri Hukum Dan Hak Asasi Manusia Republik Indonesia Nomor 17 Tahun 2018 Tentang Pendaftaran Persekutuan Komanditer, Persekutuan Firma, Dan Persekutuan Perdata*).

## 2. The Consequences of A Married Couple as the only Partners of a Firma

I.G. Rai Widjaja affirmed that the partners in/members of a Firma shall jointly be responsible for the whole liabilities of the said Firma, as mentioned hereunder:

"The rights and duties of the members:

- a. every member has the right to make an announcement and acting on behalf of the partnership firm;
- b. the agreement made by a member shall also bind the other member(s);

- c. everything acquired by a member shall become the asset of the firma,
- d. every member shall jointly be liable for the whole of any engagement done by Firma, which shall be called joint liability (I.G.Rai Widjaja, 2000: 45-46)."

In a Firma, every partner is an active partner, so each of them will enjoy as well as be liable for all losses of the Firma. If the liability of the said Firma is more than its total equity, then all of the partners should be liable to pay off with their personal assets or property, nonetheless. This is called a joint liability among the partners. The most essential characteristic of a Firma is very different to a limited liability company, of which Article 1 Paragraph 1 of Law Number 40 Year 2007 (regarding the Limited Liability Company) defines a Limited Liability Company as *an association of capital*.

The partnership firm is *not an association of capital* like a limited liability company, but instead, it is an *association of persons*. "The third element of the Limited Liability Company according to the Laws is that a Limited Liability Company is an *association of capital, not an association of persons as the partnership*. Being an association of capital, the Limited Liability Company has the potential to raise more funds compared to Firma or CV (Agus Sardjono, Yetty Komalasari Dewi, Rosewitha Irawaty, Togi Pangaribuan, 2018: 73).

Normatively, it is impossible for a limited liability company to be established only by the shareholders who are husband and wife since the Article 1 paragraph 1 of the Laws concerning the Limited Liability Company defines that a limited liability company is an association of capital. Because a husband and wife is an association of assets (without the marital agreement and/or any private property), then the said couple, normatively, shall be considered as a single shareholder (Risma Permatasari, 2018: 233).

A limited liability company as an association of capital is a separate entity to its founders or shareholders. The capital of the limited liability company can be used to acquire assets, and according to Siti Hapsah Isfardiyyana, assets owned by the said Company cannot be owned or controlled by the shareholders, therefore the shareholders cannot convey the Company's assets to any third parties, thus the said company shall be fully responsible for its own assets (Siti Hapsah Isfardiyyana, 2014: 152). A limited liability company (PT) is the most favorite business entity in Indonesia. A limited liability company is more advance than a CV, of which still has its weakness since there is an unlimited liability toward any third party, involving private assets (M. Faisal Rahendra Lubis, 2018: 25-26).

Even though in a Firma each of the partners is "contributing" their effort and/or money, but still it should be considered as an association of persons and not an association of capital. Therefore the legitimacy of a Firma is depending on the partnership between the partners.

So, as long as the husband and wife are individually capable of conducting any legal acts and making a consensual agreement, then both of them shall be entitled to establish and be the only partners in a partnership firm. The legal consequences are, as Rudhi Prasetya has mentioned above, the applicable law should treat it as "the Sole Proprietorship Company" (one man business or "eenmanszaak") unless they make a separate marital property agreement or they are contributing their personal properties. It means the married couple who do not make any separate marital property agreement or not contribute their own personal property in the said Firma should have to be liable for the whole of its obligations up to their private assets/properties.

### 3. The Limited Partnership/Commanditaire Vennootschap ("CV")

A CV is a special form of Firma, and it has one or more "commanditaire"/"passive"/"silent" partner(s), as mentioned in Article 19 of the Commercial Code:

"Partnership by way of loan, also called "en commandite", is contracted between a person or persons, as partners individually responsible for the whole, and one or more other persons, merely advancing funds.

A partnership can be at the same time a partnership under a firm with respect to the partners under the firm, and a partnership by way of a loan with regard to the party merely advancing capital."

The partnership *by way of loan* in Article 19 of the Commercial Code is a direct translation from the Dutch "De vennootschap bij wijze van geldschieter". So, the most prominent characteristic of a CV is to have at least one partner who contributes "a loan" to the CV. The said person/partner in Dutch is called "geldschieters":

"According to Prof. Sukardono, Article 19 paragraph (1) of the Commercial Code itself has misinterpreted the word "geldschieters" (or a person who lend capital) to define the commanditaire member.

It is not supposed to be like that, because toward the person who lends the money, Article 1759 and 1760 of the Civil Code, regarding the obligation of the creditor, shall not be applied (C.S.T. Kansil, Christine S.T. Kansil, 2015: 74)."

The "geldschieters" is also commonly translated as the *commanditaire* partner, silent partner or passive partner, which can be described as herein below:

"A *commanditaire* partner is a partner who contributes his/her money, assets, or skill to the partnership (as a capital), but he/she will not interfere in the management or control of the partnership, and the liability is limited up to the amount of money that has been contributed by him/her. It means the *commanditaire* partner shall not be liable personally to the *commanditaire* partnership, because only the complementary partner which has been assigned to conduct any legal acts with a third party (Article 19 of the Commercial Code).

From the abovementioned definition, there are 2 (two) kinds of partners in a *commanditaire vennootschap*:

- a working partner/complementary partner/active partner, a partner who manages the partnership;
- a non-active partner/*commanditaire* partner/passive partner, which is a sleeping partner. Even though it has been granted a power of attorney (Article 20 of the Commercial Code), a *commanditaire* partner has the right to supervise the internal management of the *commanditaire vennootschap*. In the event of the said restriction is infringed than all partners should be liable personally (Article 21 of the Commercial Code) (Abdul R. Saliman, Hermansyah, Ahmad Jalis, 2006: 109)."

Either an active partner or passive partner, each of them shall give their contribution, in the form of money, assets or skill (physically as well as mentally) on their joint

account, it means the profit and loss shall be borne together between the working partner and the *commanditaire* partner, even though the liability of the *commanditaire* partner is limited up to its capital which has been contributed (Zaeni Asyhadie, Budi Sutrisno, 2018: 51).

"Each of the partners shall be liable to undertake the CV's obligations. In the event the said CV was declared bankrupt then the one who shall legally responsible is the complementary partner (Diana Safitri, Novita; Mahartayasa, Made, 2014)."

Therefore the active partner in a CV must fulfill its duties and obligations in order to execute its businesses by practicing a good business judgment risk, the duty of care, goodwill, and prudentiality as it implies in a limited liability company's good corporate governance principles (Abdul Aziz Alsa Ningrum Natasya Sirait, Mahmul Siregar, M. Hamdan, 2015: 149). Basically, a CV is not a legal entity, but has its own assets and can be asked for any payment to any third party, and if it was not sufficient then it shall be the responsibility of the managing partner personally for the whole (Ayu Ratnawati, 2015: 159). The source of the capital of a CV, in order to conduct its businesses, can be categorized into internal or external. Internal means it is coming from the partner who manages it, while external, among others a loan from a bank or a nonbanking institution with specific collateral. In the event of default, then the said CV can be filed for bankruptcy at the Commercial Court by the Creditor or the said Debtor itself (Muhammad Reza, 2013: 2).

If there are more than one managing partners, then we will face a multifaceted company, i.e.: a partnership Firm between the managing partners, and a Commanditaire Venootschap between the managing partner and the *commanditaire* partner (Soedjono Dirdjosisworo, 1997: 42). Other characteristics which differentiate a CV over the Firma are:

- a. restriction to use the *commanditaire*/silent/passive partner's name as the CV's name,
- b. restriction to appoint the *commanditaire*/silent/passive partner to do the management or be employed by the partnership, as mentioned in Article 20 of the Commercial Code:

"Except in the case, specified in the second paragraph of Article 30, the name of the partner by way of the loan may not be used in the firm.

Such a partner may not even by virtue of power of attorney do any act of management or be employed in the firm.

He does not participate in the loss, beyond the amount of money, which he has or should have furnished, nor is he liable to the restitution of profits enjoyed."

So, being a *commanditaire*/silent/passive partner in a CV, the said partner will enjoy some benefits, among others:

- a. the passive partner shall not participate in the CV's loss more than what he/she has contributed in the said CV;
- b. the passive partner shall not be liable to the restitution of profits enjoyed, in the event of the CV's loss.

Moreover, in order to enjoy the benefits as stipulated in Article 20 (2) of the Commercial Code, the *commanditaire*/silent/passive partner in the CV should be really passive/inactive, otherwise the said passive partner should be jointly liable along with

the active partner(s) for the CV's loss up to his/her personal assets/property, as stipulated in Article 21 of the Commercial Code:

"The partner by way of loan, who infringes the restrictions imposed by the first or second paragraph of the preceding article, is individually responsible for the whole of the debts and engagements of the partnership."

So, according to Article 20 *juncto* 21 of the Commercial Code, there is a possibility for the creditor to ask the passive partner to be liable up to his/her personal or private property as well, in the event of any infringement of the said restrictions. Moreover, Rudhi Prasetya affirmed as herein below:

"In reality, the laws are not *a priori* to restrict passive partner to conduct the management. What if the said restriction is infringed? In this matter, if we read Article 21 of the Commercial Code, then the passive partner will lose its limited liability immunity. The passive partner can be asked to be personally liable for the whole of the partnership's obligations. In other words, he/she has to be equally responsible as the active partner (Soedjono Dirdjosisworo, 1997: 23-24)."

In the abovementioned situation, the formality and legitimacy of CV are still intact, but somehow the Passive Partner should be liable for the whole as if he/she is an Active Partner because the said partner has lost its limited liability immunity.

#### **4. The Consequences of a Married Couple as the only Partners of a CV**

The CV is an association of persons and certainly not an association of capital, so there is no restriction for the married couple to be the only partners of a CV, as long as the said husband and wife are entitled to do legal actions, but regarding the responsibilities/liabilities to the third party, there will be some possibilities that may occur:

- a. if the said couple married with a separate property agreement (married with Pre Nuptial Agreement), then there shall be no issue since each of them can contribute his/her own private/individual property in the CV, so in the event the CV has a bigger liability than its equity, then the active partner should be liable up to his/her private/personal property, while the other partner (his/her spouse) as the passive partner shall only be liable up to his/her contribution in the said CV;
- b. if the said couple married without making any separate property agreement (they married with a joint property condition), then the capital contributed should be from each of their own private/personal property.

According to Rudhi Prasetya, in the event there is no personal/private property to be contributed to the CV, then the said CV should be considered or treated as the sole proprietorship business (one man business or "eenmanszaak" in Dutch) and the consequences of being a sole proprietorship business is the passive partner (in this matter the spouse) will lose its limited liability immunity and therefore can be asked to be personally liable for the whole of the company's obligations as if he/she is an active partner. The CV which has a married couple as the only partners is still a legitimate CV, because the laws only require the said CV to have at least two or more founders/partners who made an agreement to conduct a business using a common/unison name, of which founders/partners, at least one of them is a

*commanditaire* partner (passive partner). As long as the said husband and wife are entitled to do legal acts, then they can establish and be the only partners in a CV, with the liability consequences as mentioned above.

### Conclusion

The legitimacy of the Firma and CV is depending on the partnership between its partners, because those partnerships are being the association of persons, and not an association of capital (like the limited liability company), so basically there is no restriction to have that to be established by a married couple as the only partners, as long as the husband and wife are individually capable of conducting any legal acts and eligible to make a consensual agreement. As what has been explained before, according to Rudhi Prasetya, for such a condition, the applicable law should treat it as "the Sole Proprietorship Company" (one man business or "*eenmanszaak*" in Dutch). Unless they make a separate marital property agreement or they are contributing their personal properties into the partnerships.

Even though it is considered as "the Sole Proprietorship Company", the joint liability between the married couple as the only founders or partners in a Firma shall not be an issue, since fundamentally all of the partners in a Firma should be liable up to their private/personal property after all, but for a CV, that condition has made the passive partner to have lost its limited liability immunity and be liable for the whole of CV's liabilities as if he/she is an active partner.

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