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Validity of digital agreements and the legal relations of the parties in affiliate marketing

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Abstract

The development of digital technologies has led to the expansion of affiliate marketing as a crucial marketing strategy in the e-commerce ecosystem. However, the validity of digital agreements, which serve as the basis for legal relations between the parties in this practice, is subject to legal uncertainty. The purpose of this study was to analyse the validity of digital agreements in affiliate marketing from the perspective of positive law in Indonesia and their impact on the legal relationship between the parties involved – sellers and affiliates. Based on the regulatory approach, this study analysed the relevant regulations, such as the Law of Indonesia “On Electronic Information and Transactions” and the Civil Code of Indonesia, and assessed the existing legal gaps in the context of affiliate marketing. The study found that while digital transactions are legally recognised, key elements such as commission mechanisms, rights and obligations of the parties, and the use of electronic signatures are often insufficiently regulated, leading to legal uncertainty. This uncertainty affects the legal relationship between the parties, provoking the risk of contract abuse, an imbalance of legal positions between the seller and affiliates, and potential conflicts that may impede trust in the digital marketing ecosystem. The study demonstrated the need for more detailed and specific legal regulation to ensure the validity of digital agreements in affiliate marketing, provide legal certainty, and establish fair and sustainable legal relations for all parties involved

Keywords:

validity of digital agreements; legal relationships; legal uncertainty; e-commerce; imbalance of legal positions

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Introduction

Technological developments affect various activities that now rely heavily on digital, including trade activities. Currently, much trade is done electronically or through e-commerce. The growth of e-commerce in Indonesia continues to increase. The Indonesian Ministry of Trade projects that the volume of digital transactions will reach IDR 1,730 trillion in 2025. The Minister of Trade 2019-2024, Zulfikli Hasan, stated that the potential for the digital economy has continued to increase rapidly in the last five years, with the value of the digital economy in 2024 estimated to reach IDR 1,292 trillion with e-commerce as the largest contributor (Candra, 2024). This is in line with the Global E-Commerce Market 2024 report from ECDB, a German e-commerce data analysis company, quoted by A.Z. Yonatan (2024), global e-commerce growth in 2024 is predicted to reach 10.4% with Indonesia projected to be the country with the highest e-commerce growth in the world at 30.5%, almost three times the global average, followed by Mexico, Thailand, Iran and Malaysia.

Amidst this phenomenon, digital-based marketing models, such as affiliate marketing, are increasingly prominent as innovative and effective strategies. Affiliate marketing is a digital marketing strategy where business actors work together with affiliates to promote products or services through links, in exchange for a commission on the resulting transactions. According to F. Husna (2023), this is an online activity to market other people's products for a commission from prospects or sales. In essence, affiliates direct visitors to the marketplace, if visitors make transactions, then the affiliate will get a commission on the results. In Indonesia, affiliate marketing is growing rapidly with a high number of internet users reaching 212.9 million, with 88.7% of them actively shopping online according to data from S. Kemp (2023). In addition, a survey by Nielsen (2023) revealed that 59% of consumers trust recommendations from affiliates more than conventional advertising and 55% of consumers prefer affiliate marketing because it makes it easier to evaluate brands or products through the content they see or hear.

In Indonesia, the development of digital technology has encouraged affiliate marketing practices as an effective marketing strategy in the e-commerce ecosystem (Jatmika & Widiarini, 2023). However, the validity of digital agreements that form the basis of legal relations between the parties in this practice still faces legal uncertainty. Although the ITE Law¹ provides a legal basis for electronic contracts, its provisions are general and do not yet cover specific needs in affiliate marketing. This creates uncertainty regarding the validity of important elements in digital agreements, such as commission mechanisms, the use of electronic

signatures, and the regulation of the rights and obligations of the parties. This uncertainty can affect the legal relationship between the parties, including the risk of contract abuse, breach of agreement, or unfairness in the implementation of the agreement. If this is not addressed immediately, it can hamper the development of the digital marketing sector and reduce the trust of the parties in the e-commerce ecosystem. Therefore, an in-depth study is needed to understand and provide solutions to the legal uncertainty related to the validity of digital agreements in affiliate marketing practices.

Relevant previous findings include a study by A. Al-faqih *et al.* (2023), which focused on the registration system within the electronic marketing affiliate programme. This study focused on minors taking part in electronic contracts under the marketing affiliate programme without parental consent. The researchers suggest that the registration system of the marketing affiliate programme contains a legal loophole that permits minors to take part without parental consent, thereby violating the requirements of legal capacity in electronic contracts. Consequently, a more accommodating system and more detailed legal regulations are necessary to ensure compliance with age limit requirements and parental consent, thereby ensuring that electronic contracts are legally valid under statutory provisions. W.T. Wahyuningsih (2023) noted that despite the rapid growth of the digital business, the existing consumer protection regulations do not fully meet the needs of the digital era, highlighting the need for specific regulations that ensure the rights of consumers and business actors with legal certainty. M.A. Syahputra (2023) discussed the civil law aspects of affiliate marketing, including the contractual relationship between affiliates and merchants and the application of civil law in this practice.

The present study employed a different approach, which was to investigate the overall concept of law in the relations between affiliates, sellers, and consumers in affiliate marketing. The focus of the study was on creating legal certainty through regulations that govern the legal relationship of the parties, offering a new perspective compared to previous studies that were more focused on consumer protection or civil law. The purpose of this study was to analyse the validity of digital agreements in affiliate marketing and how it affected the legal relationship between the parties, to create legal certainty in the digital era. This study was also relevant in answering the need for clear legal regulations and legal certainty in the field of affiliate marketing, so that it could provide the best legal protection for all parties involved.

¹ Law of Indonesia No. 1 "On Second Amendment to Law Number 11 Year 2008 on Electronic Information and Transactions". (2024, January). Retrieved from <https://peraturan.bpk.go.id/Details/274494/uu-no-1-tahun-2024>.

Materials and Methods

To analyse the stated problematic, the study determined the suitable research method following the research objectives. The regulatory approach was employed in this study by positioning the law as its object so that the truth can be found from the normative side. This type of research does not merely identify it with laws and regulations but also analyses its normative system in greater depth (Syahrum, 2022). The study employed a theoretical approach to examine the validity of a provision or legal rule. To understand the background of the significance of the validity of digital agreements in affiliate marketing practices, this study analysed the legal effects on the relationship between the parties involved in the agreement. The study examined the validity and enforceability of digital agreements in the context of affiliate marketing in e-commerce, as well as its implications for legal certainty for the parties. In this case, the study examined the legal relationship between merchants, affiliates, and consumers, by considering aspects of legal protection and legal certainty. The basic concept in this study referred to the theory of legal certainty, which is linked to the existence of clear regulations in legal relations between parties. In analysing this, the study employed a comparative approach with practices in other countries that already have analogous regulations, to provide a more comprehensive picture of the need for regulation in Indonesia.

The legal materials utilised in this study included primary legal sources or written legal provisions, consisting of the Laws of Indonesia "On Consumer Protection"¹, "On Second Amendment to Law Number 11 Year 2008 on Electronic Information and Transactions"², "On Trade"³, Civil Code of Indonesia⁴, Government Regulations "On Implementation of Electronic Systems and Transactions"⁵ and "On Trading Through Electronic Systems Government Regulation"⁶, Minister of Trade Regulation "On Business Licensing, Advertising, Guidance and Supervision of Business Actors in Trading through Electronic Systems"⁷, Financial Services

Authority Regulation of Indonesia No. 42/POJK.04/2020⁸. These legal materials were reviewed descriptively and analytically to achieve a comprehensive understanding of the regulation concerning the validity of digital agreements in affiliate marketing and their impact on the legal relationships between parties.

Results and Discussion

Validity of digital agreements in affiliate marketing.

To support the potential growth of e-commerce, the Ministry of Trade of the Republic of Indonesia has issued a significant regulation, namely the Regulation of the Minister of Trade (Permendag) No. 31 of 2023 "On Business Licensing, Advertising, Guidance and Supervision of Business Actors in Trading through Electronic Systems"⁹. However, the challenges in e-commerce, especially related to affiliate marketing, are not only limited to the marketing aspect, but also regarding the legality of digital agreements that form the basis of the relationship between the parties.

In e-commerce activities and cooperation in affiliate marketing, it relies on contracts or agreements like conventional trade. Generally, contracts are made in writing or verbally. However, the presence of the Internet expands the form of agreements through electronic agreements or e-contracts as a new form in this digitalisation. According to Article 1 number 17 of Law Number 11 of 2008 "On Electronic Information and Transactions" (ITE)¹⁰, an electronic contract is an agreement concluded through an electronic system. Electronic contracts are made without a direct meeting between the parties, unlike conventional contracts which are generally agreed on paper through face-to-face meetings. In digital agreements, a standard contract model is generally used, where only one party who has a more advantageous position will dominate in the drafting of the contract, while the other party can only agree to all clauses or none at all ("take it or leave it").

The preparation of this standard contract is applied in electronic contracts because it can cut time and costs

¹ Law of Indonesia No. 8 "On Consumer Protection". (2000, April). Retrieved from <https://peraturan.bpk.go.id/Details/45288/uu-no-8-tahun-1999>.

² Law of Indonesia No. 1 "On Second Amendment to Law Number 11 Year 2008 on Electronic Information and Transactions". (2024, January). Retrieved from <https://peraturan.bpk.go.id/Details/274494/uu-no-1-tahun-2024>.

³ Law of Indonesia No. 7 "On Trade". (2014, March). Retrieved from <https://peraturan.bpk.go.id/Details/38584/uu-no-7-tahun-2014>.

⁴ Civil Code of Indonesia. (1847, April). Retrieved from <https://www.refworld.org/legal/legislation/natlegbod/1847/en/77869>.

⁵ Government Regulation of Indonesia No. 71 "On Implementation of Electronic Systems and Transactions". (2019, October). Retrieved from <https://peraturan.bpk.go.id/Details/122030/pp-no-71-tahun-2019>.

⁶ Government Regulation (PP) No. 80 "On Trading Through Electronic Systems". (2019, November). Retrieved from <https://peraturan.bpk.go.id/Details/126143/pp-no-80-tahun-2019>.

⁷ Regulation of the Minister of Trade of Indonesia No. 31 "On Business Licensing, Advertising, Guidance and Supervision of Business Actors in Trading through Electronic Systems". (2023, September). Retrieved from <https://peraturan.bpk.go.id/Details/265202/permendag-no-31-tahun-2023>.

⁸ Financial Services Authority Regulation of Indonesia No. 42/POJK.04/2020. (2020, July). Retrieved from <https://ojk.go.id/id/regulasi/Pages/Transaksi-Afiliasi-dan-Transaksi-Benturan-Kepentingan.aspx>

⁹ Regulation of the Minister of Trade of Indonesia No. 31 "On Business Licensing, Advertising, Guidance and Supervision of Business Actors in Trading through Electronic Systems". (2023, September). Retrieved from <https://peraturan.bpk.go.id/Details/265202/permendag-no-31-tahun-2023>.

¹⁰ Law of Indonesia No. 1 "On Second Amendment to Law Number 11 Year 2008 on Electronic Information and Transactions". (2024, January). Retrieved from <https://peraturan.bpk.go.id/Details/274494/uu-no-1-tahun-2024>.

(Riadi *et al.*, 2022). In fact, according to Article 1320 of the Civil Code¹, the requirements for a valid agreement include agreement of the parties, legal capacity, good faith, and a specific object. When compared to the existing forms of electronic contracts, Article 9 of the ITE Law², which aims to regulate the use of information technology and electronic transactions so that they are carried out legally and responsibly, shows a lack of clarity in regulating the form and conditions of electronic contracts with certainty (Mokosolang *et al.*, 2023).

The practice of agreements made through registered domain websites simplifies the proof that electronic contracts were agreed upon by the parties. However, since these agreements are conducted digitally, concerns arise regarding their compliance with legal standards. Globalisation has significantly affected technology and law, and in response to rapid technological advancements, the legal system must evolve to address emerging issues, especially those related to digital economic activities like affiliate marketing. In Indonesia, no comprehensive legal instrument regulates affiliate marketing practices, including the digital agreements that govern relationships between the parties. This lack of regulation poses legal risks for both merchants and affiliates, especially in case of a dispute. As globalisation progresses, various legal challenges have emerged, particularly concerning the validity and legality of digital agreements in affiliate marketing. The legal system must adapt to accommodate these changes and address potential issues that may arise in the digital economy.

Article 1329 of the Civil Code³ states that everyone is eligible to conclude an agreement, unless otherwise specified by law. Therefore, Article 1330 of the Civil Code explains that incompetent parties include those who are minors, those under pardon and married women, and all people who are prohibited by law from concluding certain agreements. Article 1331 of the Civil Code states that an incompetent party can sue for the cancellation of an agreement that has been made, unless regulated by law. Thus, the Civil Code does not prohibit a person from making an agreement with any party they wish, as long as they are not included in the group of incompetents according to law. Even if an agreement is concluded with a party who is considered ineligible, the agreement stays valid as long as the party does not file for cancellation (Winarno *et al.*, 2023).

In the context of electronic agreements, there is a series of principles that are the main basis for the preparation and implementation of legally valid

agreements. This agreement made through electronic media, subject to basic principles that are analogous to conventional agreements, but with adjustments that are relevant to the characteristics of digital transactions. The principles of electronic agreements include:

a. Principle of freedom of contract. This principle is guided by Book III of the Civil Code⁴, giving legal subjects the freedom to make contracts with anyone, determining the content and form, as long as it does not conflict with law, morality, or public order. This principle also allows the creation of new contracts such as electronic contracts, if they meet the requirements for a valid agreement.

b. Principle of consensualism. This principle states that an agreement is based on the agreement of the parties. In an electronic contract, an agreement occurs when the offeree accepts the offer.

c. Principle of binding power (*pacta sunt servanda*). This principle requires the parties to abide by all concluded agreements because the agreement is legally binding for the parties who conclude it. In the context of electronic contracts, agreements bind the parties if they do not conflict with laws, morality, and public order.

d. Principle of good faith. This principle emphasises that an agreement must be executed in good faith. The principle of good faith is divided into two, namely pre-contract, where the parties must be honest with each other during negotiations, and contract implementation, where the contents of the agreement must be rational and implemented seriously. In the context of electronic contracts, the seller must carry out the conditions of the object clearly, while the buyer must verify the suitability of the object of the agreement.

e. Principle of equity. This principle ensures that there is equality of rights and obligations between the parties. This principle also emphasises the significance of a balanced position between the parties in the contract, so that no party is too dominant. Each party hopes to create a balance in position and obligations (Ghassani *et al.*, 2023).

Laws and regulations, such as Law Number 7 of 2014 "On Trade"⁵ and ITE Law⁶, do not specifically address the mechanisms or validity of agreements in affiliate marketing practices. While the Trade Law and the ITE Law outline certain prohibitions, they do not provide clear guidelines or regulations for affiliate marketing activities, making it challenging to supervise and ensure transparent, responsible practices, particularly regarding electronic contracts. The validity of electronic

¹ Civil Code of Indonesia. (1847, April). Retrieved from <https://www.refworld.org/legal/legislation/natlegbod/1847/en/77869>.

² Law of Indonesia No. 1 "On Second Amendment to Law Number 11 Year 2008 on Electronic Information and Transactions". (2024, January). Retrieved from <https://peraturan.bpk.go.id/Details/274494/uu-no-1-tahun-2024>.

³ Civil Code of Indonesia. (1847, April). Retrieved from <https://www.refworld.org/legal/legislation/natlegbod/1847/en/77869>.

⁴ *Ibidem*, 1847.

⁵ Law of Indonesia No. 7 "On Trade". (2014, March). Retrieved from <https://peraturan.bpk.go.id/Details/38584/uu-no-7-tahun-2014>.

⁶ Law of Indonesia No. 1 "On Second Amendment to Law Number 11 Year 2008 on Electronic Information and Transactions". (2024, January). Retrieved from <https://peraturan.bpk.go.id/Details/274494/uu-no-1-tahun-2024>.

contracts is recognised under the ITE Law, as stated in Article 1, number 17, but the law does not offer detailed explanations regarding supervision and mechanisms in the context of digital trade. Analogously, the Trade Law acknowledges the validity of electronic transactions in Article 1, number 24, and outlines the implementation of Trade Through Electronic Systems (PMSE)¹ in Article 65, but does not provide concrete regulations on the digital ecosystem or the use of electronic contracts in affiliate marketing and digital trade.

In addition to the Laws and Regulations, the preparation of Government Regulations related to Electronic System Trading (PMSE)² was ratified through Government Regulation Number 80 of 2019 concerning Electronic System Trading (PP PMSE)³ as mandated by Article 66 of the Trade Law⁴, “Further provisions regarding Electronic System Trading transactions are regulated by or based on Government Regulations”. Provisions regarding electronic contracts in PP PMSE⁵ are regulated in:

a. Article 50: “PMSE can use electronic contract mechanisms or other contractual mechanisms as a manifestation of the parties’ agreement”;

b. Article 51: “Regulates electronic contracts in the form of valid sales and purchase agreements”;

c. Article 52: “Regulates provisions in electronic contracts that can be binding on the parties”;

d. Article 53: “Regulates the provisions that information in electronic contracts must not contain lies, and must not include standard clauses that harm consumers”;

e. Article 54: “The validity of electronic signatures in electronic contracts”;

f. Article 55: “Provisions for using Indonesian in consumer electronics contracts in Indonesia”;

g. Article 57: “Provisions that electronic contracts are considered null and void if a technical error occurs due to an unsafe or unreliable electronic system”.

The articles in the PP PMSE⁶ can be used as guidelines in digital agreements in the context of digital trade including affiliate marketing practices. The legal force of electronic contracts is regulated in Article 50 and Article 52 of the PP PMSE which confirms that electronic contracts have the same legal force as conventional contracts if they meet the legal requirements of Article 1320 of the Civil Code⁷. This provides legal certainty for the parties involved in affiliate marketing. The PP PMSE also regulates the legal requirements for agreements in

the electronic context including regarding the conformity of information in the contract with the offer submitted, as well as the existence of an agreement between the parties involved (Huda, 2024). Although PP PMSE⁸ provides a legal framework for electronic transactions, there are still some aspects that must be addressed, such as the lack of more specific regulations regarding affiliate marketing practices, as well as the dualism of the legal requirements of the agreement between PP PMSE and the provisions in the Civil Code, which can cause legal uncertainty. Therefore, harmonisation is needed between these two regulations so that digital agreements have stronger legal certainty. Therefore, the absence of explicit regulations concerning provisions related to the digital context results in a lack of legal certainty regarding electronic contracts within the laws and regulations governing electronic information and transactions. The creation of electronic contracts is often dominated by one party that has a stronger position, such as merchants in the context of affiliate marketing. This imbalance causes the failure to achieve equal justice for the parties, because the unequal position prevents one party from obtaining fair benefits following the provisions of the laws and regulations. This complicates the achievement of ideal legal certainty and justice for the parties. This is clearly contrary to the theory of legal ideals put forward by Gustav Radbruch, as cited by V. Maharani (2024), which emphasises that the law must be able to ensure justice, certainty, and expediency to function and benefit society and order. Gustav Radbruch argued that justice, benefit, and certainty are three elements that complement each other to form a positive legal system. The purpose of this theory is to create harmonious legal provisions, free from conflict, having clear meaning, and devoid of legal vacuum in their application.

Legal relationship of the parties in affiliate marketing practices. The affiliate marketing programme is a programme organised by an e-commerce platform as one of the marketing techniques carried out by someone through their active social media such as X, Instagram, and TikTok. This programme is attractive to affiliates because of the many benefits offered by the e-commerce platform, such as commissions. A. Putri Nabila & G. Djayaputra (2023) found that the principal reason for someone to join as an affiliate is because of the commission they receive. To become an affiliate,

¹ Government Regulation (PP) No. 80 “On Trading Through Electronic Systems”. (2019, November). Retrieved from <https://peraturan.bpk.go.id/Details/126143/pp-no-80-tahun-2019>.

² Ibidem, 2019.

³ Ibidem, 2019.

⁴ Law of Indonesia No. 7 “On Trade”. (2014, March). Retrieved from <https://peraturan.bpk.go.id/Details/38584/uu-no-7-tahun-2014>.

⁵ Government Regulation (PP) No. 80 “On Trading Through Electronic Systems”. (2019, November). Retrieved from <https://peraturan.bpk.go.id/Details/126143/pp-no-80-tahun-2019>.

⁶ Ibidem, 2019.

⁷ Civil Code of Indonesia. (1847, April). Retrieved from <https://www.refworld.org/legal/legislation/natlegbod/1847/en/77869>.

⁸ Government Regulation (PP) No. 80 “On Trading Through Electronic Systems”. (2019, November). Retrieved from <https://peraturan.bpk.go.id/Details/126143/pp-no-80-tahun-2019>.

prospective participants must register through the e-commerce website or application, fill in the data correctly, and read and agree to the terms and conditions set. After the verification process by the e-commerce platform, prospective affiliates receive an approval notification via email and are officially registered as affiliates.

Article 1313 of the Civil Code¹ defines an agreement as an agreement where one party binds themselves to another party, becoming one of the sources of obligations other than law. The obligation from the agreement arises through consent, while the obligation from the law arises from the rights and obligations that were determined. Article 1338 of the Civil Code emphasises that a valid agreement applies as a law for the parties, thus creating a binding legal relationship. When an offer is made and accepted, an agreement is formed between the affiliate and the e-commerce platform, creating mutual rights and obligations. The affiliate is responsible for promoting the platform’s products and is entitled to a commission for their successful marketing efforts. In turn, the e-commerce platform is entitled to have its products promoted by the affiliate and is obligated to pay commissions for sales generated through the affiliate’s unique link. For example, if an affiliate shares a promotional link on social media and consumers make purchases through that link, the e-commerce platform is required to pay a commission to the affiliate. This obligation should be clearly outlined in the affiliate programme’s terms and conditions. For instance, in Shopee’s Affiliate Programme, Clause 2 specifies: “Shopee will provide Commissions and/or Bonuses (as applicable) to Participants when Participants upload Participant Links on Participant Media, in the manner and conditions specifically regulated in the Shopee Affiliate Programme Guidelines and that do not conflict with these Terms and Conditions, which are then clicked and/or accessed by Users and result in Completed Purchases that meet the provisions set by Shopee” (Shopee, 2020).

The standard agreement applied in this affiliate programme is included in the type of digital agreement. This means that the contents of the agreement are compiled digitally in the form of an electronic document designed unilaterally by the marketplace company. This document is then provided to be read and approved by other parties, namely prospective affiliates, who conclude agreements online (Gunawan & Waluyo, 2021). Electronic contracts, as defined in Article 1 point 17 of Law Number 1 of 2024², are agreements made through electronic systems. While analogous to conventional contracts, they are formed electronically. In affiliate marketing, electronic contracts establish the legal relationship between affiliates and marketplaces. Through offer and acceptance, both parties agree to mutual rights and obligations. Affiliates promote products according to the affiliate programme’s terms, and when a consumer makes a purchase through a shared promotional link, the marketplace is required to pay the affiliate a commission. This demonstrates that electronic contracts formalise legal relationships and ensure both parties perform their rights and obligations (Rahman & Ardiansyah, 2023). Affiliates are required to promote products in the marketplace, following applicable provisions. In return, affiliates are entitled to a commission from each successful achievement. On the other hand, the marketplace company is entitled to receive product promotions, and is required to provide a commission according to the products successfully sold through a special link (Rafiqih, 2022).

The legal relationship between the parties of a cooperation agreement is established in a standardized manner by the marketplace company and accepted by the affiliate through electronic media, such as a website or a specific marketplace application. In this case, the marketplace acts as a service provider and the affiliate acts as a service marketer. The cooperation agreement made is considered valid if it meets the valid requirements of the agreement regulated by Article 1320 of the Civil Code³ (Table 1).

Table 1. Requirements of the cooperation agreement

Agreement of the parties	In affiliate marketing programmes, the marketplace applies a standard agreement, which can be understood as the freedom of one party, in this case the entrepreneur, to express their will in running the company’s operations. Affiliates have the freedom to accept or decline the provisions that were set. Therefore, if an affiliate registers for the programme, they arguably agree to all applicable provisions.
Legal requirements	In affiliate marketing programmes, each party involved in an electronic contract is required to fill out a payment arrangement form that includes information such as a bank account, Identity Card (KTP), and Taxpayer Identification Number (NPWP). This provision is an effort to meet the legal capacity requirements.
Object of the agreement	An object of the agreement that was agreed upon by both parties. In the context of an affiliate marketing programme, the object refers to the rights and obligations that must be performed by each party. The specific object in this case is product promotion using a special link posted on social media by the affiliate. After successfully attracting buyers, the marketplace company must pay a commission to the affiliate according to the amount that was agreed upon.

¹ Civil Code of Indonesia. (1847, April). Retrieved from <https://www.refworld.org/legal/legislation/natlegbod/1847/en/77869>.

² Law of Indonesia No. 1 “On Second Amendment to Law Number 11 Year 2008 on Electronic Information and Transactions”. (2024, January). Retrieved from <https://peraturan.bpk.go.id/Details/274494/uu-no-1-tahun-2024>.

³ Civil Code of Indonesia. (1847, April). Retrieved from <https://www.refworld.org/legal/legislation/natlegbod/1847/en/77869>.

Table 1, Continued

Lawful cause	A lawful cause in an agreement means that the content and purpose of the agreement do not conflict with public order, morality, and applicable laws and regulations. In the context of an affiliate marketing programme, the purpose of this agreement is to encourage people to buy products through special affiliate links. Thus, this agreement benefits both parties – the marketplace platform and the affiliate who gets a commission from the results of promotions and sales.
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Source: created by the authors of this study based on the analyses of Civil Code of Indonesia¹ and Shopee Affiliate Programme (Shopee, 2020)

According to Law Number 1 of 2024 (amending Law Number 11 of 2008)², electronic information and documents are considered valid legal evidence. In affiliate marketing, electronic agreements are binding if they meet the requirements of the ITE Law³ and the Civil Code⁴. Once valid, these agreements are legally binding and cannot be cancelled unilaterally, as outlined in Article 1338 paragraph (1) of the Civil Code⁵. However, affiliate agreements, such as Shopee's, often favour the marketplace, creating an imbalance. To ensure fairness, these terms must be revised to offer equal protection for both parties. While digital agreements in affiliate marketing are not specifically regulated, the existing regulations like the ITE Law⁶, UUPK⁷, PP PMSE⁸, and PP PSTE⁹ address digital trade. Additionally, POJK Number 42/POJK.04/2020¹⁰ relates to affiliate transactions but focuses on stock-related companies, not marketing. V. Aditiya *et al.* (2024) showed that influencers and affiliates significantly affect consumer purchasing, especially among the younger generation, emphasising the need for clear legal relationships to enhance consumer trust and sales.

Overall, the legal relationship in affiliate marketing practices on e-commerce platforms such as Shopee is complex and requires serious attention. The principle of balance, legal protection for consumers, and the implementation of effective marketing strategies are essential elements to fulfil a mutually beneficial and sustainable relationship.

Analysis of legal challenges in affiliate marketing.

The practice of agreements executed through restored domain websites simplifies proof that parties agreed to

electronic contracts. However, the absence of specific regulatory frameworks tailored to affiliate marketing introduces major challenges. Globalisation and rapid technological advancement demand that the legal system adapts to address emerging complexities, especially in digital economic activities like affiliate marketing.

One primary challenge lies in the virtual, borderless nature of digital transactions, which complicates issues such as legal jurisdiction, designated forum, and applicable law. Contracts in affiliate marketing often exhibit an imbalance in contractual freedom, favouring merchants. Affiliates, with limited bargaining power, face terms dictated unilaterally, reflecting a shift from mutual autonomy to unilateral dominance. Such practices contravene the principle of freedom of contract articulated in Article 1338 of the Civil Code¹¹, which underscores equality and voluntariness in contractual agreements. Although frameworks like PP PMSE¹² offer guidelines for electronic contracts, their generality and lack of specificity for affiliate marketing exacerbate legal uncertainty. The dualism between PP PMSE¹³ and the Civil Code further complicates matters, necessitating harmonisation to establish stronger legal certainty and equitable practices.

Affiliate marketing practices have challenges in determining legal jurisdiction, designated forum, and choice of applicable law. This is due to the characteristics of digital transactions which are virtual, limitless, and paperless, thus differing from conventional transactions. The agreement on legal clauses and forums has often been determined unilaterally in electronic contracts which can affect the validity of the agreement

¹ Civil Code of Indonesia. (1847, April). Retrieved from <https://www.refworld.org/legal/legislation/natlegbod/1847/en/77869>.

² Law of Indonesia No. 1 "On Second Amendment to Law Number 11 Year 2008 on Electronic Information and Transactions". (2024, January). Retrieved from <https://peraturan.bpk.go.id/Details/274494/uu-no-1-tahun-2024>.

³ *Ibidem*, 2024.

⁴ Civil Code of Indonesia. (1847, April). Retrieved from <https://www.refworld.org/legal/legislation/natlegbod/1847/en/77869>.

⁵ *Ibidem*, 1847.

⁶ Law of Indonesia No. 1 "On Second Amendment to Law Number 11 Year 2008 on Electronic Information and Transactions". (2024, January). Retrieved from <https://peraturan.bpk.go.id/Details/274494/uu-no-1-tahun-2024>.

⁷ Law of Indonesia No. 8 "On Consumer Protection". (2000, April). Retrieved from <https://peraturan.bpk.go.id/Details/45288/uu-no-8-tahun-1999>.

⁸ Government Regulation (PP) No. 80 "On Trading Through Electronic Systems". (2019, November). Retrieved from <https://peraturan.bpk.go.id/Details/126143/pp-no-80-tahun-2019>.

⁹ Government Regulation of Indonesia No. 71 "On Implementation of Electronic Systems and Transactions". (2019, October). Retrieved from <https://peraturan.bpk.go.id/Details/122030/pp-no-71-tahun-2019>.

¹⁰ Financial Services Authority Regulation of Indonesia No. 42/POJK.04/2020. (2020, July). Retrieved from <https://ojk.go.id/id/regulasi/Pages/Transaksi-Afiliasi-dan-Transaksi-Benturan-Kepentingan.aspx>.

¹¹ Civil Code of Indonesia. (1847, April). Retrieved from <https://www.refworld.org/legal/legislation/natlegbod/1847/en/77869>.

¹² Government Regulation (PP) No. 80 "On Trading Through Electronic Systems". (2019, November). Retrieved from <https://peraturan.bpk.go.id/Details/126143/pp-no-80-tahun-2019>.

¹³ *Ibidem*, 2019.

and the legal relationship of the parties. Contracts in electronic transactions often put consumers in a weak bargaining position. Consumers have limitations in negotiating the contents of the contract and understanding complex provisions so that their protection is reduced. This imbalance shifts the principle of freedom of contract from party autonomy which is identical to the principle of freedom of contract to unilateral autonomy, where the dominant power is entirely in the hands of business actors. According to M. Isnaeni (2016), the principle of freedom of opinion in an agreement is reflected in Article 1338 of the Civil Code¹ which gives freedom to the parties to enter into an agreement. This freedom includes five main aspects, namely the freedom to conclude or not to conclude a contract, the freedom to choose the party to be invited to the contract, the freedom to determine the form of the contract, the freedom to regulate the contents of the contract, and the freedom to choose the dispute resolution forum. Article 1338 of the Civil Code embodies the principle of freedom of contract, allowing parties the autonomy to decide whether to enter into a contract, select its contents and stipulations, and define the subject matter of the agreement. In contract law, this freedom has two sides, namely, positive which means the freedom to draft a contract according to the free will of the parties, and negative which means freedom from obligations that are not regulated in the agreed contract (Handriani & Mulyanto, 2021). Although not explicitly regulated in law, this principle is central in the contract law and greatly influences contractual relationships. Freedom of contract derives from classical economics and emphasises free competition, thus reflecting the exercise of free will (Hutabalian, 2021).

Electronic contracts can be classified as obligations with legal consequences, because if the business actor fails to perform their obligations, the aggrieved party is entitled to claim compensation. This electronic contract is included in an anonymous agreement since it is not regulated in the Civil Code of Indonesia². To ensure the certainty and validity of the contract, the agreement must meet the requirements for a valid agreement according to Article 1320 of the Civil Code (Hanifah & Koto, 2023). In addition to the Civil Code, Government Regulation Number 71 of 2019 concerning the Implementation of Electronic Systems and Transactions (PP PSTE)³ also regulates the valid requirements for agreements in the digital scope, namely agreement of the parties, implementation by competent legal subjects, the existence of certain objects, and prohibitions on violating regulations, morality, and public order. The provisions in the PP PSTE do not explicitly address lawful cause, an essential element to protect parties from potential

losses. Additionally, the valid requirements for agreements within the digital space are not clearly explained.

A standard agreement is a written contract that is created unilaterally by a dominant party. The terms, structure, and execution of the agreement are predetermined and standardised, making it applicable to many parties without considering their individual circumstances. The agreement is designed in such a way that the other party can either accept or reject it, without any room to negotiate or alter the terms (commonly referred to as “take it or leave it” contracts). According to A. Muhammad as quoted by A.Y. Lestari & E. Heriyani (2009), the key characteristics of a standard agreement include being written, either as an authentic deed or a private deed. A private deed is drafted by the parties involved without the presence of an authorised official but still holds legal validity. In contrast, an authentic deed is created in the presence of an authorised official and the involved parties, granting it full legal force and allowing it to be used as evidence in legal matters (Cowandy, 2021). However, electronic contracts are not included in any category of deeds because both private deeds and authentic deeds require direct meetings between the parties and are made manually, whereas electronic contracts are drawn up through digital media without any direct face-to-face meetings.

Legal relationship of the parties in affiliate marketing practices. In the practice of affiliate marketing in e-commerce such as Shopee, the legal relationship between the parties plays a crucial role. This relationship not only includes the contractual aspects between the product owner, affiliate, and e-commerce platform, but also involves legal protection for consumers and the responsibilities of each party. First, in the legal relationship between the product owner and the affiliate, the principle of balance is fundamental. D.A. Mochtar (2019) emphasised that the principle of balance in the agreement plays a significant role in maintaining the rights and obligations of each party. In affiliate marketing practices, affiliates act as intermediaries to promote products and are entitled to receive fair commissions on sales generated. However, the position of affiliates is often weak if the agreement does not allow for negotiation, analogous to the conditions in the agreement explained by D.A. Mochtar (2019). Therefore, a fair and transparent legal framework is needed from the e-commerce platform. Legal protection for consumers is also a prominent aspect. S. Jaang (2023) emphasised that it is the state’s obligation to guarantee legal certainty in every transaction. In affiliate marketing, consumer protection from potential fraud by irresponsible affiliates is crucial. Therefore, clear regulations are needed regarding the responsibilities of

¹ Civil Code of Indonesia. (1847, April). Retrieved from <https://www.refworld.org/legal/legislation/natlegbod/1847/en/77869>.

² Ibidem, 1847.

³ Government Regulation of Indonesia No. 71 “On Implementation of Electronic Systems and Transactions”. (2019, October). Retrieved from <https://peraturan.bpk.go.id/Details/122030/pp-no-71-tahun-2019>.

affiliates and product owners to prevent legal conflicts that can harm consumers. E.A. Virginila (2024) quoted R. Soeroso's opinion that a legal relationship is a relationship between two or more legal subjects who are interconnected by agreeing on their respective rights and obligations. Every legal relationship always has two main aspects that must be considered, namely the rights and obligations of each party.

According to Article 1 paragraph (1) letter d of Financial Services Authority Regulation Number 42/POJK.04/2020¹, affiliation refers to a relationship based on control between a company and another party. In affiliate marketing, affiliates are partners, not employees, aligning with Article 1 paragraph (13) of Law of Indonesia No. 20 of 2008², which emphasises cooperation based on mutual need and trust. This is also reflected in Article 1 paragraph (6) of Law Number 7 of 2014 concerning Trade³, which includes promotional activities by affiliates for online marketplaces. The legal relationship between the marketplace and the affiliate is formalised through standard agreements. While these agreements allow companies to streamline operations, affiliates often find them less favourable as they are forced to accept pre-determined terms or reject participation entirely (Wijayanti, 2021). Affiliate is not categorised as a marketplace employee or business operator but rather an individual who facilitates product promotion within the marketplace and earns a commission based on their performance (Rachmat, 2024). This legal relationship between the marketplace and the affiliate can be understood as a partnership established through a standard cooperation agreement drafted by the marketplace and accepted by the affiliate

Effects of legal imbalance. Uncertainty in electronic contracts erodes trust among parties, increases the potential for disputes, and undermines consumer protection. Affiliates, for instance, may encounter challenges in claiming commissions due to vague terms. Consumers, analogously, face risks such as misleading promotions without clear avenues for recourse. This imbalance disproportionately benefits merchants and contradicts Gustav Radbruch's theory of legal ideals, which stresses justice, benefit, and certainty as pillars of a functional legal system. The inequities in standardised contracts, particularly in affiliate marketing, highlight the urgent need for interventions to balance the rights and obligations of all parties. Such contracts often impose unfair terms on affiliates and consumers, undermining the principle of fairness central to the doctrine of freedom of contract.

In the classical doctrine of French contract law, freedom of contract is based on the free will of the parties, where they have the autonomy to determine their own law, and their contractual obligations derive from their agreement. This doctrine emphasises individual freedom to make contracts, including anonymous contracts, provided they do not conflict with public order (Putri Nabila & Djayaputra, 2023). The application of the principle of freedom of contract as stipulated in Article 1338 paragraph (1) of the Civil Code of Indonesia⁴ must be linked to other provisions, such as Article 1320 of the Civil Code of Indonesia⁵ which requires "agreement of the parties" as a condition for the validity of an agreement. Without the agreement of one of the parties, the agreement is considered invalid and can be cancelled. In addition, agreement cannot be obtained through coercion, because coercion is contrary to the principle of freedom of contract. The *pacta sunt servanda* principle provides binding force to an agreement equal to the Law and provides legal protection against third party intervention. However, in practice, this principle can cause inequality if applied without considering the balance of rights and obligations of the parties, especially for the weaker party (Haris et al., 2024).

The effects of uncertainty in electronic contracts include reduced trust of the parties in the validity of the agreement, which can cause legal disputes if one party feels disadvantaged; the emergence of breach of contract, such as the failure of the product owner to pay commission to the affiliate, which can complicate the legal process due to the unclear terms and conditions of the contract; tension between the parties due to the lack of clarity of rights and obligations, which disrupts the cooperative relationship; risks to consumer protection, where irresponsible affiliate promotions can harm consumers without clear complaint channels, complicating legal efforts (Krisna, 2021). In the relationship between consumers and business actors, consumer contracts often place consumers in a weaker bargaining position. This imbalance is caused by standardised model contracts, where business actors have clauses prepared in advance (Hutagalung et al., 2021). As a result, consumers cannot negotiate because the contract was drafted electronically, limiting their ability to influence the content of the agreement, including in terms of choice of law. In such contracts, the freedom to make contracts and give consent is limited, unlike agreements that involve direct negotiation between the parties (Hanifah & Koto, 2023). Analogously, in the relationship between affiliates and merchants, the use of standard contracts

¹ Financial Services Authority Regulation No. 42/POJK.04/2020. (2020, July). Retrieved from <https://ojk.go.id/id/regulasi/Pages/Transaksi-Afiliasi-dan-Transaksi-Benturan-Kepentingan.aspx>.

² Law of Indonesia No. 20 "On Micro, Small and Medium Enterprises". (2008, July). Retrieved from <https://peraturan.bpk.go.id/Details/39653/uu-no-20-tahun-2008>.

³ Law of Indonesia No. 7 "On Trade". (2014, March). Retrieved from <https://peraturan.bpk.go.id/Details/38584/uu-no-7-tahun-2014>.

⁴ Civil Code of Indonesia. (1847, April). Retrieved from <https://www.refworld.org/legal/legislation/natlegbod/1847/en/77869>.

⁵ Ibidem, 1847.

prepared by merchants often limits the space for affiliates to negotiate the terms of the agreement, including regarding commissions, rights, and obligations. As a result, these contracts are “take it or leave it”. Thus, this relationship also experiences an imbalance analogous to consumer contracts.

An unbalanced contractual relationship gives rise to implications of injustice for one of the parties, because an imbalance in position can cause a gap in rights and obligations (Nasaruddin & Erwin, 2023). The dominance of one party prevents the other party from being in an advantageous position. The aspect of justice in freedom of contract develops along with the regulation of contractual relations guaranteed by law, which is the basis for the agreement of the parties (Marlinah, 2021). This principle, which reflects the supremacy of law, is recognised by all countries, including Indonesia, as stated in Article 1338 paragraph (1) of the Civil Code¹, which states that a valid agreement applies as law for the parties who make it (Moh & Hernoko, 2019). In the partnership cooperation agreement for this affiliate marketing program, the agreement will remain binding and cannot be unilaterally cancelled if no party submits a claim regarding disagreement with the content of the agreement made in a standard manner or if there is no incompetence of an affiliate who has not met the requirements of adulthood (Wijayanti, 2021).

Uncertainty in electronic contracts in affiliate marketing practices can pose serious challenges in the legal relationship between the parties. To reduce the risk, a clear and comprehensive agreement is needed, as well as a thorough understanding of each party’s rights and obligations. It is important to establish stronger regulations and clear legal protections to safeguard all parties and ensure the efficient functioning of business relationships.

Conclusions

Based on the findings of the present study on the validity of digital agreements and the legal relationship of the parties in affiliate marketing practices in e-commerce, the validity of digital agreements and their effects on the legal relationship of the parties in affiliate marketing practices in e-commerce still require more attention. Although technological developments have driven rapid growth in digital marketing, especially affiliate marketing, there is still a legal vacuum that regulates digital agreements in this context. The validity of digital agreements in affiliate marketing practices is crucial to ensure legal certainty for all parties involved, namely companies, affiliates, and consumers. A valid digital agreement will strengthen the legal relationship between the parties and reduce the potential for disputes in the future. However, challenges related to the validity and implementation of digital agreements according to the principles of positive Indonesian law still need to be overcome. By implementing clear and structured

legal regulations, the aim is to establish legal certainty that safeguards all parties involved in affiliate marketing practices, and to enhance the integrity of the digital market in Indonesia.

Affiliate marketing programme is a form of partnership in marketing based on a digital agreement between affiliates and e-commerce platforms. Although there are no specific regulations that regulate this programme in detail, several existing regulations, such as the ITE Law, UUPK, PP PMSE, and PP PSTE, provide a legal basis for digital transactions and electronic commerce. Although POJK Number 42/POJK.04/2020 regulates affiliate transactions in other sectors, the regulation does not specifically discuss affiliates in the context of marketing. In practice, the legal relationship between affiliates and e-commerce is formed through a digital agreement that regulates the rights and obligations of both parties. This agreement is binding and provides legal certainty provided that it meets the legal requirements according to legislation, as regulated in the Civil Code. With a clear agreement, especially in terms of commission payments, the position of the affiliate as a marketing partner is recognised, not as an employee or business actor.

While there are imbalances in some of the terms of the agreement that favour e-commerce platforms, improvements to the agreement are needed to achieve better balance and protection for affiliates. On the other hand, the significant influence that affiliates have in influencing consumer purchasing decisions, especially among the younger generation, suggests that clear and transparent legal relationships can increase consumer trust, which contributes to increased sales and customer satisfaction. Thus, although the regulations regarding affiliate marketing are not yet completely clear, the implementation of a valid digital agreement can provide a strong basis for legal protection, especially in regulating the rights and obligations between affiliates and e-commerce platforms.

Further research could focus on conducting comparative studies of international legal frameworks in affiliate marketing to analyse how different jurisdictions regulate electronic contracts, particularly in terms of their effects on the clarity of rights and obligations for affiliates, merchants, and consumers. This would offer valuable insights into how various legal structures address the challenges of transparency, accountability, and consumer protection in the digital marketing landscape, and could help in formulating more effective regulatory approaches for Indonesia.

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Conflict of Interest

None.

¹ Civil Code of Indonesia. (1847, April). Retrieved from <https://www.refworld.org/legal/legislation/natlegbod/1847/en/77869>.

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Анотація

Розвиток цифрових технологій зумовив розширення партнерського маркетингу як визначальної маркетингової стратегії в екосистемі електронної комерції. Однак дійсність цифрових угод, які слугують основою правовідносин між сторонами в цій практиці, постає перед проблемою правової невизначеності. Метою цього дослідження був аналіз дійсності цифрових угод у партнерському маркетингу з позицій позитивного права Індонезії та їхнього впливу на правовідносини між залученими сторонами – продавцями й афілійованими особами. На підставі нормативно-правового підходу в цьому дослідженні проаналізовано відповідні нормативно-правові акти, такі як Закон Індонезії «Про електронну інформацію та транзакції» та Цивільний кодекс Індонезії, а також оцінено наявні правові прогалини в контексті партнерського маркетингу. Дослідження засвідчило, що, попри те, що цифрові угоди юридично визнані, такі ключові елементи, як механізми комісійної винагороди, права й обов'язки сторін, а також використання електронних підписів, часто недостатньо врегульовані, що призводить до правової невизначеності. Ця невизначеність впливає на правовідносини між сторонами, провокуючи ризик зловживання контрактом, дисбаланс правових позицій між продавцем та афілійованими особами, а також потенційні конфлікти, які можуть перешкоджати довірі в екосистемі цифрового маркетингу. Обґрунтовано необхідність детальнішого та конкретнішого правового регулювання для забезпечення дійсності цифрових угод у партнерському маркетингу, забезпечення правової визначеності та встановлення справедливих і стійких правовідносин для всіх залучених сторін

Ключові слова:

дійсність цифрових угод; правовідносини; правова невизначеність; електронна комерція; дисбаланс правових позицій