

# LEGAL ISSUES IN THE IMPLEMENTATION OF CREDIT RELAXATION POLICY IN THE BANKING SECTOR AS A COUNTER CYCLICAL IMPACT ON THE COVID-19 PANDEMIC

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## Abstract

*The spread of coronavirus disease 2019 (Covid-19) has a direct or indirect impact on the financial capacity of debtors, including micro, small, and medium business debtors. This condition may disrupt banking performance, which can affect economic growth. Therefore, to encourage the optimization of the banking intermediation function, maintain financial system stability, and support economic growth, economic stimulus policies are needed as a countercyclical impact on the spread of Covid-19. OJK has issued several regulations to stimulate the banking sector. On 16 March 2020, the OJK issued OJK Regulation No.11/POJK.03/2020 concerning National Economic Stimulus as a Countercyclical Policy Impact of the Spread of Coronavirus Disease 2019 (POJK No.11/POJK.03/2020). There are some weaknesses with credit relaxation regulated in POJK No.11/POJK.03/2020. The legal question in this research is: What are appropriate legal solutions to overcome the weakness of credit relaxation regulated by POJK No.11/POJK.03/2020? This legal research employs a juridical normative method with secondary data. The secondary data consists of the applicable regulation, books, articles, and other sources. To solve the above-mentioned problems, the OJK might consider improving POJK No.11/POJK.03/2020 by providing further guidelines on the criteria of affected debtors and business sectors, and providing further guidelines on the implementation of the credit relaxation. Besides that, the OJKS needs to increase its supervisory role in monitoring the granting process of the credit relaxation and settle objections from debtors if their relaxation application is refused by the bank.*

**Keywords:** banking, covid-19, credit agreement, credit relaxation, force majeure.

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## INTRODUCTION

Coronavirus disease 2019 (Covid-19) spread has affected the financial capability of debtors, especially micro, small, and medium ones. According to the Central Bureau of Statistics (Badan Pusat Statistik - BPS), 8 of 10 companies have had financial difficulties during the Covid-19 pandemic.<sup>1</sup> A lot of companies have become unable to meet their banking obligations. This condition has disturbed banking performance, which could affect economic growth.

<sup>1</sup>Badan Pusat Statistik, "Analisis Hasil Survei Dampak Covid-19 terhadap Pelaku Usaha" <https://www.bps.go.id/publication/2020/09/15/9efe2fbda7d674c09ffd0978/analisis-hasil-survei-dampak-covid-19-terhadap-pelaku-usaha.html>, accessed on date 10 September 2020, at 3 pm.

An extraordinary effort is compulsory to handle the problems. As a countercyclical impact on the spread of Covid-19, we need an economic stimulus policy to strengthen the banking intermediation function. However, the implementation of the stimulus needs to consider prudential principles.<sup>2</sup>

On 16 March 2020, the Financial Services Authority (Otoritas Jasa Keuangan - OJK) issued OJK Regulation No.11/POJK.03/2020 concerning National Economic Stimulus as a Countercyclical Policy Impact of the Spread of Coronavirus Disease 2019 (POJK No.11/POJK.03/2020). This POJK applies to Conventional Commercial Bank (*Bank Umum Konvensional*), Sharia Commercial Bank (*Bank Umum Syariah*), Sharia Commercial Unit (*Unit Usaha Syariah*), Commercial Rural Bank (*Bank Perkreditan Rakyat*), and Sharia Rural Bank (*Bank Perkreditan Rakyat Syariah*).<sup>3</sup> This POJK aims to relax banking regulation. OJK could then mitigate the liquidity risk of banking financial institutions. We could more maintain financial stability amidst the economic downturn caused by the Covid-19 pandemic. Hopefully, the handling of Covid-19 could immediately realize the activities of “new normal”.

## 1. PROBLEMS

Understand that POJK No.11/POJK.03/2020 has been issued as a part of the effort to maintain financial sector stability amidst the economic downturn, however, there are some weaknesses about credit relaxation regulated therein. This research aims to figure out appropriate legal solutions to overcome the weaknesses of credit relaxation regulated by POJK No.11/POJK.03/2020.

## 2. RESEARCH METHOD

This research uses a normative juridical method. The Annex to Law Number 12 of 2011 concerning Legislation Making provides that a normative juridical method is a research method employed to examine legal norms. Undertaking the normative juridical method means analyzing legal norms.<sup>4</sup>

This normative legal research employs secondary data.<sup>5</sup> The secondary data employed consists of primary legal materials<sup>6</sup> and secondary legal materials.<sup>7</sup> The primary legal materials employed consist of Act No.7 of 1992 concerning Banking as amended by Act No.10 of 1998, Act No. 21 of 2008 concerning Sharia Banking Law, and OJK Regulation No.11/POJK.03/2020 concerning National Economic Stimulus as a Countercyclical Policy Impact of the Spread of Coronavirus Disease 2019. Secondary legal materials used consist of research results, books, literature, scientific articles, and journals.

The data collection had been carried out through document studies. The purpose of conducting a document study is to find a variety of appropriate and relevant secondary data available. The usage of document studies was to gather literature that may provide the required information.<sup>8</sup>

<sup>2</sup>The prudential principle requires Banks to do an analysis before granting credit or finance to debtor. Banks' obligations in relation with the prudential principle are stipulated in Article 8 and the Elucidation of Article 8 of the Law No. 7 of 1992 concerning Banking as amended by Law No. 10 of 1998. For sharia Banks, the prudential principles are regulated in Article 23 Paragraph (2) and the Elucidation of Article 23 Paragraph (2) of the Law No. 21 of 2008 regarding Sharia Banking Law.

<sup>3</sup>As stipulated in Article 1 number 1 of the Law No.21 concerning POJK, Bank refers to Conventional Commercial Bank, Sharia Commercial Bank, Sharia Commercial Unit, Conventional Rural Bank, and Sharia Rural Bank, which do business activities in a conventional manner or in accordance with sharia principles. See: Indonesia, POJK No. 11 /Pojk.03/2020 concerning National Economic Stimulus as a Countercyclical Policy Impact of the Spread of Coronavirus Disease 2019, State Gazette No. 76 of 20206.

<sup>4</sup> Indonesia, Law Number 12 of 2011 concerning Legislation Making, Appendix I, Chapter I Introduction, Part D (Method).

<sup>5</sup> Secondary data have been available and ready to use. Thus, the chosen data remain indirectly from the community. Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, (Jakarta: Raja Grafindo Persada, 2014) p. 24.

<sup>6</sup> Primary legal materials are legal materials that have the power to bind society. Soerjono Soekanto, *Pengantar Penelitian Hukum*, p.52.

<sup>7</sup> Secondary legal materials are legal materials that can provide explanation for primary legal materials. Soerjono Soekanto, *Pengantar Penelitian Hukum*, p. 52.

<sup>8</sup> Kenneth D. Balley, *Methods of Social Research*, (London: The Free Press, 1982), pp.302-304.

This research adopts a qualitative approach as a data analysis method. Secondary data were analyzed qualitatively to highlight the depth of data. Furthermore, this research-based paper is aimed at understanding the crucial issues more comprehensively.<sup>9</sup>

### 3. DISCUSSION

#### A. Credit Agreement and POJK No.11/POJK.03/2020 in Brief

Article 1 number 11 of Law No. 7 of 1992 concerning Banking as Amended by Law No. 10 of 1998 defines credit as a provision of money or equivalent claim to money based on a loan agreement between a Bank and another party, obligating the borrowing party to repay his debt after a certain period with interest.<sup>10</sup> From the definition, it can be concluded that the provision of money made by the bank and the obligation of the borrowing parties to repay his debt must be conducted based on a loan agreement. In sharia banks, the financing provided by sharia banks must also be based on an Akad.<sup>11</sup> Article 1 number 13 of Sharia Banking Law defines akad as a written covenant between a Sharia Bank or Sharia Business Unit and other parties containing the respective rights and obligations of the respective parties according to the Sharia Principle. Therefore, the base of credit or financing is a valid loan agreement or akad.

A valid loan agreement must satisfy the conditions of a valid agreement. To be valid, an agreement must satisfy the conditions stipulated in article 1320 of the Indonesian Civil Code (*Burgerlijk Wetboek*), as follows: (1) there must be the consent of the legal subjects who are bound thereby,<sup>12</sup> (2) there must be the capacity to conclude an agreement,<sup>13</sup> (3) there must be a specific subject,<sup>14</sup> and (4) there must be an admissible cause.<sup>15</sup> A valid (*sahih*) akad is an akad that satisfies its principium and requirements. The law of *sahih* akad is the enforceability of all legal consequences raised by the concerning akad and its binding to the involved parties.<sup>16</sup> Even though the Indonesian Civil Code does not require an agreement to be written, the Banking Law requires a loan agreement and akad to be in writing.<sup>17</sup>

In principle, when a bank provides credit to a debtor, the bank gives confidence to the debtor that the debtor could use the funds and return them to the bank according to the terms and conditions agreed in the underlying agreement.<sup>18</sup> A similar applies to the financing provided by sharia bank. Credit provision by conventional banks contains trust, grace period,

<sup>9</sup> Winarno Surakhmad, *Pengantar Penelitian Ilmiah: Dasar, Metode, dan Teknik* (Bandung: Tarsito, 1994), p. 17.

<sup>10</sup> Article 1 number 11 of Law No. 7 of 1992 concerning Banking as Amended by Law No. 10 of 1998, State Gazette No. 182 of 1998, Supplement No. 3790.

<sup>11</sup> See Article 19 and 21 of the Sharia Banking Law.

<sup>12</sup> The parties must be free to bind themselves, which means free from mistakes, coercion, and fraud. The consent could be expressed explicitly or tacitly. Thus, the agreement becomes invalid if the agreement occurs due to mistakes, coercion, or fraud. See also article 1321 of the Indonesian Civil Code.

<sup>13</sup> Each individual shall be authorized to conclude agreements, unless he has been declared incompetent by law. The following individuals shall be incompetent to conclude agreements: minors and individuals under guardianship (see Article 1329 and 1330 of the Indonesian Civil Code). In the matter of legal entity, only the authorized person according to the Article of Association and related law and regulations is competent to represent the concerning legal entity.

<sup>14</sup> This relates to both parties' rights and obligations, and the object of the agreement (at least, the type of goods referred to in the agreement are determined). According to Article 1333 of the Indonesian Civil Code, the object of the agreement must include certain principal items of which at least the type can be determined. Article 1332 of the Indonesian Civil Code determines that the object of the agreement shall be goods that can be traded.

<sup>15</sup> This relates to the contents of the agreement itself, which must not be contrary to law, decency, or public order. See Article 1337 of the Indonesian Civil Code.

<sup>16</sup> Fathurrahman Djamil, *Penerapan Hukum Perjanjian Dalam Transaksi di Lembaga Keuangan Syariah*, (Jakarta: grafika: 2013), p. 43 in Dahrul Muftadin, "Dasar-Dasar Hukum Perjanjian Syariah dan Penerapannya dalam Transaksi Syariah," *Jurnal Al-Adl*, Vol. 11 No. 1, January 2018, p. 103.

<sup>17</sup> The Elucidation of Article 8 Paragraph (2) of the Banking Law.

<sup>18</sup> Hermansyah, *Hukum Perbankan Nasional Indonesia*, 2nd Printing, (Jakarta: Kencana, 2005), pg. 57.

risk, and performance elements.<sup>19</sup> However, in the financing provided by sharia bank, the grace period element is not applicable.<sup>20</sup>

In providing credit, banks must be guided by the Bank Credit Policy (*Kebijakan Perkreditan Bank*).<sup>21</sup> The Bank Credit Policy is prepared by each bank and must be adhered to in a consequent and consistent manner.<sup>22</sup> The implementation of the prudential principle in credit provision and financing is related to the implementation of the 5C principle, which is an assessment of the character, capacity, capital, collateral, and condition of the economy of the debtor.<sup>23</sup> This is an attempt to protect the bank from credit risk in case the debtor becomes unable to pay off his debts or the occurrence of a non-performing loan (NPL).

Banks, both the conventional bank and sharia bank, are required to enforce prudential principles in conducting their business, including to apply it in credit and financing. Providing credit or finance intensively without considering business feasibility resulted in an increasing ratio of non-performing loans (NPL) in the banking industry and disrupt bank performance.<sup>24</sup> As to the fact, the problems that happened in the banking industry might bring a negative effect on the economy. It is feared that a snowball effect will arise, where the collapse of a bank can cause the collapse of the other bank and companies that have business relations with the collapse.<sup>25</sup>

The prudential principle has been conducted as an effort to avoid credit risk in the future. Nevertheless, many debtors experienced difficulties in making payments. In such an event, it is allowed to conduct restructuring toward the credit. Credit restructuring has been performed since before the

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<sup>19</sup> "Trust" means the performance conducted by a bank as a creditor (whether in the form of money, goods and/or services) and will actually be received back by the bank within a certain period of time in the future according to the terms and conditions agreed in the credit agreement. "Grace period" means the period between the time bank provides credit to the debtor and the time of its repayment. "Risk" means the risks that would be faced by the bank as a result of the grace period. "Performance" means credit object, which could be in the form of money, goods and/or other services. See Thomas Suyatno, et al, *Dasar-Dasar Perkreditan*, (Jakarta: Gramedia, 1990), pg. 14.

<sup>20</sup> The grace period element is not applicable since it relates to *riba*, which is prohibited in the sharia principles. See the Elucidation of the Article 2 of the Sharia Banking Law

<sup>21</sup> Indonesia, POJK No. 42 /POJK.03/2017 concerning Responsibilities of Forming and Implementing Bank's Credit or Financing Policies for Commercial Banks, State Gazette No. 148 of 2017, Supplement No. 6091.

<sup>22</sup> KPB must contain prudential principle in credit provision, credit organization and management, credit approval policies, credit documentation and administration, credit supervision, and problematic credit settlement. See: *Ibid.*, Article 3 and 4.

<sup>23</sup> The "character" principle means creditors are required to analyze the character and characteristics of the debtor in order to figure out the honesty, integrity and tenacity of the debtor in running his business, to generate income to pay off the debts to creditors. The "capacity" principle means creditors are required to analyze the form, type and prospects of the debtor's business to predict the wellness and income level of the debtor's business in relation with debtor's capability to pay off his debts to the creditor. The "capital" principle means creditors are required to analyze the debtor's business capital to determine how its distribution and usage through analysis on the capital structure in the Articles of Association and the debtor's balance sheet. The "collateral" principle is related to guarantees or collateral (goods) mortgaged by the debtor in order to ensure his capability to pay off the debt. The "condition of economy" principle means the creditor must analyze the financial condition and business sector of the debtor to figure out the risks that might arise in the debtor's business sector so that the creditor can take preventive steps to mitigate and/or minimize those risks. See: Hermansyah, *Op. Cit.*, pg. 65.

<sup>24</sup> Banking industry is considered as an industry that requires special attention since it could be influenced by external factors easily and is included in the payment system. See Muliaman D Hadad, Wimboh Santoso, dan Bambang Arianto. "Indikator Awal Krisis Perbankan." Jakarta: Bank Indonesia, 2003, p. 4 and 14.

<sup>25</sup> George F. Kaufman, "Preventing Banking Crises in the Future: Lessons from past mistakes", *The Independent Review*, v.II, n.1. Summer 1997, p.55. 5 in Muliaman D Hadad, *Ibid.*, p. 4 This also could be seen from the past Indonesian banking crisis experience, that increment in private consumption accompanied by decrement in investment and GDP could be interpreted as decrement in the capability in producing goods and services. This in turn will affect the companies' capability to earn income from their business, which supposed to be used to pay off their bank loan. Providing loan intensively without considering the business feasibility of the debtor causes increment in NPL ratio. Decrement in GDP and increment in NPLs ratio reflect a decline in Indonesian economy fundamental indicators. As a result, many foreign investors will withdraw their invested funds. If this happens on a large scale in a short time, it will cause tremendous pressure on the domestic currency, causing a sharp depreciation in the Rupiah exchange rate. As a further impact, the depreciation causes a decrement in the repayment capacity of the companies and banks that had quite high foreign currency liabilities. See: *Ibid.*, p. 14-15.

Covid-19 pandemic.<sup>26</sup> Since January 2020, restructuring is regulated in POJK No. 40/POJK.03/2019 concerning Assessment of Commercial Bank Asset Quality.<sup>27</sup> According to Article 1 number 25 of the concerning POJK, credit restructuring is an effort to improve credit activities for debtors who have the potential to experience difficulties in fulfilling their obligations. These efforts could be conducted by lowering credit interest rates, extending the credit period, reducing arrears in-credit interest, reducing arrears on loan principal, adding credit facilities, and/or converting credit into credit conversion.<sup>28</sup> To apply for a credit restructuring from a bank, the debtor must meet the following requirements:

1. The debtor is experiencing difficulties in paying loan principal and/or interest;
2. The debtor has good business prospects and is considered capable of meeting obligations after the credit is restructured.

During the Covid-19 pandemic, the amount of the debtors who are experiencing difficulties increases,<sup>29</sup> without certainty whether the debtor's financial condition could immediately recover after the pandemic ended or not. Due to this situation, many parties have claimed the Covid-19 pandemic as a force majeure to avoid breaches of contract.<sup>30</sup> In line with it, the Government has declared the Covid-19 pandemic as a national disaster<sup>31</sup> and the Directorate General of Tax of the Ministry of Finance has declared this pandemic as a force majeure.<sup>32</sup> However, the OJK firmly stated that the declaration of the Covid-19 pandemic as a national disaster cannot be the basis of force majeure. All creditor financing agreements are still valid and must continue as usual without any exceptions.<sup>33</sup>

In general, force majeure is defined as an event or effect that can be neither anticipated nor controlled. In contracts, it is common to make neither party liable to breach of a contract due to a

<sup>26</sup>Before Covid-19 pandemic, credit restructuring is conducted by making an agreement (between the debtors and the creditor) or taking litigation procedures, as regulated in Law No. 37 of 2004 concerning Bankruptcy and PKPU. If the debtor chooses to make an agreement with the creditor(s), a negotiation process to determine the credit restructuring model is required. However, if the debtor is difficult to conduct a negotiation since there are many parties and creditors involved, then the debtor shall choose the litigation process as regulated in Law No. 37 of 2004. Also see Fadhila Shaffa Luthfie and Irvan Zaldya, "Implementasi POJK No. 11/POJK.03/2020 Terhadap Restrukturisasi Utang sebagai Solusi Menyelamatkan Perusahaan dari Ancaman Kepailitan di Masa Pandemi", KlikLegal.com, Desember 18, 2020, accessed on November 5, 2020 from <https://kliklegal.com/implementasi-pojk-no-11-pojk-03-2020-terhadap-restrukturisasi-utang-sebagai-solusi-menyelamatkan-perusahaan-dari-ancaman-kepailitan-di-masa-pandemi/>

<sup>27</sup>Indonesia, POJK No. 40/POJK.03/2019 concerning Assessment of Commercial Bank Asset Quality, State Gazette No. 247 of 2019, Supplement No. 6440.

<sup>28</sup>Also see OJK. "Apa yang Dimaksud dengan Restrukturisasi Kredit?". Accessed on November 6, 2020 from <https://sikapiuangmu.ojk.go.id/FrontEnd/CMS/Article/321>

<sup>29</sup>This is boldly shown by BPS survey in year 2020, that 69.02% of MSEs stated the most needed during the Covid-19 pandemic is business capital assistance and 29.98% of MSEs stated the most needed is relaxation/delay in loan payments. Moreover, 35.07% of medium large enterprises stated the most needed during the Covid-19 pandemic is business capital assistance and 40.32% of medium large enterprises stated the most needed during the Covid-19 pandemic is relaxation/delay in loan payments. See Badan Pusat Statistik, *Op. Cit.*, pg. 21-22.

<sup>30</sup> This opinion is conveyed by Indonesian lawyers, notary, and academician, namely Rahayu Ningsih Hoed, Irma Devita, Ricardo Simanjuntak. See: Putra P. M. Siregar and Ajeng Hanifa Zahra, "Bencana Nasional Penyebaran COVID-19 sebagai Alasan Force Majeure, Apakah Bisa?", DJKN Article, April 15, 2020, accessed on November 19, 2020 from <https://www.djkn.kemenkeu.go.id/artikel/baca/13037/Bencana-Nasional-Penyebaran-COVID-19-sebagai-Alasan-Force-Majeure-Apakah-Bisa.html>; and Irma Devita, "Mengetahui Akibat dan Risiko Perjanjian Force Majeur," June 17, 2020, accessed on November 19, 2020 from <https://irmadevita.com/2020/mengetahui-akibat-dan-risiko-perjanjian-force-majeure/>

<sup>31</sup>Indonesia, President of the Republic of Indonesia Decree No. 12 of 2020 on the Declaration of a Non-Natural Disaster from the Spread of Corona Virus Disease 2019 as a National Disaster.

<sup>32</sup>Indonesia, Ministry of Finance, Director General of Tax Decree No. KEP-156/PJ/2020 concerning Taxation Policy Related to the Spread of Coronavirus Disease 2019.

<sup>33</sup>This statement conveyed by Wimboh Santoso, chairman of the Board of Commissioners of the OJK. See: Maria Yuliana Benyamin, "Corona Jadi Bencana Nasional, Ini Imbauan OJK Soal Kredit dan Polis Asuransi," Bisnis.com, April 17, 2020, accessed on November 19, 2020 from <https://finansial.bisnis.com/read/20200417/90/1228529/corona-jadi-bencana-nasional-ini-imbauan-ojk-soal-kredit-dan-polis-asuransi>

significantly detrimental condition caused by such an act occurring.<sup>34</sup> In Indonesia, force majeure is divided into absolute force majeure and relative force majeure.<sup>35</sup> The difference between absolute and relative force majeure is in the level of impossibility. If no longer possibility might occur and it (impossibility) applies to anyone in such conditions, then it is defined as an absolute force majeure. If there is still a possibility, even at great sacrifice/cost, then it is defined as a relative force majeure. In relative force majeure, it is possible to ask the debtor to fulfill his obligations when the constraints disappear or subside. However, in such conditions, the creditor is not allowed to propose reimbursement of fees, losses, and interest.<sup>36</sup> The matter of force majeure has been regulated in Article 1244 and 1245 of the Indonesian Civil Code. It prevents the debtor from bearing the consequences and risks because of his incapability to fulfill his obligation in the agreement. In such a situation, the parties may choose to terminate the agreement, postpone the implementation of the debtor's obligations, or renegotiate.<sup>37</sup>

To help debtors who are experiencing financial stress, the government through OJK has issued POJK No.11/POJK.03/2020. This policy is conducted by relaxing provisions in the banking sector to provide more room for liquidity and banking capital so that the financial sector stability could be maintained amidst the economic downturn. Through the implementation of this credit relaxation policy, the OJK hopes that debtors can settle their credit obligations and prevent massive non-performing loans (NPLs).<sup>38</sup> The following are the principles concerning POJK No.11/POJK.03/2020:

1. The POJK applies to Conventional Bank, Sharia Bank, Sharia Commercial Unit, Rural Bank, and Sharia Rural Bank;
2. Bank can implement the policy that supports the stimulus of economic growth for debtors affected by the spread of Covid-19, including Micro Small Medium Enterprises (MSMEs), with due regard to the prudential principle;
3. The affected debtors are included in the MSMEs that experiencing difficulties to fulfill their obligation to the bank because the debtors or their businesses are directly or indirectly affected by the spread of Covid-19 pandemic; in the following economic sector: tourism, transportation, hospitality, trade, processing, agriculture, and mining.
4. The stimulus policy consists of:
  - (a) The assessment of the quality of credit/financing/guarantee is solely based on the accuracy of the payments of principal and/or interest for credit/financing/other funds provision with a ceiling of up to IDR 10 billion; and
  - (b) Improve the credit/financing quality becomes smooth after the restructuring is conducted during the validity period of the POJK. Restructuring provisions could be applied by the bank regardless of credit/financing ceiling limits or the type of debtor.
5. Restructuring shall be conducted by the OJK regulation regarding asset quality assessment and could be implemented in the following manners:
  - (a) Lowering credit interest rates;
  - (b) Extending the credit period;
  - (c) Reducing arrears in credit interest;
  - (d) Reducing arrears on loan principal;
  - (e) Adding credit/financing facility; and/or

<sup>34</sup>TheLaw.com Dictionary. "Force Majeure." Accessed on November 19, 2020 from <https://dictionary.thelaw.com/force-majeure/>

<sup>35</sup>Subekti, *Pokok-Pokok Hukum Perdata*. (Jakarta: PT Intermasa, 2002), p. 150.

<sup>36</sup>Mariam Darus Badruzaman, *KUH Perdata Buku III: Hukum Perikatan dengan Penjelasan*, (Bandung: Alumni, 1996), p. 37

<sup>37</sup>Irma Devita, "Mengetahui Akibat dan Risiko Perjanjian Force Majeur," June 17, 2020, accessed on November 19, 2020 from <https://irmadevita.com/2020/mengetahui-akibat-dan-risiko-perjanjian-force-majeure/>

<sup>38</sup>During the Covid-19 pandemic, settlement of non-performing loans and bad finance are prioritized through restructuring mechanism. See: CNN Indonesia. "PKPU Didorong Utamakan Restrukturisasi Ketimbang Kepailitan." October 18, 2020. Accessed on November 19, 2020 from <https://www.cnnindonesia.com/ekonomi/20201018171951-78-559808/pkpu-didorong-utamakan-restrukturisasi-ketimbang-kepailitan>



(f) Creditconversion.

6. Bank could grant new credit/financing/guarantee facility to the debtor that previously has accepted special treatment according to this POJK provided that the quality settlement of such credit/financing/funding facility is conducted separately from the previous facility.
7. Bank shall submit a periodical report regarding the implementation of this POJK for supervisor monitoring of the data positioned since the end of April 2020.
8. The POJK applies to 31 March 2021.

To obtain credit relaxation, affected debtors must apply to the bank. If the application is approved, the restructuring scheme will be determined according to the assessment of the debtor's capability and mutual consent between the bank and the debtor.

## **B. Legal Issues on the Implementation of POJK No.11/POJK.03/2020**

POJK No.11/POJK.03/2020 has been issued as a credit relaxation policy and aimed to assist debtors who are experiencing financial stress. Through the implementation of this, the OJK hopes that debtors can settle their credit obligations and prevent massive non-performing loans (NPLs). However, there are several legal issues with the implementation of POJK No.11/POJK.03/2020, as follows: (1) the sectors affected by the Covid-19 pandemic are broader than only tourism, hospitality, trade, processing, agriculture, mining, and transportation sectors; (2) no further guidelines for the bank in conducting self-assessment regarding the criteria for eligible debtors; (3) no further guidelines from the OJK in determining how the restructuring shall be executed; (4) no further mechanism if the bank rejects debtor's application of credit relaxation.

### **B.1. The sectors affected by the Covid-19 pandemic are broader than tourism, hospitality, trade, processing, agriculture, mining, and transportation sectors**

Business sectors other than tourism, hospitality, trade, processing, agriculture, mining, and transportation are also experiencing financial difficulties as the effect of the Covid-19 pandemic.<sup>39</sup> This could be probably happened due to the existence of linkages between business sectors, both forward linkage and backward linkage. In brief, the forward linkage is related to the spreadability of a business sector towards other business sectors, and backward linkage is related to the sensitivity or dependence level of a business sector on other business sectors. For example, a food business requires agricultural commodities as raw materials. This means the agricultural sector could be productive because of the demand from the food business (backward linkage), and the food industry is related to the food distribution industry (forward linkage). Moreover, an indirect employment opportunity effect could have arisen if workers and owners of a business spend their income on the purchase of goods and services produced by other businesses, which in turn will drive production growth and job opportunities in other business groups.<sup>40</sup> Thus, it can be concluded that the difficulties experienced by tourism, hospitality, trade, processing, agriculture, mining, and transportation sectors could directly or indirectly influence other sectors.

### **B.2. No further guidelines for the bank in conducting self-assessment regarding the criteria for eligible debtors and affected business sectors**

Article 2 paragraph (4) and (5) of POJK No. 11/POJK.03/2020 delegates authority to banks to settle their guidelines in determining affected debtors (known as "self-assessment"). These guidelines should at least contain the criteria for debtors affected by Covid-19 and sectors affected by Covid-19.

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<sup>40</sup> Tulus Tambunan, "Peran Usaha Mikro dan Kecil dalam Pengentasan Kemiskinan di Daerah (The Role of Micro and Small Enterprise in Regional Poverty Alleviation)", *Jurnal Bina Praja*. Vol. 4, No. 2, Ed. June 2012. Pg. 73 - 92. Accessed from <http://jurnal.kemendagri.go.id/index.php/jbp/article/view/60/57>

Nevertheless, POJK No. 11/POJK.03/2020 has given principal qualifications of eligible debtors who could apply for credit relaxation:

1. Debtors affected by the spread of Covid-19, including micro, small and medium businesses;
2. Debtors who have businesses in the tourism, hospitality, trade, processing, agriculture, mining, and transportation sectors;
3. Debtors with a ceiling of up to IDR 10 billion.

The concerned debtor must then apply for credit relaxation to the bank and credit relaxation will be executed if the bank approves the application.

This self-assessment system allows the bank to create its guidelines. However, there are several obstacles and risks in the implementation of the self-assessment system. **First**, the implementation of the self-assessment system is still different between banks. This happens due to unclear criteria on affected debtors. On the one hand, several banks provide credit relaxation to debtors whose businesses are not in the tourism, hospitality, trade, processing, agriculture, mining, and transportation sectors, so long it's outstanding less than IDR 10 billion and the debtor is considered affected by Covid-19.<sup>41</sup> On the other hand, many relaxation applications were rejected by a bank because the debtor is considered not directly affected by Covid-19, without considering this pandemic situation, and although the concerned debtor had experienced income reduction and almost bankrupted.<sup>42</sup> **Second**, there is a credit risk in the form of fake creditors.<sup>43</sup> This risk may occur due to the possibility to apply for credit relaxation even though the concerned debtors have restructured their debts before the enactment of the POJK. **Third**, many times, credit relaxation policy is interpreted as "advice" and not "obligation" by banks.<sup>44</sup> Since banks also have a commercial interest, they will respond to the debtor's application as to their interest. As a consequence, many applications are rejected by banks.

The above elaboration is shown existing constraints and possible risks due to the implementation of the self-assessment system. From the elaboration, it is clear that the authorities need to consider to provide further guidance regarding the determination of affected debtors and business sectors. Hopefully, the follow-up guidelines could ensure that the policy achieves its goal, assists affected debtors, and at the same time protect banks from credit risk.

### B.3. No further guidelines from the OJK to determine how the relaxation shall be conducted

In principle, the implementation of a credit relaxation policy is fully delivered to bank discretion. This is understandable since each customer has a different capability in making payment so that similar treatment could not be applied to all customers. Every customer shall be treated differently from other customers according to their respective financial conditions.

Article 2 paragraph (1) and (2) of POJK Number 11/POJK.03/2020 states that bank may implement policies to support the economic growth stimulus for affected debtors, through policies on determining asset quality and policies on credit/financing restructuring. As stated in the executive summary of the concerning POJK, the restructuring could be implemented by lowering the credit interest rates, extending the credit period, reducing arrears in-credit interest, reducing arrears on loan principal, adding credit/financing facility, and/or credit conversion. The restructuring scheme will be determined according to the debtor's financial capability and mutual consent between the bank and the debtor.

In practice, the authority through OJK must consider improving POJK No. 11/POJK.03/2020 by providing further guidelines regarding the implementation of credit relaxation, particularly regarding the rescheduling and the restructuring matters. Rescheduling gives concessions regarding credit terms, particularly on the maturity date of the installments and the period of the credit agreement. To delay credit payments means to delay the maturity date of the installments and extending the credit

<sup>41</sup>Fadhila Shaffa Luthfie and Irvan Zaldya, *Op. Cit.*

<sup>42</sup>HukumOnline.com, *Op. Cit.*

<sup>43</sup>Fadhila Shaffa Luthfie and Irvan Zaldya, *Op. Cit.*

<sup>44</sup>HukumOnline.com, *Op. Cit.*

agreement period. However, rescheduling will only be effective if the debtors' financial capability could immediately recover after the Covid-19 pandemic.<sup>45</sup> Therefore, amid uncertainty over the restoration of debtors' financial capacity, rescheduling policies are not necessarily effective to help debtors and save banks from NPLs risk. Furthermore, it is a high risk for the bank if there are too many rescheduling in the loan portfolio, which might lead to the banking crisis and banking systemic problems.<sup>46</sup> Restructuring means changing the structure of the credit agreement, including but not limited to changing the maturity and expiry clauses, making adjustments in interest clauses, and remodeling the financing. Since restructuring schemes are determined by the debtor's financial capability and mutual consent between bank and debtor, it allows each debtor to obtain a way out from their payment problems according to their respective conditions and allows the bank to generate income from the credit sector. If the government does not provide further guidelines to clarify the direction of credit relaxation, banks will not have the same guidelines regarding the implementation of credit relaxation.

#### **B.4. No further mechanism if the bank rejects debtor's application of credit relaxation**

Although POJK No.11/POJK.03/2020 has been enforced into effective, no guarantee affected debtors would obtain credit relaxation. As to the fact, financial institutions, particularly banks in this matter, seems difficult to conduct credit restructuring during the Covid-19 pandemic. This problem might occur because the regulations are created for normal conditions, not in an emergency as happens now.<sup>47</sup> The issuance of POJK No.11/POJK.03/2020 could not immediately replace the previous procedures or mechanism. The situation becomes harder for the debtor since in the reality several banks require additional items for credit relaxation, which eventually becomes the reason for refusing the credit relaxation application.<sup>48</sup> During this situation, there is no further mechanism that could be taken by a debtor if the bank rejects the debtor's credit application. There is no clear arrangement on the supervisory of the granting process and further mechanism if a credit relaxation is refused by a bank. In this matter, POJK 11/2020 does not keenly stipulate the supervisory function of OJK.

### **C. Legal Solutions**

To overcome the above mentioned legal issues, the authority might consider improving POJK No.11/POJK.03/2020 by providing further guidelines on the criteria of eligible (affected) debtors and business sectors, providing further guidelines to determine how the relaxation shall be conducted, and increasing the supervisory role of the OJK so that the OJK could monitor the granting process of credit relaxation and settle objections from debtors if their relaxation application refused by bank.

#### **C.1 To improve POJK No.11/POJK.03/2020 by providing further guidelines on the criteria of eligible (affected) debtors and business sectors**

As explained before, the sectors affected by the spread of Covid-19 are broader than tourism, hospitality, trade, processing, agriculture, mining, and transportation due to the existence of linkages between business sectors. Almost all debtors and business sectors are affected by the spread of Covid-19. The most important is to create a level that determines the extent to which a debtor and a business sector are affected by Covid-19. This level then becomes a reference for all banks in determining whether the debtor and the sector's business are included in the categories referred to in POJK No.11/POJK.03/2020 and what kind of relaxation (restructuring) scheme is suitable.

<sup>45</sup> Rio Christiawan, "Relaksasi Kredit: Rescheduling atau Restrukturisasi?". Accessed on November 4, 2020 from <https://www.hukumonline.com/berita/baca/lt5ec4d0492311d/relaksasi-kredit--rescheduling-atau-restrukturisasi-oleh--rio-christiawan/>

<sup>46</sup> *Ibid.*

<sup>47</sup> HukumOnline.com, *Op. Cit.*

<sup>48</sup> *Ibid.*

### **C.2 To improve POJK No.11/POJK.03/2020 by providing further guidelines to determine how the relaxation shall be conducted.**

Credit relaxation aims to provide convenience for debtors to fulfill their obligations to banks and at the same time protect bank interests. Although the same restructuring policy cannot be applied to all debtors, it shall be better to determine what scheme, in general, will be given to debtors according to the debtor's need and the level to which the debtor is affected by Covid-19.

### **C.3 To increase the supervisory role of the OJK so that the OJK could monitor the granting process of credit relaxation and settle objections from debtors**

This solution is needed mainly due to the number of credit relaxation applications rejected by banks. During the Covid-19 pandemic, there have been many credit relaxations conducted, but still, many businesses have not received this facility. The addition and firming of the role of the OJK, in this case, is to protect the interests of debtors and also banks.

## **CONCLUSION**

The OJK has issued OJK Regulation No.11/POJK.03/2020 as one of the extraordinary efforts taken to overcome problems caused by the Covid-19. It is an economic stimulus policy as a countercyclical impact on the spread of COVID-19. Nevertheless, there are several legal issues on the implementation of this regulation, as follows: (1) the sectors affected by the Covid-19 pandemic are broader than only tourism, hospitality, trade, processing, agriculture, mining, and transportation sectors; (2) no further guidelines for the bank in conducting self-assessment regarding the criteria for eligible debtors; (3) no further guidelines from the OJK in determining how the relaxation shall be conducted; (4) no further mechanism if the bank rejects debtor's relaxation application.

To ensure the effectiveness of POJK No.11/POJK.03/2020, the aforementioned legal issues should be overcome. As the legal solutions of such issues, the authority through OJK might consider improving POJK No.11/POJK.03/2020 by providing further guidelines on the criteria of affected debtors and business sectors, and providing further guidelines on the implementation of the credit relaxation. Moreover, it is necessary to increase the supervisory role of OJK so that OJK could monitor the granting process of the credit relaxation and settle objections from debtors if their relaxation application is refused by the bank. This role shall be stipulated clearly in the improved POJK.

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